LIVENESS

Reviews of the first edition:

“Wide-ranging and deeply absorbing . . . a first point of reference for anyone interested in the meaning and prospects of performance in the contemporary world.” – Steven Connor, Birkbeck College, London

“marvellously rigorous in its intellectual musings” – Dean Wilcox, Theatre Research International

“even those who approach this text prepared to resist it every step of the way emerge with a respect for the clarity of every argument Auslander makes.” – Dorothy Chansky, Modern Drama

Winner of the Joe A. Callaway Prize for the Best Book on Drama and Theatre, 2000.

Liveness: Performance in a Mediatized Culture addresses what may be the single most important question facing all kinds of performance today. What is the status of live performance in a culture dominated by mass media?

Since its first appearance, Philip Auslander’s ground-breaking book has helped to reconfigure a new area of study. Looking at specific instances of live performance such as theatre, rock music, sport, and courtroom testimony, Liveness offers penetrating insights into media culture, suggesting that media technology has encroached on live events to the point where many are hardly live at all. In this new edition, the author thoroughly updates his provocative argument to take into account new digital and media technologies, and cultural, social, and legal developments.

In tackling some of the last great shibboleths surrounding the high cultural status of the live event, this book will continue to shape opinion and to provoke lively debate on a crucial artistic dilemma: what is live performance and what can it mean to us now?

LIVENESS
Performance in a mediatized culture
Second Edition

Philip Auslander
Why would you make live work in an age of mass communications? Why work in more or less the only field which still insists on presence? For artists interested in “the contemporary” this area of live performance seems like a bit of a backwater. Do you have something against mass-reproduction? Do you work from some quaint notion about immediacy and real presence?

I don’t know.

Answer the question.

(Forced Entertainment 1996:87)

Like most art critics, I get my best ideas from television.

(Dave Hickey 1996:43)
## CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Acknowledgments</td>
<td>ix</td>
</tr>
<tr>
<td></td>
<td>Preface to the second edition</td>
<td>xi</td>
</tr>
<tr>
<td>1</td>
<td>Introduction: “an orchid in the land of technology”</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td><strong>Live performance in a mediatized culture</strong></td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>Teevee’s playhouse</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>Is it live, or . . . ?</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>Against ontology</td>
<td>43</td>
</tr>
<tr>
<td></td>
<td>Got live if you want it</td>
<td>63</td>
</tr>
<tr>
<td>3</td>
<td><strong>Tryin’ to make it real: live performance, simulation, and the discourse of authenticity in rock culture</strong></td>
<td>73</td>
</tr>
<tr>
<td></td>
<td>Rock culture and the discourse of authenticity</td>
<td>74</td>
</tr>
<tr>
<td></td>
<td>Seeing is believing</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>I want my MTV</td>
<td>97</td>
</tr>
<tr>
<td></td>
<td>Panic Clapton</td>
<td>107</td>
</tr>
<tr>
<td>4</td>
<td><strong>Legally live: law, performance, memory</strong></td>
<td>128</td>
</tr>
<tr>
<td></td>
<td>Teevee’s courthouse, or the resistible rise of the videotape trial</td>
<td>130</td>
</tr>
<tr>
<td></td>
<td>You don’t own me: performance as intellectual property</td>
<td>147</td>
</tr>
<tr>
<td></td>
<td>The Gollum problem</td>
<td>168</td>
</tr>
<tr>
<td></td>
<td>Law and remembrance</td>
<td>176</td>
</tr>
<tr>
<td>5</td>
<td><strong>Conclusion</strong></td>
<td>183</td>
</tr>
<tr>
<td></td>
<td>Bibliography</td>
<td>188</td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td>201</td>
</tr>
</tbody>
</table>
I would like to thank Talia Rodgers for her enthusiasm and unflagging support of this project from the moment I first told her about it over a modest dinner in Philadelphia in 1993 to my suggestion in 2006 that it might be time for a second edition. I would also like to thank Minh Ha Duong for shepherding the second edition and Maria Carter, my research and editorial assistant.

The material of this book has been the basis for numerous papers and presentations over a period that has now lasted for a decade and a half. I want to thank all the organizers of all the conferences, panels, and public lectures who provided me with platforms. The responses I got on all occasions were stimulating and instructive; the influence of those occasions and audiences is reflected here.

Many colleagues, both inside and outside the academy, made significant contributions to the ideas expressed here and I thank them all. I also wish to thank my students at both the Georgia Institute of Technology and the University of Georgia for participating in courses whose materials derived in whole or part from my continuing obsession with liveness. Your presence is reflected here more than you know.

And thanks to Evie Sirlin, Laci Reed-Sirlin, and Bowie Auslander and Nico Sirlin, whose live and lively presences made the work on this book from its inception to the present so much more pleasant.

Parts of Chapters 2 and 3 appeared in “Liveness: performance and the anxiety of simulation,” in Performance and Cultural Politics, edited by Elin Diamond (London and New York: Routledge, 1996). Other parts of Chapter 2 were published in “Against ontology: making distinctions between the live and the mediatized,” Performance Research, 2, 3 (1997); “Live from cyberspace, or, I was sitting at my computer this guy appeared he thought I was a bot,” Performing Arts Journal, 24, 1 (2002); “No-shows: the headcount from the NEA,” TDR: The Journal of Performance Studies, 49 (2005); and “The performativity of performance art documentation,”
PREFACE TO THE SECOND EDITION

In the early spring of 2001, two years after the initial publication of this book, I found myself in a Gothic refectory at the University of Mainz in Germany. I was there for a conference organized by Performance Studies International and this was the event’s climactic banquet. Because the room was exceedingly loud, it was very difficult to converse. Upon hearing my name, the man sharing a wooden bench with me, another American to whom I had not been introduced, shouted, “You’re Phil Auslander? Aren’t you the guy who hates live performance?”

I set out in the original edition of this book to raise what I hoped were trenchant questions about liveness—a concept that while absolutely central to the project of theatre and performance studies had somehow escaped direct examination in those fields—the values we attribute to it, and the position of live performance in a culture ever more dominated by mass media. I admit to having been motivated by a profound dissatisfaction with the state of the theoretical discourse (or lack of discourse) around these questions. That dissatisfaction has apparently been mistaken quite regularly for hostility toward the idea of live performance itself.

This was never the point, of course. As I tried to make clear in the original introduction, the cultural analysis in which I engage here was, and still is, motivated by “my sense of living in a culture in which something I continue to value seems to have less and less presence and importance.” Picking up on this dimension of the work, Martin Barker (2003:36–7) accused me fairly of “cultural pessimism.” While I am sure that this second edition largely retains that tone, it may be a bit less pronounced this time around. The best description of my present attitude toward the vagaries of live performance’s negotiations with an ever more intensely mediatized world is pleasant bemusement. What, for example, is one to make of the Nashville Opera’s providing a commentary track similar to the ones on DVD editions of movies to be listened
to on an iPod as one watched its 2006 production of Gounod’s Roméo et Juliette? Partisans of traditional live performance (or of opera, for that matter) have good reason to be scandalized. I am neither scandalized nor surprised: this kind of development simply seems inevitable, given the current cultural standing of live performance and the continued domination of mediatized forms. Is that pessimistic? I am also entertained at the prospect and open to the possibility that it might make for an interesting experience.

One of the central goals of preparing a second edition was to make the book more responsive to a highly volatile cultural scene. Liveness is a book about performance but it is also about media, and media do not stand still. I started the work that led to Liveness in the early 1990s; at that time, it seemed plausible to insist that television was the dominant medium. By now, there is a strong case to be made that the honor belongs to the computer, though it seems more accurate to say that there is an ongoing, unresolved struggle for dominance among television, telecommunications, and the Internet. The principal players behind each of these would like nothing better than for it to be your primary source of news, entertainment, art, conversation, and other forms of engagement with the world. It remains to be seen how this struggle will play out.

In any case, although I wanted the second edition of Liveness to reflect a much greater cognizance of the centrality of digital media than the first had, I realized early on that I could not replace the central paradigm of the televisual with the digital. That would have resulted in a different book rather than a new edition of an existing one; a book worth writing, perhaps, but as a separate venture. Therefore, I have retained the idea that the televisual is the cultural dominant, while also discussing some of the ways in which digital media raise new issues for the concept of liveness.

One such example, drawn from work I have done since the initial publication of Liveness, now ends Chapter 2, following a revised discussion of the distinctive characteristics often attributed to live performance. The other changes I have made to this chapter include providing more up-to-date examples from a broader range of cultural realms, developing further my concept of cultural economy, and stressing that the idea of liveness is a moving target, a historically contingent concept whose meaning changes over time and is keyed to technological development. Although the portions of this chapter that question conventional formulations of how live performance differs from mediatized performance have excited the most response, the idea that the concept of liveness describes a historical, rather than ontological, condition has
increasingly come to seem to me to be the central point and I have tried to emphasize it accordingly.

I revised the next chapter, which focuses on the specific significance of liveness in rock music (a cultural form built around recordings), in response to changing circumstances. Assuming that younger audiences had grown indifferent to the ideology of authenticity in rock, I had been so bold as to predict the demise of that ideology. In fact, that ideology seems to be more powerful than ever. To account for that development, I chose to bookend the chapter with the Milli Vanilli lip-synching scandal of 1990 (which had always been my starting point) and the similar Ashlee Simpson scandal of 2004. The contrast between the two episodes provides a means of demonstrating how the ideology of authenticity emerged with renewed strength from the buffeting it took beginning in the mid-1980s with the advent of MTV, digital sampling, and other simulationist phenomena.

Reviewing Chapter 4, which looks at the status of live performance in the legal context, I concluded that a central argument was not articulated clearly enough because I had placed too much emphasis on the fact that live performance cannot be copyrighted. The more important point is that there has been a trend toward interpreting other existing legal theories (such as trademark) or creating new ones (such as right of publicity) to make ever more aspects of performance legally “ownable.” In addition to bringing some of the matters I discuss in this chapter more up to date, I strove to make the narrative of performance’s becoming progressively more subject to legal definition clearer and more central. I also added a new section on the intellectual property issues raised by digital performers.

I always meant Liveness to be a contentious book, a conversation-starter, and the responses to it over the years have shown that I succeeded in that endeavor. It is my hope that this new edition can both sustain the ongoing discussions of performance in a mediatized culture and start some new ones.

Philip Auslander
Atlanta, March 2007
INTRODUCTION

“An orchid in the land of technology”¹

The prospectus for a conference entitled “Why Theatre: Choices for the New Century”² posed a question that goes straight to the heart of the matter that concerns me here: “Theatre and the media: rivals or partners?” My answer to this question is unequivocal: at the level of cultural economy,³ theatre (and live performance generally) and the mass media are rivals, not partners. Neither are they equal rivals: it is absolutely clear that our current cultural formation is saturated with, and dominated by, mass media representations in general, and television in particular (though television is admittedly locked in combat for cultural and economic dominance with the Internet and telecommunications).

In an essay on theatre and cinema, Herbert Blau (1982:121) quotes Marx’s Grundrisse:

> In all forms of society, there is one specific kind of production which predominates over the rest, whose relations thus assign rank and influence to the others. It is a general illumination which bathes all the other colours and modifies their particularity. It is a particular ether which determines the specific gravity of every being which has materialized within it.

Although Marx is describing industrial production under bourgeois capitalism, for Blau, “he might as well be describing the cinema.” I would

---

¹ The title of this chapter is taken from Walter Benjamin’s celebrated essay “The work of art in the age of mechanical reproduction” (1986 [1936]:40).

² The conference, which took place in the fall of 1995 in Toronto, was sponsored by the University of Toronto and Humboldt University in Berlin.

³ I use the phrase “cultural economy” to describe a realm of inquiry that includes both the real economic relations among cultural forms, and the relative degrees of cultural prestige and power enjoyed by different forms.
argue, pace Marx and Blau, that Marx might as well be describing the television (or computer) screen: Marx’s allusions to a general illumination and an ether (a word frequently used in early discussions of broadcasting to describe the medium through which electronic waves pass) are even more appropriate to that medium than to the cinema.

As for the cultural dominance of television and its productions, Cecilia Tichi (1991:3–8) has suggested that television can no longer be seen just as an element in our cultural environment, one discourse among many, but must be seen as an environment in itself. Television has transcended its identity as a particular medium and is suffused through the culture as “the televisual.”

What the televisual names . . . is the end of the medium, in a context, and the arrival of television as the context. What is clear is that television has to be recognised as an organic part of the social fabric; which means that its transmissions are no longer managed by the flick of a switch.

(Fry 1993:13)

In other words, if television once could be seen as ranking among a number of vehicles for conveying expression or information from which we could choose, we no longer have that choice: the televisual has become an intrinsic and determining element of our cultural formation. As Tony Fry indicates, it is indeed no longer a question of thinking about television in various cultural contexts but of seeing it as the cultural context. Clearly, this issue and the related question of the nature of television culture could be (and have been) the subjects of books in themselves. The project of describing the position of other cultural discourses within our mediatized environment is as pressing as the project of describing that environment itself. Because live performance is the category of cultural production most directly affected by the dominance of media, it is particularly urgent to address the situation of live performance in our mediatized culture.

Investigating live performance’s cultural valence for the present volume, I quickly became impatient with what I consider to be traditional, unreflective assumptions that fail to get much further in their attempts to explicate the value of “liveness” than invoking clichés and mystifications like “the magic of live theatre,” the “energy” that supposedly exists between performers and spectators in a live event, and the “community” that live performance is often said to create among performers and spectators. In time, I came to see that concepts such as these do have value for performers and partisans of live performance.
Indeed, it may even be necessary for performers, especially, to believe in them. But where these concepts are used to describe the relationship between live performance and its present mediatized environment, they yield a reductive binary opposition of the live and the mediatized. Steve Wurtzler (1992:89) summarizes this traditional view well:

As socially and historically produced, the categories of the live and the recorded are defined in a mutually exclusive relationship, in that the notion of the live is premised on the absence of recording and the defining fact of the recorded is the absence of the live.

In this tradition, “the live comes to stand for a category completely outside representation” (ibid.:88). In other words, the common assumption is that the live event is “real” and that mediatized events are secondary and somehow artificial reproductions of the real. In Chapter 2, I will argue that this kind of thinking persists not only in the culture at large but even in contemporary performance studies. The arguments of this chapter are intended both to exploit and to challenge the traditional way of thinking about liveness and its cultural position by employing its terms (that is, taking the binary opposition for granted), then opening those terms themselves to critique. Chapters 3 and 4 depart from a different premise—that liveness must be examined not as a global, undifferentiated phenomenon but within specific cultural and social contexts.

Perhaps because of my impatience with the conventional wisdom, I have sometimes been mistaken for someone who does not value—who is even antagonistic toward—live performance. This is very far from being the case: my interest in the cultural status of live performance derives directly from my sense of living in a culture in which something

---

4 Wurtzler (1992:89–90) challenges this binary opposition by asserting that “the socially constructed categories live and recorded cannot account for all representational practices.” He offers a chart in which various kinds of events are positioned according to spatial and temporal vectors. Two categories of representations that are neither purely live nor purely recorded emerge: those in which performance and audience are spatially separate but temporally co-present (e.g., live television or radio) and those in which performance and audience are spatially co-present but elements of the performance are pre-recorded (e.g., lip-synched concerts, instant replays on stadium video displays). See also Table 1.1, p. 61 below.

5 I have found that scholars working in mass media studies, particularly those interested in television or popular music, have dealt more directly and fruitfully with the question of liveness than most scholars in theatre or performance studies.
I continue to value seems to have less and less presence and importance. Despite my own commitment to the theatre and other forms of live performance, I have tried here to take a fairly hard-headed, unsentimental approach. The resulting assessment of the situation of live performance in a culture dominated by mass media has not made me optimistic about its current and future cultural prestige, as understood in traditional terms. It has also enabled me to see, however, that those terms may no longer be the most useful ones.

Performance artist and actor Eric Bogosian, for example, describes live theatre as:

> medicine for a toxic environment of electronic media mind-pollution . . . Theater clears my head because it takes the subtextual brainwashing of the media madness and SHOUTS that subtext out loud . . . Theater is ritual. It is something we make together every time it happens. Theater is holy. Instead of being bombarded by a cathode ray tube we are speaking to ourselves. Human language, not electronic noise.

(Bogosian 1994:xii)

Bogosian’s perception of the value of live performance clearly derives from its existence only in the moment (“every time it happens”), and its putative ability to create community (if not communion) among its participants, including performers and spectators. These are both issues I address in the chapters to follow. Most important for the present discussion, he sets live performance in a relationship of antagonistic opposition to mediatization and imputes to live performance the social, perhaps even political, function of opposing the oppressive regime of “electronic noise” imposed upon us by the mass media. This opposition, and live performance’s ostensible curative powers, presumably derive from significant ontological distinctions between live and mediatized cultural forms. This perception of an oppositional relationship between the live and the mediatized animates my own discussion, for I wish both to exploit and to deconstruct that opposition in my discussion of the ontology of live performance in Chapter 2.

Several important premises are implied by my use of the word “mediatized,” which I have borrowed from Jean Baudrillard. I often employ this word, admittedly somewhat loosely, to indicate that a particular cultural object is a product of the mass media or of media technology. “Mediatized performance” is performance that is circulated on television, as audio or video recordings, and in other forms based in technologies of reproduction. Baudrillard’s own definition is more
expansive: “What is mediatized is not what comes off the daily press, out of the tube, or on the radio: it is what is reinterpreted by the sign form, articulated into models, and administered by the code” (Baudrillard 1981:175–6). For Baudrillard, mediatization is not simply a neutral term describing products of the media. Rather, he sees the media as instrumental in a larger, socio-political process of bringing all discourses under the dominance of a single code. Although I ignore Baudrillard’s admonishment that the word “mediatized” does not define modes of cultural production, I hope I have retained in my use of the term Baudrillard’s characterization of the mass media as the cultural dominant of contemporary, western(ized) societies. (I believe my description here can be generalized to this extent, though my focus is admittedly on the United States.) I intend to describe both live performance’s cultural-economic competition with other forms and the position of live performance in a culture for which mediatization is a vehicle of the general code in a way that live performance is not (or is no longer). Although this book is not generally in service to Baudrillardian politics, I do follow his line in my discussion of rock music in Chapter 3, both to extend his analysis into that cultural realm and to critique that analysis.

In the sense that I am treating live and mediatized performance as parallel forms that participate in the same cultural economy, my usage of “mediatization” follows Fredric Jameson’s definition of the term as: “the process whereby the traditional fine arts . . . come to consciousness of themselves as various media within a mediatic system” (Jameson 1991:162). Susan Sontag (1966:25), in her essay on theatre and film, contrasts the two forms by saying that: “theatre is never a 'medium'” in the sense that “one can make a movie 'of' a play but not a play 'of' a movie.” Part of my argument in Chapter 2 is intended to prove Sontag wrong: there have long been plays “of” movies and television programs, and live performance can even function as a kind of mass medium. Whereas the traditional view represented by Sontag’s comment sees theatre and the live performance arts generally as belonging to a cultural system separate from that of the mass media, live forms have become mediatized in Jameson’s sense: they have been forced by economic reality to acknowledge their status as media within a mediatic system that includes the mass media and information technologies. Implicitly acknowledging this situation, a number of theatres have displayed signs similar to the banner that flew outside the Alliance Theater in Atlanta declaring that its offerings are “Not Available on Video,” demonstrating that the only way of imputing specificity to the experience of live performance in the current cultural climate is by reference to the dominant experience of mediatization.
There is no question that live performance and mediatized forms compete for audiences in the cultural marketplace, and that mediatized forms have gained the advantage in that competition. Broadway producer Margo Lion’s observation about the position of theatre within this competitive cultural economy can be applied to live performance generally: “we have realized that we are all competing for the same entertainment dollars in a climate where theater isn’t always first on the list” (quoted in Rick Lyman, “On stage and off,” *New York Times*, December 19, 1997:B2). Blau (1992:76) elaborates:

[The theatre’s] status has been continually threatened by what Adorno named the culture industry and . . . the escalating dominance of the media. “Do you go to the theater often?”

That many have never gone, and that those who have, even in countries with established theater traditions, are going elsewhere or, with cable and VCRs, staying home, is also a theatrical fact, a datum of practice.

As Blau recognizes, theatre and other forms of live performance compete directly with mediatized forms that are much more advantageously positioned in the marketplace. By calling the pressure of live performance’s competition with the mediatized “a datum of practice” he suggests that performance practice inevitably reflects this pressure in the material conditions under which performance takes place, in the composition of the audience and the formation of its expectations, and in the forms and contents of performance itself.

An important consequence of thinking about live and mediatized performance as belonging to the same mediatic system is the inscription of live performance within the historical logic of media identified by Marshall McLuhan (1964:158): “A new medium is never an addition to an old one, nor does it leave the old one in peace. It never ceases to oppress the older media until it finds new shapes and positions for them.” Jay Bolter and Richard Grusin (1996:339) have refined this analysis with their concept of “remediation”—“the representation of one medium in another.” According to their analysis, “new technologies of representation proceed by Reforming or remediating earlier ones” (ibid.:352). My discussion in Chapter 2 of the relationship between theatre and early

---

6 Noël Carroll (1998:187–8) also discusses this process, with specific reference to the ways in which some popular art forms were incorporated into art forms based in technologies of mass reproduction.
television and the consequent displacement of live performance by television is an attempt to describe how this historical logic plays out in that instance. To put it bluntly, the general response of live performance to the oppression and economic superiority of mediatized forms has been to become as much like them as possible. From ball games that incorporate instant-replay screens, to rock concerts that recreate the images of music videos, to live stage versions of television shows and movies, to dance and performance art’s incorporation of video, evidence of the incursion of mediatization into the live event is available across the entire spectrum of performance genres.

This situation has created an understandable anxiety for those who value live performance, and this anxiety may be at the root of their need to say that live performance has a worth that both transcends and resists market value. In this view, the value of live performance resides in its very resistance to the market and the media, the dominant culture they represent, and the regime of cultural production that supports them. This is the position Peggy Phelan (1993b) has elucidated in her influential Unmarked: The Politics of Performance. For many reasons (which will be elaborated in the following chapters), I find this view untenable. The progressive diminution of previous distinctions between the live and the mediatized, in which live events are becoming ever more like mediatized ones, raises for me the question of whether there really are clear-cut ontological distinctions between live forms and mediatized ones. Although my initial arguments may seem to rest on the assumption that there are, ultimately I find that not to be the case. If live performance cannot be shown to be economically independent of, immune from contamination by, and ontologically different from mediatized forms, in what sense can liveness function as a site of cultural and ideological resistance, as Bogosian, Phelan, and others claim?

Chapter 2 presents an overview of these issues and a general consideration of the status of live performance in a culture dominated by mass media. I begin with a discussion of the relationship between theatre and early television in the United States to show that television originally modeled itself on the live form. This historical narrative serves as an allegory for the general cultural tendency of mediatized forms to displace and replace live ones. I next examine the more recent phenomenon of live events modeling themselves on mediatized representations, in a reversal of the previous historical pattern. I then turn to the way in which the issue of live performance is treated in contemporary performance theory and challenge its grounding of the distinction between the live and the mediatized in ostensible ontological differences between live and mediatized forms. Against that formulation, I argue
that the relationship between live and mediatized forms and the meaning of liveness be understood as historical and contingent rather than determined by immutable differences. To conclude the chapter, I examine several of the conventional explanations for why people value live performance and offer a suggestion of how liveness is being redefined for the digital age.

Chapter 3 offers a case study of the meaning of liveness within one particular cultural formation—that surrounding rock music. Because rock exists primarily as recorded music and only secondarily as live performance (see Gracyk 1996), this cultural context is a particularly interesting one in which to examine the functions and values attributed to live performance. My task, then, is to offer an explanation of what functions live performance once served within rock culture, and to show how those functions changed following the expanded mediatization of rock represented by music video. Considering these issues leads me to discuss some of rock’s institutional discourses, especially that of the Grammy awards, and the crisis precipitated by the Milli Vanilli scandal. The chapter concludes with a Baudrillardian analysis of Milli Vanilli in the context of the technological and legal changes affecting the music industry in the 1980s.

Chapter 4 resumes the critique of liveness as a site of cultural and ideological resistance begun in Chapter 2, this time by way of a discussion of the status of live performance in two fields of American jurisprudence. I begin with an examination of the effort in the early 1970s to institute prerecorded videotape trials and discuss the failure of that effort in terms of the law’s preference for live courtroom proceedings, a preference that is deeply rooted in constitutional and procedural issues. My purpose there is to show that the legal arena has proved more resistant to the incursion of mediatization than the other cultural sites examined here. I then turn to copyright law. I discuss copyright in Chapter 2 in the context of the music industry; in Chapter 4, it is pivotal to a discussion of the legal status of live performance. While it is true that live performance cannot be copyrighted, other legal theories have been brought to bear to make performance “ownable” nevertheless. Whereas an influential strain of performance theory suggests that live performance’s disappearance and persistence only in spectatorial memory make it a site of resistance to the authority of law, I argue that those very same qualities make performance available and useful to the law as both a policed site and a mechanism of regulation. Live performance and its putative ontology of disappearance (which I challenge on other grounds in Chapter 2) are in fact central to the theory and practice of American law. Indeed, the legal arena may be one
of the few remaining cultural contexts in which live performance is still considered essential.

I hope this study will be received in the speculative spirit in which it is offered. Drawing on a mixed bag of disciplines, including media theory, cultural theory, sociology, performance studies, and legal studies, it is the product of what Jacques Attali (1985:5) calls “theoretical indiscipline.” Although I have made some effort to ground my arguments in material realities, I have not hesitated to invoke barely supported (or supportable) generalizations. I have also not tried to impose a strict consistency on the book’s three main sections. Although certain issues recur, arguments that may be important in the context of the broad overview offered in Chapter 2 may not carry as much weight in the more specific contexts examined in the other two chapters, and vice versa. Above all, I am aware of a certain tendentiousness in my arguments, which leads, as Attali (ibid.:4) says of his own work, to “unusual and unacceptable conclusions.” I trust, however, that there is a sense in which these unacceptable conclusions articulate some small truths of our cultural situation.
In his autobiography, John Densmore (1991), the drummer for the rock group the Doors, recounts an anecdote concerning an early television appearance by the group, probably in 1967. Having taped an appearance on a variety show, the Doors wanted to be able to watch themselves on television. They therefore requested that a set be placed in their backstage dressing room the night their performance was to be broadcast. Because their segment had not yet come on when they were ready to begin their concert, they took the television set onstage with them, perching it atop an amplifier with the volume turned off. When the Doors finally appeared on the television, they stopped playing mid-song, turned up the television volume, and sat on the floor of the stage watching themselves, their backs to the audience. When their segment was over, they resumed playing.

By staging their relationship to television in this way in 1967, the Doors revealed their prescience concerning what would happen in the relationship between live and mediatized performance. There are several harbingers to be noted in this anecdote, particularly the presentation of a previously recorded event as live; the incorporation of video into the live event; and the precedence of the mediatized over the live, even for the performers themselves. Now, forty years later, we are well into a period of cultural history defined by the domination of mediatized representations. My concern here is with the situation of live performance within that mediatized environment. I begin with a historical account of the early relationship between television and theatre in the United States, which I present as an allegory for the general relationship of live to mediatized forms within our cultural economy. Initially, mediatized events were modeled on live ones. The subsequent cultural dominance of mediatization has had the ironic result that live events now frequently are modeled on the very mediatized representations that once took the self-same live events as their models. After presenting this allegory, I will
turn to the present day to describe what I see as a pattern of increased incursion of mediatization into live events themselves. I go on to discuss the way in which performance theory continues to characterize the relationship between the live and the mediatized as one of opposition, despite the erosion of the differences between them.

Although I have stated that the relationship between the live and the mediatized is one of competitive opposition at the level of cultural economy, I do not see that opposition as deriving from the intrinsic characteristics of live and mediatized forms but, rather, as determined by cultural and historical contingencies. Through an examination of what may be called the ontological characteristics of live and mediatized performances, an examination which begins with the discussion of early television and theatre that opens the chapter, I will argue against intrinsic opposition and in favor of a view that both emphasizes the mutual dependence of the live and the mediatized and challenges the traditional assumption that the live precedes the mediatized. Throughout this chapter, I emphasize large contextual and cultural issues in the hope of creating a theoretical and historical framework for understanding the current relationship of the live and the mediatized.

### Teevee’s playhouse

Although I stated in the previous chapter that I consider television, not film, to be the dominant cultural medium, the historical relationship of theatre to film provides a precedent for the pattern of development I am describing and is therefore worthy of some attention. Early film modeled itself directly on theatrical practice. As A. Nicholas Vardac shows in his classic study *Stage to Screen* (1949), the narrative structures and visual devices of cinema, including the close-up and the fade-in/fade-out, and parallel editing, had all been fully developed on stage before becoming the foundations of the new medium’s language, at least in its narrative forms. Steele MacKaye, for example, embarked on a series of technical innovations, beginning in the late 1870s, that brought greater flexibility to the stage in ways that anticipated cinematic techniques. To cite but one example, his “proscenium adjuster,” a device that instantly changed the shape and size of the proscenium opening, enabled smooth transitions between scenes and among different views of the same setting. “In this way, MacKaye could control the type of stage picture offered, in the fashion of the motion picture with its long or medium shot, its panoramic or tracking shot” (Vardac 1949:143). In their more recent look at the relationship between early film and the stage, Ben Brewster and Lea Jacobs (1997:214) disagree with Vardac’s characterization of
nineteenth-century theatre as: “protocinematic,’ as attempting to be cinematic without the appropriate technology.” But they agree with him concerning the profound influence of theatrical practice on early cinema: “The development of cinematic staging and editing in the 1910s were not attempts to lay the basis for a specifically cinematic approach to narration, but the pursuit of goals well-established in nineteenth-century theatre with new means” (ibid.:210). “[T]he cinema,” they conclude, “strove to be theatrical” (ibid.:214). Early cinema took over and reformed a theatrical vocabulary and also rapidly usurped the theatre’s cultural position as the dominant form of entertainment. Indeed, film had thoroughly routed the theatre by 1926, so there was little left to pillage when television arrived in force some twenty years later (Poggi 1968:85–6). In these respects, the historical relationship between television and theatre, and the general situation of live performance in our mediatized culture, recapitulates this earlier history.

There can be no question that the advent of film had a devastating cultural-economic impact on the theatre, but that fact, taken by itself, leaves an important question unanswered. If the theatre as a popular form had been so thoroughly usurped by film in the 1920s that it was hardly even a force to be reckoned with when television came around, why did television embrace “the theatre as a model for representation” (Spigel 1992:142) as the cinema itself had done in its earliest days, rather than model itself on film? As a camera-bound medium, television might well have striven to be cinematic; but instead it strove to be theatrical. The answer to this question lies in the way in which the essence of the televisual was understood, from television’s earliest appearances, as an ontology of liveness more akin to the ontology of theatre than to that of film. Television’s essence was seen in its ability to transmit events as they occur, not in a filmic capacity to record events for later viewing. Originally, of course, all television broadcasts were live transmissions. Jane Feuer (1983) argues that the definition of television as an ontologically live medium remains part of our fundamental conception of the medium—even though television ceased long ago to be live in an ontological sense, it remains so in an ideological sense. Rick Altman (1986:45) has made a similar observation: “whether the events transmitted by television are live or not, the television experience itself is . . . sensed as live by the home viewing audience.”1 The fact that television can “go

---

1 Steve Wurtzler (1992:91) makes the point that:

the textual practices of American television present themselves as, or are experienced in ways similar to, the fully present live . . . even the recorded
live” at any moment to convey sight and sound at a distance in a way no other medium can remains a crucial part of the televisual imaginary even though that way of using the medium is now the exception rather than the rule.

I contend that this ideologically engrained sense of television as a live medium makes its historical relationship to the theatre different from that of film, and enabled television to colonize liveness, the one aspect of theatrical presentation that film could not replicate. Vardac shows how film remediated theatre by adopting the narrative structures and visual strategies of nineteenth-century melodrama. Whereas film could only remediate the theatre at these structural levels, television could remediate theatre at the ontological level through its claim to immediacy. It is also significant in this context that television remediates not only live performance but film, in a way that film has never remediated television. Although television was originally dependent on cinematic technology (the kinescope) for its own reproduction, the advent of videotape liberated television and gave it the means of transforming film into a televisual discourse to the point that, by now, much of our experience of “film” is actually a televisual experience (of video).

Programs of broadcast television are assigned a sense of spatial co-presence and temporal simultaneity in that, once a program has aired in its scheduled time slot, there is little or no chance of viewing it outside of its initial temporal and spatial (channel) context.

Wurtzler (ibid.:259) implies in a note that time-shifting by means of VCRs has made this effect even more pronounced. The impulse to tape programs for later viewing only emphasizes the extent to which we think of them as fleeting, onetime, quasi-live events.

2 There are cases in which television becomes film in the same way that film becomes television when it is broadcast or played on a DVD. An early instance is the film The Groove Tube (1974), a counter-cultural parody of television shot originally on videotape then transferred to film. Clearly, there were stylistic reasons for doing this, as is often the case when film directors use video transfer as a technique. The historical context of this particular remediation is also important. Since the ideology of the counter-cultural audience it hoped to reach rejected television as a necessarily co-opted medium but found film to be credible, The Groove Tube had to look like television, the object of its satire, but also had to establish its identity as a film and thus distinguish itself from its source medium. (I return to the counter-cultural rejection of television in another context in Chapter 3.) Now, of course, it is quite common for films to be shot on digital video, for stylistic or economic reasons, then transferred.

3 An early version of the kinescope was the Paramount Intermediate Film System, in which a television image was recorded on motion picture film, then processed and projected immediately (the delay from reception to projection was sixty-six seconds).
Television “does not simply ‘transport’ previous forms (theatre, film, radio) but rather translates them and recombines them” (Dienst 1994: 142), thus turning them into something different: television itself.

Television broadcasting was inaugurated in the United States in 1939, when the National Broadcasting Company (NBC), the Columbia Broadcasting System (CBS), and Dumont all began broadcasting diverse programming in New York City. By 1940, there were twenty-three television stations actively broadcasting in the country (Ritchie 1994:92). Along with the manufacture of radio receivers and sound recordings, television programming was curtailed in 1942 with the entry of the United States into World War II. Television experienced a resurgence after the war, beginning in 1946 when sets became widely available to the public. The first television era in the United States, then, occurred between 1939 and 1945, for although programming and the industrial development of television were truncated by the war effort, the discourse on television remained lively during those years. This first phase of television was characterized by experimentation, speculation, and debate. From 1947 onward, television broadcasting coalesced into the industry we know today.

One of the central concerns of the discourse on television in the United States during its earliest phases was the relationship of television to other forms of entertainment and communication, particularly radio, film, and theatre. Television was often described as a hybrid of existing forms. One analyst characterized it as a “new and synthetic medium . . . radio with sight, movies with the zest of immediacy, theatre (intimate or spectacular) with all seats about six rows back and in the centre, tabloid opera and circus without peanut vendors” (Wade 1944:728). The question, in the words of Hans Burger (1940:209), was “whether or not television is . . . a new complex of existing arts, or an art in its own right. And if it is an art, what are its essential techniques and possibilities?” In the opinion of Kay Reynolds (1942:121), “an authentically [sic] television form” had not yet been discovered.

Although the question of authentic television form remained unresolved, early writers on television generally agreed that television’s essential properties as a medium are immediacy and intimacy. As Lenox

Douglas Gomery (1985:56–7) describes this process as an early form of projection television. Arguably, it can also be seen as a filmic remediation of television. Although the content shown derives from a television signal, the actual perceptual experience is of a filmed image, not a televisual one. By incorporating television technology, the Paramount system gave film nearly the same immediacy that was foregrounded as the essence of television in the early descriptions of that medium discussed here.
Lohr, the president of NBC, put it, “the most utilitarian feature of television lies in broadcasting events exactly when and as they happen” (Lohr 1940:52, original emphasis). Orrin E. Dunlap’s later description is even more emphatic: “People now look upon scenes never before within their range; they see politics as practiced, sports as played, drama as enacted, news as it happens, history as it is made” (Dunlap 1947:8). In an essay of 1937, Alfred N. Goldsmith, an industrial engineer, compares television, film, and human vision in these terms:

As far as ocular vision is concerned, a real event can be seen only at the instant of occurrence . . . Accordingly all the historical past is lost so far as direct vision by human beings is concerned. The motion picture suffers from no such limitation . . . the motion picture may be made at any time and shown at any later time . . . Television with direct pick-up of an actual event is as dependent on its time of occurrence as is the eye.

(Goldsmith 1937:55)

Here, film is represented as the realm of memory, repetition, and displacement in time. By contrast, television, like direct human vision (and also like theatre, as Goldsmith (ibid.:56) observes later in his essay) occurs only in the now. Unlike film, but like theatre, a television broadcast is characterized as a performance in the present. This was literally the case in the early days of television when most material was broadcast live. Even now that most television programming is pre-recorded, the television image remains a performance in the present in an important sense I shall discuss later in this chapter. Although the possibility of recording television broadcasts was available as part of television technology from quite early in its development, the capacity for rebroadcasting was seen then as ancillary to television’s essence as a live medium. In the 1930s and 1940s, television was envisioned primarily as a medium devoted to the transmission of ongoing live events, not to reproduction. Not surprisingly, early television displayed a voracious appetite for all types of live presentation. A survey of the activity of one pioneering television station (WRGB in Schenectady, New York) between 1939 and 1945 lists among its offerings: variety shows and revues; sports; drama, including amateur and college theatricals; light opera; various musical groups; dance; news; panel discussions; educational presentations; fashion shows; puppet shows; quizzes and games; vaudeville acts, monologists, and magicians; children’s shows; religious shows; and commercials (Dupuy 1945).
Television’s intimacy was seen as a function of its immediacy—the close proximity of viewer to event that it enables—and the fact that events from outside are transmitted into the viewer’s home. As Lohr (1940:3) put it, “the viewer of the television scene feels himself to be on the scene.” The position of the television viewer relative to the image on the screen was often compared with that of a boxing fan sitting ringside or a theatre-goer with the best seat in the house. Television “make[s] all the world a stage and every home a front-row seat for sports, drama, and news” (Dunlap 1947:8). It was thought to make the home into a kind of theatre characterized, paradoxically, by both absolute intimacy and global reach. Given the domestic context in which television was envisioned, it is important to sketch the social implications of the home theatre. Spigel (1992:110) argues persuasively that the new medium was associated with an existing cultural discourse, dating back to the mid-1800s, in which “electrical communications would defuse the threat of cultural difference by limiting experiences and placing social encounters into safe, familiar, and predictable contexts.” By the early 1920s, “radio, like the telegraph and telephone before it, was seen as an instrument of social sanitation” that would make cultural objects more generally accessible, but in a way that would also keep “undesirables away from the middle-classes.” In the postwar era, Spigel (ibid.:111) goes on to say, “the fantasy of antiseptic, electrical space was transposed onto television.” That the linkage between television and the discourse of antiseptic electrical space occurred in the context of the growing suburbanization of the postwar period is evident from the following quotation, from a 1958 book entitled, strikingly, A Primer for Playgoers, in which the author stresses:

4 Lohr (1940) treats television as a domestic technology, thus implying that the uses of the technology had been decided definitively that early. In fact, the situation was somewhat more complicated. As Gomery (1985) has shown, Hollywood’s major motion picture corporations hatched a scheme in the late 1940s to co-opt television by installing television projection equipment in movie theatres and offering programming, including live coverage of sports and newsworthy public events, to a paying public in those venues. This experiment, known as “theatre television,” proved not to be cost-effective and was abandoned in the early 1950s.

5 Lynn Spigel (1992:99, 106–9) traces the phrase “home theatre” and the concept it embodies as far back as 1912 and discusses how, in the period after World War II, suburban homeowners were encouraged to construct their television viewing areas on the model of a theatre. It is significant that throughout the first half of the twentieth century, the home theatre was imagined as a domestic version of the dramatic stage. Now, that phrase is used to describe equipment intended to transport the experience of the cinema, not that of live theatre, into the home.
the tremendous personal comfort of relaxing at home in an easy chair and seeing some of the top names in the theatre world perform in a variety of three or four programs in a single evening. This involves a greater degree of physical comfort than to come home weary from the day’s work, wash, dress, hurry, drive through heavy traffic, find a place to park, walk to the theatre, pay an ever-increasing admission, sit on the same seat for two hours, then fight traffic and arrive home very late.

(Wright 1958:222–3)

Here, the benefit of television-as-theatre over live performance is defined explicitly in terms of the suburban experience. Tichi notes that this understanding of television was frequently reiterated in advertisements for television sets:

Numerous advertisements . . . showed couples in evening attire gathered in their living rooms as if in a private box at the theatre, and gazing in rapt attention at on-screen ballet, opera, or drama from the legitimate stage. Television in the living room was thus offered . . . as an excursion out of the household and into an expensive private box for an experience of high culture.

(Tichi 1991:94; see also Spigel 1992:126)

Descriptions of drama on television from this period emphasize that television’s immediacy and intimacy make the experience of televised drama entirely comparable to that of drama in the theatre. (By televised drama, I mean plays written or adapted for television, not direct broadcasts of theatre events. Although such broadcasts did occur, it was generally conceded that direct transmission of a play in the theatre yielded unsatisfactory television.6) In an article in Theatre Arts, Mary Hunter (1949:46) observes that “the audience experience in relation to the performer is similar in television to the performer–audience relationship in the theatre: the audience is in direct contact with the performer at the moment of his ‘performance.’ You see him when he does it.” Likewise, Lohr (1940:72), writing almost a decade earlier, makes the immediacy of televised drama the basis on which to distinguish television from film: “the instantaneous nature of the broadcast gives television drama a certain superiority over filmed drama. The spectator

6 For a useful overview of theatrical presentations on television from the 1940s through the 1980s, see Rose (1986).
knows that he is seeing something actually taking place at the moment.”7 (Lohr (ibid.:80–1) advances the same argument to assert the superiority of televised news over the filmed newsreel.) Spigel summarizes this discourse:

Television, it was constantly argued, would be a better approximation of live entertainment than any previous form of technological reproduction. Its ability to broadcast direct to the home would allow people to feel as if they really were at the theatre . . . Whereas film allowed spectators imaginatively to project themselves into a scene, television would give people the sense of being on the scene of presentation—it would simulate the entire experience of being at the theatre.

(Spigel 1992:138–9, original emphasis)

I want to emphasize the implications of this last statement, as I shall go on to argue that the goal of televised drama was not merely to convey a theatrical event to the viewer, but to recreate the theatrical experience for the home viewer through televizual discourse and, thus, to replace live performance.

As significant as this habitual representation of television as theatre and the notion that televised drama partakes of the immediacy of drama in the theatre is the suggestion that emerges from the early commentary that television production techniques themselves evolved in a conscious effort to reproduce the theatrical image. In commenting on the television actor, Lohr observes:

In a theatre, each actor assumes that the audience has as wide-angle vision as he possesses, but he must be taught that a television camera does not see at such wide angles . . . For this reason, television producers have found it helpful to use more than one camera for studio productions. This enables a televizier to see a continuous action.

(Lohr 1940:56)

7 The immediacy of televised drama was harrowing for actors. Even as seasoned a trouper as Jose Ferrer (1949:47), writing of his first television appearance (as Cyrano de Bergerac on the Philco Television Playhouse in 1949), described the “this-is-it’ feeling” of performing on television as “a bad psychological handicap.” This insecurity was apparently brought on by television’s characteristically brief rehearsal period and the absence of a prompter. Television production manuals of the 1940s monotonously repeat the assertion that a basic requirement for television actors is the ability to memorize lines, leading one to speculate about the exact state of the art of acting in the United States at the time.
The multiple-camera set-up enables the television image to recreate the perceptual continuity of the theatre. Switching from camera to camera allows the television director to replicate the effect of the theatre spectator’s wandering eye: “the eye, while observing a stage set . . . makes its own changes to various parts of the scene to maintain interest, whereas in television the camera must take the eye to various points of interest in the scene” (ibid.:55). One way of objecting to Lohr’s characterization of television editing would be to say that televisual discourse fails to replicate the perceptual discourse of the spectator’s eye because whereas in the theatre spectators direct their own vision, the television camera does not permit them to choose their own perspectives. In her article explaining why stage directors might make good television directors, however, Hunter implicitly responds to such an objection by suggesting that the spectator’s gaze is always directed in the theatre by means of focal points in the staging that are equivalent to camera views. She compares the stage director’s manipulation of audience attention with the television director’s use of the camera, saying that: “the [stage] director’s approach to movement on the stage is to apply something of a ‘psychological’ camera eye. He must direct the audience’s attention about the stage precisely as the camera moves from one point of interest to the next” (Hunter 1949:47).

These observations are striking because they suggest that the multiple-camera set-up deploying three to five cameras simultaneously (still the standard way in which television studio productions are shot) evolved specifically out of a desire to replicate the visual discourse of the spectator’s experience of theatre. In a provocative comparison of television and film editing, Burger explains in detail why the image produced by the multiple-camera set-up is theatrical rather than cinematic:

This shifting between cameras has a purpose similar to cutting in the movies. It divides the scene into different views of the same object, thus affording a greater variety. Actually, however, the effect of television cutting is quite different. Since the cameras are placed almost in one line, and since the settings resemble bas-reliefs more than the three-dimensional sets of the films, the possibility for variety among the shots is strictly limited. If the angles of the cameras are changed they run the danger of catching each other or the low-hanging mike in their line of vision; and counter-shots are, as yet, almost impossible because there is no background for them. Therefore, although the television camera shifts, it does not show a new angle of the scene or tell more about the actors. What happens is essentially
the same as in the occasional use of opera glasses in the theatre; the frame of the picture is changed, but the angle is the same.

(Burger 1940:209, original emphasis)

Susan Sontag (1966:29, original emphasis) contrasts theatre and film by asserting that whereas “theatre is confined to a logical or continuous use of space[,] cinema . . . has access to an alogical or discontinuous use of space.” Burger suggests that the limited camera work possible in early television created an effect of spatial continuity more comparable to the theatre than to cinema. That television editing appears as a reframing of a single, continuous image from a fixed point of view, rather than a suturing of image to image or a shift in point of view, also asserts the immediacy, the sense of a continuous perceptual experience unfolding in real time, that television shares with theatre.

It is important to acknowledge that the resemblance of televisual discourse to theatrical discourse was strongest at this early stage in the development of broadcast television, when live presentation of drama and other televised events was the norm, and the technology itself was sufficiently clumsy that it could not easily replicate cinematic discourse. Because of their relative immobility, the cameras were arranged along a single axis parallel to the width of the playing area, and their movements were highly restricted. In an article on directing ballet for television, Paul Belanger (1946:8–9), a director of dance programs for CBS, catalogs the types of shot available to television cameras: all are either pans, “tongues” (i.e., vertical pans), or trucking shots. In the diagrams that accompany the article, the two cameras are always placed outside and in front of the performance space. This set-up illustrates the fact that in this earliest phase of American broadcast television, all shows were shot “in proscenium” (see D. Barker 1987 [1985]); the cameras never entered the playing space to produce reverse angles (Burger’s “counter-shots”). As a result, the television image was frontal and oriented toward the viewer in much the same way as a performance on a proscenium stage would be. This was reflected in the actors’ playing, which Burger (1940:209) describes as “aimed . . . at the fourth wall” in front of the cameras “much as it is on stage.”

As television technology quickly became more sophisticated and television cameras more nimble, televisual discourse aspired less to the theatrical and more to the cinematic. To Murray Bolen, the author of a postwar book entitled Fundamentals of Television, immediacy was no longer clearly fundamental to the medium. Acknowledging that champions of televisual immediacy have a valid point, Bolen (1950:190) nevertheless demurs that “we cannot be sure as yet that the instan-
The question has been commonly asked: Why cannot the television medium transmit a stage play to the home audience, capturing the immediacy of the performance instead of attempting to simulate the motion picture? Perhaps if a play were televised in one continuous long shot with the proscenium arch of the stage constantly visible, the effect of a stage play would be retained. As soon as the cameras are brought onto the stage, however, and proceed to break the action down into close-ups, two-shots, reverse angles, and so forth, the show no longer resembles a play but has become a motion picture. The television medium is a medium of the camera and as such has departed almost as far from the live theatre as has the medium of film.

(Bretz 1953:3)

Once the cameras could enter the set and shoot from reverse angles, the syntax of televisual discourse became that of cinematic discourse, though it is probably not coincidental that these comments were made around the time (1951–2) when television production was beginning to switch from live broadcasting to film production and, consequently, from New York City to Hollywood (Barnouw 1990:133–4). For Bretz, who embraces the cinematic paradigm for television, to replicate theatrical discourse on television means to present a static television image. But, as we have seen, the more imaginative television conceptualists of the previous decades felt that replicating theatrical discourse on television meant replicating the discourse of the spectator’s shifting eye, not that of the static proscenium.

As television production practice moved away from honoring the ontology of televisual immediacy and its links with theatrical discourse,

---

8 Andrew Lavender (2003) argues that we have seen a re-theatricalization of television in reality programs like Big Brother through their emphasis on liveness, frontality, evocations of theatrical space and temporality, and the manner in which contestants perform their identities.
televisual appropriations of theatrical discourse ironically became simultaneously more overt and more vestigial. Fictional shows shot cinematically still represented themselves as theatre, but through the use of dramatic convention rather than by using the camera to replicate the perceptual experience of the theatre spectator. The so-called “Golden Age” of television, which began after World War II and lasted through the 1950s, saw a spate of drama anthology shows with theatrical names, including *The Kraft Television Theatre*, *Ford Theatre*, *Playhouse 90*, *The Philco TV Playhouse*, and *Goodyear TV Playhouse* (see Barnouw 1990:154–67). In the early 1960s, the practice of making episodes of such hour-long dramatic series as *The Fugitive* and *The Man from U.N.C.L.E.* into “plays” by giving each episode a title and dividing it into “acts” became prominent. Even as the American theatre moved closer to making the streamlined two-act play its normal product, television drama remained wedded to an Ibsenian four-act structure because of the segmentation imposed upon it by the requirements of advertisers. The laughtrack and the practice of announcing that programs are “filmed before a live studio audience” are more recent techniques of theatricalizing television. It is ironic that in the 1930s and 1940s, when television practice was most faithful to the medium’s ontological immediacy, television studios could not accommodate audiences; the programs were directed exclusively to the home audience. The current practice of taping before “a live studio audience” is a simulation, rather than a replication, of the conditions of live theatrical production. The presence of the studio audience on the television screen and soundtrack implies that the program is a record of a real event. Because the programs are edited, however, the home audience does not see the same performance as the studio audience, but rather a performance that never took place.

An important theme emerges from this glimpse at history. For Raymond Williams (1992 [1974]:19), “when the question of [early television’s] content was raised, it was resolved, in the main, parasitically.” Television was imagined as theatre, not just in the sense that it could convey theatrical events to the viewer, but in that it offered to replicate the visual and experiential discourse of theatre in the antiseptic space of the suburban home theatre. Television, as parasite, strangled its host by offering itself not as an extension of the theatrical experience but as an equivalent replacement for that experience. As the passage from *A Primer for Playgoers* quoted above suggests, the implication of the cultural discourse surrounding television was that one should watch it instead of going to the theatre. The televisual experience is implicitly equated with the live theatrical experience, but is represented as better
suited to the postwar, suburban lifestyle: the message is that nothing is lost, and much is gained, by staying home.

This assumption translated into very concrete economic effects on the market for live performance. In their pioneering 1966 study of the economic situation of the performing arts, Baumol and Bowen (1966: 245) analyze live performance’s competition with television by pointing out that between 1948 and 1952, the years in which television became widely available, consumer spending generally rose by 23 percent, but admissions to live performances rose only by 5 percent. “In sum,” the authors conclude, “it seems clear that the mass media have made inroads into the audience for live performance.”

A much more recent study, the 2004 Survey of Public Participation in the Arts (SPPA), produced every five years by the US government’s National Endowment for the Arts (NEA), strongly suggests that live forms remain in direct competition with mediatized ones. The broad facts will come as no surprise: 60 percent of American adults go to the movies versus the 22.3 percent who go to the theatre and the 4 percent who attend the opera or ballet; the average adult watches 2.9 hours of television per day (NEA 2004:45). While a question such as “Do people go to the movies or watch television instead of attending live performances?” is difficult to answer with empirical certainty, the SPPA provides a useful perspective through comparisons of adults’ consumption of specific kinds of performance in both live and mediatized forms that allow us to get a glimpse of how people interested in a particular form pursue that interest. It is self-evident that far more people listen to recorded music than attend concerts, but the discrepancy may be larger than expected, especially considering that the SPPA tracks classical music and jazz but not popular music: 47.9 percent of adult Americans listen to recorded music, while only 18.8 percent attend concerts; 8.7 percent attend dance recitals, but 13.7 percent view dance in mediatized forms (ibid.:6). Irrespective of whether it is literally the case that the people who consume these arts in mediatized forms do so instead of attending live events, it is very clear that the mediatized version of these arts defines the normative experience of them.

The theatre audience seems to prefer the live event, though not by a huge margin: 22.3 percent of adults attended the theatre while 21 percent watched theatre in mediatized forms (ibid.:6). But there is
a wrinkle. Audiences for both musical and non-musical theatre typically attended 2.3 productions in 2002. The number of mediatized viewings on TV, VCR, or DVD was exactly twice that figure for musical theatre (4.6 viewings) and three times it for non-musical theatre (6.9 viewings) (ibid.:28). So, even though the percentage of adults who attended live theatre at least once in 2002 is higher than the percentage that viewed theatre in mediatized forms, the theatre is being consumed in mediatized forms two to three times more often than it is attended live. There are good reasons why people might choose to watch or listen to mediatized theatre, music, and dance which do not necessarily reflect the value they place on live performance, including cost, access, convenience, the unavailability of live performances by particular artists or of specific works at a given moment, and many others. But the fact that the audiences for these performing arts are participating in mediatized versions of them far more often than in live forms probably means that live performances are in direct competition with recorded performances.

Television’s usurpation of the cultural-economic position formerly enjoyed by live media such as theatre was not simply the result of the generalized mediatization of our society. Its specific ability to position itself as theatre’s replacement originates in the claims of immediacy made on behalf of television throughout its development, and in its claim to replicate theatrical discourse. What is true of the relationship between television and theatre is equally true, by allegorical extension, of the general cultural relationship of the televisual and mediatized to the live: the ideology of liveness that the televisual (the cultural dominant that is now expressed through a variety of media) inherited from television (the medium) has enabled it to displace and replace live performance in a wide variety of cultural contexts.

Is it live, or . . .?

To move from a discussion of the early relationship between theatre and television to an examination of the current situation of live performance is to confront the irony that whereas television initially sought to replicate and, implicitly, to replace live theatre, live performance itself has developed since that time toward the replication of the discourse of mediatization. This phenomenon is understandable in terms of the historical logic of remediation discussed in Chapter 1. While new technologies remediate older ones, as film and television both remediated theatre, “earlier technologies are struggling to maintain their legitimacy by remediating newer ones” (Bolter and Grusin 1996:352).
The multiple ways in which live performance now endeavors to replicate television, video, and film, and to incorporate digital media, provide vivid examples.¹⁰

Live performance now often incorporates mediatization to the degree that the live event itself is a product of media technologies. This has been the case to some degree for a long time, of course: as soon as electric amplification is used, one might say that an event is mediatized. What we actually hear is the vibration of a speaker, a reproduction by technological means of a sound picked up by a microphone, not the original (live) acoustic event. Recently, however, this effect has been intensified across a very wide range of performance genres and cultural contexts, from the giant television screens at sports arenas to the video apparatus used in much performance art. The spectator sitting in the back rows of a Rolling Stones or Bruce Springsteen concert, or even a Bill Cosby stand-up comedy performance, is present at a live performance, but hardly participates in it as such since his/her main experience of the performance is to read it off a video monitor.

Spectators at many sporting events now watch significant portions of the games they are attending on giant video screens. The rhetoric of mediatization embedded in such devices as the instant replay, the “simulcast,” and the close-up, at one time understood to be secondary elaborations of what was originally a live event, are now constitutive of the live event itself. The games—their scheduling, the distribution of time within them, their rules, and so forth—have themselves been molded by their entry into the economy of repetition, which demands that the form of the games as live events be determined by the requirements of mediatization. For example, “media time-outs” periodically

¹⁰ Vsevolod Meyerhold, the Soviet theatre director, actively promoted this phenomenon. Noting in an essay of 1929–30 (Meyerhold 1969 [1930]:254–6) that “the cinema is attracting far greater audiences than any other type of theatre,” he called for the “cinefication” of the theatre: “Give us the chance to work in a theatre incorporating modern techniques and capable of meeting the demands which our conception of the theatrical spectacle will create, and we shall stage productions which will attract just as many spectators as the cinema.” Meyerhold's analysis was based, however, in a faulty perception of film's position in cultural economy. He saw sound film as an attempt by the cinema “to compete with the theatre, with live actors [. . . by] furnishing the screen with dialogue.” This attempt was doomed to failure, in his view, because film's strength—and its international appeal—was as a visual, not a verbal, medium. When film acquired language, Meyerhold believed, it lost its universality. He felt that once the theatre could offer visual spectacle comparable to the cinema, an audience craving both that spectacle and words would flock back to the theatre.
bring professional and collegiate basketball games to a halt to allow television stations to show commercials. Given these conditions, “attending a live performance . . . these days is often roughly the experience of watching a small, noisy TV set in a large, crowded field” (Goodwin 1990:269).

Many of the most interesting recent examples of the incursion of media technology into live performance have taken place in the realm of symphonic music, traditionally a “high cultural” form in which the appearance of video projections and the like is much more surprising than in popular music concerts, which have always emphasized spectacle. It has taken place nevertheless: in 2004, the New York Philharmonic, in a bid to attract a younger audience, began to experiment with using live-feed video in its concerts so that audiences could experience close-up views of the musicians and conductor, a practice that met with resistance from some of the musicians (Robin Pogrebin, “For symphony fans, the touch of MTV,” New York Times, February 23, 2004:E1). Other orchestras that have employed similar technologies include Vancouver and Atlanta; in some cases, video screens display not only live feed from the ongoing performance but such contextual material as interviews with composers. The experience of the live concert thus becomes somewhat like that of watching a DVD in which one can access extra features as well as the concert itself. This idea has taken on an even more remarkable form in an experiment by the Nashville Opera in which recorded commentary by the director and cast was made available via iPod during performances of Gounod’s Roméo et Juliette, in the manner of commentary tracks on DVDs (Pierre Ruhe, “Nashville opera works iPod iNsights into Roméo,” Atlanta Journal–Constitution, February 2, 2007:F1).

The theatre, too, has experienced this attenuated incursion of media technology. The set for the 1995 Broadway revival of How to Succeed in Business without Really Trying, for example, was “a wall composed of thirty-two projection cubes showing a video of computer-generated three-dimensional images” (von Hoffman 1995:132). In the theatre, as at the stadium, you are often watching television even when attending the live event, and audiences now expect live performances to resemble mediatized ones. The celebrated helicopter effect in Miss Saigon, to choose but one small example, represents a direct importation of cinematic or televisual realism into the theatre. As theatre designer Wendall K. Harrington has said, “theatre-goers today have been raised on television. They have a cinematic vocabulary that one must deal with” (quoted in ibid.:132). This development lends credence to Patrice Pavis’s claim that “the formation . . . of audience taste by television
necessarily rebounds on the future audience for theatre, particularly in the demand for realism” (Pavis 1992:121).

Theatre audiences are not only seeing live performances that resemble mediatized ones as closely as possible, but are apparently modeling their responses to the live event on those expected of them by television. Ethan Mordden, quoted in an article analyzing the ubiquity of standing ovations on Broadway, offers the opinion that “audience reactions at live performances are so programmed as to seem canned, and . . . theatre audiences, emulating those in television studios, appear to applaud on cue” (Peter Marks, “Standing room only (and that’s not good),” New York Times, December 8, 1995:H5). Of course, audience response has been the object of manipulation throughout the history of theatre: the organized claques employed from the ancient Roman theatre at least through the dawn of the twentieth century were a central mechanism of such manipulation (see Esslin 1977:64 for a useful summary of this phenomenon). It is tempting to draw a parallel between claques and the “Applause” signs used in television studios as mechanisms for cuing audience response, but it is likely that the more recent model is the proximate cause of contemporary audience behavior. Even in the absence of “Applause” signs, contemporary spectators respond in a programmed fashion, as if they were a television studio audience. Arguably, theatre audiences today respond spontaneously to the same sorts of cues that would be signaled by means of the “Applause” sign in a television studio because the studio audience has become the culturally engrained model for what gets applause and how audiences behave.11

Just as mediatization is reflected in the presence of the apparatus of reproduction in the live setting, so too is it reflected in the forms and cultural positions of performance. In his book on the political economy of music, Jacques Attali offers a useful description of the cultural economy in which performance currently takes place. He distinguishes an economy based on representation from one based on repetition:

Stated very simply, representation in the system of commerce is that which arises from a singular act; repetition is that which is mass-produced. Thus, a concert is a representation, but

11 Altman (1986:47) describes what he calls television’s “internal audiences,” which can be studio audiences, newscasters, announcers, commentators, or even characters in fictional programs. The reactions of the internal audiences focus viewer attention and response by functioning as a “sign that someone else thinks an important phenomenon is taking place on the screen,” thus manipulating viewer attention.
also a meal à la carte in a restaurant; a phonograph record or a can of food is repetition. 

(Attali 1985:41)

In his historical analysis, Attali points out that although “representation emerged with capitalism” when the sponsorship of concerts became a profitable enterprise and not merely the prerogative of a feudal lord, capital ultimately “los[t] interest in the economy of representation” (ibid.). Repetition, the mass-production of cultural objects, held greater promise for capital because whereas “in representation, a work is generally heard only once—it is a unique moment[,] in repetition, potential hearings are stockpiled” (ibid.). By being recorded and becoming mediatized, performance becomes an accumulable value. Live performance exists within the economy of repetition largely either to promote mass-produced cultural objects—such as the CDs and DVDs always available at performances by Cirque du Soleil or Blue Man Group—or to serve as raw material for mediatization, as when live theatre productions are staged in order to be reproduced on television.

To an ever-greater extent, live performances are economically tied to mediatization. In the case of professional sports, for instance, the live game can take place because of the income the teams receive from the companies that broadcast the game, who derive income, in turn, from advertising during the game. In many instances, the same capital interests are behind both live and mediatized cultural objects. This is true of the Broadway productions underwritten by cable television companies that I discuss below. Disney’s Beauty and the Beast, also mentioned below, is another example: Disney has established a division specifically to repurpose their film properties as live performances alongside the home videos, sound recordings, toys, and so on produced from the same materials.12 In a particularly elaborate scenario, the casting of the lead players in a Broadway revival of the musical Grease that opened in the summer of 2007 was determined by the NBC reality television show Grease: You’re the One that I Want. In this American Idol-style competition, viewers’ votes ultimately determined which of the finalists were cast. In what could be seen as a test of the relationship between telesvisual liveness and theatrical liveness, viewers are placed in the distinctive position of having to assess the stageworthiness of performers they see live on the screen. The fact of the eventual live performance makes the

12 For a close analysis of the articulation of live performance to consumer culture, see Wickstrom (2006).
television program more compelling, independent of the theatrical production’s quality or reception. The success of this symbiotic economic relationship between television and theatre is clear: more than six months before opening, the Broadway show had garnered ticket receipts of over one million dollars on the strength of just one episode of the television program.

In these and all such instances, the economic success or failure of any one cultural object is much less important than the profit derived from the whole package. Until recently, this had long been the case for popular music concerts. Traditionally, they were staged to advertise recordings and were not always profitable in themselves. The recordings thus promoted, however, had the potential to be enormously profitable and more than make up for losses incurred by the concert tour. This relationship changed in 1999, when digital file sharing of musical recordings began to undermine the sale of recordings. As economists Julie Holland Mortimer and Alan Sorensen (2005) have shown, when it became clear that recordings were newly problematic as a source of revenue, the music industry as a whole began to emphasize live performance.13 Between 1993 and 2002, the number of bands on tour more than doubled, as did the number of concerts on offer, while the revenue derived from these events more than tripled (Mortimer and Sorensen 2005:15). “For artists, the decline in revenues from recorded music after 1998 is striking, but appears to have been more than offset by a concomitant increase in concert revenues” (ibid.:32). The industry as a whole has not fully recovered, however, leading to the prediction that whereas in the past record labels generally did not participate extensively in concert promotion, “it seems likely a new equilibrium will emerge in which those labels play a larger role in concert promotion and claim a larger share of concert profits” (ibid.:33). The current trend, which will continue for the foreseeable future, is for highly capitalized cultural producers to envision “projects” that can be realized in many different

13 In a curious inversion of the traditional relationship, some rock artists and even jazz musicians are engaging in live performances of older albums, playing them in their entirety. Since the recordings in question are well established as back-catalog sellers, the concerts do not serve to promote them (though obviously they can revive interest and sales). Rather, the album is invoked as a beloved artifact in order to sell the concert. In at least one case in which a group’s best-known album is a live album (Cheap Trick’s Live at Budokan), the result was a live recreation of a live recording. And, needless to say, some of these concerts have themselves been released as live recordings. See Elisabeth Vincentelli, “If you won’t buy the album, they’ll sing it, from the top,” New York Times, December 31, 2006:2:28.
forms (as films, television programs, DVDs, live performances, sound recordings, toys, collectibles, etc.) rather than individual cultural objects.\textsuperscript{14} Even if changing circumstances necessitate shifts of emphasis, none of the particular manifestations of the project need be profitable as long as the project as a whole is.

I first became aware of the imbrication of theatre within the economy of repetition in the early 1980s when I noticed that a number of the Broadway productions I was seeing had been underwritten in part by cable television money with the understanding that taped versions of the productions would appear later on cable networks.\textsuperscript{15} Whether by conscious intention or not, the productions themselves (particularly their sets, but also their staging) were clearly “camera-ready”—pre-adjusted to the aspect ratio, intimate scale, and relative lack of detail of the television image—a suspicion borne out when I later saw the televised version of one of them. This is a particularly explicit example of the historical reversal I mentioned earlier. In a process driven by the economics of cultural production, television, which initially modeled itself on the theatre, especially in dramatic presentations, has become both model and telos for live theatre. In \textit{The Post-Modern Aura}, Charles Newman (1985:129) declares that “the adaptation . . . has become the primary literary convention of the age.” As compared with those of television’s Golden Age, the productions to which I refer here did not need to be adapted to make the journey from stage to television, because the live versions had been constructed to be seen as television—they were pre-adapted (so to say) to the demands of their new medium. Contrary to Newman’s suggestion that the adaptation is the essential postmodern form, I would argue that the very fact that these productions required no adaptation in making the transition from representation to repetition is what defines them as postmodern. While I would not want to assert

\textsuperscript{14} The publishing industry is moving in a comparable direction. Whereas the historically conventional progression was from hardcover book to paperback, then perhaps to an audiobook (the possibility of film or television adaptation is also part of the sequence), today a “book” can begin at any point on this continuum. Ana Maria Alessi of HarperMedia describes the new approach: “We’re pursuing a number of authors where we are going to work with them on what we are calling ‘born digital’ products, where we will say it will start its life as a digital download audio book, and may then go to e-book and with that success, we may then go to paper” (quoted in Neary 2007).

\textsuperscript{15} For a useful overview of cable television’s involvement in the presentation of theatrical productions, see Rose (1986:229–33). Although Rose does not discuss the involvement of cable networks in the financing of live theatre, he does take note of the fact that cable executives lost interest in theatre around 1982 when they realized that an original television movie can be produced for less than the cost of mounting a theatrical production for broadcast (\textit{ibid.}:231).
unconditionally that the live event I saw while sitting in the theatre was no different from its television counterpart, its identity as *theatre*, rather than television, and its specificity as a *live*, rather than mediatized, event had been called into question long before it showed up on the screen.

Instances in which the live event exists at least as much to serve as the basis for a mediatized representation as to be an end in itself are not confined to the world of commercial entertainment. Although some of the early documentation of the performance and body art of the early 1970s was not carefully planned or conceived as such, artists who were interested in preserving their work quickly became fully conscious of the need to stage it for the camera as much as for an immediately present audience, if not more so. Chris Burden, for example, “carefully staged each performance and had it photographed and sometimes also filmed; he selected usually one or two photographs of each event for display in exhibitions and catalogs . . . In this way, Burden produced himself for posterity through meticulously orchestrated textual and visual representations” (Jones 1994:568). As another example, the European body artist Gina Pane describes the role of photography in her work in the following terms: “It creates the work the audience will be seeing afterwards. So the photographer is not an external factor, he is positioned inside the action space with me, just a few centimeters away. There were times when he obstructed the [audience's] view!” (quoted in O'Dell 1997:76–7).

It is clear, then, that such archetypal works of body and endurance art as Burden's and Pane's were not autonomous performances whose documentation supplements and provides access to an originary event. Rather, the events were staged to be documented at least as much as to be seen by an audience; as Pane observes, sometimes the process of documentation even interfered with the initial audience’s ability to perceive the performance. In this respect, no documented work of performance art is performed solely as an end in itself: the performance is always at one level raw material for documentation, the final product through which it will be circulated and with which it will inevitably become identified, or, as Kathy O'Dell (*ibid.*, 77) puts it, “performance art is the virtual equivalent of its representations.” These developments illustrate Walter Benjamin’s (1986 [1936]:33) claim in “The work of art in the age of mechanical reproduction” that “To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility.”

16 For a fuller discussion of the relationship between performance art and its documentation, see Auslander (2006d).
Just as body art reflects the degree to which live performance is made to be reproduced as much as the commercial theatre, a more subtle incursion of mediatization into the live setting probably began earlier in avant-garde performance than in the commercial theatre and is currently manifest not only in the presence of video in much performance art, but in the kind of performing characteristic of the avant-garde. Thirty-five years ago, Michael Kirby (1984 [1972]:100) characterized the kind of performance taking place in much experimental theatre and performance art as “nonmatrixed representation,” in which the performer does not embody a fictional character but “merely carries out certain actions” that nevertheless can have referential or representational significance. As Kirby observes, the decade from the early 1960s through the early 1970s saw a trend away from conventional acting and toward nonmatrixed performance in American avant-garde theatre (ibid.:110). Although “character” did make something of a comeback in the performance art of the later 1970s and 1980s, the concept of nonmatrixed representation remains useful (and under-employed) for describing the performing evident in much performance art from the 1960s to the present. It also serves as a conceptual bridge from the experimental theatre of the 1960s, which was frequently ideologically opposed to the mass media, to subsequent mediatized performance.

The sense in which nonmatrixed representation provided a beachhead for mediatization within artistic practices that resisted it may best be seen in Kirby’s statement that “in nonmatrixed representation the referential elements are applied to the performer and are not acted by him” (ibid.:100). In other words, the performance requires some form of mediation of the performer’s actions to create meaning. Although that mediation was not usually technological in the performances Kirby discusses, film acting seems to be a good example of nonmatrixed representation. There are, after all, many times when a film actor, like the avant-garde performers Kirby mentions, is called upon merely to carry out certain actions that acquire representational and characterological significance only in the editing room.17 Clint Eastwood’s squint, for

---

17 Kirby (1984 [1972]:107) acknowledges that “the film actor may do very little, while the camera and the physical/informational context do the ‘acting’ for him,” and he characterizes film acting as “simple acting,” which, for him, is at the “matrixed” end of the spectrum between completely nonmatrixed and fully matrixed performing. Although I employ Kirby’s vocabulary, my own characterization of film acting is somewhat different in emphasis, since I wish to position it toward the “nonmatrixed” side of Kirby’s performance continuum.
example, becomes meaningful only through the mediation of the camera in close-up and editing. Prior to this mediation, it is just Clint squinting.

Wooster Group performer Willem Dafoe suggested the parallel between avant-garde performing and film acting when I interviewed him in 1985. He told me that, from his point of view as a performer, what he does when performing in a Wooster Group piece is virtually identical to his acting in films—to him, both are primarily nonmatrixed, task-based performing (Auslander 1997:44). Dafoe is one of a growing group of American performance artists whose experiences in the avant-garde enabled them to make a smooth transition into acting on film or television; the careers of Laurie Anderson, Spalding Gray, Ron Vawter, Ann Magnuson, Eric Bogosian, Steve Buscemi, and many others are noteworthy in this regard. More important, their more experimental work itself has found its way into mass-cultural contexts in many cases: Anderson’s performances as rock concerts, films, and videos; Gray’s and Bogosian’s monologues as movies; Magnuson’s pop performance extravaganzas as cable television specials, and so forth. Daryl Chin (1991:20) describes this trend disparagingly by saying that “much of what passes for performance art, experimental film, and ‘advanced’ visual art is more like an audition, a trial-run, a mock-up for work in television, commercial movies, or advertising.” While I disagree with Chin’s evaluation of this work, his point that it is now possible for a performer to move directly from the context of the avant-garde to that of mass culture is surely valid. I have proposed the expression “cross-over,” a venerable music business term referring to popular songs that appear on more than one hit parade, to characterize this phenomenon, with the understanding that what is being crossed over—the distinction between

18 I summarize these activities in Auslander (1993:62). A number of performance artists have had “specials” on cable networks or have appeared on public television and on the occasional network program, such as Saturday Night Live. Ann Magnuson has played characters from soap operas—one of her performances was entitled Christmas Special (1981); she has also appeared in films (Making Mr. Right (1987)) and on television (on Anything but Love), and toured with her satirical rock band, Bongwater. In 1990 she returned to solo performance, including an appearance at Lincoln Center in New York, in You Could Be Home Now. A number of these performers have achieved success in mass entertainment forms as a consequence of their fame as performance artists: Bogosian has acted in films and on television; his play Talk Radio was made into a film released in 1988. Anderson records for a major label and has appeared in a film of United States, which she has also produced as a sound recording and a colorful book. Spalding Gray also acted in films and on television, including in The Nanny; he appeared in film versions of several of his monologues and published them in book form.
the avant-garde and mass culture—is a distinction between received cultural categories that is more profound even than that between, say, rock and disco (which itself is considerable). 19 Ironically, one of the factors that contributed to the performance avant-garde’s becoming ready for prime-time was its adoption of nonmatrixed performance, an approach originally meant to differentiate “performing” from conventional acting but that ultimately served as a training ground for the kinds of performance skills demanded by the mass media because, like film acting, it depends on mediation for its significance. In effect, the performance avant-garde had absorbed the phenomenology of mediatized performance even before it took up a position within the economy of repetition.

That mediatization is the experience to which live performance must refer and which it must seek to recreate is evident from examples drawn from a broad range of cultural contexts. The practice of staging live reenactments of televisual events began as early as the mid-1950s, when television plays like *Twelve Angry Men* and *Visit to a Small Planet* were presented on Broadway, and it has accelerated in recent times with the restaging of television programs as live performances (*The Real Live Brady Bunch*), animated films as stage musicals (Disney’s *Beauty and the Beast*), and music videos as concerts. As the personnel involved in staging Madonna’s tours freely admit, the goal of their productions, like that of many rock and pop concerts, is to reproduce the artist’s music videos as closely as possible in a live setting on the assumption that the audience comes to the show expecting to see what it has already seen on television. One could say that because the music video sets the standard for what is “real” in this realm, only a recreation of its imagery can count as “realistic.” Reciprocally, the fact that images from Madonna’s videos can be recreated in a live setting enhances the realism of the original videos.

Another performance genre in which that assumption operates is stand-up comedy. From the advent of television until the 1980s, the conventional wisdom was always that television used up in a few minutes of broadcast time material it might have taken the comic years to hone. With the stand-up comedy boom of the 1980s, however, comics and comedy club owners discovered that audiences were only too happy to

19 For a more detailed discussion of cross-over performance artists, see Auslander (1992b). The issue of distinctions between genres of popular music, to which I refer here merely in passing, is central to my discussion in Chapter 3 of the present volume.
come to a club to hear the same jokes they had already heard on a comic's cable television special. (Indeed, they may have been disappointed not to hear them.) In these cases, the traditional privileging of the “original,” live performance over its elaborations and adaptations is undermined and reversed: in an “inversion of the structural dependence of copies upon originals” (Connor 1989:153) the mediatized performance has become the referent of the live one. “What irony: people originally intended to use the record to preserve the performance, and today the performance is only successful as a simulacrum of the record” (Attali 1985:85). Vincent Canby (“Look who’s talking on Broadway: microphones,” New York Times, January 22, 1995:2:1, 4–5) has argued that the use of sound systems and mixing techniques that produce digital-quality sound at live performances of Broadway musicals encourages audiences to assess live performances in terms of their resemblance to mediatized ones: “the theatre is fast approaching the day when a Broadway show will be a nearly perfect, if artificial, representation of a live performance.” In all of these contexts, live performance is now a recreation of itself at one remove, filtered through its own mediatized reproductions. (I shall make a similar argument regarding live performance of rock and music video in Chapter 3.)

All of these instances, and a great many more that I could mention, exemplify the way mediatization is now explicitly and implicitly embedded within the live experience. I have described examples of the incursion of mediatization into a range of live performance events at some length to make the point that, within our mediatized culture, whatever distinction we may have supposed there to be between live and mediatized events is collapsing because live events are increasingly either made to be reproduced or are becoming ever more identical with mediatized ones. When I have presented this idea in public lectures, it has often been challenged by the claim that, while what I say may be true of large-scale entertainment such as sporting events, Broadway shows, and rock concerts, it does not hold true for more intimate forms of theatre and performance art. However, I do not believe this distinction to be valid. I am not arguing that all instances of live performance reflect the incursion of mediatization in the same ways or to the same degree, and scale is certainly one differentiating factor. Some sectors of our cultural economy determine that if an event is to occur live at all, it must be mounted on a large scale. Connor (1989:151–2) points out, for

---

20 See Auslander (1992b) for a discussion of the comedy boom and television in a somewhat different context.
example, that the use of giant video screens at rock concerts provides a means of creating in a large-scale event the effect of “intimacy and immediacy” associated with smaller live events. In order to retain those characteristics, large-scale events must surrender a substantial measure of their liveness to mediatization. Ironically, intimacy and immediacy are precisely the qualities attributed to television that enabled it to displace live performance. In the case of such large-scale events, live performance survives as television.

More intimate live performances may not be mediatized in the same way or to the same effect. Inasmuch as mediatization is the cultural context in which live performances are now inevitably situated, however, its influence nevertheless pervades even these smaller-scale events. I have already discussed this relation to the documentation of performance art. But mediatization is not just a question of the employment of media technology; it is also a matter of what might be called “media epistemology.”

[It] should not be understood as meaning simply that our world-view is being increasingly dominated by technical equipment. Even more important is the fact that we often perceive reality only through the mediation of machines (microscope, telescope, television). These frameworks . . . preform our perception of [the world].

(Bolz and van Reijen 1996:71)

Even small-scale, intimate live performances can be products of this preformed perception. In an earlier analysis (Auslander 1992b:70–81), I pointed out that both Laurie Anderson’s media-saturated performances and Spalding Gray’s low-tech, intimate ones can be seen as televisual, even in live presentations. To those familiar with her performance work, Anderson’s engagement of media technology is well known (see ibid.:105–24; I shall also have occasion to refer to one of her performances at the end of this chapter). Because Gray’s relation to mediatization is less obvious, I will review that part of my argument briefly. I contend that his monologue performances were televisual in two respects. First, their narrative structure, which followed the continuing adventures of a small group of central characters whose essential traits never changed, was very close to that of the television serial. Second, and more important here, Gray created a performance persona that:

can crop up anywhere—as character and narrator in [his] monologues, whether live or recorded; as a television or film
actor (I would insist here that when we see Gray acting on television, in film or on the . . . stage . . . what we are seeing is the “Spalding” persona as actor); as a character in, and the author of a book . . . the “Spalding” persona, which began as a fictional conceit of his performances, has become “real” by virtue of its continual reappearance in the cultural arena . . . The blending of real and fabricated personae and situations that occurs when performance personae assume the same functions as “real” people in the media has the same disorienting effect as the flowing together of various levels and types of meanings on television [itself].

(ibid.:77–8)

That Gray’s performance persona itself can be seen as a televisual entity, that the commercial theatre now frequently presents live versions of films and television and camera-ready productions of plays, that live concerts often recreate the imagery of music videos, that the non-matrixed performing characteristic of avant-garde theatre proved a suitable training ground for television and film acting all suggest that the incursion of mediatization into live performance is not simply a question of the use of certain equipment in that context. It also has to do with approaches to performance and characterization, and the mobility and meanings of those within a particular cultural context. What we are seeing in many cases is not so much the incursion of media-derived “technics” and techniques into the context of live performance but, rather, live performance’s absorption of a media-derived epistemology.

Thinking about these phenomena has led me back to Walter Benjamin’s crucially important essay “The work of art in the age of mechanical reproduction” (1986 [1936]). The focus of Benjamin’s analysis in that essay is on the historical progression from unique, “auratic” cultural forms to mass-reproduced ones.Except in his brief discussion of Dada, Benjamin does not take note there of the kind of doubling back that I have described, in which older forms emulate and incorporate newer ones. He was remarkably prescient, however, and many of the terms of his analysis still shed light on the current situation.

I will begin by noting Benjamin’s emphasis on the idea that “human sense perception . . . is determined not only by nature but by historical circumstances as well” (ibid.:31). Many aspects of our relation to performance suggest that mediatization has had a powerful effect in shaping the sensory norm for the current historical moment. Roger Copeland (1990:29) has explained the use of amplification in live
theatrical performance in precisely these terms: “on Broadway these days even nonmusical plays are routinely miked, in part because the results sound more ‘natural’ to an audience whose ears have been conditioned by stereo television, high fidelity LPs, and compact disks.” The use of almost invisible microphones placed on the bodies of the actors only reinforces our perception of an amplified voice as “natural.” Andrew Goodwin (1990:266) has identified another intriguing case of the normalization of mediatized sound: that of the handclap effect used on many pop and dance records. Recordings of the 1970s frequently used a particular percussion synthesizer, the TR-808, as the source for this sound. After a decade of synthesized handclaps, when musicians in the 1980s wanted to sample a handclap effect from existing recordings, “they sampled their own electronic simulation from the TR-808 machine, rather than ‘real’ handclaps” because “the electronic handclap sounded so ‘natural’ to pop musicians and audiences” (ibid.). Linda Dusman (1994:140), a composer, has suggested that the dominance of recording as the normative experience of music has made it almost impossible for audiences to hear a live musical performance as something actually occurring in the moment rather than a reproduction of a recording.

The degree to which our eyes and ears have been conditioned by mediatization was clear well before the advent of compact discs, stereo television, and sampling: think of the people who have long brought portable radios or television sets to the baseball park, or consider Evan Eisenberg’s anecdote of stumbling upon a free jazz concert in Central Park in New York City, only to notice that some spectators were listening to the radio broadcast of the very concert they were attending (Eisenberg 1987:85). An even more developed version of the latter scenario occurred at an Atlanta performance of the rock group Yes. The group’s set-up included a system that permitted those attending the concert to listen to it on headphones plugged directly into the group’s mixing board.

Benjamin describes the mode of perception he saw in an emergent mass culture in terms of overcoming distance (and therefore banishing aura, which can be understood as a function of distance). He refers to:

the desire of contemporary masses to bring things “closer” spatially and humanly, which is just as ardent as their bent toward overcoming the uniqueness of every reality by accepting its reproduction. Every day the urge grows stronger to get hold of an object at very close range by way of its likeness, its reproduction.

(Benjamin 1986 [1936]:31–2)
Benjamin’s notion of a mass desire for proximity, and its alliance with a desire for reproduced objects, provides a useful matrix for understanding the interrelation of live and mediatized forms that I have described. The people listening to the Central Park concert on the radio and those watching Yes with headphones clapped on their ears are trying to achieve a kind of aural intimacy that can be obtained only from the reproduction of sound. The use of giant video screens at sporting events, music and dance concerts, and other performances is another direct illustration of Benjamin’s concept: the kind of proximity and intimacy we can experience with television, which has become our model for close-up perception, but that is traditionally absent from these performances, can be reintroduced only by means of their “videation.”

When a live performance recreates a mass-reproduced one, as in the case of the replication of music video imagery in concerts or cartoon images in theatre, an inverted version of the same effect takes place. Because we are already intimately familiar with the images from our televisual and filmic experience of them, we see them as proximate, irrespective of how far away they may be in physical distance. If you know what Madonna’s videos look like from MTV, you can read the images in her concerts as if you were in intimate relation to them, even from the last row. Whether the effect of intimacy results from the videation of the live event or from acquaintance with the live images from their prior reproductions, it makes live performances seem more like television, and thus enables live events to fulfill the desire for reproduction that Benjamin notes. Even in the most intimate of performance art projects, in which we may be only a few feet away from the performers, we are still frequently offered the opportunity for the even greater intimacy of watching the performers in close-up on video monitors, as if we can experience true proximity only in televisual terms.

This points to another of Benjamin’s (ibid.:30) postulates: that “the quality of [the original’s] presence is always depreciated” by reproduction. Steve Wurtzler’s analysis of this effect in the context of sports may be generalized to many other cultural contexts:

Over time, as the conventions of the televisually posited live come to constitute the way we think of the live, attending the game . . . becomes a degraded version of the event’s televisual representation. This degradation of the live is itself compensated for by the use of Diamondvision and instant replays on elaborate stadium score boards . . . In other words, the degradation of the live is compensated for by the inscription into the “real” of its representation.

(Wurtzler 1992:92)
The ubiquity of reproductions of performances of all kinds in our culture has led to the depreciation of live presence, which can only be compensated for by making the perceptual experience of the live as much as possible like that of the mediatized, even in cases where the live event provides its own brand of proximity.

I will conclude this section with a brief consideration of mixed-media performances, in the cultural/perceptual environment I have described. There has been a critical discourse surrounding the concept of mixed-media performance and the possibilities of incorporating film into theatre since at least the early 1920s. Robert Edmond Jones (1941:17) declared: “In the simultaneous use of the living actor and the talking picture in the theatre there lies a wholly new theatrical art, whose possibilities are as infinite as those of speech itself.” Whereas film, for Jones, is “the perfect medium for expressing the Unconscious,” live actors express conscious reality. Therefore, the combination of the two media “will reveal simultaneously the two worlds of the Conscious and the Unconscious . . . the objective world of actuality and the subjective world of motive” (ibid.:18). Implicit in Jones’s call for this form of mixed-media performance is the assumption that live and filmed representations can be combined as complementary and equally compelling languages.

The notion that, working together, stage and screen can convey a fuller sense of what it is to be human than either can alone is premised on the assumption of their working together as complementary equals, an assumption that still underlies much performance work that incorporates both live and screened bodies (see, e.g., Dixon 2006). The possibility that audience perception may inevitably be drawn to a screen even when there are human beings also present, for instance, is not usually considered as part of the equation. Jones, for one, does not take cultural economy into consideration or raise the question of how live performance juxtaposed with film would be perceived by an audience that had been deserting theatres in favor of movie houses for over twenty years. Would such an audience perceive the live aspects of the kind of

---

21 By “mixed-media performances” I mean events combining live and mediatized representations: live actors with film, video, or digital projections, for instance.

22 In 1923, Sergei M. Eisenstein directed a stage production that incorporated filmed sequences. He discussed the possibilities of combining film with theatre, and of making the theatre more cinematic, in “The montage of attractions” (Eisenstein 1988 [1923]).

23 Movies had been stealing American audiences from theatre both in New York and on the road since the early 1920s. By 1930, about twenty Broadway theatres
mixed-media production envisioned by Jones as equally compelling as its filmed components, or might they see the live as an uninteresting, degraded version of the filmic?

I am skeptical of discussions of work based on the interaction of live and mediatized performance that do not factor in such considerations. As Robert Wechsler (2006) points out, one reason why technical media compel attention is quite simply the “how’d-they-do-it?” factor. The audience’s inevitable curiosity about how technical effects are achieved makes them centers of attention, an effect compounded by the ways such devices may reiterate the audience’s experience of dominant media forms and appeal to the dominant mode of perception. Although some performance makers seek transparency in their uses of technology or to demystify the apparatus, it is not at all clear that such tactics derail an audience’s fascination with technological spectacle and novelty.

Twenty-five years after Robert Edmond Jones called for the unification of theatre and cinema, the actor Roberts Blossom, who was combining live actors with film in a series of experiments he called Filmstage, explicated his activity in terms very similar to Jones’s. Whereas Jones saw film as representing the unconscious and live actors as representing consciousness, Blossom (1966:70) saw film as representing consciousness and the live actors as representing corporeality, physical existence. Unlike Jones, who saw theatre and film as portraying complementary aspects of the psyche, Blossom saw the live and filmed elements of his productions as competing with one another. He acknowledged that the competition between the actors’ live bodies and the filmed images in these mixed-media performances was intrinsically unfair because the filmed images were inevitably more compelling. By comparison with the films, the actors appeared as “fifty-watt bulbs waiting to be screwed into their source and to shine with the light that is perpetual (behind them,

“were alternating motion pictures with plays”; many of these theatres soon became movie houses (Poggi 1968:83). Poggi comments: “the motion pictures could not have crushed the legitimate theatre if there had been a real preference for live drama. Theatre managers would never have turned their buildings over to the movies if they could have made more money by booking plays” (ibid.:43). I assume that Jones was aware of these developments. It is possible, therefore, that his proposal for mixed-media performance was a covert way of recuperating theatre’s enemy.

Filmstage was but one of many intermedia experiments undertaken in the mid-1960s by theatre, film, and performance artists. Carolee Schneeman and Robert Whitman, for instance, both staged “Happenings” that juxtaposed live performers with filmed images. For a useful contemporary survey of these activities and other experimental uses of film, video, and live performance, see Youngblood (1970).
around them) but which they can only reflect at fifty watts” (*ibid.*). In terms of psychic economy, we might interpret Blossom as saying that physical existence is only ever a pale reflection of the consciousness underlying it. But his statement can also be read in terms of cultural economy. In those terms, the live actors are only pale reflections of the mediatized representations that dominate the cultural landscape. Although Blossom (*ibid.*:72) may be implying the possibility of existing as pure consciousness when he concludes that “our presence as bodies begins to be suspect,” that statement also summarizes the devaluation of live presence in mediatized culture.

If the value of live presence has depreciated in our mediatized culture, it would seem that audiences would be more likely to perceive the live elements of mixed-media performances as the fifty-watt bulbs described by Blossom than as the equal partners of mediatized representations envisioned by Jones. This question is difficult to address in any other than anecdotal terms: when we go to a concert employing a large video screen, for instance, what do we look at? Do we concentrate our attention on the live bodies or are our eyes drawn to the screen, as Benjamin’s postulate of our desire for proximity would predict? At a party I once attended, I found the latter to be the case. There was a live band, dancing, and a video simulcast of the dancers on two screens adjacent to the dance floor. My eye was drawn to the screen, compared to which the live dancers indeed had all the brilliance of fifty-watt bulbs.

Another example, one that carries this discussion into the digital domain, is *Pôles*, by Pps Danse of Montreal, a performance described by its makers as “Dance+Virtual.” The piece combines two live dancers with holographic projections of themselves deployed against a shifting background of digital projections. The best moments of *Pôles* are those in which it is difficult to distinguish the living dancers from their holographic counterparts. In one sequence, four figures chase each other through a grotto-like projection; the three-dimensional dancers seem as able to enter into the two-dimensional projected space as the wraith-like holograms. On other occasions, the holograms are projected on to the dancers to produce the effect of dematerializing bodies. The question that such a performance raises for me is: do we see a piece like *Pôles* as a juxtaposition of the live and the digital, a shifting among realms? My feeling is that the answer is no, that we now experience such work as a fusion, not a con-fusion, of realms, a fusion that we see as taking place within a digital environment that incorporates the live elements as part of its raw material. Rather than a conversation among distinct media, the production presents the assimilation of varied materials to the cultural dominant. In this sense, Dance+Virtual=Virtual.
I do not wish to oversimplify, however. While I consider it crucial to keep in mind that different media or modes of expression do not interact on a level cultural playing field, I am not suggesting that the relationships among different elements at different moments of a performance are simply fixed at a cultural-economic level. Surveying performance work that combines live and screened images from Erwin Piscator’s Epic Theatre through the work of the Wooster Group, the Builders’ Association, Cyburbia Productions, and many others, it is clear there are ways of asserting the presence of a human body over that of a projection, for instance, or vice versa, and that screened images may integrate seamlessly with live ones, or one may be used to comment on the other, and so on. However, none of this changes the fact that such performances occur now in a cultural context in which the projection is more closely related to the dominant media than is the live body, a fact that undoubtedly has implications for how the audience perceives the whole performance.  

**Against ontology**

Live performance thus has become the means by which mediatized representations are naturalized, according to a simple logic that appeals to our nostalgia for what we assumed was the im-mediate: if the mediatized image can be recreated in a live setting, it must have been “real” to begin with. This schema resolves (or rather, fails to resolve) into an impossible oscillation between the two poles of what once seemed a clear opposition: whereas mediatized performance derives its authority from its reference to the live or the real, the live now derives its authority from its reference to the mediatized, which derives its authority from its reference to the live, etc. The paradigm that best describes the current relationship between the live and the mediatized is the Baudrillardian paradigm of *simulation*: “nothing separates one pole from the other, the initial from the terminal: there is just a sort of

---

25 The cultural terrain is uneven in other ways, too. Turning from the question of dominance to that of prestige, for instance, one may find a somewhat different story. As Martin Barker (2003) suggests, even though the theatre has, in my terms, much lower cultural presence and power than, say, cinema or the Internet, it may enjoy greater prestige because it continues to be perceived as a high art form requiring specific educational and cultural capital to appreciate. Even though most people now would prefer to watch television or play a computer game than go to the theatre, they may still accord the theatre greater prestige. Video on stage or in an installation may thus become “art,” while video on your television set remains “entertainment.”
contraction into each other, a fantastic telescoping, a collapsing of the
two traditional poles into one another: an IMPLOSION.” Baudrillard
states, with typical insistence, about such implosions: “this is where
simulation begins” (Baudrillard 1983:57, original emphasis). In the pre-
vious sections of this chapter, I indicated the twin vectors of implosion
in the case of live and mediatized performance. As the mediatized
replaces the live within cultural economy, the live itself incorporates
the mediatized, both technologically and epistemologically. The result
of this implosion is that a seemingly secure opposition is now a site of
anxiety, the anxiety that underlies many performance theorists’ desire
to reassert the integrity of the live and the corrupt, co-opted nature of
the mediatized. One of the most articulate versions of this position is
Peggy Phelan’s account of what she understands to be the ontology of
performance. For Phelan, the basic ontological fact of performance is
that its

only life is in the present. Performance cannot be saved, recorded, documented, or otherwise participate in the cir-
culation of representations of representations: once it does so, it becomes something other than performance. To the
degree that performance attempts to enter the economy of
reproduction, it betrays and lessens the promise of its own
ontology.

(Phelan 1993b:146)

For Phelan, performance’s devotion to the “now” and the fact that its
only continued existence is in the spectator’s memory enable it to
sidestep the economy of repetition. “Performance’s independence from
mass reproduction, technologically, economically, and linguistically, is
its greatest strength” (ibid.:149).26

Although it may seem that live performance cannot be mass-
reproduced, I shall argue otherwise later in this section. I have already
suggested that live performance is becoming progressively less inde-
pendent of media technology. Phelan’s claim that performance is linguis-
tically independent from mass reproduction is based on a tautological
argument. She posits performance as nonreproductive and writing as a
form of reproduction, allowing her to conclude that writing (language)

---

26 I realize that I am considering only a portion of Phelan’s argument, which ultimately
has to do with issues of presence and visibility for a political performance practice. I
am concerned here only with her fundamental ontological premises.
cannot capture performance. To the extent, however, that mediatization, the technology of reproduction, is embedded within the language of live performance itself, performance cannot claim linguistic independence from mass reproduction, either. It interests me that although Phelan discusses performance artist Angelika Festa’s *Untitled Dance (with fish and others)* (1987) in the context of her argument concerning the ontology of performance, she does not specifically address the encroachment of technologies of reproduction on this piece, in which Festa made extensive use of video technology to construct the images Phelan analyzes. It is ironic that the video camera, perhaps the *sine qua non* of the pressures that Phelan sees as compromising the ontological integrity of performance, is itself integral to the performance in question.27

Much as I admire Phelan’s commitment to a rigorous conception of an ontology of liveness, I doubt very strongly that any cultural discourse can stand outside the ideologies of capital and reproduction that define a mediatized culture or should be expected to do so, even to assume an oppositional stance.28 I agree with Sean Cubitt (1994:283–4) when he says that “in our period of history, and in our Western societies, there is no performance that is not always already a commodity.” Furthermore, as Pavis (1992:134) observes, “the work of art in the era of technical reproduction’ cannot escape the socioeconomic-technological domination which determines its aesthetic dimension.” It is not realistic to propose that live performance can remain ontologically pristine or that it operates in a cultural economy separate from that of the mass media.

Despite the recognition by critics such as Pavis (*ibid.*) of what he calls the inevitable “technological and aesthetic contamination” of live performance in the economy of repetition, there remains a strong tendency in performance theory to place live performance and mediatized or technologized forms in direct opposition to one another. The terms of this opposition focus on two primary issues: reproduction and distribution.29 Herbert Molderings (1984:172–3) defines the question of reproduction (or recording) by saying:

---

27 I am not suggesting that Phelan presents Festa’s performance as an ontologically pure example. Phelan expresses significant doubts about several aspects of the performance.

28 This position is central to my *Presence and Resistance* (Auslander 1992b), where I argue it in detail.

29 I have borrowed these categories from Pavis (1992:104–7). They are two of fifteen vectors identified by Pavis along which live performance and media may be
in contrast to traditional art[,] performances do not contain a
reproduction element . . . Whatever survives of a performance
in the form of a photograph or videotape is no more than a
fragmentary, petrified vestige of a lively process that took place
at a different time in a different place.

Or, in Phelan’s (1993b:3, 146) succinct formulations, performance “can
be defined as representation without reproduction”; “Performance’s
being becomes itself through disappearance.” In terms of distribution,
Pavis (1992:101) contrasts the one-to-many model of broadcasting
with the “limited range” of theatre: “media easily multiply the number
of their spectators, becoming accessible to a potentially infinite audience.
If theatre relationships are to take place, however, the performance
cannot tolerate more than a limited number of spectators.” In these
formulations, live performance is identified with intimacy and dis-
appearance, media with a mass audience, reproduction, and repetition.
Phelan (1993b:149) offers an apt summary of this view: “Performance
honors the idea that a limited number of people in a specific time/space
frame can have an experience of value which leaves no visible trace
afterward.”

Overtly or covertly, the writers I have just cited valorize the live over
the mediatized, as is evident in Molderings’s contrast between “lively”
performance and “petrified” video. Even Pavis, who argues that theatre
needs to be seen in relation to other media, nevertheless refers to the
influence of other media on theatre as a contamination. All too often,
such analyses take on the air of a melodrama in which virtuous live
performance is threatened, encroached upon, dominated, and con-
taminated by its insidious Other, with which it is locked in a life-and-
death struggle. From this point of view, once live performance succumbs
to mediatization, it loses its ontological integrity.

At one level, the anxiety of critics who champion live performance is
understandable, given the way our cultural economy privileges the
mediatized and marginalizes the live. In the economy of repetition, live
performance is little more than a vestigial remnant of the previous
historical order of representation, a hold-over that can claim little in
the way of cultural presence or power. Perhaps making a virtue of neces-
sity, Phelan (ibid.:148) claims that live performance’s inability to

compared. The others are: relationship between production and reception, voice,
audience, nature of signifiers, mode of representation, conditions of production,
dramaturgy, specificity, framing, norms and codes, repertoire, fictional status, and
indices of fictional status.
participate in the economy of repetition “gives performance art its distinctive oppositional edge.”

These formulations of the relationship between live performance and mediatization as oppositional are not neutrally descriptive; rather, they reflect an ideology central to contemporary performance studies. Molderings (1984:178–9) describes performance art as a direct counterresponse to television’s banalization and objectification of the visual image. Phelan picks up this theme in a discussion of Anna Deveare Smith’s *Twilight: Los Angeles* (1992), suggesting that Smith’s performance, which incorporates, alludes to, and reinterprets the widely disseminated media images of the 1992 Los Angeles riots, “seeks to preserve and contain the chaotic flood of images the cameras ‘mechanically’ reproduced” (Phelan 1993a:6). Phelan observes that this way of seeing the relationship between the live and the mediatized is based on “an old boast—television cameras give you only ‘images,’ and theatre gives you living truth” and emphasizes the degree to which Smith’s performance is indebted to “the camera that precedes and frames and invites” it. She goes on to suggest that Smith’s performance “also offers another way to interpret the relation between film and theatrical performance: the camera’s own performativity needs to be read as theatre” (ibid.:7). Even though Phelan describes a subtle interaction between live and mediatized forms that goes beyond simple opposition, her suggestion that the action of the camera be seen as theatre tends to reinscribe the traditional privileging

---

30 I would like to suggest in passing that in the context of a mediatized, repetitive economy, using the technology of reproduction in ways that defy that economy may be a more significantly oppositional gesture than asserting the value of the live. I am thinking, for instance, of Christine Kozlov’s installation, *Information: No Theory* (1970), which consisted of a tape-recorder equipped with a tape loop, whose control was fixed in the “record” mode. Therefore, as the artist herself noted, new information continuously replaced existing information on the tape, and “proof of the existence of the information [did] not in fact exist” (quoted in Meyer 1972:172). The functions of reproduction, storage, and distribution that animate the network of repetition were thus undermined by this way of using the very technology that brought that network into being (see Attali 1985:32). In this context, reproduction without representation may be more radical than representation without reproduction.

31 Phelan (1993a:6) describes Smith’s *Twilight* as signaling a shift in the relationship between television and theatre: “formerly, live theatre hoped to find itself preserved on television, while Smith’s performance transforms the ‘raw’ televised story into stylized, well-rehearsed drama.” I tend to see Smith’s work as belonging to a general cultural trend in which mediatized events are reconfigured as live ones. In considering the relationship between theatre and television, does Smith’s derivation of her performance from televisual documentary sources constitute a new development or the extension of an established cultural trend into a new area?
of the live over the mediatized: for her, it is by entering the space of theatre, or being seen as theatre, that media images become subject to critique. I believe that this privileging of live performance as a site of critique is an article of faith for most who analyze performance in political terms. If I were to insist that Smith’s performance works in the opposite way to that which Phelan suggests—that Smith’s incorporation of mediatized images does not transform them into theatre but, rather, turns her performances metaphorically into television—many commentators would feel I was denying that her performance could function critically.

My purpose here is to destabilize these theoretical oppositions of the live and the mediatized somewhat, first by reference to what might be called the “electronic ontology” of media (these initial observations will not pertain to film, of course, whose ontology is photographic rather than electronic):

the broadcast flow is . . . a vanishing, a constant disappearing of what has just been shown. The electron scan builds up two images of each frame shown, the lines interlacing to form a “complete” picture. Yet not only is the sensation of movement on screen an optical illusion brought about by the rapid succession of frames: each frame is itself radically incomplete, the line before always fading away, the first scan of the frame all but gone, even from the retina, before the second interlacing scan is complete . . . TV’s presence to the viewer is subject to constant flux: it is only intermittently “present,” as a kind of writing on the glass . . . caught in a dialectic of constant becoming and constant fading.

(Cubitt 1991:30–1)

As this quotation from Cubitt suggests, disappearance may be even more fundamental to television than it is to live performance—the televisual image is always simultaneously coming into being and vanishing; there is no point at which it is fully present. At the electronic level, the televisual image is hardly a petrified remnant of some other event, as Molderings would have it, but exists rather as a lively, and forever

32 Kozlov’s tape-recorder installation replicates this process of the continuous replacement of electronic information. The difference is that whereas in the normal usage of video this process is the necessary condition for the creation of a perceivable image, it becomes, when applied by Kozlov to sound recording, a way of making an imperceptible sound image that exists only theoretically.
unresolved, process. For some theorists, the televisual image’s existence only in the present also obviates the notion that television (and video) is a form of reproduction. Contrasting television with film in this regard, Stephen Heath and Gillian Skirrow (1977:54–6) point out that:

where film sides towards instantaneous memory (“everything is absent, everything is recorded—as a memory trace which is so at once, without having been something else before”33) television operates much more as an absence of memory, the recorded material it uses—including material recorded on film—instituted as actual in the production of the television image.

Regardless of whether the image conveyed by television is live or recorded (and, as Stanley Cavell (1982:86) reminds us, on television there is “no sensuous distinction between the live and the repeat or replay”) its production as a televisual image occurs only in the present moment. “Hence the possibility of performing the television image—electronic, it can be modified, altered, transformed in the moment of its transmission, is a production in the present” (Heath and Skirrow 1977:53). Although Heath and Skirrow are referring here to broadcast television, what they say is as true for video as it is for broadcast: the televisual image is not only a reproduction or repetition of a performance, but a performance in itself.

If we shift our gaze from the electronic writing on the glass to consider, for a moment, the nature of the magnetic writing on a videotape, another issue comes to the fore. Cubitt (1991:169) posits as a crucial feature of the medium “the phenomena [sic] of lost generations” resulting from the various stages of life a video image is likely to pass through, “from master to submaster, to broadcast, to timeshift, where it begins to degenerate with every play.” Video shares this characteristic with other means of technical reproduction, including photographic and sound-recording media. Since tapes, films, and other recording media deteriorate over time and with each use, they are physically different objects at each playing, even though this process may become perceptible only when it reaches critical mass (e.g., when the film or video develops visible flaws). Each time I watch a videotape is the only time I can watch that tape in that state of being because the very process of playing it alters it. The tape that I initially placed in my VCR or audio player started disappearing the moment I began watching it or listening.

33 This quotation is from Christian Metz.
to it. (This has not changed with the shift to digital media. As a research team on the preservation of television archives reports, “discrete digital media suffers [sic] from many of the same problems of discrete analogue media” (Addis et al. 2005:3). They therefore recommend not only that analogue archives be digitized but that digital archives be transferred to fresh media every three to five years.) Disappearance, existence only in the present moment, is not, then, an ontological quality of live performance that distinguishes it from modes of technical reproduction. Both live performance and the performance of mediatization are predicated on disappearance: the televisual image is produced by an ongoing process in which scan lines replace one another, and it is always as absent as it is present; the use of recordings causes them to degenerate. In a very literal, material sense, televisual and other technical reproductions, like live performances, become themselves through disappearance.

I want to worry this question of reproduction in one last context, by considering the related issue of repetition. Writing on the experience of film, Cavell (1982:78) observes that:

movies . . . at least some movies, maybe most, used to exist in something that resembles [a] condition of evanescence, viewable only in certain places at certain times, discussable solely as occasions for sociable exchange, and never seen more than once, and then more or less forgotten.

It is remarkable how closely Cavell’s description of the film experience parallels descriptions of the experience of live performance. The fact that Cavell is talking about the past, probably about the heyday of the American film industry in the 1930s and 1940s, and about a way of experiencing film that we no longer believe to be typical, is critical. Film is no longer an unrepeated experience confined to particular places and times: people frequently see their favorite films multiple times, and have opportunities to do so afforded them by the appearances of these movies on cable and broadcast television, and on DVDs and the Internet. If we want to, we can own copies of movies and watch them whenever, and as often, as we wish. Whereas film was once experienced as evanescence, it is now experienced as repetition. The crucial point is that this transition was not caused by any substantive change in the film medium itself.34 As a medium, film can be used to provide an evanescent experience that leaves little behind, in the manner of a live performance, or it can

34 One change that deserves mention is the replacement of highly volatile nitrate film stocks with safety stocks, a transition that was not complete until the 1950s. The
provide an experience based in repetition and the stockpiling of film commodities.\footnote{Sontag (1966:31, original emphasis) makes two points that challenge the distinction between film as repeatable and live performance as nonrepeatable: 

With respect to any \textit{single} experience, it hardly matters that a film is usually identical from one projection of it to another while theatre performances are highly mutable . . . a movie may be altered from one projection to the next. Harry Smith, when he runs off his own films, makes each projection an unrepeatable performance.} Cubitt (1991:92–3) makes much the same point with respect to video, arguing that repetition is not “an essence in the medium.” Rather, “the possibility of repetition is only a possibility”; the actual use of the medium is determined by “the imaginary relation of viewer and tape.” Repetition is not an ontological characteristic of either film or video that determines the experiences these media can provide, but a historically contingent effect of their culturally determined uses.

Just as recording media like film and video can provide an experience of evanescence, so, too, live forms such as theatre have been used in ways that do not respect, or even recognize, the ostensible spatial and temporal characteristics of live performance. I would go so far as to argue that live performances can be mass-produced. One example would be the WPA Federal Theater’s 1936 production of \textit{It Can’t Happen Here}, which opened simultaneously in eighteen different American cities. The intention of this experiment is clearly suggested by a contemporary account, which observes that the Federal Theater produced the play “after a motion picture corporation decided not to do it” (Whitman 1937:6). To take a more recent example, producers of the genre known as “interactive plays” envision live performances as franchisable commodities. Interactive plays are environmental performances that incorporate varying degrees of spectator participation.\footnote{For a discussion of the interactive theatre phenomenon, see Peter Marks, “When the audience joins the cast,” \textit{New York Times}, April 22, 1997:B1:7).} In \textit{Tamara}, for instance, spectators follow the character of their choice through a series of early nitrate stocks would frequently ignite in the projector; nitrate prints were often discarded after only a few showings because of the stock’s dangerous instability. Following Raymond Williams’s critique of technological determinism, I would insist that how technologies are used should be understood as \textit{effect} rather than \textit{cause} (Williams 1992 [1974]:3–8). In this case, I would argue that the transition from the evanescent experience of film to the experience of film as repetition was not caused by such technological changes as the development of safety stocks and the advent of video. Rather, the development of those technologies was the intentional result of a social need for cultural forms offering an experience of repetition, a need perhaps related to the desire for reproductions cited by Benjamin and discussed earlier.
of rooms, witnessing various scenes of a narrative. In *Tony ’n’ Tina’s Wedding* and similar performances, spectators interact with the performers by eating with them, dancing with them, gossiping with them, etc. Barrie Wexler, the California producer of *Tamara*, “franchises . . . *Tamara* worldwide, replicating the product in exact and dependable detail. ‘It’s like staying in the Hilton,’ he explains, ‘everything is exactly the same no matter where you are’” (Fuchs 1996:142). In these cases, live performance takes on the defining characteristics of a mass medium: it makes the same text available simultaneously to a large number of participants distributed widely in space. In fact, Hollywood saw the Federal Theater as a competitor, and opposed it (Whitman 1937:130–2).

It is crucial to observe that the intentions underlying these two examples of this use of the live medium are very different, and each is arguably reflective of its historical moment. The ideological positioning of these productions is determined not by their shared use of live performance as a mass medium, but by the different intentions and contexts of those uses. The Federal Theater’s practices may be said to have grown out of a generally left-populist attitude, while interactive plays are the creatures of postmodern consumer capitalism (see Fuchs 1996:129). Ironically, interactive plays like *Tamara* commodify the very aspects of live performance that are said to resist commodification. Because they are designed to offer a different experience at each visit, they can be merchandised as events that must be purchased over and over again: the ostensible evanescence and nonrepeatability of the live experience ironically become selling points to promote a product that must be fundamentally the same in each of its instantiations. The promise of having a different experience at each attendance at an interactive play is meaningful only if each is clearly recognizable as a different experience of the same, essentially static, object. One of those selling points is, of course, the intimacy of witnessing the narrative from a particular character’s perspective or physically interacting with the characters. Again, the alliance of the desire for proximity with that for reproduction suggested by Benjamin is apparent.

My contention that theatre can function as a mass medium leads me to disagree with Noël Carroll, who defines “mass art” in a way that excludes theatre and all live performance from that category. Carroll (1998:196) asserts that:

X is a mass artwork if and only if 1. x is a multiple instance or type artwork, 2. produced and distributed by a mass technology, 3. which artwork is intentionally designed to gravitate in its
structural choices (for example, its narrative forms, symbolism, intended affect, and even its content) toward those choices that promise accessibility with minimum effort, virtually on first contact, for the largest number of untutored (or relatively untutored) audiences.

Although there clearly is much theatre and live performance that meets the third condition, Carroll would place such work into the category of “popular art” rather than mass art because he believes it cannot meet his first two criteria. But it seems to me that live performance events like Tamara pose difficulties for those parts of Carroll’s theory. If all productions are functionally identical, as Wexler describes, then we have a case of theatre as a multiple instance or type artwork. If multiple productions of the play are staged simultaneously all over the world, then theatre fulfills Carroll’s definition of a mass technology as “capable of delivering multiple instances . . . of mass artworks to widely disparate reception points” (ibid.:188).

Carroll argues that performances of live theatre differ from those of films by saying that whereas the performance of a film is generated directly from a template (a print of the film), a theatrical performance is generated from an interpretation of the play text. He goes on to generalize from this basis that the generation of performances from templates, rather than interpretations, is a crucial ontological characteristic of mass art forms. While it takes no particular artistic or interpretive skill to be a projectionist, “it takes artistry and imagination to embody an interpretation” (ibid.:213–14). It is for this reason that we recognize theatrical performances as works of art in themselves but do not accord that status to film showings.

The distinction Carroll draws between template and interpretation is provocative. I am not persuaded, however, that they are mutually exclusive categories. If we take the producer of Tamara at his word and assume that he does succeed in mounting numerous productions of the play that are functionally identical, would it not be fair to say that the interpretation used in all cases functions as a template? (When I refer to the various productions as functionally identical, I am not suggesting that there would not be differences among them, only that such differences would be trivial—differences, but not distinctions that would differentiate one production of Tamara from any other in aesthetically significant ways.37) While the actors would have to possess a certain

37 Carroll (1998:201) describes the different reception instances of the same mass artwork as “identical in the same sense that two dimes of the same minting are
amount of craft and skill to replicate the performances established in
the template (just as it takes a certain amount of craft and skill to be
a good projectionist), individual artistry and imagination would be
negative qualities in such a performance, since they would tend to work
against the success of Tamara as a standardized product. (Similarly,
we would not want a projectionist to be “creative” in showing a
conventional film.)

If this argument seems a bit far-fetched in the context of theatre
(though I do not believe it is), we can switch for a moment to another
kind of franchised performance. Consider the various live performances
of actors portraying trademark cartoon characters and superheroes who
interact with visitors at theme parks all over the world. It is precisely the
point of these performances that they all represent the same, standard-
ized characters. All such performances of Batman, for instance, are
generated from a single interpretation of the character, which functions
as a template. I have chosen this example in part to make the point that
a template is not the same as a script: improvisational performances, like
“Batman’s” unscripted interaction with a young admirer, can be
generated from a template. (It is significant in the context of this chapter
that our familiarity with this template derives mostly from seeing
Batman, Bugs Bunny, and similar characters on screen. The live pre-
sentations of these characters are further instances of live performance’s
recreation of mediatized representations.) If a child were led to make
judgments concerning the interpretive quality of the various Batmans or
Cinderellas he or she had seen—such as: “I liked the Cinderella at
Eurodisney better” or “This guy did Batman better when we were last at
Six Flags”—then the performances would have been dismal failures
precisely because they, like Tamara, are instances where live perfor-
manace aspires to the condition of mass art. These instances also suggest

38 For further discussion of the theatrical production as template, see Saltz (2001:
304–5).
how live performance may participate in the economy of repetition, not just by being recorded and replicated, but through the mass production of the live event itself.

I return now to Benjamin’s observation on what he called “contemporary perception” and its hunger for reproductions. “To pry an object from its shell,” he writes, “to destroy its aura, is the mark of a perception whose ‘sense of the universal equality of all things’ has increased to such a degree that it extracts it even from a unique object by means of reproduction” (Benjamin 1986 [1936]:32). I have tried to suggest here that this is exactly the state in which live performance now finds itself: its traditional status as auratic and unique has been wrested from it by an ever-accelerating incursion of reproduction into the live event. Following Benjamin, I might argue that live performance has indeed been pried from its shell and that all performance modes, live or mediatized, are now equal: none is perceived as auratic or authentic; the live performance is just one more reproduction of a given text or one more reproducible text. (To say that no performance in any medium can be perceived as auratic is not to say that all such performances are experienced in the same way—just that no one of them is experienced as the auratic, authentic original.) Live performance could now be said to partake of the ontology that Benjamin ascribes to photography: “From a photographic negative . . . one can make any number of prints; to ask for the ‘authentic’ print makes no sense” (ibid.:33). Similarly, it makes little sense to ask which of the many identical productions of Tamara or Disney’s Beauty and the Beast is the “authentic” one. It does not even make much sense to ask which of the many iterations of that Beauty and the Beast—as animated film, DVD, CD, book, or theatrical performance—is the “authentic” iteration. This situation represents the historical triumph of mechanical (and electronic) reproduction (what I am calling mediatization) that Benjamin implies: aura, authenticity, and cult value have been definitively routed, even in live performance, the site that once seemed the last refuge of the auratic.

I am suggesting further that thinking about the relationship between live and mediatized forms in terms of ontological oppositions is not especially productive, because there are few grounds on which to make significant ontological distinctions. Like live performance, electronic and photographic media can be described meaningfully as partaking of the ontology of disappearance ascribed to live performance, and they can also be used to provide an experience of evanescence. Like film and television, theatre can be used as a mass medium. Half jokingly, I might cite Pavis’s observation that “theatre repeated too often deteriorates” (Pavis 1992:101) as evidence that the theatrical object degenerates with
repeated use in a manner akin to a recorded object! I am not proposing, however, that live performance and mediatization partake of a shared ontology. As the historical allegory I presented in the first section of this chapter suggests, that claim is the basis for mediatization’s displacement of the live within cultural economy. I am suggesting, rather, that how live and mediatized forms are used is determined not by their ostensibly intrinsic characteristics but by their positions within cultural economy. To understand the relationship between live and mediatized forms, it is necessary to investigate that relationship as historical and contingent, not as ontologically given or technologically determined.

As a starting point for this exploration, I propose that, historically, the live is actually an effect of mediatization, not the other way around. It was the development of recording technologies that made it possible to perceive existing representations as “live.” Prior to the advent of those technologies (e.g., sound recording and motion pictures), there was no such thing as “live” performance, for that category has meaning only in relation to an opposing possibility. The ancient Greek theatre, for example, was not live because there was no possibility of recording it. In a special case of Baudrillard’s well-known dictum that “the very definition of the real is that of which it is possible to give an equivalent reproduction” (Baudrillard 1983:146, original emphasis), the “live” can be defined only as “that which can be recorded.” Most dictionary definitions of this usage of the word “live” reflect the necessity of defining it in terms of its opposite: “Of a performance, heard or watched at the time of its occurrence, as distinguished from one recorded on film, tape, etc.” (Oxford English Dictionary, 2nd edn).

On this basis, the historical relationship of liveness and mediatization must be seen as a relation of dependence and imbrication rather than opposition. That the mediated is engrained in the live is apparent in the structure of the English word “immediate.” The root form is the word mediate, of which immediate is, of course, the negation. Mediation is thus embedded within the im-mediate; the relation of mediation and the im-mediate is one of mutual dependence, not precession. Far from being encroached upon, contaminated, or threatened by mediation, live performance is always already inscribed with traces of the possibility of technical mediation (i.e., mediatization) that defines it as live. Although the anxiety of critics who champion live performance is understandable, theorizations that privilege liveness as a pristine state uncontaminated by mediatization misconstrue the relation between the two terms.

Connor (1989:153) summarizes the relationship between the live and the mediatized in related terms:
In the case of “live” performance, the desire for originality is a secondary effect of various forms of reproduction. The intense “reality” of the performance is not something that lies behind the particulars of the setting, the technology and the audience; its reality consists in all of that apparatus of representation.

Connor’s frame of reference is the performance of popular music, my subject in the next chapter. A good example of the inscription of the apparatus of representation within live performance in that realm is the status of the microphone in popular music performance: consider its central role in Elvis Presley’s performance style, the microphonic acrobatics of James Brown, or the way the Supremes’ and Temptations’ choreography revolved around the positioning of their microphones. As Connor implies, the very presence of the microphone and the performers’ manipulation of it are paradoxical markers of the performance’s status as live and im-mediate. Far from suppressing the apparatus of reproduction, as a performer such as Madonna may be said to be attempting when she uses a headset mike not clearly visible to the audience (with the effect of naturalizing mediatized representations, as I discussed earlier in this chapter), these performers emphasize that the apparatus of reproduction is a constitutive element of their liveness. In short, they perform the inscription of mediatization within the im-mediate.

The im-mediate is not prior to mediation but derives precisely from the mutually defining relationship between the im-mediate and the mediated. Similarly, live performance cannot be said to have ontological or historical priority over mediatization, since liveness was made visible only by the possibility of technical reproduction. This problematizes Phelan’s claim that “to the degree that live performance attempts to enter into the economy of reproduction it betrays and lessens the promise of its own ontology” (Phelan 1993b:146), not just because it is not at all clear that live performance has a distinctive ontology, but because it is not a question of live performance’s entering into the economy of reproduction, since it has always been there. My argument is that the very concept of live performance presupposes that of reproduction—that the live can exist only within an economy of reproduction.

I want to emphasize that reproduction (recording) is the key issue. The Greek theatre may have been technologically mediated, if one subscribes to the theory that the masks acted as megaphones. What concerns me here, however, is technological reproduction, not just technological mediation. Greek theatrical masks may have amplified the actors’ voices, but they did not reproduce them, in the manner of electric amplification.
Throughout history, performance has employed available technologies and has been mediated in one sense or another. It is only since the advent of mechanical and electric technologies of recording and reproduction, however, that performance has been mediatized.

Although I realize this is a contentious point, I will stipulate that I do not consider writing to be a form of recording in this context, for several reasons. Scripts are blueprints for performances, not recordings of them, even though they may contain some information based on performance practice. Written descriptions and drawings or paintings of performances are not direct transcriptions through which we can access the performance itself, as aural and visual recording media are. I would draw the same distinction here that Roland Barthes (1977:44) makes between drawing and photography: whereas drawing, like writing, transforms performance, audio-visual technologies, like photography, record it.39

In everyday usage, we refer to “live” or “recorded” performances but not to “written” performances or “painted” performances, perhaps for this reason. This means that the history of live performance is bound up with the history of recording media; it extends over no more than the past 100 to 150 years. To declare retroactively that all performance before, say, the mid-nineteenth century was “live” would be an anachronistic imposition of a modern concept on a pre-modern phenomenon. In fact, the Oxford English Dictionary’s earliest examples of the use of the word “live” in reference to performance come from 1934, well after the advent of sound-recording technologies in the 1890s and the development of broadcasting systems in the 1920s. If this word history is complete (and I assume that if the word “live” had been applied to performances in, say, the Middle Ages, the editors of the OED would have found the references!), then the concept of live performance came into being not at the appearance of the basic recording technologies that made the concept possible but only with the maturation of mediatized society itself.

The reason why the appearance of recording technologies was not enough in itself to bring the concept of liveness into being has to do,  

39 I am not suggesting that recording media do not transform live performance in the process of capturing it, only that they can provide a kind of access to the live event that writing and static visual media do not. This is in part because recording media may be used to capture performance in real time: the duration of the recording can be identical with that of the performance itself. The question of temporality places still photography in an ambiguous position, since photography does record performance but only as a series of individual moments divorced from their temporal procession. The question of whether a static visual medium can be said to reproduce the temporality of performance will return in a legal context in Chapter 4.
I think, with the fact that with the first recording technology, sound recording, the distinction between live performances and recordings remained experientially unproblematic. If you put a record on your gramophone and listened to it, you knew exactly what you were doing and there was no possibility of mistaking the activity of listening to a record for that of attending a live performance. As Attali (1985:90–6) points out, the earliest forms of sound recording, such as Edison’s cylinder, were intended to serve as secondary adjuncts to live performance by preserving it. As recording technology brought the live into being, it also respected and reinforced the primacy of existing modes of performance. Live and recorded performances thus coexisted clearly as discrete, complementary experiences, necessitating no particular effort to distinguish them.

It is significant that the earliest use of the word “live” in relation to performance listed in the OED has to do with the distinction between live and recorded sound, but not with the gramophone. The technology necessitating this usage was radio. This first citation of the word “live” comes from the BBC Yearbook for 1934 and iterates the complaint “that recorded material was too liberally used” on the radio. Here, we can glimpse the beginnings of the historical process by which recorded performances came to replace live ones. But radio represented a challenge to the complementary relationship of live and recorded performances that went beyond its role in enabling recordings to replace live performances. Unlike the gramophone, radio does not allow you to see the sources of the sounds you are hearing; therefore, you can never be sure if they are live or recorded. Radio’s characteristic form of sensory deprivation crucially undermined the clear-cut distinction between recorded and live sound. It appears, then, that the concept of the live was brought into being not just when it became possible to think in those terms—that is, when recording technologies such as the gramophone were in place to serve as a ground against which the figure of the live could be perceived—but only when it became urgent to do so. The need to make that identification arose as an affective response specifically to radio, a communications technology that put the clear opposition of the live and the recorded into a state of crisis. The response to this crisis was a terminological distinction that attempted to preserve the formerly clear dichotomy between two modes of performance—the live and the recorded—a dichotomy that had been so self-evident up to that point that it did not even need to be named.

Recording technology brought the live into being, but under conditions that permitted a clear distinction between the existing mode of performance and the new one. The development of broadcast
technology, however, obscured that distinction, and thus subverted the formerly complementary relationship between live and recorded modes of performance. The word “live” was pressed into service as part of a vocabulary designed to contain this crisis by describing it and reinstating the former distinction discursively even if it could no longer be sustained experientially. As a consequence of the circumstances under which this vocabulary was instated, the distinction between the live and the recorded was reconceived as one of binary opposition rather than complementarity. This way of conceptualizing the live and the distinction between the live and recorded or mediatized originated in the era of analog technologies and persists to the present day; it forms the basis of our current assumptions about liveness.

It is clear from this history that the word “live” is not used to define intrinsic, ontological properties of performance that set it apart from mediatized forms, but rather is a historically contingent term. The default definition of live performance is that it is the kind of performance in which the performers and the audience are both physically and temporally co-present to one another. But over time, we have come to use “live” to describe performance situations that do not meet those basic conditions. With the advent of broadcast technologies—first radio, then television—we began to speak of “live broadcasts.” This phrase is not considered an oxymoron, even though live broadcasts meet only one of the basic conditions: performers and audience are temporally co-present in that the audience witnesses the performance as it happens, but they are not spatially co-present. Another use of the term worth considering is in the phrase “recorded live.” This expression is an oxymoron (how can something be both recorded and live?) but is another concept we now accept without question. In the case of live recordings, the audience shares neither a temporal frame nor a physical location with the performers, but experiences the performance later and usually in a different place than it first occurred. The liveness of the experience of listening to or watching the recording is primarily affective: live recordings allow the listener a sense of participating in a specific performance and a vicarious relationship to the audience for that performance not accessible through studio productions.

The phrases “live broadcast” and “live recording” suggest that the definition of liveness has expanded well beyond its initial scope as the concept of liveness has been articulated to emergent technologies. And the process continues, still in relation to technological development (I have summarized the developments discussed here in Table 1.1). Along these lines, Nick Couldry (2004:356–7) proposes “two new forms of liveness,” which he calls “online liveness” and “group liveness”:
Online liveness: social co-presence on a variety of scales from very small groups in chat rooms to huge international audiences for breaking news on major Web sites, all made possible by the Internet as an underlying infrastructure . . . [Group liveness]: . . . the “liveness” of a mobile group of friends who are in continuous contact via their mobile phones through calls and texting.

Understood in this way, the experience of liveness is not limited to specific performer–audience interactions but to a sense of always being connected to other people, of continuous, technologically mediated co-presence with others known and unknown (ibid.:357).

Although the decentered experiences of liveness to which Couldry points are not easily assimilable to a performer–audience model, they nevertheless posit liveness as a technologically mediated relationship among human beings. However, the word “live” has also come to refer to connections and interactions with non-human agents. Margaret

Table 1.1  Historical development of the concept of liveness

<table>
<thead>
<tr>
<th>Type of liveness</th>
<th>Significant characteristics</th>
<th>Cultural forms</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Classic” liveness</td>
<td>Physical co-presence of performers and audience; temporal simultaneity of production and reception; experience in the moment</td>
<td>Theatre, concerts, dance, sports, etc.</td>
</tr>
<tr>
<td>Live broadcast</td>
<td>Temporal simultaneity of production and reception; experience of event as it occurs</td>
<td>Radio, television, Internet, etc.</td>
</tr>
<tr>
<td>Live recording</td>
<td>Temporal gap between production and reception; possibility of infinite repetition</td>
<td>LP, CD, film, DVD, etc.</td>
</tr>
<tr>
<td>Internet liveness (Couldry 2004)</td>
<td>Sense of co-presence among users</td>
<td>Internet-based media</td>
</tr>
<tr>
<td>Social liveness (Couldry 2004)</td>
<td>Sense of connection to others</td>
<td>Mobile phones, instant messaging, etc.</td>
</tr>
<tr>
<td>Website “goes live”</td>
<td>Feedback between technology and user</td>
<td>Websites, interactive media, chatterbots, etc.</td>
</tr>
</tbody>
</table>
Morse (1998:15) observes that the imaginary developing around interactive computer technologies also entails an ideology of liveness whose source lies in our interaction with the machine itself rather than the connections to the outside world permitted by it.

Feedback in the broadest sense . . . is a capacity of a machine to signal or seem to respond to input instantaneously. A machine that thus “interacts” with the user even at this minimal level can produce a feeling of “liveness” and a sense of the machine’s agency and—because it exchanges symbols—even of a subjective encounter with a persona.

Liveness is attributed not only to the entities we access with the machine but also to the machine itself. When a website is first made available to users, it is said to “go live.” As is true of the computer, the liveness of a website resides in the feedback loop we initiate with it: the website responds to our input. It may be that we are at a point at which liveness can no longer be defined in terms of either the presence of living human beings before each other or physical and temporal relationships. The emerging definition of liveness may be built primarily around the audience’s affective experience. To the extent that websites and other virtual entities respond to us in real time, they feel live to us, and this may be the kind of liveness we now value. (I discuss this development further in the final section of this chapter.)

In challenging the traditional opposition of the live and the mediated, I am not suggesting that we cannot make phenomenological distinctions between the respective experiences of live and mediated representations, distinctions concerning their respective positions within cultural economy, and ideological distinctions among performed representations in all media. What I am suggesting is that any distinctions need to derive from careful consideration of how the relationship between the live and the mediated is articulated in particular cases, not from a set of assumptions that constructs liveness as an ontological condition rather than a historically mutable concept and the relation between live and mediated representations a priori as a relation of essential opposition. I attempted to do something of the kind in the first section of this chapter by examining the way that television came to be positioned discursively first as a replication of theatrical discourse, then as a replacement for live theatre. That theatre and television came to be competitors within cultural economy resulted from this particular discursive history, not from some intrinsic opposition between them. In Chapter 3, I will analyze the changing status of live performance within
rock music culture to make a related point: that the relation of live performance to mediatized forms needs to be understood historically and locally, in particular cultural contexts.

Got live if you want it

In addition to being a historically contingent concept, liveness is clearly a relational concept used to distinguish among cultural forms and experiences. It is not, however, a neutrally descriptive term; as I have already shown, those who speak for the value of liveness frequently do so in oppositional terms by implying that the characteristics that make live performance distinctive also make it superior to mediatized forms. This makes it important to focus critically on the values often attributed to live performance. Needless to say, any attempt to address this question at a general level is bound to be flawed. Ultimately, the values attributed to live performance must be discussed from the perspective of particular cultural contexts: what does live performance mean, and why is it demanded, within particular groups defined by shared cultural identity and/or tastes? Before undertaking that kind of contextual analysis in the next chapter, I will address some of the positive qualities often associated with live performances, including: spontaneity, community, presence, and feedback between performers and audience.

Obviously, some mediatized performances, such as live broadcasts, can be just as spontaneous as live performances in which performers and audience share the same space. It is also obviously true that whereas recorded performances are fixed, live performances can be spontaneously different each time. Although much is made of the way each instantiation of a live performance is potentially different from every other one, how different do we, as the audience, want them to be? In the case of traditional theatre, any given performance of a particular production of a play has to be virtually identical to any other performance of that same production. If a particular performance deviates radically, it is arguably no longer a performance of that production. As Martin Barker (2003:28, original emphasis) indicates,

>a committed company of players will surely be working towards minimizing random changes between performances. They will seek a plateau where everything in a production is controlled, where characterization is organic and consistent, movements are choreographed, timed and effective, where dialogue is delivered with the patina of appropriate emotion, and so on. In addition, although in principle they could, most audiences rarely
go back for a second viewing. But even when they do, it is hardly to search for and pay attention to the small elements of difference. They go in most cases, I suspect, in order perhaps to be able to scrutinize the same performance more closely.

Barker goes on to suggest that the valorization of the spontaneous variability of live theatre is more ideological than based on real experience: audiences seek to experience theatrical performances “as if they had elements of uniqueness” (ibid.) even though the actual variations are probably minimal and insignificant.

There are, of course, kinds of performance that have spontaneity as part of their makeup, such as improv comedy or jazz. While such spontaneity can make every performance different in important ways from every other, it is also hedged in by conventions. Although a jazz musician is expected to improvise, her improvisation is supposed to remain recognizable within the particular conventions of the type of jazz she plays. She cannot, for example, spontaneously decide to play classical music that night instead of jazz. It is also the case that there must be a high degree of continuity across improvised performances by the same artist. If I choose to attend a performance by a comedy improv troupe or a jazz musician whose work I have enjoyed in the past, I expect the newly improvised performance to be somehow consistent with my earlier experience. Paradoxically, the most successfully spontaneous forms of performance may be those in which spontaneity is relatively planned and predictable.

It is often suggested that the experience of live performance builds community. It is surely the case that a sense of community may emanate from being part of an audience that clearly values something you value, though the reality of our cultural economy is that the communal bond unifying such an audience is most likely to be little more than the common consumption of a particular performance commodity. Leaving that issue aside, I would argue against the idea that live performance itself somehow generates whatever sense of community one may experience. For one thing, mediatized performance makes just as effective a focal point for the gathering of a social group as live performance. Theodore Gracyk (1997:147), who discusses this issue as it pertains to popular music, observes that:

One does not need a live performance to create such a [social] space or its attendant sense of being part of a community engaged with the music: discos, Jamaican “sound system” trucks, bars and pubs and pool halls with juke boxes, and the
British rave scene have created diverse public sites for recorded music.

Gracyk’s point can be generalized across performance genres. A parallel example from a different cultural realm would be that of the crowd that gathered in the town square of a small city adjacent to Atlanta to watch a big-screen simulcast of the opening ceremonies of the 1996 Olympic Games. The people gathered around the giant television screen constituted a community in all the same senses as the audience attending the live event a few miles away. Since most of the people gathered in the town square were neighbors, not merely people drawn together to attend an event, their experience was arguably more genuinely communal than that of the audience attending the live performance. Another example would be that of the crowds that gather for midnight screenings of The Rocky Horror Picture Show or other cult films; such audiences probably experience a stronger sense of community, of shared interest and purpose, than the typical audience for live performance. My point is simply that communality is not a function of liveness. The sense of community arises from being part of an audience, and the quality of the experience of community derives from the specific audience situation, not from the spectacle for which that audience has gathered.

Another version of this account of the appeal of live performance proposes that live performance brings performers and spectators together in a community. This view misunderstands the dynamic of performance, which is predicated on the distinction between performers and spectators. Indeed, the effort to eliminate that distinction destroys the very possibility of performance: “The more you approach a performer, the more you inhibit the very performance you are there to see. No matter how much a performer gives, no matter how intensively you attend to her, the gap remains between” (Cubitt 1994:283). Those like Jerzy Grotowski and Augusto Boal, for whom bridging this gap became the primary purpose of their work, albeit for very different reasons, found themselves constrained to abandon performance as such altogether (see Auslander 1997:26–7, 99–101). Blau (1990:10, original emphasis) addresses these issues of performance and communality in his discussion of the theatre audience:

Desire has always been... for the audience as community, similarly enlightened, unified in belief, all the disparities in some way healed by the experience of theater. The very nature of theater reminds us somehow of the original unity even as it implicates us in the common experience of fracture, which produces both what is time-serving and divisive in theater and
what is self-serving and subversive in desire . . . as there is no theater without separation, there is no appeasing of desire.

As Blau suggests in this extraordinary passage, the experience of theatre (of live performance generally, I would say) provokes our desire for community but cannot satisfy that desire because performance is founded on difference, on separation and fragmentation, not unity. Live performance places us in the living presence of the performers, other human beings with whom we desire unity and can imagine achieving it, because they are there, in front of us. Yet live performance also inevitably frustrates that desire since its very occurrence presupposes a gap between performer and spectator. Whereas mediatized performance can provide the occasion for a satisfactory experience of community within the audience, live performance inevitably yields a sense of the failure to achieve community between the audience and the performer. By reasserting the unbridgeable distinction between audience and performance, live performance foregrounds its own fractious nature and the unlikelihood of community in a way that mediatized representations, which never hold out the promise of unity, do not.

Partly because of the promise of community, we go to live performances to be in the presence of the performers, but we must acknowledge that such presence can take on a wide variety of forms. Seeing a singer in a cabaret setting is quite different from going to a stadium rock concert where for most in attendance the singer is a tiny speck in the distance seen clearly only on the jumbo video screen above. Since both situations are equally regarded as live performances, live presence cannot be equated with any particular relationship between audience and performers. For an audience to share space with performers does not in itself guarantee any sort of intimacy, connection, or communication between performers and spectators.

Furthermore, one can ask: what, exactly, is the value of presence? It certainly is not an absolute value. Some actors are far better on screen than on stage, and it may well be that I can see and follow a football game much better on television than at the stadium (and I can even enjoy the experience of community, albeit on a smaller scale than at the stadium, if I invite some friends over to watch and cheer with me). There is no sense in which it is somehow “better,” across the board, to be present at a live event than to witness it by other means. There is, however, a socio-cultural value attached to live presence: being able to say that you saw a particular musician or actor live or that you were present at a particularly legendary performance enables you to gain social prestige. Attendance at a particular event can constitute valuable symbolic
capital—certainly, it is possible to dine out on the cachet of having been at Woodstock, for example. One remarkable aspect of performance’s position within cultural economy is that our ability to convert attendance at a live event into symbolic capital is completely independent of the experiential quality of the event itself. Attending Woodstock might have meant spending three days hungry, sick, covered with mud, and unable to hear any music whatsoever. Seeing the Beatles at New York’s Shea Stadium in 1965 almost undoubtedly did mean hearing no music and might have meant suffering temporary deafness as a result of screaming fans. None of this matters, however; merely being able to say you were there, live, translates into symbolic capital in the appropriate cultural contexts.

This aspect of liveness has a complex relation to cultural economy. Despite the claim, discussed earlier, that performance’s evanescence allows it to escape commodification, it is that very evanescence that gives performance value in terms of cultural prestige. The less an event leaves behind in the way of artifacts and documentation, the more symbolic capital accrues to those who were in attendance, at least in some cases

40 I agree with Simon Frith (1996:9) that Pierre Bourdieu’s concepts of cultural capital and symbolic capital can and should be extended beyond his original usage. Bourdieu’s “interest . . . is in the creation of a taste hierarchy in terms of high and low: the possession of cultural capital, he suggests, is what defines high culture in the first place.” Frith’s rejoinder “is that a similar use of accumulated knowledge and discriminatory skill is apparent in low cultural forms, and has the same hierarchical effect” of differentiating those who are truly adept in a particular cultural arena from those who are not (see also Shuker 1994:247–50). Cultural capital and symbolic capital, in this extended sense, must be understood as determined contextually. Particular subcultural and taste groups attribute symbolic capital to experiences that other groups do not recognize as valuable. That kind of discrimination is at the heart of my analysis of rock music culture in the next chapter: to an adept of “rock,” “pop” music carries no symbolic capital. (More accurately, an enthusiasm for pop carries negative symbolic capital within the context of rock culture!)

41 Considering the concept of symbolic capital in the context of taste or fan cultures, as I am implicitly doing here, makes certain aspects of the nature of symbolic capital visible. Randal Johnson argues that Bourdieu’s various “capitals” (e.g., cultural capital, symbolic capital, linguistic capital, economic capital) “are not reducible to each other” (Johnson 1993:7). Within fan cultures, however, cultural capital does translate into symbolic capital: the more you know about a particular rock group, for example, the more prestige you will have among fans of that group. Among collectors, the symbolic value of an object is generally a function of its rarity and inaccessibility, which also determine its economic value. It is roughly true, then, that the greater the economic value of a collectible, the greater its symbolic value. (One class of exceptions would be those in which an object that is worth very little economically carries great symbolic value because it attests to the rarefaction of the
(see Cubitt 1994:289). In other cases, however, the symbolic value of having attended an event may be a function of that event’s notoriety, which, in turn, may result from the extent to which the event has been circulated as reproductions. Having been at Woodstock may carry a great deal of symbolic capital precisely because it has been so widely reproduced as multiple sound recordings, books, and a film, and thus has become culturally iconic in a way that many other rock festivals have not.

The issue of feedback between performers and audience raises similar questions as the concept of presence. It is often claimed that live performance of all kinds entails a process of communication in which the performers influence the audience and the audience influences the performers. Certainly, this is different from recorded performances in which the performers may influence the audience but not vice versa. At the very least, however, we should qualify this belief by saying that not all forms of performance take advantage of this possibility. As happy as performers and spectators generally are to be in one another’s presence, it is not necessarily the case that the performance itself is open to being influenced by the audience or that the audience wishes to assume that responsibility. It does not seem likely that a symphony concert, for example, will be greatly affected by signals sent by the listeners in the way that the performance of athletes may be affected by the presence of cheering (or booing) fans.42 For reasons I have already mentioned.

owner's taste. There are, for instance, rare but not particularly valuable psychedelic rock albums. Owning these records is a sign of expert knowledge and an indication that your taste for the music extends well beyond what is known to most fans, even though the records have little actual economic value.) Even taking into consideration Johnson’s admonishment that “Bourdieu’s use of economic terminology does not imply any sort of economism” (ibid.:8), it becomes apparent that symbolic capital can be quantified, relatively even if not absolutely. In considering the symbolic value of attendance at live performances, rarity, distance in time, and proximity to an imagined originary moment are determining factors. It is clear, for example, that having seen a Rolling Stones concert in 1964 is worth more symbolic capital within rock culture than having seen them in 2004, for all the reasons I just mentioned. It may even be that having seen the Beatles live is worth more than having seen the Stones, even in 1964, precisely because the Beatles’ performing career was relatively short. Whereas one may still see the Stones, one will never again be able to see the Beatles. Although such comparisons probably can be made, it is unlikely that symbolic capital can be quantified to the point of determining the exchange values that would justify a statement such as: having seen the Rolling Stones ten times between 1964 and 1997 is of equivalent symbolic value to having seen the Beatles live once.

42 There is a substantial literature on the “home field advantage” in social psychology and other fields. For a good overview, see Nevill and Holder (1999), who conclude
traditional theatrical productions cannot vary much in response to different audiences. In other kinds of performance, such as improv comedy, performers may actually solicit input directly from the audience. But even in such cases, we have to be cautious in assessing just how much real impact the audience’s responses have on the performance, since the performers may use the audience’s suggestions as pretexts for doing something they wish to do anyway.

Another thing to consider is whether we need to be present at the live performance in order to enjoy the interaction between audience and performers. Watching recorded improv comedy on television, for instance, do we not experience the pleasure of seeing performers engaging with audience suggestions? Is it necessary that those suggestions emanate from an audience of which we are members to enjoy that experience?

The most significant challenge to traditional concepts of presence and interaction between performer and audience now come from digital entities able to perform live and respond both to other performers and to audience input; although these entities cover a broad range, I will limit my discussion here to those known as “chatterbots” and take up other issues raised by virtual performers in Chapter 4. In digital culture, the word “bot,” a shortened form of the word “robot,” refers to computer software that can respond to input and autonomously execute commands. The most familiar type of bot is probably the search engine—you tell it what to look for, and it goes forth into cyberspace, seeks, and finds (you hope) what you wanted. It can do this not because it has access to existing lists of websites that have already been indexed by key word but because it is programmed to conduct searches itself. In other words, if you tell a search engine to find websites about “liveness,” say, it does not simply spit out an existing list of sites that have been indexed by that term. Rather, the bot itself searches the web electronically, locates sites containing that key word, and reports back to you.

Chatterbots, sometimes called chatbots, are software programs designed to engage in conversation. The first and still most famous chatterbot is Eliza, a program that interrogates the user in the manner of a Rogerian psychotherapist, developed at MIT in 1966. Chatterbots typically operate in text-based digital environments, in which the user types messages to the bot and the bot responds in “typed” words that appear on the computer screen or are spoken by a synthesized voice.
They are based on research in natural language processing and are generally programmed to recognize words and word patterns and to respond with statements that make sense in the context of what is said to them, though some are also capable of initiating conversations. The more sophisticated the programming, the more similar to human discourse the bot’s conversation will be. Since Eliza, many other chatterbots have been created, including the well-known Julia, developed around 1990. Elaborate chatbots possessing faces and voices as well as the ability to converse and interact have been used in theatre and performance art: examples include Jeremiah, developed by Susan Broadhurst, who first appeared onstage in 2001 (Broadhurst 2006), and Stelarc’s Prosthetic Head, a digital replica of his own head, first exhibited in 2003 (Stelarc 2005). Andrew Leonard’s description of Julia in Bots: The Origin of New Species gives a sense of the capabilities of chatterbots:

Dubbed “a hockey-loving ex-librarian with an attitude” by Wired magazine, Julia has bedazzled would-be suitors . . . Her sense of humor is well developed. She can keep track . . . of both her own statements and the responses of the human she might be talking to. Her database of conversational statements is grouped into nodes that concentrate on specific topics, such as pets. A clever system of weighting insures that her tendency to speak about pets automatically increases or decreases depending on the answers she gets to certain questions. If the response to her question “Do you have pets?” is no, the weights on all of the sentence patterns having to do with pets are automatically lowered. She can purposefully send conversations off in new directions by randomly injecting statements such as “people don’t own cats” . . . She even simulates human typing by including delays between the characters she types and by spelling words incorrectly.

(Leonard 1997:41–2)

Chatterbots are ubiquitous online, though they are not always identified as such. In an Internet chatroom or on an e-mail list, you do not necessarily choose to talk with bots and it can be impossible to know whether you are conversing with a human being or a piece of software. One of the questions addressed in an online document entitled “I Chat, Therefore I Am?? An Introduction to Bots on IRC [Internet Relay Chat]” is “How come people [in chatrooms] ask me if I’m a bot?” The author, Heather Peel, advises that if you type too fast, lurk in the chatroom without participating actively in the conversation, or use too
many automated functions in your chat responses, you may be mistaken for a bot.

The existence of chatterbots reframes the question of liveness at a fundamental level. The ambiguity created by chatterbots online parallels the ambiguity of radio sound I discussed earlier, but with a crucial difference: while it is true that you cannot know whether sounds you hear on the radio are produced live or not, you generally can have confidence in the ultimate source of the performance you hear. That is, even if you are listening to a recording, there is usually little doubt that it is a recording of a performance by a human being. The ambiguity created by radio has to do with the ontology of the performance (live or recorded), not with the ontological status of the performer (human or non-human). The chatterbot forces the discussion of liveness to be reframed as a discussion of the ontology of the performer rather than that of the performance.

If we return once more to the OED’s definition of “live,” it becomes evident that chatterbots are live performers. “Of a performance, heard or watched at the time of its occurrence, as distinguished from one recorded on film, tape, etc.” Chatterbot performances are certainly live according to this definition. It is important in this context to stress that chatterbots are not playback devices. Whereas audio and video players allow us to access performances carried out by other entities (i.e., the human beings on the recordings) at an earlier time, chatterbots are themselves performing entities that construct their performances at the same time as we witness them.

The magnitude of the challenge chatterbots pose to traditional conceptions of liveness becomes evident when we consider how both the ontology and the value of live performance have been construed in performance theory, which often invokes the performer’s materiality and mortality to describe liveness in existential terms. In Blooded Thought, Blau (1982:34) declares dramatically, “In a very strict sense, it is the actor’s mortality which is the actual subject [of any performance], for he is right there dying in front of your eyes.” Phelan (1997:3) echoes some of the same themes in Mourning Sex: “Live performance and theatre (‘art with real bodies’) persist despite an economy of reproduction that makes them seem illogical and certainly a poor investment . . . it may well be that theatre and performance respond to a psychic need to rehearse for loss, and especially for death.”

Clearly, performances by bots cannot address these ideas in the same way as those by human performers. Since bots are virtual entities, they have no physical presence, no corporeality; they are not dying in front of our eyes—they are, in fact, immortal. Bots can be destroyed or taken out of service,
but while they may degrade, they do not age or die in any biological sense. They perform live, but they are not alive, at least not in the same way that organic entities are alive. Performances by bots therefore do not engage existential issues simply by virtue of the performers’ presence in the way Blau and Phelan describe human performances. Both emphasize the failing organicism of live human bodies to counterpoint the way those same bodies are represented through technologies of cultural reproduction and to emphasize that basic aspect of live performance stated in the OED definition: live performance is not recorded. Bots are technological entities, but they constitute a technology of production, not reproduction. Although chatterbots are programmed and draw their conversational material from databases, their individual performances are responsive to the actions of other performers, autonomous, unpredictable, and improvisational. That is, they perform in the moment. The chatterbot undermines the idea that live performance is a specifically human activity; it subverts the centrality of the live, organic presence of human beings to the experience of live performance; and it casts into doubt the existential significance attributed to live performance.43

43 For further discussion of machine performers, see Auslander (2006a).
TRYIN’ TO MAKE IT REAL
Live performance, simulation, and the discourse of authenticity in rock culture

In the spring of 1990, the Franco-German pop singing and dancing duo Milli Vanilli was awarded the Best New Artist Grammy for 1989. The award prompted a spate of newspaper articles with titles like “That Syncing’ Feeling” (Detroit News, July 31, 1990) and other media commentary concerning various performers, including Milli Vanilli, who allegedly lip-synched to pre-recorded vocals in concert (Madonna, Michael Jackson, Paula Abdul, and many others were similarly accused). Most of the commentary was adamantly opposed to the practice, though virtually all of it also admitted that the main audiences for the performers in question, mostly young teenagers, did not seem to care whether their idols sang or not. In November, Milli Vanilli’s producer created fresh controversy when he admitted that not only had the duo lip-synched during their concerts; they had not even sung on the recording for which they were awarded the Grammy, which was then rescinded, much to the embarrassment of the National Academy of Recording Arts and Sciences (NARAS), the Grammys’ institutional sponsor. In response to these waves of scandal, legislators in many American states followed the lead of those in New York and New Jersey.

1 There is no consensus as to whether “lip-synch” or “lip-sync” is the proper spelling. I prefer the former but retain the latter in quoted materials.
2 I have been asked whether race was a factor in the singling out of Milli Vanilli. My feeling is that their status as Europeans is probably more significant than their African heritage. The fact of their being German places them outside the American music establishment in a way that their being Black does not, and may account for why they, rather than, say, Michael Jackson, were challenged. Christopher Martin (1993:71, 73) implies that since the two members of Milli Vanilli were rumored to be gay, homophobia may have played a role in their stigmatization. Ted Friedman (1993) makes a similar point.
3 My younger students, polled in the fall of 1990, felt precisely that way.
by introducing bills mandating that tickets and posters promoting concerts during which performers lip-synch state that fact; stiff fines were to be levied against violators. These legislators claimed to see the lip-synching issue as a question of consumer fraud.5

My purpose in this chapter is to analyze the changing meaning and status of live performance within a particular cultural context, that of rock music. The Milli Vanilli scandal is central to this analysis and to an understanding of how traditional liveness came to be devalued in that cultural realm. Before discussing the devaluation of liveness, however, it is necessary to establish the nature of the value that live performance once had within rock culture. To that end, the first part of this chapter offers a description of what live performance meant in the rock culture of the 1960s and 1970s. Because rock culture is specifically organized around recordings, it is a particularly interesting arena in which to examine the question of liveness. The early sections of this chapter, therefore, focus on the relationship between the two main forms in which rock music is consumed: as live performances and as recordings. I then take up the question of what happened to the status of live performance of rock with the rise of music television and digital technologies. The last portion of the chapter offers a Baudrillardian reading of Milli Vanilli in relation to the institutional discourses of the Grammys and the law.

Rock culture and the discourse of authenticity

In Rhythm and Noise: An Aesthetics of Rock (1996), Theodore Gracyk argues persuasively that the primary object of rock music as an aesthetic form is the recording, not live musical performance. Arguing that

4 The same issue arose, belatedly, in newly capitalistic Russia, and the response was the same: a revision to consumer law forcing lip-synching artists to say so in their publicity (see Bronwyn McLaren, “Lip-synch proposal could drive stars off stage,” Moscow Times, June 10, 1997:3).

5 A class action suit against Milli Vanilli’s record company was settled in favor of consumers: anyone who had purchased their recordings was entitled to a refund. However, the judge who oversaw the settlement, and other judges in the Cook County (Illinois) Circuit where the case was filed, considered the use of the courts to address such a matter an abuse of process. In its decision in Ippolito v. Lennon (542 N.Y.S.2d 3 [1989]), a New York case involving some similar issues, the court had written: “In the realm of entertainment media, where the use of stand-ins, stunt doubles, voice overs and lip-syncing is commonplace, there is some reluctance to create a cause of action out of such activity” (quoted in Clarida 1993:191).
musical instruments are not the primary materials of rock, as they are of many other genres of music, Gracyk (1996:74–5, original emphasis) offers the following analysis:

The vast majority of the time, the audience for rock music listens to speakers delivering recordings. Exploring the limitations and possibilities of the recording process, crafting music in those terms, rock’s primary materials are often the available recording and playback equipment. Guitars, pianos, voices, and so on became secondary materials. Consequently, rock music is not essentially a performing art, no matter how much time rock musicians spend practicing on their instruments or playing live.

Therefore, “studio recordings have become the standard for judging live performances,”6 and “musicians are usually re-creating music [in live performances], not making it” (ibid.:84, 77).

Gracyk is clearly correct: there is no question that rock exists primarily as recorded music and that rock culture is organized around recordings.7 Indeed, rock culture as such can be said to have come into existence partly as a result of the development of the 45 r.p.m. record in 1948, which made popular music cheaper to produce and easier to integrate into social life than the more cumbersome and fragile 78 r.p.m. discs

6 Note that Gracyk’s comment exactly parallels Steve Wurtzler’s observation about the relationship of live and televised sports cited in Chapter 2 and supports my general point there that live performance now tends to recapitulate mediatized representations. Wurtzler (1992:94) extends his analysis into the realm of music by arguing that live albums are judged not according to the accuracy with which they represent the concerts they document, but by comparison with the “original,” recorded versions of the music. “Again the live is conceived as a degraded version of the recorded.”

7 By “rock culture,” I mean the cultural formation that includes and surrounds rock music itself, a culture whose main adherents are: on the production side, musicians, their producers, and those peopling the apparatus of the music industry; on the reception side, rock music fans and critics. I have in mind something similar to what Lawrence Grossberg (1994:41) calls “the rock formation,” a term he uses to suggest that “the identity and effect of rock always depends on more than its sonorial dimension . . . We always locate musical practices in the context of a complex . . . set of relations with other cultural and social practices. . . .” With Grossberg, I acknowledge that there is diversity within rock culture but justify the use of a seemingly monolithic concept by pointing out that “there is some unified sense to ‘rock’ . . . the overemphasis on locality and specificity often leads us away from important generalities, as well as from the fact that such generalities are part of the reality of the local articulations.” It is in terms of these generalities that I am speaking here.
It is equally the case, however, that rock music is performed live and that, within rock culture, live performance is important and demanded. If we accept Gracyk’s characterization of rock music as primarily a recorded form, how do we account for the importance of live performance in rock culture? If rock is primarily a recorded music, why shouldn’t the presence of the recordings on the radio, television, and the Internet suffice? And how exactly could live performances, which Gracyk insists belong to a different aesthetic order than recordings, satisfy a desire created by the recordings? These questions intertwine with a basic question framed from the point of view of reception: if rock fans are primarily engaged with recordings, what need does live performance fulfill for them?

Gracyk’s own handling of the question of live performance is not altogether consistent. Initially, he describes the pleasures of live performance as deriving from interaction with others: the individual listener has the opportunity to commune with fellow fans and to experience an illusory bond with the performer (Gracyk 1996:78). He goes on, however, to lump live performance together with other visual representations of rock, including coffee-table books, magazine spreads, album covers, and television, saying, “A major trap is to buy into the imagery of rock promotion” (ibid.:75). According to Gracyk, since all of these media tend to represent rock musicians primarily as live performers and not as the studio artists they truly are, they are all guilty of a pernicious misrepresentation. The problem with Gracyk’s argument is that most rock recordings are guilty of the same misrepresentation. Only a few rock records foreground the artifice of their studio construction; most are made to sound like performances that could have taken place, even if they really did not (and could not).

Simon Frith’s description of his own listening experience can probably stand as typical for that of a sophisticated rock fan:

I listen to records in the full knowledge that what I hear is something that never existed, that never could exist, as a “performance,” something happening in a single time and space; nevertheless, it is now happening, in a single time and space: it is thus a performance and I hear it as one.

(Frith 1996:211)

8 The idea that recordings represent musical performances that never took place is not specific to rock music. An oft-cited early example comes from the realm of classical music performance: on a 1951 recording, Wagnerian soprano Kristen Flagstad’s high notes as Isolde were sung by Elizabeth Schwarzkopf to produce a perfect vocal performance. See Eisenberg (1987:116) and Attali (1985:106).
In a general discussion of the ontological status of musical recordings, Gracyk (1997:142, original emphasis) argues that recordings “offer either a reproduction or a representation of [the music’s] performance . . . Undoctored recordings of live performances reproduce a performance. Les Paul’s ‘Lady of Spain’ [in which Paul plays several overdubbed guitars] is a representation of a performance.” Frith suggests that the rock fan knows that recordings are representations, but hears them as reproductions nevertheless. If Frith is right when he says that rock recordings create the impression of being performances taking place in a single space and time, even for a listener who is fully aware that the performance exists only on the recording, then they should be just as deceptive and pernicious for Gracyk as visual representations of rock that depict musicians as performing live rather than at work in the studio. The grounds on which Gracyk wants to dismiss live performance of rock, together with its representations, as promoting a false view of the music’s origins would seem to be grounds on which to dismiss the music itself. If rock music can be seen as a form worthy of aesthetic appreciation, despite (or because of?) its industrial origins and commercial character, the visual culture that surrounds the music and its live performance must be seen as contributing to that aesthetic experience, not merely as a systematic misrepresentation of the music whose sole purpose is the cynical promotion of an attractive illusion. The visual culture of rock is neither more nor less cynical than the music itself: like rock records, live performances, photographs, and so on are products of the commercial apparatus of the music industry that contribute to the impression that rock music is a performing art. However inaccurate that impression may be, it defines the experience of rock for its listeners.

I suggest that the visual artifacts of rock serve a particular function within rock culture and that live performance plays a pivotal role in this regard. The function to which I am alluding is that of establishing the authenticity of the music for the rock fan. Before proceeding, some definitional discussion is in order.

First, authenticity. This clearly relates to questions of production but not to a thought-through theory; “inauthentic,” that is to say, is a term that can be applied evaluatively within genres which are, in production terms, “inauthentic” by definition—fans can distinguish between authentic and inauthentic Eurodisco, and what is being described by implication is not how something was actually produced but a more inchoate feature of the music itself, a perceived quality of sincerity and commitment . . . What is it about a record that makes us
say, “I just don’t believe it!” (my reaction to Paul Simon’s *Graceland*, for example)? . . . This is obviously related somehow to the ways in which we judge people’s sincerity generally; it is a human as well as a musical judgment. And it also reflects our extra-musical beliefs—what I already knew about Paul Simon obviously had an effect on how I heard his music (and new knowledge—new music—might mean I changed my mind).

(Frith 1996:71)

Frith makes two important points here: that authenticity can be heard in the music, yet it is an effect not just of the music itself but also of prior musical and extra-musical knowledge and beliefs; and that what counts as authentic varies among musical genres and subgenres. Because I am focusing here on the genre called “rock,” I will consider the concept of authenticity as it is understood within that cultural context. Following a conventional usage, I employ the word “rock” to denote a kind of popular music that originated in the mid-1960s, as distinct from its 1950s predecessor, rock and roll. Friedlander (1996) offers a good summary history of rock and its predecessor. The first generation of rock and roll musicians consisted primarily of Black artists (e.g., Chuck Berry, Little Richard, Fats Domino). The one important White artist was Bill Haley. The roster of the second generation of rock and roll artists, which emerged around 1956, contained only White artists: Elvis Presley, Jerry Lee Lewis, Buddy Holly, etc.9 By the end of the 1950s, this music had:

all but faded from view. In its place records from female vocal groups (who became known as the “girl groups”) and clean-cut young men (teen idols), a budding California “surf” sound, and a developing folk revival all became popular . . . In 1964, the United States awakened to the sound of the Beatles, with their

9 Robert Palmer (1995:8) elucidates this distinction, though he uses the term “rock and roll” where I use “rock”: “[T]he term ‘rock and roll’ came to designate guitar-based music with a ‘black’ beat, primarily played by and for whites. By the sixties, ‘rock and roll’ carried such ‘white’ connotations that writers began referring to the new, rhythm-oriented styles first as ‘soul,’ then ‘funk.’” Friedlander (1996:12) also describes soul and Motown, musical styles that evolved contemporaneously with rock, as “African-American genres” distinct from rock. Indeed, one of the more disappointing aspects of rock culture is its exclusion of Black musicians, who have had great difficulty in being accepted as rock artists. Producers and record companies have typically wanted to market African-American musicians as soul or rhythm and blues artists, rather than rock acts.

A case in point is that of the Chambers Brothers, best known for the psychedelic anthem “Time Has Come Today” (1968). An African-American family group from
variety of classic rock styles combined with touches of pop and rockabilly. This British invasion, which included music from the Rolling Stones, the Dave Clark Five, the Who, and others, reawakened America’s rock and roll urges.

(Friedlander 1996:11–12)

Rock contains multiple subgenres, including acid rock, hard rock, folk rock, punk, grunge, emo, and a long and ever-changing list of others. Lawrence Grossberg (1993:202) suggests that there have always been “many forms of rock authenticity”: what is considered authentic in the context of one subgenre is not necessarily seen that way in another. While rock culture can accommodate multiple definitions of authenticity, the concept of authenticity has also always been exclusionary. “At every moment in its history, rock fans have always identified some [forms of] music which, along with their associated cultural apparatuses and audiences, are dismissed, not merely as bad or inferior rock but somehow as not really rock at all.”

10 The name most frequently used for rock’s Other is “pop.”11 Rock and pop can be distinguished on a more-or-less

Mississippi that had moved to Los Angeles in the mid-1950s, the Chambers Brothers began as gospel singers, becoming active on the coffee-house and folk-festival circuit by the early 1960s. Their controversial performance of “Time Has Come Today,” which they had written, at the 1965 Newport Folk Festival (the same festival at which Bob Dylan created even more controversy by using electric instrumentation; see note 53, below) reflected their identification with rock and hippie culture. Even so, the record companies interested in signing them wanted to treat them as an “R&B act with uniforms and choreography.” Columbia Records, with whom the Chambers Brothers did sign, did not place that demand on them but said that “Time Has Come Today” could only be recorded by a White rock group. Only after the Chambers Brothers had a hit with another song did Columbia permit them to record “Time Has Come Today.” In the 1970s, the Chambers brothers were remanded by Columbia to the R&B producers Gamble and Huff, who attempted to make them over into a “Black” act (Jud Cost, liner notes for Time Has Come: The Best of the Chambers Brothers, Columbia Records, 1996). Needless to say, the Chambers Brothers were far more successful as a rock group in the 1960s than as an R&B act in the 1970s.

10 Frith (1996:40) points out that the discourses surrounding other forms of popular music also define them in terms of this kind of distinction. The discourse of folk music, for instance, emphasizes its difference from “commercial pop.”

11 There is some terminological confusion in the use of the expressions “popular music” and “pop music.” The distinction between rock and pop I just cited derives from American parlance; British music commentators frequently use the term pop in a way that includes rock in that category, though the same commentators may also distinguish rock from pop in other contexts. I use “pop” to refer to rock’s ideological Other and “popular music” to refer to the broader sphere that encompasses both, as well as many other genres.
objective basis: whereas rock derives historically from African-American roots in 1950s rock and roll, pop derives historically from the White popular music of the 1950s: Perry Como, Patti Page, and their ilk. In most cases, this historical difference is quite evident in the music itself: no one would ever mistake the Lettermen or Barry Manilow for rock musicians.

In rock culture, however, the distinction between rock and pop is not primarily historical or stylistic. As Grossberg (1992:131) puts it, “rock cannot be defined in musical terms,” for “there are, for all practical purposes, no musical limits on what can or cannot be rock . . . There is nothing that cannot become a rock song or, perhaps more accurately, there is no sound that cannot become rock.” Richard Meltzer (1987 [1970]:270) had made a similar observation much earlier: “everything . . . is contextualizable as rock.” Indeed, if the substitution of the string section for rock instrumentation on the Beatles’ recordings of “Yesterday” and “Eleanor Rigby” can be heard as rock, it is hard to imagine what musical sound could not be so contextualized. Keith Negus (1997:162) objects to this way of thinking about rock on the grounds that it tends simultaneously to privilege rock as the central category of popular music and to define it far too broadly: “This is an approach to studying popular music that ignores the vast numbers of generic distinctions made by musicians and audiences across the world and which reduces popular music to the category of rock.” As my own insistence on distinguishing “rock” from “rock and roll” should suggest, I sympathize with Negus’s view that rock needs to be defined specifically. I doubt, however, that such a definition can be constructed by identifying rock’s “stylistic practices,” as Negus would wish, since Grossberg and Meltzer are surely correct in asserting that any musical style can be assimilated to the category “rock.” As my own insistence on distinguishing “rock” from “rock and roll” should suggest, I sympathize with Negus’s view that rock needs to be defined specifically. I doubt, however, that such a definition can be constructed by identifying rock’s “stylistic practices,” as Negus would wish, since Grossberg and Meltzer are surely correct in asserting that any musical style can be assimilated to the category “rock.” Ultimately, “the designation of rock music is more of a sociological than a musical one” (Shuker 1994:247).

12 At least, this is the case when rock is defined broadly. It may be that particular subgenres of rock do have identifiable musical and stylistic characteristics, and canons of acceptable and unacceptable sounds. Sheila Whiteley (1992) does an admirable job of analyzing the stylistic and structural features of psychedelic rock. It is noteworthy, however, that Whiteley supports her case with extensive analysis of the lyrics of songs as well as their purely musical features.

13 In a related vein, Nicholas Cook (1995–6:39) argues that the basic compositional unit of rock music is not best understood on the model employed in classical musicology of an Urtext (the composition) which gives rise to “a variety of subordinate and derivative texts” when performed. A piece of rock music exists primarily as “a cultural entity,” not a formal composition, and that entity is “the sum total” of the “multiplicity of texts” (e.g., recordings, live performances) in which it is embodied.
generic distinctions that Negus raises is nevertheless central to understanding that the way rock fans define the music is principally ideological, not stylistic.

The ideological distinction between rock and pop is precisely the distinction between the authentic and the inauthentic, the sincere and the cynical, the genuinely popular and the slickly commercial, the potentially resistant and the necessarily co-opted, art and entertainment. Susan Douglas offers the following succinct definition of rock ideology and the expectations it imposes on the music: “Real rock and roll must be ‘authentic’—meaning it features instrumental virtuosity, original songwriting, social criticism, a stance of anger and/or alienation” (Douglas 1997:22; see also Negus 1997:149–50). From the point of view of rock ideology, there can be no such thing as “authentic Eurodisco,” for example: all Eurodisco is condemned as intrinsically inauthentic pop music, precisely because it does not meet the requirements Douglas identifies. The interesting cases, then, are not those like disco or Barry Manilow, where identification as pop is obvious, but those in which the artist has a suspect claim to being an authentic rock musician (I shall discuss the Monkees in this connection later in this chapter). The fact that there is even a rock subgenre called “pop-rock” itself suggests that this distinction is not always clear cut, and is open to negotiation. These are the cases that are subject to extensive debate by rock fans. By not taking this aspect of rock culture into account, Gracyk commits the error of defining rock too broadly. While it is fair to say that rock is a diverse stylistic category with fuzzy borders, it is nevertheless true that, within rock culture, the music is often defined in terms of an exclusionary concept of authenticity (and Gracyk (1996:222) certainly goes too far when he identifies Whitney Houston as a rock musician!). The concept of rock authenticity is linked with the romantic bent of rock culture, in which rock music is imagined to be truly expressive of the artists’ souls and psyches, and as necessarily politically and culturally oppositional. The romantic ideals of rock music are nicely expressed in Neil Young’s song “Tonight’s the Night (Part 1)” in which he sings of a deceased roadie: “Late at night when the people were gone/He used to pick up my

---


15 The distinction between rock and pop has been the subject of parliamentary debate in Great Britain. A consortium bidding to broadcast over a radio frequency that had been designated for music “other than pop” argued that their plan to broadcast rock music was consistent with this requirement. For accounts of the ensuing debate, see Frith (1996:81–4) and Shuker (1994:9–10).
guitar/And sing a song in a shaky voice/That was real as the day was long.” These few lines summarize the mythology of self-expression central to rock in terms of authenticity, anti-commodification (the “real” singer takes the stage after the paying customers have left), and populism (since the roadie is described as “a working man” who also makes music). Gracyk (1996:175–206) points out the untenability of rock romanticism, which wants to treat industrial products as individual expression and cultural resistance. Gracyk’s analysis notwithstanding, the fact that the criteria for rock authenticity are imaginary has never prevented them from functioning in a very real way for rock fans.

I want to be very clear on one point. Taken on its own terms, rock authenticity is an essentialist concept, in the sense that rock fans treat authenticity as an essence that is either present or absent in the music itself, and they may well debate particular musical works in those terms. It is my intention to recognize this usage and to explore its implications. In my own discourse, however, I treat rock authenticity as an ideological concept and as a discursive effect. My approving citation of Frith’s definition notwithstanding, I will argue that authenticity is not simply present in the music itself and will also emphasize its cultural, rather than ethical, dimension. In other words, I posit that the creation of the effect of authenticity in rock is a matter of culturally determined convention, not an expression of essence. It is also a result of industrial practice: the music industry specifically sets out to endow its products with the necessary signs of authenticity.

The specific semiotic markers of authenticity vary by musical genre and subgenre. Tightly choreographed unison dance steps may be necessary for a soul vocal group to establish itself as authentic but would be a sign of inauthenticity in a rock group because they belie the effect of spontaneity rock audiences value. Whereas acoustic playing is a sign of authenticity for the blues rock and folk rock of the 1960s and 1970s, it does not function that way for the more recent rock subgenre of industrial noise, which employs only highly amplified sounds not always produced by conventional rock instruments. In order to appear authentic, many British rockers sing in American accents, thus acknowledging the historical origins of their musical genre (Durant 1985:112). Female hardrockers frequently employ the aggressive vocal inflections and macho physical gestures and postures associated with male musicians, because that vocabulary is the established iconography of authenticity for that particular rock subgenre.16

16 For an analysis of such a performer, see “Suzi Quatro wants to be your man: female masculinity in glam rock,” in Auslander (2006c:193–226).
The signs of rock authenticity not only differ among its subgenres but change over time:

Rock must constantly change to survive; it must seek to reproduce its authenticity in new forms, in new places, in new alliances. It must constantly move from one center to another, transforming what had been authentic into the inauthentic in order to constantly project its claim to authenticity.

(Grossberg 1992:209)

Rock’s authenticity effects are thus dependent on the nomination of something to serve as the inauthentic Other, whether that thing is current pop music or other rock. Alternative rock, for example, first presented itself in the 1980s as more authentic than the bloated art-rock left over from the 1970s, and still beloved to the baby-boomers. In this respect, rock ideology is conservative: authenticity is often located in current music’s relationship to an earlier, “purer” moment in a mythic history of the music. In the 1970s, some rock groups (Queen, for instance) wrote in the liner notes to their albums that they did not use synthesizers, thus stressing their connection to the traditional instrumentation of roots rock (“real” electric guitars, drums, etc.).

The advent of digital musical instruments, however, changed the historical status of the synthesizer relative to authenticity:

Playing analogue synthesizers is now a mark of authenticity, where it was once a sign of alienation—to pop iconography, the image of musicians standing immobile behind synths signified coldness . . . Now it is the image of a technician hunched over a computer terminal that is problematic—but that, like the image of the synth player, can and will change.

(Goodwin 1990:269)

17 The two rock subgenres I mention here can be defined as follows: art-rock, or progressive rock, which originated in the late 1960s and emphasizes compositional complexity and instrumental virtuosity, is rock with pretensions to status as classical music or jazz. Groups such as Yes, Emerson, Lake and Palmer, and Jethro Tull belong in this category. Roots rock, on the other hand, which looks back to rock’s origins in folk, country, and rock and roll, emphasizes straightforward compositions on traditional themes. Both self-conscious revivalists like the Stray Cats and more sophisticated groups like Creedence Clearwater Revival and the Band make up this category.
Synthesizers, once seen not as musical instruments but as machines that had no place in rock, have come to be seen as just another form of keyboard instrument. The computer keyboard has not yet been fully assimilated in quite the same way, though that process is well under way. As early as 1997, the British pop group Duran Duran foregrounded their use of a computer during an appearance on US television by having the camera cut to the keyboard player at moments when he was typing commands on a laptop.

Rock authenticity is performative, in Judith Butler’s sense of that term: rock musicians achieve and maintain the effect of authenticity by continuously citing in their music and performance styles the norms of authenticity for their particular rock subgenre and historical moment, and these norms change along with changes in the prevailing discourse of authenticity. The interplay of these factors is complex, however. In her analysis of *Their Satanic Majesties Request* (1967), the album on which the Rolling Stones attempt psychedelic rock, Sheila Whiteley (1992:90–9) points out that because the Stones’ authenticity derives from their roots in American rhythm and blues, their switch to psychedelic rock came off as forced and inauthentic. In this case, the group’s own musical history was at odds with their attempt to cite the stylistic norm of that moment in rock history.

Grossberg (1993:204) locates rock authenticity in the music’s sound, not the visual aspects of its performance:

> The authenticity of rock has always been measured by its sound, and most commonly, by its voice. Obviously, given the contexts in which rock was made available to the majority of its fans, it is not surprising that its ideology would focus on sound . . . The eye has always been suspect in rock culture; after all, visually, rock often borders on the inauthentic . . . It was here—in its visual presentation—that rock often most explicitly manifested its resistance to the dominant culture, but also its sympathies with the business of entertainment.

---

18 See Butler (1993:12–16) for a succinct discussion of her notion of performativity.
19 Grossberg (1993:204) makes the curious observation that “rock’s appeal to its black roots further secured the primacy of sound” as opposed to visual elements. This seems not to take into account the rather troubling history of the discourse of authenticity in the blues and soul music, in which, at various places and times, the question of authenticity has hinged on the pigmentation of the performer’s skin. It also ignores the importance of visual elements in the performance of African-American popular music.
Like Gracyk, Grossberg suggests that only the music itself as it is experienced on records can be treated seriously, that the visual culture of rock reflects its imbrication with a venal entertainment industry. All aspects of rock culture are products of this industry, however: the music, the visual artifacts that surround it (including live performances), even rock ideology and the effect of authenticity itself are manufactured to a very large extent. It makes little sense to separate the music from these other discourses, as if it transcends its origins in ways that they cannot.

Seeing is believing

Historically, one consequence of the reification of music in recordings is the century-old separation of the musical experience from live performance, and, particularly, the aural experience of music from its visual experience. The critical impact of the gramophone when it became widely available in the 1890s was “a vital shift in the experience of listening to music: the replacement of an audio-visual event with a primarily audio one, sound without vision” and it is from this originary point that the culture of popular music, and its emphasis on the aural aspects of music performance, has evolved (Laing 1991:7–8). Nevertheless, sound recording certainly did not render the visual aspects of music irrelevant; indeed, listening to recordings may always be a visual as well as an aural experience. Evan Eisenberg distinguishes the experience of monophonic and stereophonic recordings by saying that: “Stereo . . . arrays the musicians before you in empty space . . . The introduction of stereo . . . changed the phenomenology of the phonograph by adding a spatial, and hence a visual aspect” (Eisenberg 1987:64–5, my emphasis). Eisenberg’s point is an important one: when sound is divorced from sight by virtue of technological mediation, the aural experience nevertheless evokes a visual one: “every mode of record listening leaves us with a need for something, if not someone, to see and touch” (ibid.:65).

This visual experience of recorded music is generically specific: Eisenberg argues that “rock listeners, who have no preconception as to how live musicians should be deployed” tend to prefer to listen through

Although I agree with Eisenberg that recorded sound evokes a visual image, I question this historical point. I doubt that monophonic sound completely lacks a spatial aspect—even when a recording is designed to be played through a single speaker, the arrangement of sounds still evokes spatial concepts like foreground and background.
headphones, which give the impression that the music is inside them rather than emanating from an exterior space (ibid.). Although Eisenberg does not say so explicitly, I assume he is contrasting rock with classical music and jazz, each of which uses well-known spatial configurations of musicians (the arrangement of symphony musicians is the most highly conventionalized). While it is true that rock recordings frequently contain “exaggerated stereo effects,” I think that Eisenberg is wrong—rock listeners do visualize the musicians while listening to recordings: “to hear music is to see it performed, on stage, with all the trappings” (Frith 1996:211). Meltzer (1987 [1970]:229) suggests that listening to rock on records engages the visual imagination in a highly developed way: “Required [when ‘listening to a standard guitarist on record’] is a mental picture of the guy facing you and occasionally moving around; in conjunction with this you visually change the situation and sit behind him or turn the stage around, or you put yourself right in his shoes.” Precisely because there are fewer conventions for the arrangement of rock musicians on stage than there are for a symphony orchestra (though there are some: drums upstage center, for example) and because rock recordings frequently generate an irrational stereo field (that is, an imaginary aural space with no possible physical analog), our ability to visualize the performance of rock music as we listen to it is dependent on the availability of visual artifacts that show us what the musicians look like in performance.

Rock “has always stressed the visual as a necessary part of its apparatus—in performance, on record covers, in magazine and press photographs, and in advertising” (Goodwin 1993:8), and it is from such sources that these images derive. “[S]ince,” as Meltzer (1987 [1970]:152–3) puts it, “a black circular piece of plastic is just a drag” (and all you see on a CD is yourself looking back) the listening experience must be supplemented by additional artifacts: posters, booklets that come with the recordings, and the paraphernalia of fandom (trading cards, souvenirs, etc.). It is clear that such images help to define, but also must conform to, the visual standards of rock authenticity prevalent at a given historical moment. Whereas it was possible at the moment of rock’s emergence in 1964 for the Beatles to be a credible rock group

21 On many of Jimi Hendrix’s recordings, for example, his guitar sound pans back and forth from right to left, rather than remaining on one side of the field or at its center. This movement of the sound may be somewhat reflective of rock guitarists’ penchant for stalking back and forth across the concert stage. The irony is that, in live performance, the sound does not move with the guitarist, as the amplifiers and speakers from which it emanates remain stationary.
while wearing identical “mop-top” haircuts, tailored suits, and “Beatle boots” in photographs, including those on their record covers, that was no longer possible by the psychedelic era. Hence, the inclusion of pictures of the long-haired and bearded Beatles packaged with the so-called *White Album* (1968). Similarly, the members of Jefferson Airplane would not have had much credibility as a psychedelic group had they appeared on their album covers dressed in business suits.

It is the case, however, that this kind of visual evidence is not enough to assure the authenticity of a rock group. In photographs, members of the Ohio Express, a late sixties bubblegum rock group, were appropriately hirsute and displayed Carnaby Street fashions, yet the group never truly existed; it was the studio creation of its producers. Grossberg’s claim that “the authenticity of rock has always been measured by its sound” is nevertheless misleading. Sound alone cannot establish rock authenticity (or inauthenticity) any more than visuals alone. It is not self-evident from listening to a Monkees album such as *Pisces, Aquarius, Capricorn and Jones, Ltd.* (1968) that their music is inauthentic. In terms of style, sound, and lyrical content, songs on this album compare favorably with the work of the Beatles, Crosby, Stills, and Nash, and Jefferson Airplane. (It may be tempting to argue that this plurality of styles is itself evidence of inauthenticity, but a certain musical eclecticism was in fact a hallmark of the psychedelic era, nowhere more evident than on the Beatles’ *Sergeant Pepper’s Lonely Hearts Club Band* (1967). Meltzer (1987 [1970]:92–9) even argues that eclecticism is a hallmark of rock.) The Monkees’ inauthenticity is not directly audible on their records but is a function of other knowledge that the rock fan brings to the record (e.g., that the Monkees were created for television, that they did not play

---

For a useful overview of the bubblegum rock phenomenon, including the Monkees’ relationship to it, see Cafarelli (1997), who reproduces a photograph of the Ohio Express. From the point of view of rock ideology, bubblegum is necessarily inauthentic because it was made mostly by groups that did not exist outside the studio. Yet, one of Cafarelli’s sources goes so far as to suggest that only nonexistent groups can make authentic bubblegum rock!

In comparing the Monkees’ music with that of other groups, Cafarelli (1997:17) observes that “each [song] sounds like a stirring sample of AM-friendly pop-rock, with the Monkees’ (inaudible) artificial origin the sole, negligible difference between these records and contemporary records by the Raiders, . . . Turtles, Dave Clark Five, Hollies, etc., etc.” Each of these groups was commercially oriented but all had followed the conventional rock career path described below. My own list is intended to force a comparison between the Monkees and groups considered less overtly commercial in outlook who nevertheless had hit records, even on AM radio.
their instruments, etc.). Whiteley’s examination of *Their Satanic Majesties Request* cited earlier is one of the best close analyses of rock sound in terms of authenticity. On the basis of its lyrics and musical structures, she concludes that the album is a calculated attempt at imitating the psychedelic style established by the Beatles on *Sergeant Pepper* and, therefore, inauthentic. Whiteley (1992:99) ends her discussion by saying that “there is a mismatch between the expectations generated by the [album’s psychedelic] cover, [and] the content, style and presentation [of the music itself],” thus acknowledging that the album’s visual aspects play a role in the creation of expectation and the determination of (in)authenticity. Would Whiteley have heard the music on the album differently if it had had a different cover? I am suggesting that the determination of rock authenticity cannot be made on the basis of either visual or aural evidence alone, but only by considering both, and the relationship of one to the other in light of other knowledge the listener brings to bear.24

While recordings and the visual artifacts of rock culture proffer evidence of authenticity, only live performance can certify it for rock ideology. Live performance contributes to the process of authentication in two crucial ways. First, to be considered an authentic rocker, a musician must have a history as a live performer, as someone who has paid those dues and whose current visibility is the result of earlier popularity with a local following. Pursuing rock’s traditional career path, musicians must first establish themselves and find an audience through live performance; musicians are chosen to record by industry scouts on the basis of live performances. Subsequent moves from live performance at the local level to live performance at the national and international levels serve as indices of the musicians’ popularity with audiences and status within the industry (Frith 1988b:111–12). Even in the case of an act like the Beatles, who opted out of live performance to become exclusively a studio group very shortly after ascending to international

---

24 It is significant in this context that Meltzer (1987 [1970]:30) asserts that “the Beatles do not have to be seen or heard to produce an audience reaction of awesome magnitude.” (He is referring to the frenzy of the crowd at a concert before the Beatles took the stage.) “This represents the growth of true ‘inauthentic experience.”’ Meltzer seems to be arguing that in a case in which neither the group’s music nor their presence really matters, in which audience desire is projected entirely on to an inchoate image or idea of the group, then the group has been reduced to inauthenticity. The implication of his argument is that authenticity derives from the musicians’ sound and presence.
fame, the fact that they had once been a performing band (and, conceivably, might be again) and that they had made their original reputation through live performance lent authority and authenticity to their recordings.\(^\text{25}\) In an essay of 1968, for example, rock critic Albert Goldman refers to the Beatles as “the best costumed, best produced, most versatile, and technically resourceful of rock bands” (Goldman 1992:60, my emphasis). Goldman’s reference to costuming implies a perception of the Beatles as a performing unit even though they had abandoned live performance several years earlier. Similarly, continual rumors in the mid-1970s that Steely Dan, a group known to exist primarily in the studio, would be embarking on a tour helped the group maintain credibility with the rock audience even though the tour never materialized.\(^\text{26}\) On the other hand, groups lacking a history of live performance and, like the Monkees or the Ohio Express, known (or suspected) to have been created only as studio aggregations, were dismissed by rock critics and fans as mere pop even when they did perform live.\(^\text{27}\) Whereas the Beatles

---

\(^\text{25}\) For a decade before the death of John Lennon, rumors that a reformed version of the Beatles would soon be on tour continued to circulate. Even after Lennon’s death, rumors persisted that the Beatles would reform with his elder son, Julian Lennon, in his place.

\(^\text{26}\) In fact, Steely Dan stopped touring in 1974, two years after the formation of the group, and did not play live again until a reunion tour in 1993. Steely Dan is a particularly difficult case to assess in terms of rock ideology. While rock fans held it against the group that they did not play live, “to the true aficionado, Steely Dan’s unwillingness to waste time touring in order to focus on the bigger rewards of record-making was just the ultimate measure of their ornery integrity” (Chris Willman, liner notes for \textit{Citizen Steely Dan}, MCA Records, 1993). Willman argues that their refusal to tour “allowed them a sort of infamous anonymity on a scale more in line with their bebop heroes than with rock and roll’s cult of personality.” As the anthology of critical responses to their music reprinted in the booklet accompanying the \textit{Citizen Steely Dan} box set suggests, critics had a hard time deciding whether they were best understood as a rock group, a pop group, or even a jazz group.

\(^\text{27}\) Jim Curtis (1987:218) dismisses this disdain of the Monkees as elitism on the part of the critics (and, by extension, the rock culture generally). He points out that, authentic or not, the Monkees were extremely popular and states that “there must have been something in the grooves which made those records sell.” Indeed there was: the Monkees’ records stand up quite well more than thirty years later as examples of well-crafted pop-rock. The point, however, is that popularity is not an index to authenticity. Paradoxically, even though some authentic rock groups are enormously successful financially, their authenticity hinges on the counter-cultural aura that derives from a putative lack of mass-market appeal or from the accretion of a coterie audience, however large (e.g., the Deadheads). It is also possible that some of the Monkees’ records might have sold to rock fans who would never admit to a fondness for their music. The inauthentic has its (guilty?) pleasures.
retained their authenticity even after they stopped performing live because they possessed a history as live performers, and Steely Dan was given the benefit of doubt, the Monkees could never be considered authentic, no matter how many live concerts they played, because they were known to have originated as a synthetic, televisual group, not as musicians with an “organically” developed history of live performance. It is for this reason that the producer of Radish, a grunge group founded in 1994, “wanted Radish to build up a local following around Dallas prior to the release of the band’s first album . . . He felt that Radish should be from Texas—from somewhere real, and not just from the music industry, like a nineties version of the Monkees” (Seabrook 1997:80–1). The fact that the evidence of authenticity results from a calculated effort of the promotional apparatus does not prevent it from counting for rock fans. Nor should it, given the commodity context in which all aspects of rock culture are produced.

The second, and most critical, reason why live performance enables the determination of authenticity is that it is only in live performance when the listener can ascertain that a group which looks authentic in photographs, and sounds authentic on records, really is authentic in terms of rock ideology. In the context of his argument that the locus of rock authenticity is in sound, not sight, Grossberg (1993:204) claims that:

> the importance of live performance lies precisely in the fact that it is only here that one can see the actual production of the sound, and the emotional work carried in the voice. It is not the visual appearance of rock that is offered in live performance but the concrete production of the music as sound.28 The demand for live performance has always expressed the desire for the visual mark (and proof) of authenticity.

Although I believe that Grossberg has put his finger on a matter of vital importance in understanding the function of live performance in rock culture, his insistence that live performance is not visual but auditory in

---

28 Stan Godlovitch (1998) makes a parallel argument with respect to classical music, though not in reference to the authentication of recordings, which, for Godlovitch, are merely captured performances, not primary cultural objects. Because we perceive the performance of classical music as a difficult, highly skilled activity, we wish to witness the demonstration of those skills and the human beings who possess them.
nature again reflects the anti-visual bias I have identified in his and Gracyk’s work, the insistence that the visual is necessarily inauthentic in a way that the auditory is not.\(^{29}\) I agree emphatically that live rock performance is precisely about establishing the authenticity of the recorded sound, but surely this must involve not just the “concrete production” of that sound, but also visual evidence of the sound’s production by musicians whose appearance suggests that they are its legitimate makers. It is for this reason that producers of rock recordings will not hire a group on the basis of a demonstration tape alone, but always insist on seeing the group perform live.

Because it is well known within rock culture that the sound is manufactured in the recording studio, the visual aspects of rock music performance do not work merely as a secondary confirmation of an authenticity established primarily in the rock sound. Prior to seeing a band perform live, the rock fan cannot be sure that their music really is their music or that they are who they should be, given the identity they apparently perform on their recordings. The visual evidence of live performance, the fact that those sounds can be produced live by the appropriate musicians, serves to authenticate music as legitimate rock and not synthetic pop in a way that cannot occur on the basis of the recording alone; only live performance can resolve the tension between rock’s romantic ideology and the listener’s knowledge that the music is produced in the studio. A provocative statement by Neil Tennant of the Pet Shop Boys underlines the association of musical ability and live performance with rock and studio artifice with pop: “It’s kinda macho nowadays to prove you can cut it live. I quite like proving we can’t cut it live. We’re a pop group, not a rock and roll group” (quoted in Goodwin 1990:268, original emphasis). A case in point is that of the Beach Boys’ well-known recording of “Good Vibrations” (1966), a performance pieced together with extreme care over numerous recording sessions and one of the most elegant and complex examples in popular music of “phonography,” the art of recorded—as distinct from live—music (Eisenberg 1987). The assertion of rock authenticity was particularly problematic for the Beach Boys, as their music, which derives as much

\(^{29}\) Gracyk and Grossberg typify, in this respect, what Martin (1993:67) has identified as the “demonization of the visual” in music criticism underwritten by the ideology of rock. It is noteworthy that rock critics are not the only ones who reject visual spectacle as part of rock. Some musicians, particularly “progressive” rockers who want their music to be perceived as “serious” (i.e., art), and not as popular entertainment, specifically refuse to engage in spectacular live performance, preferring that the focus be exclusively on the sound.
from the pop tradition of vocal groups like the Four Freshmen as from
the proto-rock and roll of Chuck Berry (see Curtis 1987:105–7), has
always been regarded somewhat suspiciously within rock culture,
especially since it is associated with a reactionary cultural politics. The
passage from Friedlander (1996:11–12) quoted earlier indicates that surf
music, of which the Beach Boys are a principal representative, is a pre-
rock form. The prosperous, suburban Southern California lifestyle of
which it is an expression was not valued by the rock counter-culture of
the late 1960s. As Jim Curtis (1987:117) puts it, the Beach Boys, like
President Lyndon Johnson, seemed to embody “an implicit belief in the
frontier as the unending hegemony of white Protestant democracy.” He
points out that the Beach Boys’ popularity waxed and waned with that
of the war in Vietnam, and indicates that their failure to appear at “the
one brief, shining moment of the counterculture,” the Monterey Pop
Festival in 1967, was damaging to their credibility as a rock act. In the
mid-1960s, the word on “Good Vibrations” was that it was purely a
studio product that could not possibly be performed live. Yet, a live
recording of 1966 reveals the group struggling through the song before
the single had even been released. A later live recording, of 1969, shows
that by that point the group had mastered the ability to reproduce the
sound of the recording—including some of its special effects—in a live
setting, thus enhancing their credibility with rock audiences at the
height of the psychedelic era, a time when their style seemed hopelessly
out of touch. It is noteworthy that the group’s visual style had changed
considerably: in the late 1960s, the Beach Boys sported hippie garb, long
hair, and beards in place of their previous uniform of striped shirts and
clean-cut hairstyles.

An anecdote that circulated in the late 1960s summarizes much of
what is being discussed here. According to this story, Jimi Hendrix
toured with the Monkees as one of their backing musicians. Because the
Monkees could not play their own instruments and wanted to disguise
that fact, they placed Hendrix behind a curtain, hiding him from the
audience and making it seem as if the band were responsible for his guitar

30 On “Third Stone from the Sun,” a trippy piece on the Jimi Hendrix Experience’s first
album, Are You Experienced? (1967), Hendrix is heard to say, “You’ll never hear surf
music again.”

31 The 1966 live version of “Good Vibrations” is available on the CD box set Good
Vibrations: Thirty Years of the Beach Boys (Capitol Records, 1993), which also includes
some of the session tapes from the studio recording of the song, making it possible to
hear just how it was constructed. The 1969 recording is on Live in London (Capitol
sound. At one fateful concert, the curtain fell away, revealing Hendrix and unmasking the Monkees as frauds. Though the story is false (Hendrix did tour the United States with the Monkees briefly in 1967, but only as their opening act), it is very revealing of rock ideology and the premium it places on the ability to perform one’s music live. From the perspective of rock ideology, the juxtaposition of Hendrix and the Monkees, artists placed at opposite ends of the spectrum of authenticity, is delicious, as is the way the revelation of the fraudulent results in the glorification of the authentic.

The idea that live performance establishes the authenticity of the rock recording suggests a particular relationship between live and recorded music in that cultural context. In jazz and classical music, recorded and live performances are considered separate art forms. No concert-goer, for example, would expect the flutes in Khatchaturian’s second symphony to be louder than the brass, as they are on Stokowski’s recording (Eisenberg 1987:153), and jazz fans expect the music they hear live to feature spontaneous inventions and improvisations different from those on recordings. (Improvisation plays an important role in certain kinds of rock music (progressive rock, for instance) but it is not an essential characteristic of rock as it is of jazz. Nonimprovisational jazz is arguably

32 There is no reference to this event in the discussions of Hendrix’s tour with the Monkees in either Jerry Hopkins’s or Harry Shapiro and Caesar Glebbeek’s respective Hendrix biographies, for example (see Hopkins 1983:122–4 and Shapiro and Glebbeek 1990:196–201). Monkee Michael Nesmith confirmed in a personal communication that Hendrix had served only as an opening act. Both Hopkins and Shapiro and Glebbeek emphasize that Hendrix did not go down well with the Monkees’ audience and opted out of the tour after less than two weeks. His management chose to circulate a false story that he had been kicked off the tour because his performance style was too raw and sexual for the teenie boppers in the Monkees’ audience. This fabrication, too, enhanced Hendrix’s authenticity effect by playing on ideological distinctions between rock and pop and stereotypes of Black masculinity.

33 Hopkins (1983:123) points out the irony of the ideological view that posits Hendrix as more authentic than the Monkees by underlining the fact that the Jimi Hendrix Experience was a manufactured British group constructed around an American guitarist by Hendrix’s English manager, Chas Chandler. Meltzer (1987 [1970]:277) makes the same point, somewhat obscurely: “Jimi Hendrix, who left the US and r&b for England and ‘acid’ and would have become the Monkees but instead became the Monkees.” The fact that Hendrix took the United States by storm only upon returning from England contributed to his mythology and made him seem that much more authentic. When he left the United States, Hendrix was a talented journeyman rhythm and blues musician. Chandler transformed him into an exotic and iconic incarnation of Carnaby Street psychedelia.
an oxymoron; nonimprovisational rock is not (Gracyk 1996:170).) The relationship between the live and the recorded in rock music is different, however, precisely because live performances and recordings are not treated as fully separable artworks in rock culture. Gracyk argues that live performance and recordings are “two different media,” and goes on to claim that “recording facilitates a certain indifference as to whether the music can be re-created in live performance” (ibid.:80, 84). His differentiation of live and recorded performances is valid in terms of his ontological argument but not when considered in the context of rock culture. I have been arguing that rock fans and critics are not at all indifferent to whether the music can be recreated in live performance; that the ability to do precisely that is a hallmark ideological distinction between authentic rock and contrived pop.34 Listeners steeped in rock ideology are tolerant of studio manipulation only to the extent that they know or believe that the resulting sound can be reproduced on stage by the same performers.35 When that belief is substantiated, the music is authenticated. When it is shown (or even strongly suspected) to be false, the music is condemned to inauthenticity. While live and recorded performance are indeed different media, they are linked symbiotically in

34 In the elided section of the last passage I quoted from Gracyk (1996), he quotes Rolling Stone Keith Richards to support his contention that “recording facilitates a certain indifference as to whether the music can be re-created in live performance.” Therefore, it is not clear whether Gracyk intends this statement to apply to rock musicians, listeners, or both. I contend that irrespective of whether it applies to rock musicians, it does not apply to fans of their music.

35 The question of who performs the studio manipulation can be important, as well. Gracyk (1996:77; see also 82) quotes both Eddie Kramer, who engineered many recordings by Jimi Hendrix, and Jerry Garcia, of the Grateful Dead, to the effect that the mixing of a recording constitutes “a performance at a console.” In terms of rock ideology, it is preferable that this technological performance be carried out by the musical artist. If it is performed only by a producer or engineer, the taint of inauthenticity creeps in. Hence, the controversy surrounding the posthumous release of studio recordings by Hendrix, many of which featured overdubs recorded after his death. The problem with these recordings was not that they were manipulated in the studio, as were all of the albums Hendrix made when alive, but that these manipulations occurred after the death of the artist. The resulting recordings were suspected, therefore, of being inauthentic Hendrix. (Gracyk (ibid.:86) sees them as wholly unproblematic in this regard.) The producers of the live album Band of Gypsys 2 (Capitol Records), which came out in 1986 after a large amount of Hendrix’s remaining studio material had been issued on albums, sought to capitalize on the questions raised about those albums by emphasizing in the cover copy that the record contains “no studio tricks, just Jimi live.” 

94
rock culture. Rather than existing as an autonomous artwork, the rock recording calls up the desire for a live performance that will serve to authenticate the sounds on the recording.\textsuperscript{36} In live performance, the rock audience is exposed to the music in a context that endorses it as authentic in the terms of rock ideology.\textsuperscript{37} The concert answers the question raised implicitly by the recording.

As a cultural form based in mass production, rock music both illustrates and complicates Walter Benjamin’s account of authenticity and the disappearance of aura in the age of mechanical reproduction. His postulate that “the whole sphere of authenticity is outside technical . . . reproducibility” (Benjamin 1986 [1936]:30; see also p. 47) is certainly borne out in rock culture, for the mass-produced rock recording in and of itself cannot be authentic: its authenticity must be ratified by live performance. This process is at once a challenge to and a symptom of what Benjamin (ibid.:31) describes as the “decay of the aura,” which he defines as an aspect of the “contemporary perception” conditioned by mechanical reproducibility, as discussed in Chapter 2. It is a challenge in the sense that rock ideology, itself a product of the age of mechanical reproduction, is a form of contemporary perception that allows its adherents to experience mass-produced objects as auratic through the process of authentication. Rock ideology also attempts to arrest the process described by Benjamin (ibid.:29–30) in which the mass-produced object loses its historical specificity: authentication requires that the

\textsuperscript{36} There is no one way in which authentication by live performance occurs, however. In some cases, such as that of the Beach Boys, it is necessary for the group to replicate its recordings in concert to demonstrate authenticity. In other instances (the Grateful Dead comes to mind), authenticity resides in the fact that live versions of songs are different from the recorded versions. These differences in the triangulation of live performance, recordings, and the establishment of authenticity depend in part on which rock subgenre is involved and which ideological issues are engaged. Because the Beach Boys were suspected of being a pop group, it was crucial that they demonstrate their ability to perform their music live. Somewhat like a jazz audience, the audience for the Grateful Dead expected the group to demonstrate its authenticity by showing they could recreate their recorded sound, then go beyond it improvisationally.

\textsuperscript{37} Rock ideology has always been exploited for marketing purposes: see Frith (1988b) and Gross (1986:105). Without endorsing the manipulative tactics of marketers, I will say that I find Gracyk’s emphasis on the fact that rock music has always been produced in a commercial context salutary as a warning against slipping into a simplistic, romanticized opposition of “commodified” and “non-commodified” music. It is fair to say that rock, by definition, is always already commodified.
recording be positioned within historical discourses (e.g., the story of the musicians who produced it, its relation to the history of rock, etc.). Certification as authentic is also historically contingent: a recording can lose its certification as those histories are revised (e.g., as groups thought to be authentic are discovered not to be and vice versa), and the authentic music of the past becomes the inauthentic music of the present. Arguably, the desire to reestablish the aura expressed in both these aspects of rock authentication is itself symptomatic of the aura’s decay (see Crimp 1993 [1980]:174).

By positing mass-produced recordings as being authentic, rock ideology paradoxically recreates the conditions that governed the perception of works of art prior to mechanical reproduction within the terms of a cultural formation based on mass production. In doing so, it complicates Benjamin’s concepts of the authentic and auratic. For Benjamin (1986 [1936]:29), “the presence of the original is the prerequisite to the concept of authenticity.” He derives this argument from the fact that a work of plastic art must be physically present to have its authenticity tested. At first glance, this schema seems to map fairly well on to rock’s ideology of authenticity, in which a mass-produced recording must be authenticated through the presence of a unique object, a live performance. To leave the question at that would be to forget, however, that in rock, the live performance is a recreation of the recording, which is, in fact, the original performance. Rock ideology is in perfect accord with Benjamin in stipulating that because the original artifact is mass-produced, its presence does not imply its authenticity. But it does not follow for rock ideology, as it does for Benjamin, that this recognition entails relinquishing the idea of authenticity.

But where does rock ideology locate the aura? Live performance of rock is not in itself any more authentic than recordings. It makes little sense, in fact, to speak of live performance of rock apart from recording, since rock is music made to be recorded: it is constructed along principles derived from recording practices, inspired by earlier music heard primarily on recordings, etc. Even if a group is unlucky enough not to have recorded, epistemologically their music is still recorded music. In Benjaminian terms, rock music is “designed for reproducibility” (ibid.:33) and is therefore already always already inauthentic, even when played live. Rock authentication is not a process by which an aura located in the live performance spreads to the recording, nor is it a case in which the aura is displaced on to a reproducible object in the absence of a unique object, as Douglas Crimp (1993 [1980]:177) suggests of post-modern photographic practices. In the case of rock ideology, the aura must be seen as existing between the recording and the live performance.
It is located in a dialectical tension between these two cultural objects rather than perceived as a property inherent in a single object, and it is from this relation of mutuality that both objects derive their authenticity.

I want my MTV

Up to this point, I have defined rock culture and ideology, primarily through examples from the 1960s and 1970s, and treated them as discourses that remain current after forty years. There is reason to question whether this is actually the case, for changes in rock culture beginning in the 1980s suggested that the values championed by rock ideology might have lost their hold. Although I shall survey those developments here, I shall reserve my assessment of the state of the ideology until the end of the chapter. At the very least, the Milli Vanilli episode indicated that rock’s ideology of authenticity would enter the 1990s in a state of crisis. Milli Vanilli’s young audience was not upset at their lip-synching. This is perfectly understandable in terms of the ideological distinction between rock and pop. Milli Vanilli was not a rock group; it was a pop dance group whose audience would not be expected to be concerned about authenticity. Rather, it was the fans’ parents and parental surrogates (such as the representatives who called for legislation and the attorneys who filed consumer fraud suits) who were disturbed. Jon Pareles, a New York Times popular music journalist, inveighing against the use of lip-synching, computer-programmed musical instruments, and other forms of automation in concert and upholding the value of traditional live performance, referred to the entrance of these techniques into live performance as a paradigm shift. “I’m not ready for the new paradigm,” he wrote. “The spontaneity, uncertainty and ensemble coordination that automation eliminates are exactly what I go to concerts to see” (Jon Pareles, “The midi menace: machine perfection is far from perfect,” New York Times, May 13,

38 I want to emphasize that I am talking here about how rock fans would locate the aura were they to speak in those terms. I am not suggesting that Benjamin himself locates the aura in objects. For Benjamin, aura is a function of perception, not a property inherent in objects. As I suggested at the end of Chapter 2, the withering of the aura in the age of mechanical reproduction is a withering of the ability to perceive objects as auratic due to changes in the social conditions that shape perception, not an objective change in the objects themselves. (Of course, I also argued there that live performances themselves have changed in response to cultural and economic changes.)
Like Pareles, most commentators were adamantly opposed to the incursion of automation into live music performance. The intriguing aspect of the Milli Vanilli scandal is that those commentators did not simply dismiss it as the logical outcome of the pop audience’s indifference to authenticity. It was seen, rather, as signifying a crisis in the ideology of authenticity with implications well beyond the specific case:

the Milli Vanilli lip-synching scandal of 1990 must be seen as the culmination of nearly a decade of concern over the status and legitimacy of live performance in an era of sequencers, samplers, and backing tapes. For critics the problem was not simply that musicians were trying to sound like their recordings when performing on stage (a longtime preoccupation among pop musicians) but that concerts had indeed become recordings.

(Théberge 1997:231)

It is clear, then, why Milli Vanilli was scandalous from the point of view of the rock ideology endorsed by these older commentators, even if not to the group’s young listeners. It suggested the arrival of a new era of music performance in which the visual evidence of performance would have no relation to the production of the sound.39 The dialectic of recordings and live performances central to rock ideology was threatened. Were it to break down, live performance would be deprived of its traditional authenticating function. Live concerts would become what recordings had always been: simulations — recreations of performances that never took place, representations without referents in the real.

This possible change in music culture seemed plausible because alterations in the structure of the music industry, and its relation to other entertainment industries, in the 1980s could be seen as anticipating such

---

39 This issue has emerged in a new genre of music: electronic music performed on computers or other digital instruments, in which it can be very difficult for audiences to perceive the relationship between the performer’s often minimal gestures and the sounds produced. Whereas W. Andrew Schloss (2003) argues that performers of electronic music should find ways of making the causal relations between gesture and sound evident to audiences, Caleb Stuart (2003), by contrast, argues that audiences for laptop music should be educated to surrender their desire for spectacle and accept that its performativity exists only on the aural plane.
a change. Frith (1988b:113–14) argues that the traditional rock career path—in which musicians worked their way up a career ladder from live performances at the local and regional levels, to ever more prominent recordings, perhaps to eventual stardom—has given way to an “irrational” system in which music is packaged by entertainment conglomerates and sold to a public that has evinced no previous demand for that music. Grossberg (1988:318) notes the same shift in industry patterns: “The new star does not need a history. The old model of a star building an ever-expanding audience while ‘paying their dues’ is being replaced by the immediate insertion of a figure into a position of stardom already waiting for them.” A history of live performance no longer seemed meaningful as a source of rock authentication; while some artists came up the traditional way, many did not, and the distinction seemed not to matter to the audience.40

The crisis in the ideology of rock authenticity41 was also reflected in the changing relationship of rock to television.42 Rock music and television are traditionally opposed within rock ideology: “For many fans, television has often been seen as part of the dominant culture against which the rock culture is defined” (Grossberg 1993:189).43 Indeed, the aforementioned antagonism of the rock culture toward the Monkees derived precisely from the fact that the band were not only a manufactured group

Robert Burnett (1996) points out that the concentration of the music industry in the hands of a few multinational corporations has meant that the new way of building a performer’s career is practiced on an increasingly international scale. Artists from anywhere can be promoted anywhere else.

Gracyk (1996:222) disagrees that there is a crisis. He states that “the ideology of authenticity is not on the wane in the rock community,” arguing that although some artists may represent the trends I describe above, many do not. He justifies his position, however, by reference to what I have already described as his overbroad definition of rock music: “As long as rock is catholic enough to embrace both Whitney Houston and Courtney Love, we should not assume that either is a truer indication of the current state of rock.” That Gracyk does not recognize a crisis of authenticity is directly related to his lack of interest in the distinction between rock and pop that I, along with Grossberg and Frith, take to be one of the defining elements of rock culture.

For an overview of rock music’s relationship to television prior to MTV, see Banks (1996:23–9). Curtis (1987:43–4, 219) also makes some useful observations.

For Grossberg (1993), the defining change in rock culture has been a shift in the balance of the relative importance of visual and aural media. Whereas traditional rock culture, in his view, privileged aural media as sites of authenticity and suspected the visual of inauthenticity, the new rock culture privileges the visual and no longer values authenticity. I concur with Grossberg that there has been a reconfiguration of the relationships between cultural texts in rock. But since I do not agree that the visual aspects of rock culture are less authentic than the aural, I do not see the same realignment he does.
but were manufactured for television. This antagonism toward television was fueled by an association of the medium with the establishment rather than the counter-culture and with pop rather than rock. It even extended to MTV, which “became the target of hostility from the established rock audience . . . It seemed to mean the replacement of rock values (sincerity, musical dexterity, live communion) with old pop conceits (visual style, gimmickry, hype)” (Frith 1988a:210).

Although the mutual distrust of television and rock culture was clearly manifest in the counter-cultural 1960s, it has a longer history. Until the advent of MTV in 1981, rock had no home on American television (see Goldman 1992:51), partly because of sociological factors that differentiate television’s relationship with its audience from rock’s.

TV entertainment works on what audiences have in common across class/gender/race/generational divides, it rests on an ideology of the family as ideal and real TV viewer. Rock, by contrast, is about difference and what distinguishes us from people with other tastes. It rests on an ideology of the peer group as both the ideal and reality of rock community.

(Frith 1988a:213, original emphasis)

Even the popular and long-lived American Bandstand was a somewhat marginal affair, for “television could accommodate innovative music only when it was not in prime time, and when television itself was a secondary medium: American Bandstand” (Curtis 1987:44). The mid-1960s saw a flurry of rock programming in the wake of Beatlemania (Shindig, Hullabaloo, etc.) but, again, these were nonprime-time shows and the trend came to a halt in 1967. “The limitations of network television, demographic as well as technical, doomed all attempts to make music shows viable” (ibid.:219). In any case, the widespread practice of lip-synching on all of these programs (and on many prime-time variety shows that sometimes featured rock groups) marked them indelibly as inauthentic in terms of rock ideology.

---

44 It is noteworthy that one of the Monkees, Michael Nesmith, became the first producer of music videos for MTV and has been described as “the father of the [American] music video” (Nance 1993:15).

45 Indeed, Negus (2006) shows convincingly that from the beginnings of television broadcasting in the 1930s, broadcasters have worried that musical performance does not make “good television” and music critics have been concerned over the association of specific visual images with musical works.

46 In the 1970s, Saturday Night Live, which regularly featured performances by rock artists, was a partial exception. Musical artists did not lip-synch on the show, which
Curtis (ibid.:252) proposes that the turn toward theatricalism in rock music performance of the 1970s indicated that rock was competing with television by offering in live settings experiences that could not be obtained from recordings or television (his examples are Elton John, Alice Cooper, and David Bowie). Goldman sees the same development as a transition from authentic to inauthentic rock performance. Whereas in 1968 he saw in performances by the Doors and others “a nascent theater that is already squalling with vigor” (Goldman 1992:57), in 1974 he saw performances by John, Cooper, and Bowie as a “new rock show business” reflecting values of commercialism and professionalism (the same “pop” values that prompted the early anxiety over MTV) spurned by the rock performers of the 1960s (ibid.:86). Ironically, it is probable that, rather than establishing live music performance as an alternative to television, these spectacular concerts paved the way for music video by associating specific, highly cinematic images with particular songs. Curtis’s and Goldman’s respective descriptions of the theatricality of performances in the 1970s by John, Cooper, and Bowie sound, from the vantage point of today, like descriptions of music videos. Paradoxically, then, the performances Curtis sees as designed to provide a quintessential experience of liveness actually constituted a decisive step toward the incorporation of rock into television, the crisis of the ideology of authenticity in rock, and the breakdown of the dialectical relationship between the live and the mediatized manifest in the Milli Vanilli effect.

It is significant in this context that the performers in question were more concerned to create spectacular stage personae than images of authenticity. This is particularly true for Bowie, whose systematic and self-conscious metamorphoses of persona (including his sexuality) and musical style represent a significant departure from the ideology of authenticity (see Curtis 1987:259). I have already suggested that rock also had a certain counter-cultural appeal because it was not in prime time and had been banned in some American cities. That appeal was further enhanced by the association of some writers and cast members with counter-cultural humor outlets like National Lampoon. For a brief discussion of some of the connections between rock and comedy, see Auslander (1992b:132–4). For a discussion of a lip-synch scandal that eventually erupted on Saturday Night Live, see below.

Vincent Furnier (Alice Cooper) has gone on record as saying that he intentionally sought to keep his performing and private identities completely separate: “Alice had a life of his own that existed only on stage . . . But then my other life was my own, and it had a lot more aspects to it than Alice’s did” (quoted in Hall 1997:15). No rocker who wished to be thought of as authentic would refer to his performance persona as a separate entity existing only in a theatrical context. Rock ideology

47
musicians need to transform themselves periodically in order to keep up
with the multiple and ever-changing definitions of rock authenticity: the
photographs of the long-haired and bearded Beatles that accompanied
the White Album were crucial in this regard. Bowie’s distinctiveness lies
not only in the frequency and extremity of his transformations but more
importantly in his assertion of the conventionality and artificiality of all
of his performance personae. His summary statement of this point is the
album Pin Ups (1973), on which he performs songs by groups he admired
during the mid-1960s. The photographs accompanying the record
feature Bowie in a number of personae, including the spaced-out Ziggy
Stardust and a much cooler musician wearing a suit and holding a
saxophone. The cover shows Bowie (and Twiggy, herself an icon of
swinging, mid-sixties London) in highly stylized makeup, which suggests
that their faces are masks. On the recording itself, Bowie sings songs in
a number of styles in different voices, including different accents,
another variant of masking which suggests that, contra rock’s romantic
ideology of self-expression, the singer’s “self” is determined by the song,
not vice versa. Bowie’s strategy of mutating identities anticipated the
devaluation of rock authenticity seen by some commentators as a
hallmark of popular music culture in the 1980s, the age of the music
video. The valorization of authenticity appeared to have given way to “a
logic of authentic inauthenticity” in which “the only possible claim to
authenticity is derived from the knowledge and admission of your
inauthenticity” (Grossberg 1993:205–6), knowledge that Bowie had
foregrounded ten years before MTV.48 (The statement by Neil Tennant
quoted earlier marks the Pet Shop Boys as a more recent example of
authentic inauthenticity.) Bowie’s deconstruction of rock authenticity
also anticipates Frith’s (1988b:91) video-era identification of “the rock
version of the postmodern condition: a media complex in which music
has meaning only as long as it keeps circulating, ‘authentic’ sounds are
demands parity between the performer’s stage and private personae, even if that
parity is wholly illusory.

48 Grossberg (1992:234–5) notes that “rock has always, at least implicitly, played with
the idea of authentic inauthenticity” but argues that it became dominant in rock only
in the late 1970s: “The logic of authentic inauthenticity is foregrounded most visibly
in the contradiction and conjunction of punk and disco.” I am suggesting here that
Bowie anticipated this development by several years. He is a pioneer of what
Grossberg (ibid.:227–9) calls “ironic inauthenticity,” which posits that any given
identity is a construction to be occupied only temporarily. Meltzer (1987 [1970]:185)
deserves credit for having raised the issue of “the authenticity of inauthenticity” in
the context of rock well before Grossberg.
recognized by their place in a system of signs, and rock history only matters as a resource for recurrent pastiche.”

Although it is tempting to describe music video as having caused the devaluation of the live event as a marker of authenticity in rock music, that temptation should be resisted. As Goodwin (1993:35–6) has shown, music video and lip-synched concerts were not causally linked; rather, both were symptoms of changes in the culture and production of rock music after punk that were driven by the developments in the music industry already discussed, changes in musical style (British new pop, the resurgence of dance music), and changes in musical technology (see Beadle 1993 and Théberge 1997). Increased access to recording technology contributed to the devaluation of live performance as an essential part of the rock career path:

Suddenly . . . ”paying your dues” in the music business took on a new meaning . . . instead of struggling with a band year after year, performing in bars and night clubs, the purchase of suitable recording equipment seemed a more viable route to a successful career in pop music. “Paying your dues” now meant making payments on your gear.

(Théberge 1997:221)

The year 1981—the debut of the MTV cable network—also saw the refinement of the digital sampler and other high-tech, computerized musical instruments. Greater access to automated musical instruments accompanied by a decrease in the number of venues for—and the profitability of—live music (ibid.:221, 265, n. 4) resulted in “the displacement of the musician” in both the studio and the live concert (Goodwin 1993:32). “[T]his argument suggests that the later development of acts such as Milli Vanilli was not a ‘result’ of MTV and music television. Rather, both Milli Vanilli and MTV were effects of the uses to which the new pop technologies were put” (ibid.:33).

Goodwin (ibid.:18) takes issue with those who claim that live music performance came to replicate the images and effects of music video (my argument in Chapter 2) by pointing out that those effects derive originally from the conventions of rock music performance rather than from television:

The argument is constructed around a chronological sleight of hand. The problem . . . is that [the argument] conflate[s] those artists who present live music based on representations from music videos (Madonna, for instance) with a more common
phenomenon: artists whose live performances look like their videos because the video clips are closely based on their stage acts. My point is that visual spectacles (dancing, gesture, the display of virtuosity, lighting, smoke bombs, dry ice, back projection, etc.) have always worked in tandem with the music itself. Performance videos on music television mirror many of these codes and conventions (established in more than thirty years of rock and pop concerts).

While Goodwin’s historical point is provocative, it implies that the conventions of rock performance have not changed significantly over its fifty-year development. If, as I have suggested, the theatricalization of live performance of rock music in the 1970s (see Auslander 2006c) was an important innovation that proved to be a condition of possibility for music video, then live performance now imitates music video imitating live performance, and is thus another example of live performance’s recapitulation of mediatized representations based originally on live performances, as discussed in the previous chapter.

Goodwin notes that music videos frequently expose the apparatus of music-making. The particular iconography he cites is “the all-pervasive mise-en-scène of the rehearsal room/warehouse space in music video clips,” arguing that representation of the sites on which the music is made serves as “a guarantor of authenticity” (Goodwin 1993:77, original emphasis). Jody Berland (1993:37) suggests, “with the emergence of rock video, the ‘authenticity’ of the performer is assured (if not that of the performance whose sound is still frequently dubbed).” Taken together, these two observations suggest that music video works to authenticate sound recordings in much the same way—and that authentication is necessary for much the same reason—as when live performance was the main guarantor of authenticity. Now, as then, the fan needs to witness the production of the music on the appropriate site by the appropriate people in order to be assured of its authenticity. The difference, of course, is that both site and people are now simulated in televsional space rather than witnessed live, yet they count for the audience in the way only live performance counted previously.49 In terms of rock ideology, and its previous rejection of television as necessarily inauthentic, this change represents a major cultural shift.

49 See E. Ann Kaplan (1987:53, original emphasis): “Earlier [i.e., pre-music video] promoters at least manipulated live bodies, who could resist in certain ways; but now the ‘materials’ that are manipulated, positioned, circulated in a certain fashion are simulations which begin to replace the ‘real.’”
Under the traditional schema, live performance authenticated the record, and (usually lip-synched) performance on television was deemed intrinsically inauthentic and, therefore, simply irrelevant to that process. Now, the music video has usurped live performance’s authenticating function. The function of live performance under this new arrangement is to authenticate the video by showing that the same images and events that occur in the video can be reproduced onstage, thus making the video the standard for what is “real” in this performative realm. Although it is true that only some music videos show performance or other processes of music-making, while others can be abstract, fantastic, or take the form of narrative mini-movies that place the musicians in situations not to be replicated on stage, all music video participates in one way or another in constructing the musicians’ performance personae (see Auslander 2006b). It is these personae, first visualized in music video, that audiences expect to see replicated on the concert stage even if the particular video did not represent the production or performance of the music. “For an increasing number of rock fans the meaning of ‘live’ performance, the look of music ‘in reality’ . . . comes from its ubiquitous simulation. This is an example of what we might call the Baudrillard effect: a concert feels real only to the extent that it matches its TV reproduction” (Frith 1988b:124–5). While the video authenticates the sound recording by replicating the live production of the sound, live performance authenticates the video by replicating its images and personae in real space. Live performance retains a certain value in this reconfigured schema, but its value is subordinate to that of the televisual image. MTV was more than the Shindig of the 1980s and 1990s: rather than constituting a way of presenting music on television, music video was symptomatic of music’s having been made into television, even in live performance.

As I noted in the previous chapter, the early years of the twenty-first century have seen a realignment of the music industry’s offerings perhaps even more significant than the one brought about by the introduction of music video in 1981. Recordings, formerly the primary musical commodity that all others existed to promote, have become much less profitable while live performances have become more so, reversing the trend away from live performance that Théberge (1997) observed. Music video became less vital in the mid-1990s as cable networks formerly devoted to such programming (e.g., MTV and VH1) started to branch out into other areas. But more recently, there has been an enormous resurgence of music video, energized by a greatly increased number of media outlets. No longer confined to television, music videos are ubiquitous on the Internet, available to be downloaded to iPods and cell
phones, for sale alongside audio recordings on digital music services such as iTunes, and so on. No longer designed chiefly to promote recordings, videos have become primary musical texts in their own right (Knopper 2005).

Although this is an important change, I do not think it has profound implications for the basic analysis of the relationship between live performance and music video I have outlined here: the current ubiquity of music videos only reinforces the relationship to live performance I have described. Since the audience’s primary access not only to the music but to the performers is increasingly through videos, they become the primary texts in need of authentication by live performance. What seems to be occurring now is a relative diminution in the importance of the audio recording. Whereas the recording was once the primary text that needed authentication either by live performance or by video imagery, the direct relationship between music video and live performance has replaced the former triangulation as the most significant relationship. The enhanced profitability of live performance has not altered its place in this schema: its central function remains that of serving as a means of authenticating the primary musical text. The historical progression I have described here breaks down into three phases. In the first, live performance authenticates audio recordings. In the second, with the advent of music video, the video authenticates the recording and the live performance authenticates the video. Now that video seems to be replacing the audio recording as the primary cultural object, we return to a binary relationship in which live performance authenticates the video and the audio recording becomes a secondary musical object.

The relationships among these cultural forms have been wittily complicated and subverted in the performance practices of the British group Gorillaz, founded in 1999 by Damon Albarn of the rock group Blur and Jamie Hewlett, an illustrator and one of the co-authors of the Tank Girl comic books. The musical contributors behind the group are a large and shifting roster of artists associated with a variety of genres. Originally, the sources of the sound were to remain anonymous. Partly for that reason, the musicians generally appeared in live performances only as silhouettes against colored backdrops accompanied by projection screens featuring Hewlett’s images and other material. The result was that the live performances themselves looked very much like music videos, and video clips of the live performances are indistinguishable from music videos.

In a subsequent phase of the group’s virtual existence, cartoon characters Hewlett designed to represent its fictional members appeared
“live” on stage by means of a projection system that made digital animations appear to be three-dimensional presences able to walk across the stage, take up a position at a microphone or on a stool, and so on. The first such performance took place at the MTV Europe Music Awards in Lisbon in 2005. These figures, whose exaggeratedly emaciated bodies and bowl haircuts evoke the stereotypical characteristics of the emo performer, sometimes appeared as giants, other times in more normal scale, and often shared the stage with human beings, including the members of the hip-hop group De La Soul and, at the 2006 Grammy Awards ceremony, Madonna. On some occasions, the members of Gorillaz, themselves digital video projections, were also featured in close-up on large overhead screens.

With Gorillaz, the binary relationship of live performance and music video collapses as the two become identical: because the live performances are always already videos, their authenticating function is undermined by being pushed to an extreme (it is guaranteed, after all, that the live performance will be identical to the videos). At the same time, the audience is teased with the implication that there are “real” musicians hidden behind the cartoon figures. But this is only sometimes true: depending on the availability of particular individuals, sometimes Gorillaz’s musical sound is produced live, and sometimes it is recorded. The production of a group made up of very distinctive individuals, each of whom has a history and a set of specific relationships to the other group members (one early member, the girlfriend of another, was “thrown out” of the group, for instance), who are the visible manifestation of an elaborate and largely hidden production process clearly satirizes the whole notion of authenticity as it is understood in rock culture.

Panic Clapton

I return now to the question of whether the Milli Vanilli scandal and the apparent indifference of their fans to the value of authenticity sounded the death knell for rock ideology. The Grammy awarded to Milli Vanilli can be read as a strategic institutional acknowledgment of the centrality of simulation to the music industry. Rumors that Milli Vanilli did not sing live and had not sung on their album were in circulation as long as a year before the Grammy vote. One member of NARAS voted for Milli Vanilli even though he had specific knowledge that they had not sung on the record (Bruce Britt, “Milli Vanilli’s pact with the Devil,” Los Angeles Daily News, November 21, 1990, NewsBank Review of the Arts, Performing Arts, 1990, fiche 173, grids G4–5). He knew this because he was their vocal coach (though exactly what he coached is not clear).
There was nothing particularly novel about what Milli Vanilli had done—the possibility of passing off one voice as another was implicit from the moment music was first recorded. Substitutions of this kind have been quite typical in recordings of popular music for several decades, and there are many well-known cases of groups having been formed by producers specifically to exploit recordings made using other voices. The practice of lip-synching itself was nothing new, either, especially when music groups appeared on television, including the Grammy awards show. What was significantly different about Milli Vanilli was that they were discovered to be transporting these techniques from the studio and the television screen to the concert stage.

As I noted earlier in this chapter, it is easy to understand why Milli Vanilli would have been scandalous from the perspective of rock’s ideology of authenticity, since their actions deprived live performance of its authenticating function. Rock ideology, however, is not the institutional ideology of NARAS. The premise of the Grammy awards, that it is not the music itself that should be acknowledged but the recording of the music, accords with the realities of how rock music is primarily consumed, but also privileges the recording in a way that does not altogether accord with the relationship between live and recorded performances in rock culture. As I have argued, rock authenticity traditionally resides in a dialectical relationship between recording and live performance. The recording cannot be severed from this relationship without losing its authenticity as rock. This is not the case for pop music and, not surprisingly, the popular music Grammys have consistently been awarded to pop, rather than rock, recordings.

Historically, NARAS has been overtly hostile to rock music and rock culture. It was founded in 1957 precisely as a counter-response to the emergence of rock and roll, which its founders “regarded . . . as a kind of antimusic—lyrically inane, shoddily produced, a mockery of any reasonable set of musical standards” and as antithetical to postwar conformist culture (Schipper 1992:1). Quincy Jones, whom Grammy historian Henry Schipper describes as “a low-profile, background industry figure . . . excellent in his own limited arena but mediocre when held up against the musical giants of the last thirty-three years”

---

50 One particularly convoluted case is that of the early 1960s “girl group” the Crystals, whose producer, Phil Spector, had another group, the Blossoms, record as the Crystals while the Crystals themselves were out on tour. Before and after this episode, the Crystals also sang on their own records, with the result that recordings by “the Crystals” are actually by two completely different groups (Gaar 1992:44–6). See also note 8, above.
(ibid.:92–3), has won more Grammys than anyone else; second place belongs to pop film composer Henry Mancini. By contrast, none of the pioneers of rock and roll (Chuck Berry, Little Richard, etc.), nor most of the important figures of rock (the Rolling Stones, the Doors, etc.) have received Grammys, except posthumously or in the Lifetime Achievement category, an award generally granted well after the artist has ceased making vital contributions to music. From this perspective, the awarding of the Grammy to Milli Vanilli, a pop group par excellence that existed musically only on its recordings, was hardly aberrant. Rather, it seems to have been the logical expression of NARAS’s values. Milli Vanilli was scandalous only from the perspective of rock ideology, and NARAS is no champion of that ideology. How, then, do we explain l’affaire Milli Vanilli?

I propose that we begin by recognizing, as Baudrillard (1983:26–7) says of Watergate, that the Milli Vanilli “scandal” was not a real scandal at all but rather a scandal effect used by agencies of power and capital to “regenerate a reality principle in distress.” Power requires for its working a matrix of significant oppositions and “capital, which is immoral and unscrupulous, can only function behind a moral superstructure” (ibid.:27). Simulation threatens the structures on which power and capital depend by implying that moral, political, and other distinctions are no longer meaningful: the Right is the Left; the Mediatized is the Live. “When it is threatened today by simulation (the threat of vanishing in the play of signs), power risks the real, risks crisis” (ibid.:44).

Baudrillard (ibid.:12–13) also points out that:

When the real is no longer what it used to be, nostalgia assumes its full meaning. There is a proliferation of myths of origin and signs of reality; of second-hand truth, objectivity and authenticity. There is an escalation of the true, of the lived experience . . . And there is a panic-stricken reproduction of the real and the referential.

51 “The list of sixties artists who never won a Grammy seems all-encompassing: the Doors, Janis Joplin, Jimi Hendrix, Jefferson Airplane, the Grateful Dead, Cream, the Who, Creedence Clearwater, Santana, Van Morrison, the Byrds, The Rolling Stones, Rod Stewart, Led Zeppelin, and many more” (Schipper 1992:43). Schipper (ibid.:93–4) also points to the Grammys’ practice—perhaps the strategy—of giving Lifetime Achievement Grammys . . . to artists whose records and careers Grammy voters have largely or completely ignored. The Rolling Stones, Chuck Berry, Jimi Hendrix, James Brown, Paul McCartney, John Lennon, Motown Records founder Berry Gordy (whose legendary label won just one Grammy during the entire sixties) . . . and Bob Dylan.
I believe we witnessed these very phenomena in the wake of Milli Vanilli. I am thinking primarily of two developments: the renewed emphasis within rock music on acoustic performance, of which the television program MTV Unplugged was the apotheosis, and the multiple awards given to Eric Clapton at the 1993 Grammy ceremony. These two phenomena overlap significantly, since the recording for which Clapton won his awards was the live album derived from his acoustic performance on MTV Unplugged. The plaudits heaped on Clapton in the spring of 1993 signaled a complex confluence of institutional and cultural discourses (NARAS, rock ideology, television), some of which previously had been mutually antagonistic. The result of this confluence was the recuperation of rock's ideology of authenticity for a simulationist cultural economy.

Lest I be accused of a “chronological sleight of hand” because I juxtapose Milli Vanilli’s Grammy for Best New Artist of 1989 with Clapton’s wins in 1993, I shall comment briefly on the awards made at the two Grammy ceremonies that took place in between. One thing that is immediately apparent is that the awards for 1990 and 1991 were entirely conventional, given primarily to the kind of mainstream pop artists NARAS was founded to support. Phil Collins won Record of the Year for 1990, while the ubiquitous Quincy Jones won Album of the Year. At the awards for 1991, Natalie Cole swept the Grammys, including both of those categories, with her recording of “Unforgettable,” a simulated duet with her deceased father, Nat King Cole, who had been on the steering committee that originally set up NARAS (Schipper 1992:4). In both years, the recipients in the category won by Milli Vanilli in 1990, were, like Milli Vanilli themselves, pop artists whose careers conformed to the new pattern identified by Grossberg and Frith: both Mariah Carey and Marc Cohn appeared on the charts with no previous history and without having built an audience through live performance. In neither case, however, was there any doubt about the winning artist’s musicianship. The extravagance of Carey’s vocal ability, in fact, could almost be seen as a direct rejoinder to the Milli Vanilli debacle. Other awards anticipated the Grammys’ colonization of rock ideology at the 1993 ceremony: in 1990, Clapton himself won for Rock Vocal Performance, while the group award went to the almost equally

52 Like other rock artists, Clapton previously had been neglected by the Grammys. Active in blues and rock since 1965 and a member of such seminal groups as the Yardbirds, the Bluesbreakers, Cream, and Blind Faith, Clapton received his first Grammy only in 1990.
venerable Aerosmith. A year later, Bonnie Raitt, whose career reflects a commitment to roots rock and the blues that parallels Clapton’s own, won the same award he had in 1990. All three of these awards suggest a displacement of NARAS’s practice of recognizing important rock acts only very late in their careers from the Lifetime Achievement category to other categories. In both years, younger artists whose style reflects a commitment to rock history and ideology, such as Living Colour and REM, won Grammys as well. In the wake of the Milli Vanilli scandal, NARAS retrenched by awarding Grammys to the kind of pop artist it has always endorsed, and it also looked ahead by making room on its lists for artists committed to the ideology of rock.

Given NARAS’s historical disdain for rock music, it is noteworthy that the values it implicitly endorsed by giving awards to Clapton after Milli Vanilli correspond to the standards of authenticity in rock ideology. *MTV Unplugged*, from which Clapton’s Grammy-winning work derived, took acoustic performance and liveness as its twin imperatives and was a veritable cornucopia of signs of the real as that category is articulated in the context of the rock and folk-rock music of the 1960s, the historical discourse with which Clapton is associated. Since at least the early 1960s, acoustic playing has stood, within that discourse, for authenticity, sincerity, and rootsiness; hence the dismay that greeted Bob Dylan’s use of an electric guitar at the 1965 Newport Folk Festival.53

Many commentators on music television agree with E. Ann Kaplan (1987:29) that MTV’s continuous rotation of music videos “simply takes over the history of rock and roll, flattening out all the distinct types into one continuous present.” But Goodwin (1993:145) disagrees, drawing attention to the fact that MTV’s schedule is not made up of homogeneous units and that some materials within the flow, such as “Woodstock Minutes,” are presented from a specifically “historicizing perspective” (original emphasis). *MTV Unplugged* also might be seen as having stood out from the MTV flow because it was implicitly historicizing—as I have already indicated, the discourse of authenticity invoked on *MTV Unplugged* is at root a discourse based in the historical meaning of live performance and acoustic musicianship in rock culture.

53 This tale of Dylan’s “going electric” may be as false as the story of Hendrix and the Monkees. According to Al Kooper, Dylan’s organist at Newport, the crowd there consisted mostly of Dylan fans who booed because he played only three songs, not because they abhorred his use of electric instrumentation (Palmer 1995:105–6). The story nevertheless has achieved the status of myth in rock culture, and it is for that reason that I cite it here.
My own argument is that MTV Unplugged’s celebration of authenticity and historicity was only apparent and that the program was in itself symptomatic of the crisis state of the distinction between authenticity and inauthenticity in rock culture. The apparent restoration of the imploded polarity of authenticity and inauthenticity central to rock ideology on MTV Unplugged was, in fact, a simulation of restoration. That this artificial resuscitation of rock ideology occurred under the sign of the simulacrum is apparent from the way an appearance on MTV Unplugged became a rite of passage for all kinds of popular musicians, even those who work in musical genres for which the liveness and acoustic musicianship valorized in rock ideology are not traditional signs of authenticity. Most of the artists who appeared on MTV Unplugged are either historical figures whose association with rock ideology is obvious (e.g., Neil Young, Rod Stewart, Paul McCartney), artists of the next musical generation who have carried on the rock legacy (e.g., Bruce Springsteen, Elvis Costello), or still younger artists with an allegiance to rock ideology (e.g., Nirvana, REM, 10,000 Maniacs). Pop singers Mariah Carey and Tony Bennett54 have both appeared, however, as have rap and hip-hop artists whose musical idioms are directly linked with such simulationist technologies as digital sampling. Arrested Development, the hip-hop group chosen as the Best New Artist at the 1993 Grammy awards ceremony, lost no time in making an appearance on MTV Unplugged. By imposing the ideology of rock authenticity on performers from other musical genres in which authenticity is defined differently than in rock or is not ideologically important at all, MTV Unplugged negated the kinds of distinctions the polarity of authenticity and inauthenticity in rock ideology, and its attendant historicism, is meant to support even as it appeared to reaffirm that very polarity.55

54 The popularity of Tony Bennett with the MTV generation is an intriguing phenomenon in need of analysis. The enthusiasm for him is undeniably part of the same wave of retro-chic that has seen renewed interest in cocktail jazz, “bachelor pad” mood music, atomic age decor, cigars, steakhouses, and martinis. Bennett’s popularity is not due, however, to camp appeal: if that were the desired affect, crooners like Wayne Newton, Tom Jones (whose career also has seen a recent resurgence), and Englebert Humperdinck would have been more likely candidates. Aside from his genuine talent, I think that Bennett’s appeal lies in the possibility of seeing him on the model of an authentic rocker. According to this mythology, he could be seen as a saloon singer who has been faithful to his roots by never having sold out to become a megastar (i.e., he’s not Frank Sinatra or Elvis) and who has protected his music’s jazzy integrity by not succumbing to Las Vegas glitz (i.e., he’s not Wayne Newton or Elvis).

55 My argument here is of the same form as Kaplan’s, except that I see a version of the “flattening out” she describes within MTV Unplugged itself, not as a characteristic of MTV’s flow.
In addition to seeming to resurrect rock ideology, *MTV Unplugged* apparently recapitulated the traditional relationship between live performance and the live recording. Just as in the past, the live event precedes its recorded version: there is a series of albums derived from the television broadcasts.\(^{56}\) The irony is that the “live” event recorded on the album was itself produced as a recording—a television program shown repeatedly on MTV. *MTV Unplugged* thus simulated the polarities that define rock ideology, even as the program was itself symptomatic of the crisis in that same ideology. Bob Dylan’s appearance on *MTV Unplugged* in 1995 was, therefore, an ironic historical counterpoint to his having plugged in at Newport thirty years earlier. Dylan, who had precipitated a defining moment in the development of rock ideology, was also there to usher it into the age of simulation.\(^{57}\)

The fact that Clapton’s *Unplugged* album is given over largely to performances of venerable blues numbers is another bid for authenticity and also an evocation of myths of origin. “[T]he image of authenticity in rock culture derives from a particular, historical imagination of black culture, and of the relationship between the blues and its black performers and fans” (Grossberg 1993:208, n. 5). This myth is frequently invoked in music videos by the inclusion of “black musicians and audiences to ‘authenticate’ white rock music” (Goodwin 1993:116). Even rock music that is stylistically considerably removed from the blues retains its aura of authenticity if it seems to have developed organically from its creator’s earlier experience playing blues (see Whiteley 1992:36). Clapton has always portrayed himself in these terms, as in this excerpt from an interview with *Rolling Stone*:

56 An unfortunate side-effect of the *Unplugged* phenomenon has been the resurrection of racial segregation in music programming. It is well known that, in its early years, MTV was accused of racial bias because Black artists were poorly represented in its video rotation. One outcome of this debate was the development in 1988 of *Yo! MTV Raps*, a show devoted to Black music (see Nance 1993:46–51). Although this may have meant that MTV was more active in presenting current Black music, it also meant that few videos by Black artists were included in other parts of the rotation. This segregation has been replicated in the recordings deriving from *MTV Unplugged*. The anthology *The Unplugged Collection Volume One* contains only one song by a Black artist (Lenny Kravitz). Instead, Black artists appear on a separate album called *MTV Uptown Unplugged*.

57 Dylan has engaged directly with the new musical economy more than most artists of his generation in the ways he has allowed both his music and his persona to be distributed across a variety of media. Examples include his appearance in a commercial for Victoria’s Secret lingerie in 2004 (for which he was sharply criticized, of course), his serving as host for a satellite radio program (*Theme Time Radio Hour* on XM), and his permitting the use of his recordings in an episode of the television program *Cold Case* (CBS, February 18, 2007).
Because he was so readily available, I dug Big Bill Broonzy; then I heard a lot of cats I had never heard of before: Robert Johnson and Skip James and Blind Boy Fuller. I just finally got completely overwhelmed and listened to it and went right down in it and came back up in it. I was about seventeen or eighteen. When I came back up in it, turned on to B.B. King and it’s been that way ever since.

(quoted in Cook 1973:178–9)

Both rock music’s ancestry in the blues and Clapton’s own personal history as a rock music legend who launched his career in the mid-1960s as a faithful devotee of American blues guitar styles, and whose own musical style, which has changed considerably over time, remains traceable to that original commitment to the bedrock of the music, are invoked as indices of authenticity. These two strands intertwine in one of the most popular selections from the recording, Clapton’s acoustic revision of his song “Layla.” Thus, both the myth of the blues as rock’s progenitor (and rock’s consequent mythological claim to authenticity as folk expression) and Clapton’s own authenticity as a blues-educated rock legend are brought into play.

It is worth referring again to David Bowie’s Pin Ups album to contrast Clapton’s claim to authenticity with Bowie’s authentic inauthenticity. Whereas on the MTV Unplugged album (and, even more strongly, on his subsequent album From the Cradle and its accompanying video documentary) Clapton identifies his musical origins as residing in American blues, Bowie identifies his musical origins as residing in the performances of American blues and rock (among other material) by British bands such as the Yardbirds (of which Clapton was a member). These bands, active on the London club scene of the mid-1960s, where Bowie saw them, themselves made the kind of claim to authenticity through their relationship to the blues that Clapton continues to make. It is significant that, in the mid-1960s, Bowie himself, then still known as Davy Jones,58 had been in similar mod groups, such as the Manish Boys, named with a phrase derived from blues parlance. On Pin Ups, however, Bowie elides that part of his own musical history, preferring to construct his musical “roots” as self-consciously second-hand. His claim

---

58 One of the trivial but wonderful wrinkles in the history of rock is that Bowie changed his name from Davy Jones to avoid confusion with the Monkee of the same name. The manufacture of the Monkees as a group thus had as its consequence the manufacture of the identity Bowie has made a career of redefining.
to authentic inauthenticity lies in his highly mannered pastiche of the
British blues-rock that was already at one (if not more) remove from the
origins it cited to establish its own authenticity.

Authentic inauthenticity is not, however, the same thing as the pop
ideology represented by Milli Vanilli. Authentic inauthenticity, which
demands that performers acknowledge and assert their own inauthen-
ticity, defines itself against traditional rock authenticity. It thus reasserts
the original meaning of authenticity in rock even while critiquing it.
Although it revels in its own inauthenticity, authentically inauthentic
music such as Bowie’s nevertheless takes rock’s ideology of authenticity
as its point of reference and is therefore allied with that ideology in a way
that pop, for which the whole concept of authenticity articulated in rock
culture is simply irrelevant, does not.

The excessive proliferation of signs for the real and the authentic
manifest in MTV Unplugged and, particularly, in Clapton’s performance
on the program, constitutes the panic to which Baudrillard refers, the
music industry’s urgent program of damage-control designed to rescue
the reality principle and, hence, its own power, from the exposure of
simulation. In place of Milli Vanilli we were given what Arthur Kroker
(Kroker et al. 1989) might choose to call “Panic MTV” and “Panic
Clapton” that apparently reinstated the signs that signify the real in the
 cultural context of rock music. A Baudrillardian reading of the Grammy
awards to Clapton would suggest that NARAS sought to tap into rock’s
ideology of authenticity in order to preserve its own power. Contrapos-
ing Clapton to Milli Vanilli, NARAS was able to “regenerate a reality
principle in distress” by appearing to recreate a matrix of oppositions that
are significant in the cultural context of rock music (e.g., authentic vs.
inauthentic, rock vs. pop, real vs. simulated). NARAS thus produced the
real-effect necessary to reaffirm its position as the arbiter among such
distinctions. Rescinding the award also gave NARAS the appearance of
morality necessary to the operation of capital: “whoever regenerates this
public morality (by indignation, denunciation, etc.) spontaneously
furthers the order of capital” (Baudrillard 1983:27). (Although the legis-
lators who proposed consumer regulations following the Milli Vanilli
revelation represented themselves as challenging a dishonest music
industry, their indignation, too, was complicit with capital.) The end
result was that rock’s ideology of authenticity, which, as we have seen,
was already in crisis, was brought back to life to serve the interests of
capital.

I am arguing that a scandal effect had to be created around Milli
Vanilli because the music industry and the concentric rings of power that
attend it (including music critics) could not afford to admit that it is an
industry devoted to simulation. If the distinction between live and mediatised performance were to be revealed as empty, then the ability to sell the same material over and over again—as a studio recording, as a music video, as a live performance, as a video of the live performance, as a live album—would disappear. The Grammys’ ideological procedure of awarding the prize to performers, as though they are the authors of their recordings and not merely “the tip of an elaborate commercial network of investors, managers, agents, and publishers” (Sudjic 1990:143), would be exposed. And what of rock critics? On what basis would they discriminate among recordings and performances once it is acknowledged that all are simply different articulations of the same code, recombinant variations on the same genetic material?

More is at stake here than simply the survival of the music industry in its current form or even the interests of capital generally. Law, as well as capital, depends on the maintenance of a system of polarities and is therefore threatened by simulation. “Simulation neutralizes the poles that organize the perspectival space of the real and the Law” (Baudrillard 1990:155). NARAS’s reinscription of binary oppositions, effected by rescinding Milli Vanilli’s Grammy and subsequently granting Clapton multiple awards, generated a real-effect that worked not only in the interest of capital but in the interest of law, for “the denunciation of scandal always pays homage to the law” (Baudrillard 1983:27). To understand how this scenario played out in this particular instance, it is necessary to examine more closely the landscape of technological change against which the drama of Milli Vanilli unfolded and the challenges to the reign of law, copyright law in particular, implied by those changes.

The historical progression of technologies of musical reproduction exactly recapitulates the three orders of simulacra and the three stages of the image Baudrillard identifies in the general movement from the dominance of reproduction to that of simulation. First-order simulacra are *counterfeits* that “never abolished difference” but suppose “an always detectable alteration between semblance and reality” (ibid.:94–5). Baudrillard’s example is that of the automaton, which counterfeits the

---

59 Wurtzler’s description of three phases in the development of music recording practices follows a similar trajectory:

firstly, recording conceived as the documentation of a preexisting event; secondly, recording conceived as the construction of an event; and thirdly, recording conceived as the dismantling of any sense of an original event and the creation instead of a copy for which no original exists.

(Wurtzler 1992:93)
human figure, but imperfectly, and thus defers to the human being as the referent of the real. In terms of musical technologies, I would suggest that the player piano is a first-order simulacrum, a device that counterfeits a human performance but clearly is not human (the chatterbots I discussed at the end of the previous chapter would also be first-order simulacra).

The second order is associated with an industrial economy in which the serial production of objects ultimately obliterates the unique object from which they were generated, Attali’s economy of repetition. “In a series, objects become undefined simulacra one of the other” (ibid.:97). The phonograph record is a second-order simulacrum, a mass-produced object whose reference back to an original artifact has been rendered irrelevant. In rock culture, as we have seen, live performance serves to authenticate the recording but does not function explicitly as its originary referent; live performance can and does authenticate the recording in the absence of any claim that the recording is of that particular performance.

The third stage of the image is what Baudrillard (ibid.:83) refers to as “simulation proper”:

> the reigning scheme of the current phase that is controlled by the code . . . And here it is a question of a reversal of origin and finality, for all the forms change once they are not so much mechanically reproduced but even conceived from the point-of-view of their very reproducibility, diffracted from a generating nucleus we call the model . . . Here are the models from which proceed all forms according to the modulation of their differences.

(ibid.:100–1, original emphasis)

In terms of technologies of musical reproduction, the age of digital music technologies such as the compact disc is the age of simulation proper. The code and model is the binary code that defines all products of digital technology, products that differ from one another only according to different modulations of the common code from which they are all diffracted. There is no intrinsic difference between the binary code on a music disc and the code in the software that controls the launching of missiles: regardless of its purpose or destination, all digital information is generated from the same model and is, in that sense, of the same genetic stuff and, therefore, perfectly exchangeable with all other digital information. And since digital code is reproduced through a process of “cloning,” the information on all compact discs and their sources is identical: all are “originals”; there is neither an originary referent nor a
first in the series. (In a reproductive process, one can speak of a “parent.” A clone, however, is a simulation, the replication of a model, not the offspring of a parent.) As simulated on MTV Unplugged, live performance, too, becomes the replication of a model rather than an originary event on which reproductions are (imagined to be) based. In a way, the historical relationship of live performance to recorded music in rock culture anticipated the logic of simulation, since live performances always derived from the very recordings they served to authenticate.

Since the early 1980s, digital technologies have been increasingly implicated not just in the reproduction of music (on CDs) but in its production as well, especially through the extensive use of digital sampling instruments both in the studio and in concert.

Digital samplers allow one to encode a fragment of sound, from one to several seconds in duration, in a digitised binary form which can then be stored in computer memory. This stored sound may be played back through a keyboard, with its pitch and tonal qualities accurately reproduced or, as is often the case, manipulated through electronic editing. Because of its unsurpassed mimetic capabilities, one common use of the sampler has been to store in computer memory a note or set of notes played by an individual who has a unique playing style. When played back through a keyboard, one could construct an entire solo line which would potentially sound as if that person were playing it. Another common use of the sampler is to extract a fragment of sound from one context and place it in a new one.

(Porcello 1991:69)

As this description suggests, digital musical technologies imply an enhanced ability to incorporate parts of existing musical texts into new ones and to simulate the playing style of particular musicians. These technologies therefore “place authenticity and creativity in crisis, not just because of the issue of theft [of musical texts], but through the increasingly automated nature of their mechanisms” (Goodwin 1990:262, original emphasis).

Because it transforms music into transportable bits of information, digital technology also holds out the promise of enabling music consumers to construct the music itself.

When digital recording is the norm, the “listener” will have as much opportunity to unfix and refix a piece of music at home as the “producer” in the studio . . . The music consumer of the
future will thus be “active” in new ways—editing out the bass, feeding in a drum line from another package altogether, adding their own voice.

(Frith 1988b:123)

Frith’s comment anticipated the current popularity of “mash-ups” (recordings made by combining two or more songs) and the construction of homemade music videos by fans who combine their favorite songs with images of their own choosing. Although digital technologies are based on binary logic, they have had the ironic effect of dismantling cultural binaries, including distinctions between original and copy, producer and consumer, music and nonmusic (since the digitization of music renders it exchangeable and interchangeable with any other digital information), human being and machine. For this reason, digital technologies, including those specifically associated with music production, offer a profound challenge to “the print-oriented model of the creative process” that underlies copyright law (Katsh 1989:175). Copyright, which controls the ownership of and the right to disseminate cultural texts, has meaning only within a cultural economy in which the very binary oppositions challenged by digital technologies are in force.

Despite Katsh’s (ibid.:176) claim that “the redefinition of copyright is inevitable” in the face of these new technologies, the legal response thus far has been to try to bring simulationist practices under the authority of existing legal structures by characterizing the issues they raise as moral ones. This is what legislators did when they defined lip-synching in concert as a question in consumer law and also what Judge Kevin Thomas Duffy did when he decided, late in 1991, that sampling from a recording without obtaining prior permission from those who hold the copyright on the song and its recording is simply theft. In a highly unusual disposition of a civil copyright infringement claim, Duffy referred the case to the District Attorney for possible criminal prosecution (Grand Upright Music Ltd. v. Warner Brothers Records, Inc., 182, 185). Because such contentions prior to 1991 were settled out of court, sampling had not been brought under the rule of law (Beadle 1993:199). The decision in Grand Upright Music v. Warner Brothers brought sampling definitively within the domain of law and therefore had a chilling effect on the music industry in both the United States and the

60 The case concerned rapper Biz Markie’s appropriation of a sample from Gilbert O’Sullivan’s recording of his “Alone Again (Naturally)” and Markie’s apparent lack of interest in securing permission to do so.
United Kingdom (ibid.:201–2, 208). The decision derived from the theory that unlicensed sampling infringed the copyright in the musical composition. A more recent decision, Bridgeport Music, Inc. v. Dimension Films, 2004 FED App. 0297P (6th Cir.), understood to be the definitive interpretation of the legal status of digital sampling, was based on the theory that even samples that might not be considered to infringe the copyright in a composition (because only a particular chord is borrowed, for instance) still infringe the copyright in the sound recording. The judge’s advice is blunt: “Get a license or do not sample.”

It is in the context of the growing dominance of digital technologies in music production, their implicit ability to redefine the traditional roles of musician and consumer, and the resulting challenge to copyright that the Milli Vanilli scandal must be seen. These developments must themselves be seen, in turn, as part of a larger picture in which the authority of law generally is threatened by the evolution of simulationist technologies that break down the polarities on which that authority depends. It is for this reason that Baudrillard uses the word “Digitality” to describe the cultural logic of simulation. The word “Polarity” describes the logic replaced by Digitality; whereas “the polar relation, or the dialectical or contradictory relation, organizes the universe of the Law, the social and meaning[,] the digital relation (but it is no longer a ‘relation’ —let us speak instead of the digital connection) allocates the space of Norms and Models” (Baudrillard 1990:156, original emphasis). By scapegoating Milli Vanilli, then seemingly endorsing rock’s ideology of authenticity, the music industry, through NARAS and MTV Unplugged, recreated “the poles that organize the perspectival space of the real and the Law” within the culture of rock music and, thus, paid homage to the law at a crucial moment when the legality of some musical practices was being questioned. That the music industry acted in its own interest is clear: even as it implicitly endorsed the bringing of simulationist musical practices under the rule of law, it placed itself outside the law by subverting the need for legislation and establishing the appearance of a moral superstructure behind which to conduct business as usual. The chronology of events is important here: notice that it was only after anti-
lip-synching legislation was proposed that the award to Milli Vanilli was rescinded and that the subsequent awards to Clapton were made immediately following Judge Duffy’s decision in *Grand Upright Music v. Warner Brothers*. In each case, the music industry responded to a challenge to its simulationist practices by reasserting the polar discourse of rock authenticity. The awards to Natalie Cole take on a new significance in this light: they stand for the whole development I have described. In this allegory, the exposure of Milli Vanilli represents simulation as a rogue element threatening NARAS (power), the music industry (capital), and the law. The awards to Cole for her technologically simulated duet with her father enact the forced accommodation of simulation to the interests of all three agencies. An acknowledged simulation, Cole’s bizarre but fundamentally sentimental reunion with her deceased father transformed the scene of simulation from one entailing the victimization of child music consumers to one supportive of family values: safe simulation.

At the risk of seeming cynical, I will also suggest that the song singled out for particular Grammy recognition from Clapton’s *Unplugged* album, “Tears in Heaven,” itself contributed greatly to the real-effect sought by the music industry in the wake of Milli Vanilli. Like Cole’s duet with her late father, the song—a memorial to Clapton’s young son, who died in a freak accident—imagines the field of recorded sound as the space for a posthumous reunion of parent and child. Clearly, this corresponds to what Baudrillard (1983:12) calls “an escalation of the true, of the lived experience.” As opposed to Milli Vanilli, who won an award for a song they neither composed nor sang, Clapton was rewarded for a song that he not only wrote and performed but that alludes to a well-known personal tragedy. Does it get any “realer” than this? The song’s regret at the death of an individual seems to reinstate the value of the unique that has lost ground within the current cultural conformation. Under the economy of repetition, the single representation cannot be stockpiled and, therefore, has no value. In the age of digital cloning, the model is infinitely replicable—death is no longer the ultimate limit, as can be seen from the posthumous performances by musicians and, now, actors digitally cloned from their existing recordings and films.62 Through the

62 For a discussion of performance in the age of digital technology that includes reference to the practice of posthumous cloning, see Auslander (1992a). Many television commercials now feature actor-cloning: long-dead celebrities pitch various products. Actor Brandon Lee, who was killed during the making of the film *The Crow* (1994), appears in scenes he never had the opportunity to shoot through the intervention of digital technology. I discuss the ramifications of these practices for intellectual property law in the next chapter.
specificity of the personal experience it describes and the personal relationship of singer to song, Clapton’s performance seems to return us to an economy of representation in which the singular event is valorized. By poignantly reinstating death as an immitigable absence and, thus, apparently recovering the life/death opposition from implosion, the song valorizes living presence and underscores MTV Unplugged’s assertion of its own liveness and authenticity. All of this, however, was merely another diversionary tactic designed to mask the fact that the music industry is fully given over to simulation. The challenge Clapton’s song and performance seem to offer to the regime of simulation took place on television and was designed from the start to occupy a position in the economy of repetition through its many lives as cable television show, compact disc, and DVD, all of which are replications of the model. The small audience that participated in the taping and for whom Clapton’s Unplugged concert was a “real” live event was similarly packaged for repetition and became another exploitable sign of the event’s liveness and authenticity. The experience of the audience present at a live musical event that has been designed for repetition is “to be totally reduced to the role of an extra in the record or film [or, in this case, television show] that finances it” (Attali 1985:137), to become part of a simulated, commodified audience. If Milli Vanilli provided capital with the opportunity to stage a scandal-effect, Clapton’s meditation on living presence and the abundance of signs insisting on MTV Unplugged’s status as live event contributed to the simulation of liveness, the creation of a live-effect that appeared to denounce simulation while really furthering its dominance.

As must be apparent from the foregoing analysis, the psychic trope of Baudrillardian cultural analysis is paranoia. I will push my paranoid interpretation one step further to show that it ultimately rebounds on Baudrillard’s own assertion that simulation is symptomatic of the undoing of the power structure on which capital depends. Surely it is important that MTV has been an active agent at almost every crucial point in the story I have been telling. It is largely through MTV that music videos have become the “reality” that live performance of music seeks to recreate. It was during an MTV-sponsored tour in 1988 that rumors about Milli Vanilli’s inability to sing live first appeared. And, of course, the whole “unplugged” phenomenon that was so powerfully implicated in restoring the reality principle post-Milli Vanilli was institutionalized, if not actually created, by MTV. (Is it surprising, then, that Gorillaz, the ultimate pop simulation, has used both an MTV awards ceremony and the Grammys as the settings for its most important “live” performances?)
Coincidence? I think not. Power requires a matrix of clearly defined oppositions in which to operate and will create the appearance of oppositions in response to the implosion of a previously operational system. “[P]ower is absolute only if it is capable of diffraction into various equivalents, if it knows how to take off so as to put more on. This goes for brands of soap-suds as well as peaceful coexistence” (Baudrillard 1983:134). Baudrillard suggests here that governments must appear to have different interests even though they may all be part of a single, global system of power, just as products with different brand names must appear to be different from one another even though the same company manufactures them all. This diffraction of power is clearly visible in the operation of MTV. The establishment of the music video as a cultural form was symptomatic of musical performance’s entrance into the age of simulation. Through MTV Unplugged, MTV also proposed itself as the antidote to the regime of simulation. A truly paranoid reading of the fact that Milli Vanilli first came under suspicion during an MTV-sponsored tour would suggest that MTV engineered the whole scenario as a way of solidifying its own power, first by problematizing the reality principle through the promotion of simulation, then by creating a scandal-effect around Milli Vanilli, and finally by establishing itself as the champion of the reality principle through a seemingly panicked reassertion of reality and authenticity in popular music that was, in fact, merely the creation of a liveness-effect through a cynical merchandizing of Eric Clapton’s personal loss. In the context of MTV’s regime of simulated liveness, Clapton’s touching memorial becomes a means of bringing the one realm that might seem to evade simulation under its thrall. It may be that, in a mediatized culture, live performance inevitably brings death into the economy of repetition. The live asserts itself not as a triumph over death (it is simulation that represents such a triumph, as in Nat King Cole’s return to sing with his daughter or the reunification of the late John Lennon with the other Beatles in the space of digital recording) but as a celebration of the unique, nonrepeatable event, of which death is the ultimate example.63 Ironically, the effect of this attempt to recuperate death as a sign of the live results in the commodification of death itself, for the live finally cannot evade the economy of repetition. “[R]epetition makes death exchangeable, in other words, it represents it, puts it on stage, and sells it as a spectacle” (Attali 1985:126).

63 A sad but pertinent example is the suicide of Kurt Cobain. According to published accounts, Cobain’s self-murder was motivated by his sense that as his band, Nirvana, became more successful, their music was losing its spontaneity and authenticity.
To put the matter more generally, it may be that the implosion of the opposition between live and mediatized performance in popular music posited earlier in this chapter was a simulation of implosion created by an agency of capital to consolidate and extend its power by recuperating simulation itself as one of its strategies. It seems to be just as possible to see simulation as the latest weapon in the arsenal of capital (or at least as a phenomenon co-opted by capital, as my analysis of Natalie Cole's Grammys suggests) as to insist that it means the end of the entire system of real power within which capital operates. At the end of a passage I quoted earlier, Baudrillard (1983:44) claims that when power “is threatened today by simulation . . . [it] risks the real . . . This is a question of life and death for it. But it is too late.” But is it too late? Or is it possible that simulation can be brought into the system of power to be used by capital to maintain its dominance, as I have suggested in my paranoid interpretation of the machinations of MTV?

If the music industry's response to Milli Vanilli was an attempt to reaffirm the value of authenticity and deflect the accusation of simulation, it was very successful. As Ted Friedman (1993) puts it, “Milli Vanilli became martyrs to [the] myth of authenticity. They were the recording industry's sacrifice meant to prove the integrity of the rest of their product.” He goes on to summarize subsequent developments:

The sacrifice worked. Paula Abdul faced down a lawsuit from a former backup singer claiming Abdul's voice was barely audible on several of the tracks from her hit *Forever Your Girl*, and established her artistic credibility by singing ballads on the follow-up *Spellbound*. Rapper Biz Markie was successfully sued for unlicensed sampling, and now every hip-hop appropriation is contractually accounted for. Gangsta rap and grunge rock emerged as mass genres which laid special claims to authentic expression, and nobody smirked . . . Soon, post-Vanilli diva Mariah Carey was performing live on MTV just to prove her multi-octave range was an honest freak of nature, and not just a studio trick.

Rather than face the prospect of endlessly repeating his performances, Cobain sought refuge in what he seems to have thought of as the only authentic gesture left to him. It was, of course, a gesture that was instantly recuperated by the very economy that drove Cobain to self-destruction, as has been the case with all famous “rock and roll suicides” (David Bowie). Witness the marketing of Elvis Presley, Jimi Hendrix, and Jim Morrison, in particular, since (and because of) their respective demises.
As Friedman suggests, the scapegoating of Milli Vanilli not only successfully reasserted and shored up rock’s ideology of authenticity but helped to extend the reach of that ideology to musical genres and artists with whom it would not previously have been associated. Pop singers such as Abdul and Carey, for instance, would not previously have been called upon to adhere to standards of authenticity defined within rock culture; after Milli Vanilli, however, even they felt compelled to demonstrate their authenticity as singers.64

The renewed vigor of rock ideology and its articulation to a broader field of musical endeavor is exemplified by an incident that may serve here as a pendant to Milli Vanilli: the Ashlee Simpson scandal of October 2004. As Simpson began to sing a new song during a performance on the television program *Saturday Night Live*, her obviously recorded voice singing a different song she had performed earlier in the program came over the PA system, taking her by surprise. Unable to continue vocally, she danced a sort of jig, then slinked off stage leaving her band to fend for themselves before the show’s producers mercifully went to a commercial break. Reaction to this performance was swift and angry: Simpson was booed when she performed during the halftime show at the Orange Bowl a few months later, and Bethany Decker, a teenager from Staten Island, New York, circulated an online petition calling on the singer’s management and record label to end her career. It is significant that the response came from Simpson’s fans rather than their parents. Whereas the Milli Vanilli incident was ultimately treated as a legal matter calling for legislation, the Simpson situation remained within the world of pop music and the realm of fandom. The terms of Decker’s petition (which had garnered almost half a million signatures as of the time of writing and was still visible online at <http://www.petitiononline.com/StopAsh/petition.html>) are also important. The petition complains that Simpson “cannot match the sound of her voice that can be found on her CDs, when she sings live . . . We are so sickened by her ‘performing’ that we are taking this opportunity to demand that

64 Elizabeth Eva Leach (2001) makes a similar point from the British perspective about the reaffirmation of rock ideology and its extension to pop after Milli Vanilli. She provides an analysis of the way the Spice Girls, a pop music phenomenon of the 1990s, positioned themselves both inside and outside of rock ideology by presenting themselves simultaneously as the creators of their own music and as no different from their ordinary girl fans. As a result, they were able to construct “a polysemy which allows different collectives to construct the kind of authenticity that they require” (Leach 2001:162) and achieved great commercial success by appealing simultaneously to otherwise mutually exclusive audiences.
she stop.” Even though Simpson is clearly a pop artist, not a rocker, and even though her career conforms to the post-rock “insertion” pattern defined by Frith, in which a performer is introduced to the audience as a full-blown star rather than working her way up, her fans clearly held her to the standards of rock ideology.

In many respects, the Ashlee Simpson social drama played out in much the same way as had the Milli Vanilli story, with Saturday Night Live assuming the role played by MTV in the earlier scandal.65 But since Milli Vanilli had served as the music industry’s scapegoat years earlier, Simpson was allowed to seek redemption. Almost a year after the initial fiasco, in October 2005, she returned to Saturday Night Live and persuaded her audience that she really could sing. She introduced the first song she performed on the program by saying, “I wrote this song after my last SNL experience” (quoted in Lehner 2005). This statement both served as a public acknowledgment of her own earlier failing and positioned Simpson squarely within rock ideology by stressing her authorship of the song and its autobiographical nature as well as her ability to deliver as a live performer. She was rewarded when her next album entered the charts in the top position.

Although recent debates over “rockism” can be read as indicating that the hegemony of rock ideology and its particular emphasis on liveness are undergoing a fresh challenge,66 it is clear both from those debates and from incidents like the Ashlee Simpson social drama that rock ideology continues to set the terms for defining authenticity in popular music. Much has changed: it is certainly ironic in historical terms that questions about Simpson’s authenticity as a performer were both raised and resolved on television, traditionally viewed in rock terms as a site of inevitably inauthentic performance. Television, as the place where both the infraction and the redressive measures used to resolve the crisis it engendered occurred, functioned as a closed system with no necessary

65 This episode also points to the particular social and cultural function Saturday Night Live has assumed in recent years. Having long since shed its connections to the counter-culture of the 1960s, it now serves as “a sort of celebrity image treatment center” for errant celebrities like Janet Jackson and Paris Hilton who achieve expiation by making mild fun of themselves (see Bruce Britt, “SNL,’ giving Janet Jackson a chance to redress,” Washington Post, April 10, 2004: C1; I am quoted in this article).

66 Broadly speaking, rockism is the belief that rock is the most important form of popular music and, therefore, other forms should be understood and evaluated in relation to rock ideology. A number of music critics have spoken out about this bias in recent years; key texts in the rockism debates include Sasha Frere-Jones (2003), Kelefa Sanneh (2004), Douglas Wolk (2005), and Jody Rosen (2006).
reference to anything outside of itself. The fact that a performance on a
Television program was perceived as sufficiently live to engender ques-
tions of performative authenticity is further evidence of the way that
video has replaced live performance as the site of authentication. On
the other hand, much remains the same: not only does the particular
relationship between liveness and authenticity defined within rock
ideology remain the standard for assessing those matters in rock, the
ideology has expanded its hegemony to include forms of pop music
against which rock previously defined itself.
Herbert Blau (1996:274) has noted the strong desire in current theory for “a language of ‘performativity’ that will outwit, baffle, or abolish the regulatory functions that work in the name of the law.” This desire is certainly reflected in contemporary performance theory. Peggy Phelan (1993b:148), for instance, argues that “without a copy, live performance plunges into visibility—in a maniacally charged present—and disappears into memory, into the realm of invisibility and the unconscious where it eludes regulation and control.” Despite the overheated rhetoric of this passage, Phelan makes an influential claim. Her suggestion that a performance cannot be copied and still remain a performance derives from her view that performance's most crucial ontological characteristic is its disappearance, discussed in Chapter 2. In Phelan’s view, if performance cannot be copied, it cannot participate in a cultural economy based in repetition and is therefore exempt from control by the forces that govern that economy, including the law. She invokes another ostensibly ontological quality of performance when she refers to its continued existence only as spectatorial memory. Patrice Pavis (1992:67) explains the relationship between performance’s evanescence and its storage in memory: “The work, once performed, disappears for ever. The only memory which one can preserve is that of the spectator’s more or less distracted perception.” Phelan extends this analysis of performance into the political realm by arguing that performance’s disappearance and subsequent persistence only in memory make it a privileged site of resistance to forces of regulation and control. Her position depends on two premises: that performance resists reproduction and that memory is a safe haven from the law.

In this chapter, I hope to problematize this way of thinking about the relationship of performance and the law by showing that the law attributes to performance the same ontological qualities—existence only
in the moment and persistence only as memory—as those who see performance as resisting the law. Although those qualities enable performance to escape regulation in one very limited sense, they also make performance available and useful to the law in other, more comprehensive, ways. Live performance is, in fact, essential to legal procedure. I will explore this issue in terms of two different areas of jurisprudence: I discuss evidence law in the first section of this chapter and intellectual property law in the second. To show that the assumption that a trial is an ontologically live event is fundamental to the discourse of American law, I will examine the phenomenon of the prerecorded videotape trial and pose the question of why it never achieved the popularity predicted for it. To demonstrate the centrality of live performance to legal procedure, I will discuss the system’s strong preference for live testimony and the ways in which testimony is defined as a live performance of memory-retrieval. This discussion focuses primarily on evidence law. In the next section, I take up the question of live performance’s status under intellectual property law. Although performance as such is not regulated as a cultural commodity under copyright, there has been a historical trend toward making more and more aspects of performance “ownable” through the interpretation of existing legal theories (e.g., trademark) and the development of new ones, such as right of publicity. The third section of this chapter problematizes the claim that performance’s continued existence in spectatorial memory places it outside the reach of regulation by showing that memory is both policed by law and pressed into service as a mechanism for the enforcement of law.

Whereas evidence law regulates “the proof used to persuade on fact questions at the trial of a lawsuit” (Rothstein 1981:1) and therefore sets conditions that regulate the conduct of trials as performances of the law, copyright governs the ownership and circulation of cultural objects, and therefore determines the conditions under which performance participates in a commodity economy. As such, it is the branch of jurisprudence that deals most directly with the status of performance in the law. I want here to survey statutes and decisions that shed light on both performance’s status in the law and the nature of legal proceedings as performance. Although copyright and evidence are separate areas of law, considering them in relation to performance reveals that memory is a thematic common to both—perhaps the central thematic of law generally. Using the thematic of memory as a pivot point, this chapter’s discussion of law and performance will reexamine many of the issues raised in Chapters 2 and 3 from a specifically legal angle. The discussions of testimony and copyright reassert the dual focus of this study on liveness in both ontological and cultural-economic terms.
Teevee’s courthouse, or the resistible rise of the videotape trial

The American courtroom has undergone the same incursion of mediatization as other cultural sites formerly devoted to live performance, for the same cultural reasons. As David M. Rubin suggests in “The Visual Trial,” the experience of television is so deeply engrained in jurors, so central to our current mode of perception, that attorneys must provide a comparable level of visual information and sophistication in their courtroom presentations. Some prosecutors fear what has come to be called the “CSI effect,” named for the US television series CSI and its various offshoots. It is supposed that juries expect live trials to resemble their televisual counterparts and are disappointed when they do not, a situation that parallels the way in which live events come to seem like degraded versions of their own mediatized representations, as discussed in Chapter 2.¹ Video and digital information technologies are now used in many phases of trials. A suspect may be arraigned from jail by means of a remote video hook-up. In some cases, such as the use of home videos of births as evidence in medical malpractice trials, the event at issue itself may be shown on video, as a form of eyewitness testimony.² Other types of testimony—the depositions of expert and even substantive witnesses—also may be presented on video. So-called “day-in-the-life” videos are used to show the impact of an injury on its victim. Demonstrative evidence, such as reenactments of crimes, may be staged on video or animated on the computer screen. Even closing arguments may incorporate video. Standard Chartered PLC v. Price Waterhouse (88–34414 [Super. Ct., Maricopa Co., AZ]) gained notoriety in legal circles because the plaintiff’s attorneys incorporated into their closing argument a screening of a production entitled “The Titanic” to present an analogy they would otherwise have made verbally. “In this $17,000 video, scenes from A Night to Remember, a 1958 British movie about the sinking of the Titanic, are alternated with information and graphics about how Price Waterhouse’s faulty audit financially sunk an invest-


² In such cases, the cross-examining attorney must employ a variation on a classic strategy. Rather than trying to persuade the jury that the witness did not see what she claimed to have seen, the attorney must persuade the jury that the video does not show what the plaintiff claims it shows. The jurors become eyewitnesses who must be persuaded of the unreliability of the video representation rather than of their own perceptual unreliability.
ment by the British bank Standard Chartered PLC” (Sherman 1993:1). In order to accommodate the many possible forms of mediatized testimony and evidence, the well-equipped, contemporary courtroom may include such devices and systems as the following, excerpted from a much longer list:

- Recorded or real-time televised evidence display with analog optical disk storage using the . . . Litigation Sciences videodisc system, which features bar code indexing and light pen control;
- Built-in video deposition playback facilities;
- Automatic Court Technologies microchip-controlled, multi-camera, multi-frame, video recording of proceedings using ceiling-mounted cameras and Shure Microphone voice-initiated switching; . . .
- Text, graphics, and TV-capable jury computers and monitors; . . .
- The A.D.A.M. simulation and display of the human body. (Lederer 1994:1099–100)

Given the potentially extensive presence of media technology in the courtroom, it is possible for a jury to find itself in much the same position as a concert audience or sports crowd attending an ostensibly live event and watching most of it on video displays. Nevertheless, I shall argue that the courtroom has proved far more resistant to the incursion of mediatization than the other cultural sites discussed here.

A proposition for fully mediatized trials was put forth in the early 1970s, when the simplification of videotape technology made it accessible to users outside the television industry. Sparing no fanfare, jurist  

---

3 Ronald L.K. Collins and David M. Skover (1992) refer to video and other nonprint media used as legal documents as “paratexts.” They make the interesting argument that as law becomes ever more dependent on paratexts and less bound to the written word, the performative aspects of legal proceedings (such as gesture, facial expression, and so on) will become part of the record in the way that only words are at present. In some respects, the law will then be practiced in a manner reminiscent of pre-literate societies. Bernard Hibbitts (1992, 1995) has elaborated this position through his analyses of legal performativity.

4 This is not even to mention the further mediatization of the trial as it is presented by means of video on the nightly news or Court TV, which is to the American legal system what MTV is to the music industry. For a useful historical overview, and a skeptical evaluation, of this kind of mediatization, see Thaler (1994). Important as it is, external mediatization of the trial as news event is not my concern here; I am focusing on the internal mediatization of the courtroom event itself.
Alan Morrill (1970:237–8) made the following proclamation in a law journal article at the beginning of the 1970s:

One day very soon now, a courtroom somewhere in this illustrious land will introduce a sweeping change in the present system of trial by jury . . . A jury will have decided the issues of a lawsuit by merely viewing and hearing the entire proceedings of a trial on a television screen . . . The lawyers who conducted the trial probably will have been in the presence of the jury only during the jury selection . . . Regardless of the domain, this destined event will take place—be it in one of the large cities or in a remote county seat—that location will be recorded in history as the place where it all began. This unique modification in the resolving of lawsuits will spread rapidly over the length and breadth of our nation, notwithstanding entrenched attitudes of a portion of the trial bar.

Morrill was a true prophet—most of what he prognosticated came to pass, with the major exception of the sweeping reform he describes in his last sentence. The kind of trial he predicted, which came to be known as the “prerecorded videotape trial,” usually abbreviated PRVTT or PRVT (I will use the latter), took place numerous times in several jurisdictions and acquired staunch advocates within the judiciary.

History records when and where the first PRVT took place without, alas, enshrining that city as the birthplace of a legal paradigm shift in the manner Morrill anticipated. It occurred on May 23, 1971 in Sandusky, Ohio, and was overseen by the Hon. James L. McCrystal, judge in the Erie County Common Pleas Court, who intentionally chose a simple case so as to incur a minimum of technical problems. In McCall v. Clemens (Civil No. 39301 [Erie County Court of Common Pleas, Ohio]), the plaintiff had been injured when the elderly defendant lost control of her car. “Liability was admitted and the only fact questions for the jury were the nature and extent of McCall’s injuries and the amount due him as damages” (Murray 1972b:268). McCrystal considered the experiment an unqualified success; the two participating attorneys also reported satisfaction with the procedure (McCrystal 1972; Murray 1972a; Watts 1972).5 The Supreme Court of Ohio was sufficiently impressed with the outcome to change the state’s Rules of Civil Procedure and its

---

5 It may be, of course, that the two attorneys, who were presumably likely to appear before McCrystal again, were loath to disagree with the judge’s assessment!
Superintendence Rules to make the PRVT a regular possibility in its jurisdiction.\textsuperscript{6}

It is worth quoting at length a description of the procedures used in McCall \textit{v.} Clemens and subsequent PRVTs to establish a clear sense of just what a prerecorded videotape trial was:

All witnesses testified under oath in mutually agreed upon settings in the presence of the lawyers and a court officer other than the trial judge. The order of taping the testimony was not stipulated, nor was it binding on the subsequent order of presentation. All objections were formally noted, but questioning was not curtailed. The master tape, containing the entirety of the testimony, was reviewed subsequently in chambers in the presence of the attorneys. At this time, the trial judge passed and ruled on all objections.\textsuperscript{7} Both the formal objections and the objectionable statements were deleted on a second tape.\textsuperscript{8} Thus, the edited version of the trial tape was prepared without destroying the continuity of the admissible testimony. The trial tape was then further spliced so that the witnesses could be presented in the agreed upon order. The master tape remained intact for appeal purposes.

\textsuperscript{6}See McCrystal and Young (1973:561–3) for a discussion of this change in Ohio’s procedural rules. For the complete, annotated text of these rules and others relevant to the PRVT, see McCrystal (1983:109–25).

\textsuperscript{7}In a later, streamlined version of this procedure, the attorneys would note their objections on a chart keyed to particular points on the unedited tape. The judge would make rulings on these objections alone in chambers, often by watching only those moments of the tape at which objections occurred. The trial tape would be edited from the master tape according to the judge’s rulings (McCrystal 1983:114–18).

\textsuperscript{8}Two different editing procedures were used. Sometimes, objectionable material was simply excluded from the edited trial tape. On other occasions, a technician would black out portions of the audio and visual tracks during playback. (An automated version of this system, in which the selections shown are controlled by a computer, was proposed by a later PRVT advocate; see Perritt 1994:1083). By these means, the jury would know that something had been excluded at that point. Two communications scholars who studied prerecorded trials during the 1970s note that this latter method, which involves no actual editing of the tape, was particularly appropriate to “this post-Watergate era when suspicions of tampering and subversion are relatively commonplace.” They nevertheless recommend the first editing procedure as less distracting to jurors and because they found that “when jurors knew material was edited, they speculated about its content, an activity that might be even more biasing than knowing what the excerpt contained and being instructed to disregard it” (Miller and Fontes 1979:23, 137).
The jurors were not impaneled until the completion of the trial tapes. After the attorneys delivered their opening statements in the courtroom, the trial tape was shown to the jurors on monitors. Neither lawyers nor trial judge remained in the courtroom throughout the presentation, although an officer of the court was in attendance at all times. In all cases, lawyers gave their closing statements live, but judges rendered instructions to the jurors on tape.

Probable appellate [sic] procedures have been discussed . . . If a new trial were ordered, it would be accomplished by re-editing the trial tape according to the findings of the higher court, and presenting this new tape to another jury.

(Shutkin 1973:365–6, original footnotes excluded)

As this description indicates, PRVTs were simulations, in the strict, Baudrillardian sense: the trial tape is a reproduction of an event that never took place. It reflects the “inversion of the structural dependence of copies upon originals” (Connor 1989:153) characteristic of simulations. As one commentator observes, the trial tape is “a transcript of the trial [made] before the trial occurs” (Perritt 1994:1071).

After presiding over McCall v. Clemens, Judge McCrystal became the PRVT’s strongest advocate. With missionary zeal, he barnstormed law journals, conferences, and seminars, preaching the virtues of the PRVT to anyone in the legal community who would listen (see McCrystal 1972, 1983; McCrystal and Maschari 1983 [1981], 1983, 1984 [1983]; McCrystal and Young 1973). The benefits he and other advocates pointed to were largely administrative and procedural (see Marshall 1984; McCrystal and Young 1973:563–4; Morrill 1970:239–47). The PRVT was said to be more efficient than live trials: neither judges nor attorneys had to spend much time in the courtroom and could attend to other cases, even participate in other trials, while the jury was watching a completed trial tape. Additionally, judges could make more considered replies to objections since they did not have to be delivered in the heat of trial. Trials would never have to be delayed to await a witness’s arrival, and witness testimony could be presented in the best possible sequence. Witnesses could be deposed at their leisure and would not feel inconvenienced by having to spend time in the courtroom. Jurors’ time was used more efficiently, as well, since they did not have to be present for conferences between attorneys and clients or the judge, and the trial was never interrupted for any reason, resulting in a much shorter running time. As a result of these efficiencies, the PRVT was seen as a way of
clearing crowded dockets. Because the jurors would never see or hear inadmissible testimony or prejudicial comments and would not be influenced by the demeanor of the judge, the chances of a mistrial and the likelihood of appeal were reduced. The fact that the whole trial could be seen before it was presented to the jury meant that directed-verdict motions—in which one or both of the parties request that the judge, not the jury, rule on the case—could be resolved prior to impaneling the jury, and that attorneys could show their clients exactly what the jury would see and discuss settlements or plea bargains on that basis. Attorneys would also have a much clearer idea of what to ask when interviewing prospective jurors in the *voir dire* phase of the trial. PRVTs were also touted as more cost effective than live trials, supposedly reducing the costs of discovery depositions taken as part of the pre-trial information-gathering process and those of conducting the trial itself by more than half (Marshall 1984:855; McCrystal and Maschari 1983).10

By 1983, over 200 PRVTs had occurred in Ohio, with McCrystal presiding over many of them (McCrystal and Maschari 1983:70). Although the vast majority of these cases were civil suits, there were also criminal PRVTs; McCrystal presided over the first prerecorded murder trial in 1982 (Croyder 1982). The PRVT experiment spread to other states. Michigan inaugurated Project TAPE (an acronym for “total application of prerecorded evidence”; Brennan 1972:6–7); and by 1984, Indiana and Texas had joined the PRVT family (see Marshall 1984; McCrystal and Maschari 1983 [1981]).

Several social scientific studies of the PRVT were undertaken, including one by communications scholars at Michigan State University (Miller and Fontes 1979) and another by the National Bureau of Standards

---

9 McCrystal bragged of having been “assigned by the presiding Ohio chief justice to a nearby metropolitan county to hear over 100 highway-appropriation and eminent domain cases. Over 50 of these cases were terminated by PRVT in less than a year, and the pre-recorded testimony of nearly 25 cases was edited . . . and forwarded on to the nearby county where local judges presided at the trials” (McCrystal and Maschari 1984 [1983]:246).

10 These were among what might be called the “official” benefits PRVT advocates cited, but there were probably other reasons for its appeal, especially to judges, to whom it promised an unprecedented degree of control over what happens in the courtroom. The historical context of the early 1970s is important here. Morrill (1970:245) refers to “the recent political trials,” such as the Chicago Seven trial, and notes that the videotape process makes it impossible for a defendant to throw the trial into chaos or to use the courtroom as a political platform. Although other advocates of the PRVT do not broach this issue as bluntly as Morrill, it crops up as a motif in several discussions.
(Robertson 1979). The Michigan State study was reported at book length; McCrystal quoted its generally favorable conclusions on every possible occasion. Comparing jurors’ responses to the same trial performed live and on videotape, the authors found that neither the verdicts nor the awards differed significantly from one form of presentation to the other, findings confirmed by a more recent study undertaken by the Australian Institute of Criminology that compared live testimony with prerecorded testimony and testimony on closed-circuit television (Taylor and Joudo 2005). The Michigan State researchers also found that jurors’ perception of the witnesses’ truthfulness did not differ significantly, that the deletion of inadmissible testimony did not affect the jurors’ perception of the attorneys’ veracity, and that jurors remembered the facts of the case better when the trial was presented on videotape than when they saw it live (Miller and Fontes 1979:211–12).

The PRVT concept therefore seemingly had a lot going for it. As I indicated at the beginning of this chapter, the courtroom has shown itself to be amenable to the incorporation of new technologies. The PRVT enjoyed the staunch support of several jurists. Even those skeptical of the its virtues acknowledged that it might be a way of conducting a trial more in tune with contemporary, mediatized perception than the traditional live event.11 Yet, the PRVT never became an accepted practice. Far from the paradigm shift envisioned by its proponents, it has languished as a fairly obscure footnote to American legal history. The clearest indication of its failure to take root is that the author of a 1994 law journal article describes it as “a concept that is gaining support” and advocates it in exactly the same terms as Morrill had almost a quarter-century earlier (Perritt 1994). The standard explanation proposed by PRVT advocates for this failure is that the PRVT would be opposed by trial attorneys because it deprived them of the opportunity to grandstand in front of the jury. To the extent that this position seeks an explanation for the failure of the PRVT in a consideration of performance, it charts the course I will follow. At stake, however, is much more than the desire of attorneys to show off. The PRVT challenged some of the most basic assumptions underlying American jurisprudence, assumptions that have shaped debates on constitutional and procedural rights, and underlie the

11 In his critical analysis of the PRVT, David M. Doret (1974:249, original emphasis) states that the novelty of the concept may be only temporary: “The communications revolution of our time may ultimately acclimate people to accept interpersonal interaction through television screens as the norm.” The connections between this statement and Walter Benjamin’s notion that “contemporary perception” is shaped, in part, by technology are self-evident.
important question of just what sort of performance testimony is understood to be. It is always easier to explain why something happened than why something failed to happen, but this inquiry may permit at least a speculative understanding of why the PRVT never caught on.

Of the PRVT’s various advocates, Morrill acknowledged most directly the procedural obstacle confronting it (see also McCrystal and Young 1973:564–5). After citing various decisions to demonstrate that films, sound recordings, and videotapes had all been accepted as evidence, he identifies what he considers a paradox:

in spite of the court’s complete stamp of approval upon the reliability of these mechanical devices to accurately reproduce sound and sight, their use is severely restricted. There is complete agreement among the jurisdictions that an evidence deposition . . . cannot be admitted in evidence if the witness himself is available . . . . There is, therefore, a complete road-block set up in the path of a pressing need for change.

(Morrill 1970:256–7)

Morrill refers here to a doctrine enshrined in the Confrontation Clause of the Sixth Amendment to the US Constitution, which states that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” Although this clause is far more ambiguous than it may first appear and has a long and contentious history of Supreme Court interpretation,12 it has always been taken to mean that the testimony of live witnesses who are physically present in

12 For an excellent summary of the contentious history of Confrontation Clause interpretation, see Nichols (1996), who argues persuasively that confrontation has proved such a sticky issue because of the Supreme Court’s desire to balance the Constitution with public policy. In many instances, it has seemed in the public interest to allow the admission of types of testimony that a strict reading of the Clause would deem hearsay: the spate of child abuse cases in the 1980s, and the various policies crafted by the states to permit child victims to testify outside the presence of the accused, are large categories of examples. “At the same time, the Court has been reluctant to let go of the notion that the Clause connotes ‘a preference for face-to-face confrontation at trial’” (ibid.:395). These conflicting imperatives have proved impossible to reconcile. There is general agreement that the historical trend in Supreme Court decisions has been away from protecting the Sixth Amendment rights of the accused and toward allowing ever more kinds of formerly inadmissible testimony. White v. Illinois (502 US 346 [1992]) represents the most extreme decision of that kind to date. The Supreme Court upheld the conviction of an alleged child molester when the only evidence against him was the victim’s statements to her
the courtroom is preferable to any form of deposition.13 Depositions are used, of course, but their admission at trial is generally problematic in a way that live testimony never is.14 Children are sometimes allowed to testify on video or closed-circuit television when accusing an alleged abuser, for example, but in most jurisdictions this can happen only after the court makes a specific finding that it would harm the particular child in identifiable ways to be in the presence of the defendant and grants an exception to permit mediatized testimony (see Holmes 1989:697–700).15

Even decisions in favor of the use of depositions generally, and of videotaped depositions in particular, reflect the law’s strong preference for live witnesses. For example, the Georgia Court of Appeals judge who ruled that “the taking of the deposition of an expert witness to be used at the trial . . . by means of videotaping” is an acceptable practice also stressed in his decision that: “it is well to remember that the taking of a deposition . . . is a substitute, at best, for the actual live testimony of the witness” (Mayor v. Palmerio 135 Ga. App. 147 [1975], 150). Indeed, most of the court decisions that have allowed the use of depositions at criminal trials stipulate very clearly that this practice is acceptable only when the

---

13 The Confrontation Clause has often been interpreted as a guarantee of the defendant’s right to cross-examine the witnesses against him. The PRVT is relatively unproblematic in this respect, since the defendant’s attorney can cross-examine witnesses at the time the tape is made (Doret 1974:266). The importance of cross-examination is underscored by State v. Wilkinson (64 Ohio Sr.2d 308, 414 NE 2d 261), in which an undercover drug agent’s death-bed testimony recorded on video at a hospital was deemed inadmissible because the defendant’s attorney had not been given sufficient notice to be there during the taping.

14 Henry H. Perritt (1994:1074) points out that “the revised Federal Rules of Civil Procedure express a preference for videotaped depositions in jury trials over stenographic records of depositions.” (For a Confrontation Clause argument in favor of videotape depositions as opposed to stenographic transcripts in criminal trials, see Stein (1981).) The obstacle confronted by the PRVT is not that the judiciary is opposed to videotaped depositions but, rather, the reluctance to admit depositions at all. One exception is that some jurisdictions have made it easy for medical experts to testify on video to encourage them to participate in trials.

15 It is also the case that most of the forms of mediatized evidence mentioned at the start of this section, including “The Titanic” video, would be admissible only by order of the presiding judge.
witness is legitimately unavailable to testify live. In *Stores v. State* (625 P.2d 820), heard by the Supreme Court of Alaska in 1980, the court overturned a conviction in a rape case on these grounds, finding that the prosecution had not made sufficient good-faith efforts to secure at the trial the presence of the doctor who had examined the victim, whose testimony had been presented on video while she was vacationing. The higher court’s interpretation of the prosecution’s strategy was that “the sole purpose of taking the deposition was to create former testimony to be used in lieu of live testimony. We will not sanction such an evasion of the constitutionally based preference for live testimony in open court” (827). The law’s preference for the live presence of witnesses, implied by the Confrontation Clause, is clear.

Writing for the dissent in *Stores v. State*, Justice Matthews argued that “the critical question is whether there was a significant difference between the testimony as it was actually presented to the jury on the videotape and as it might have been presented had Dr. Sydnam appeared in person at Stores’ trial” (830). Justice Matthews’s position was that in as much as the circumstances of the taping were similar to those of the trial (the same attorneys were present, as was a trial judge, and the witness was cross-examined), there was no reason to believe that the videotape did not provide an accurate rendition of her testimony. It is

---

16 As a legal term, “unavailability” refers to a variety of circumstances in which a witness cannot, will not, or does not testify. A dead witness is said to be unavailable, as is a witness who did not respond to a subpoena or refuses to speak on the stand. I quote part of the definition of unavailability found in the Federal Rules of Evidence later in the main text. In addition to justifying the use of a deposition, the unavailability of a witness enables a variety of types of testimony to be admitted that would otherwise be considered hearsay (Federal Rule of Evidence 804b).

17 A US Supreme Court case almost exactly contemporaneous with *Stores* turned, in part, on the same question. In *Ohio v. Roberts* (448 US 56 [1980]), the Court addressed, among other evidentiary issues, the question of whether the prosecution had made sufficient good-faith efforts to secure a witness before introducing her testimony from a preliminary hearing. Justice Brennan’s dissent focuses entirely on this question.

18 I have employed the standard format for legal citations in the first citation to the decisions I discuss. I will place only the relevant page number in the parentheses following subsequent citations.

19 The idea that admissible prior testimony should have been given under “trial-like” conditions emerges in many decisions, as does debate over whether the circumstances of pre-trial depositions and preliminary hearings are sufficiently trial-like for testimony given under them to be admissible. This issue, too, presents a difficulty for the PRVT. Its supporters frequently emphasize the efficiency of being able to videotape witnesses outside the courtroom, whenever and wherever are most convenient. Challengers argue that it is difficult to maintain sufficiently trial-like conditions in these circumstances.
interesting that Justice Connor did not argue that the doctor’s testimony would have been different had she appeared live, only that it might have been, and that that possibility was grounds on which to reverse the original decision. Justice Connor’s opinion insists on the importance of live performance to the legal proceeding: the witness’s live presence before the jury and the possibility that something could happen in “the maniacally charged present” of the trial that did not happen on the videotape are issues of sufficient moment to require the reversal of a rape conviction.

Interpreted in this way, the Confrontation Clause would seem to be a major hurdle for the PRVT, since all testimony would take the form, technically, of prerecorded depositions. Another aspect of the Confrontation Clause also creates difficulty for the PRVT. The Clause has been interpreted as supporting “jury observation of witness demeanor during confrontation to determine credibility and elicit truth” (Armstrong 1976:570). At first glance, this seems relatively unproblematic: the defendant could be present during the taping of testimony, thus confronting the witness, and the jury would observe the witness’s demeanor when shown the tape in the courtroom. But if the Confrontation Clause is interpreted as meaning that the confrontation of witness and accused must take place in the jury’s presence, then the PRVT has encountered an obstacle it cannot overcome, for to have the jury present during the taping of testimony would be equivalent to staging a live trial!20

There is reason to believe that the Sixth Amendment does indeed demand that confrontation take place live, before the jury. In Maryland v. Craig (497 US 836 [1990]) the Supreme Court concluded that allowing a victim of child abuse to testify by closed-circuit television was acceptable because “the judge, jury, and defendant [were] able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifie[d]” (quoted in Nichols 1996:415–16). The key words here are “albeit” and “as.” The first word implies that observing a witness by means of television is acceptable primarily because it is better than not observing the witness at all, and further implies that direct, live observation would be even better. The “as” clearly indicates that the Court interprets the Confrontation Clause to mean that the jury’s observation of the witness is supposed to be simultaneous with the testimony, thus suggesting that confrontation is not just something to be seen by a jury.

20 I am indebted to Armstrong (1976) for the direction of my argument concerning the constitutionality of the PRVT.
at some point after it occurred, but something that should occur live, in
the presence of the jury.

To pursue further the ways in which liveness is fundamental to trial
proceedings, I will turn to what the law says about the nature of testi-
mony itself. A textbook analysis of the legal concept of hearsay describes
the function of witnesses as the “recordation and recollection” of
perceived events; this process of the storage and retrieval of memories is
the basis for in-court testimony (Graham 1992:262). To give testimony
is to perform recollection, the retrieval of memory, in the present
moment of the trial. The text of Federal Rule of Evidence 804(a) offers
further support for this characterization of the witness function. The
Rule presents the following definition of “unavailability as a witness,”
which is the necessary condition for the introduction of a deposition into
a trial:

“Unavailability as a witness” includes situations in which the
declarant—.

(3) testifies to a lack of memory of the subject matter of the
declarant’s statement; or
(4) is unable to be present or to testify at the hearing because
of death or then existing physical or mental illness.21

In other words, from the point of view of the federal courts, a witness
who is unable to perform memory in the courtroom is indistinguishable
from a dead witness or a deranged one.22

In his dissenting opinion in United States v. Owens (108 S. Ct. 838
[1988]), a case concerning John Foster, a savagely beaten prison guard
who had identified his assailant while in the hospital but, subsequently,

21 The alert reader will have noticed by this point that I have drawn my examples from
the realm of criminal law even though most of the PRVTs that took place were civil
trials. It is the case that the Sixth Amendment right to confrontation applies only to
criminal proceedings. As I mentioned earlier, there were criminal PRVTs, and its
early advocates did not limit its use to civil cases. Where the use of depositions and
the availability of witnesses are concerned, the guidelines in the Federal Rules of
Civil Procedure are very similar to those in the Federal Rules of Evidence that govern
criminal trials. According to Federal Rule of Civil Procedure 32. V.a., depositions can
be used only when a witness is unavailable, and unavailability is defined there in the
same terms as in the Federal Rules of Evidence.

22 The legal system’s dependence on memory is illustrated differently by the law’s
ambiguity where false claims of memory lapse are concerned. As David Greenwald
(1993:194) has pointed out, judges have a tendency to treat witnesses whom they
suspect of such a false claim as fully present and available for cross-examination and
impeachment despite their technical unavailability.
could not remember the attack, though he could remember making the identification, Justice Brennan suggests that in as much as Foster had had no memory of his assailant at the time of the trial, he had not even been present in the courtroom:

respondent’s sole accuser was the John Foster who, on May 5, 1982, identified respondent as his attacker. This John Foster, however, did not testify at respondent’s trial: the profound memory loss he suffered . . . prevented him from affirming, explaining, or elaborating upon his out-of-court statement just as surely and completely as . . . his death would have.

(846)

In Brennan’s analysis, it is not because certain contents had been erased from Foster’s memory that he was “unavailable as a witness.” Foster had retrieved and articulated those contents while in the hospital; they were known and had served as the basis for a trial. Rather, it was Foster’s inability to perform the retrieval of those memories in the present moment of the trial, to “affirm, explain, or elaborate upon” what he had said earlier and outside the courtroom, that led Brennan to declare that the trial court should have considered Foster to be functionally dead and his hospital-bed identification inadmissible hearsay.23

In the interest of intellectual honesty, I have to underline that Brennan’s opinion was the dissenting one and that the Court found that the admission of Foster’s identification of his assailant had been proper, despite his loss of memory. At first glance, this circumstance problematizes my thesis: if the performance of memory retrieval is the crucial feature of testimony, how could the Court accept the testimony of an amnesiac witness? Justice Scalia, writing for the majority, found that as long as cross-examination of Foster had been possible, there was no Sixth

23 I would base an analysis of the legal system’s ultimate lack of enthusiasm for the psycho-therapeutic theory of repressed memory—in which an unconscious memory of past abuse is said to rise to consciousness, leading to lawsuits and trials—on this notion that testimony is supposed to be a recollection of memory in the present moment of the trial. In repressed memory cases, the act of retrieving the memory is the very thing that prompts legal action. Therefore, there is no way in which that memory can be seen to be retrieved as a fresh recollection during the trial itself. This is only a partial explanation, of course; the psycho-therapeutic community itself lost faith in the concept, as did many patients, who sued their therapists for malpractice. For a good summary of the rise and fall of the concept of repressed memory in the legal and psychological contexts, see MacNamara (1995).
Amendment violation, despite Foster’s “unavailability as a witness” due to memory loss at the time of the trial. His argument was that “meaningful cross-examination . . . is not destroyed by the witness’ assertion of memory loss, which is often the very result sought to be produced by cross-examination” (838).

Regardless of its merits as law, which are open to question, Scalia’s opinion supports my contention that the performance of recollection is the essence of testimony. In Scalia’s view, to assert memory loss in the courtroom is to perform recollection, albeit in a negative way that makes the opposing attorney’s job very easy. If testimony is the performance of recollection, the purpose of cross-examination is to discredit that performance specifically by showing that it has no legitimate claim to being a performance of recollection, whether by demonstrating that the accuracy of the witness’s memory is open to question or by showing that the witness has, in fact, no memory of the events at issue. There is no disagreement between Brennan and Scalia on the theoretical issue of whether testimony is a performance of recollection. Rather, they disagree on the question of whether John Foster should be described as having failed to give such a performance (Brennan) or as having given a performance that helped the other side (Scalia).

Federal Rule of Evidence 612, concerning the use of documents to “refresh [the witness’s] memory” in the courtroom, also clearly illustrates the premium placed within the legal discourse on the idea that testimony is a present performance of memory retrieval. Such documents may be used only to stimulate the witness’s “independent recollection” of the issue at hand; they may not function as scripts from which witnesses recount

---

24 Claire Seltz (1988:867, 897–8) offers a thoroughgoing critique of Scalia’s decision, arguing that “the Court’s reasoning is erroneous, extreme, and not indicative of legislative history or precedent” and creates “the illogical possibility that all out-of-court identifications of any cooperative witnesses, regardless of the value of the cross-examination achieved, will be admissible at trial.” Although far gentler in tone, Greenwald’s (1993:178, 186) analysis of the case is also critical of the decision, which he faults for invoking a false precedent and misinterpreting an ambiguity in the Federal Rules of Evidence. Although Seltz and Greenwald agree that the Owens decision displays faulty legal logic and sets a dangerous precedent, neither argues that the Court came to the wrong conclusion concerning the particular case. Both commentators agree that because Foster retained partial memory of the circumstances of his attack and identification, he could be effectively cross-examined concerning the basis and credibility of that identification and that Owens therefore suffered no Sixth Amendment violation (Seltz 1988:888–90; Greenwald 1993:179). As Greenwald (ibid.:179, 187) notes, a case in which the witness could not even remember making the identification would demand a different analysis.
their recollections (Rothstein 1981:49). The judge must be persuaded that “the witness’s statement, springing from active, current (though revived) recollection will be the evidence” (ibid.:45). If the judge feels that the witness is testifying “from what purports to be a revived present memory when his testimony is actually a reflection, conscious or unconscious, of what he has read rather than what he remembers,” the judge has the right “to reject such testimony by finding that the writing did not in fact revive the witness’s recollection” (Graham 1992:213). In fact, the introduction of such a writing can be justified only by a specific, and fairly elaborate, performance:

In order to use a writing to refresh a recollection of the witness, that witness must exhibit both a lack of present memory and a need for the aid of the writing for recall. The witness must testify that he cannot remember the fact sought to be elicited. Until it is shown that the memory of the witness needs the aid of memoranda to refresh it, there can be no recourse thereto.

(American Jurisprudence 1992:773)25

The judge and jury must see the witness fail to recall the fact, and they must see his memory refreshed at that very moment.26 To constitute valid testimony, the witness’s statements must be persuasive as present performances of memory retrieval.

The foregoing analyses show that the PRVT fought an inevitably losing battle against a fundamental premise of American jurisprudence: that a trial is an ontologically live event. The hurdles placed in the way of using depositions, the emphasis on presenting live witnesses, the definition of testimony as a performance of memory retrieval in the courtroom at the present moment of the trial and of availability in terms of the witness’s ability to undertake that performance all demonstrate the centrality of this premise. The legal system has no aversion to incorporating representational technologies into its proceedings, but accepts only incursions of mediatization that do not violate the liveness of the trial. It should be clear that this respect for liveness is ideological and

25 It is worth emphasizing the irony that this thoroughly scripted moment is part of a performance of memory retrieval that the court ultimately must find to be convincingly spontaneous and unscripted.

26 Some American jurisdictions forcibly extend the same logic to the process by which a verdict is reached by forbidding jurors from taking written notes on the trial. Their decision-making thus becomes a performance of memory retrieval guaranteed to be unprompted by written texts (see Hibbitts 1992:895).
that it is rooted in an unexamined belief that live confrontation can somehow give rise to the truth in ways that recorded representations cannot (a claim similar to Eric Bogosian’s comments on live performance and mass media that were quoted in Chapter 1). David M. Doret (1974:250) states, for example, that “the very confrontation between witness and jury serves to elicit truth and expose falsehood.” Perritt (1994:1093) argues for a limited use of the PRVT for cases in which “a high proportion of the total trial evidence involves experts and demonstrative evidence” but not for those in which “a high proportion of the trial evidence involves individual witnesses whose veracity is being challenged.” This proposal again reflects the assumption that liveness equals truth.28 This assumption is highly questionable: advocates for the PRVT made the point that testimony taped before the trial may be fresher in the witness’s memory and, therefore, more accurate than what the witness recalls at trial. While logical, this claim misses the point, which is that the essence of testimony is not the information recalled but the performance of recalling it in the courtroom, before the accused and the jury. In this context, the replacement of the trial itself by a videotape is simply an impossibility. The PRVT trial tape becomes evidence that functions that should take place in the courtroom at the time of the trial had already happened at the wrong time and in the wrong place.

Many of the questions raised about the validity of the PRVT reflect the traditional assumptions about the nature of live performance discussed in Chapters 1 and 2. John A. Shutkin (1973:381) asks whether witnesses on video would have the same presence as live witnesses: “it is . . . doubtful whether a television production could ever attain the

27 In fact, the Michigan State researchers found that jurors were no better able to detect dissembling at a live trial than at a mediatized one. They also found that jurors are generally very poor lie detectors, regardless of the form of the testimony (Miller and Fontes 1979:205).

28 Collins and Skover (1992:532) claim that the transition from oral culture to print culture entailed a progressive distrust of orality in the law. Referring to the English Statute of Frauds (1677), they state: “by equating perjury with orality, and truthfulness with writing, the statute reflected the legal mindset associated with the typographic age.” I am arguing the opposite here, of course: that modern American law associates live, oral testimony with truth and recorded testimony with fraud. It is true that the live performance of testimony takes place in order to be recorded in a (usually) written record of the trial, which then represents the historical truth of the trial from that point on. The written record is nevertheless assumed to have been preceded by a live trial, which is its precondition. The authority of the written document derives from its presumed accuracy as a transcription of the live event.
impact of a stage presentation. This impact . . . seems undeniably to be the product of the live performance.” (Shutkin acknowledges, at least, that the “impact” to which he refers is “intangible and immeasurable.”)

It is ironic that whereas there were doubts in the 1970s as to whether a televisual trial could have the impact of a live one, the current concern over the CSI effect indicates doubt as to whether a live trial can have the impact of a televisual one! Doret (1974:258) makes an equally unsubstantiated claim: “much of the power of the trial as a medium of social communication derives from the visibility of the different participants at a single, centralized forum.” He offers no explanation as to why that forum must be a live trial. These statements, which are rooted in presumed ontological differences between live and mediatized representations of precisely the kind I critiqued in Chapter 2, beg the questions of just what kind of presence live performance possesses, how that presence differs from mediatized representations, and just what presence and the temporal and spatial simultaneity invoked by Doret contribute to the legal process.

Ultimately, the advocates of the PRVT themselves acknowledged that liveness is fundamental to jurisprudence. As a counterpoint to the initial outpouring of utopian claims for the PRVT in the early 1970s, further advocacy in the 1980s and 1990s promoted the idea that its primary value is as a way of clearing the docket of relatively simple, minor cases so that more complex and important cases can be tried live and be given the attention they deserve. McCrystal argued in the 1980s that the PRVT works best in tandem with a “dual docket system,” which was put into practice in Ohio, consisting of a “live docket” and a “prerecorded docket.”

Factually simple cases such as automobile accidents, slip and falls, landlord–tenant actions, workers’ compensation, and intentional torts are assigned to the videotape docket as soon as the case is at issue” thus freeing up the court’s time and energies for the more complex cases that must be tried live (McCrystal and Maschari 1983:71). The history of the PRVT is roughly comparable to that of the relationship between theatre and television discussed in Chapter 2. In both cases, the

29 Rule 3.02 of the Erie County Rules of Practice of the Court of Common Pleas states that cases assigned to the videotape docket “will usually arise out of auto collisions, contracts, collections or other cases which in the court’s opinion are adaptable to the videotape medium” (reproduced in McCrystal 1983:122).

30 Judge Richard B. Klein of Philadelphia advocates a comparably limited use of the PRVT in criminal cases: “I draw the line on video trials in criminal cases unless the prosecutor certifies the sentence cannot be more than a year in jail” (quoted in Perritt 1994:1084).
mediatized form was proposed as an equivalent replacement for the live form. But whereas the televisual has very largely succeeded in supplanting the live in many of its former arenas, the legal system, despite the incursion of mediatization it has inevitably undergone, has proven to champion liveness in its fundamental procedures. The later line of argument adopted by PRVT advocates transforms the PRVT from a substitute for the live trial into an expedient designed to enhance the prestige of the live event. No longer the harbinger of a new paradigm of mediatized legal practice, the PRVT was pressed into the service of the existing paradigm, that of live performance.31

You don’t own me: performance as intellectual property

If consideration of the privileging of liveness within legal procedure, and of the nature of testimony, prompted further reflection on the traditional values attributed to live performance, a look at copyright and intellectual property law will provoke renewed consideration of the ontology of live performance and its position within a cultural economy dominated by reproduction. Copyright is in many ways an ideal context in which to raise the latter issue since copyright law itself is a direct result of the development of technologies of reproduction and consequent economic changes. “[T]he [English] copyright act of 1710 is a sign not only of print technology’s capacity to increase the rate of production of copies of a book but also of the profitability that generates disputes, litigation and lawyers” (Saunders 1992:39).32 In order to be protected under Title 17 of the United States Code, otherwise known as the 1976 Copyright Act, a work must be “fixed in a tangible medium of expression” that renders it replicable (that is what “copyright” means, after all). The definition of creation in Title 17 reflects this requirement: “A work is created when it is fixed in a copy . . . for the first time” (section 101). As far as copyright law is concerned, a work exists legally only in so far as it has been replicated; if a work has not been reproduced, it has not yet been created. There are no “originals” under copyright law: “The term ‘copies’ includes

31 The failure of the PRVT may support Jean Baudrillard’s assertion, cited in Chapter 3, that simulation threatens the foundations of law. The American legal system’s rejection of the televisually simulated trial might be seen as a successful effort to contain that threat.

32 Saunders (1992) provides a good overview of the development of copyright law in Britain, France, Germany, and the US. For a brief, practical summary of the history of copyright in Britain and the US, see Miller and Davis (1990:280–7).
the material object . . . in which the work is first fixed” (section 101). Yet again, we find ourselves in the realm of Baudrillard’s simulacrum: every “copyrightable” work is always already a reproduction of itself.

Title 17 is also a work of performance theory.\(^{33}\) Historically, copyright law has refused to grant to live performance the status of intellectual property. The Copyright Clause of the United States Constitution (Article I, section 8, clause 8) gives Congress the power to secure “to Authors . . . the exclusive Right to their respective Writings.” Although over the years Congress and the courts have shown themselves to be willing to construe the concept of a “Writing” quite broadly—as “any physical rendering of the fruits of creative, intellectual or aesthetic labor” (Goldstein v. California [1973] as quoted in Miller and Davis 1990:304)—they have never granted that status to “intangible expression,” which is to say performed expression.\(^{34}\) The copyright statute’s definition of fixation states that “a work is ‘fixed’ . . . when its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration” (section 101). Live performance, which exists only in the transitory present moment, is therefore excluded. Similarly, the statutory definition of “publication” states explicitly that in as much as “publication’ is the distribution of copies . . . of a work to the public . . . a public performance or display of a work does not of itself constitute publication” (section 101), presumably because a performance is assumed to be a unique, nonrepeatable event, not an object that can be copied and distributed (an assumption with which I took issue in

---

\(^{33}\) Obviously, the context in which the relationship between copyright and performance is most frequently discussed is that of the rights of authors of plays and other performance texts. Title 17 grants to authors an exclusive right “to do and to authorize” public performances of their works (section 106.4). There have been some interesting controversies over the years focusing on playwrights who wish to assert their rights against productions whose interpretations of their work they dislike. (I discuss one such dispute against the background of changing information technologies in Auslander (1992a).) Because I am concerned here with the copyright status of performance per se, I will not address the issues arising from disputes over textual interpretation.

\(^{34}\) It is important to stress that I am focusing here on the federal copyright statute. It is possible for individual states to recognize intangible expression as property under common law or to enact statutes that offer such protection; I discuss common law copyright later in this chapter. For a good overview of state law protection of live performances, see Meltzer (1982:1278–80). Meltzer (ibid.:1297) argues, however, that “piecemeal state law protection of performance interests inadequately compensates entertainers.”
Chapter 2).\textsuperscript{35} Although Title 17 specifically mentions “choreographic works” as one type of protectable work of authorship (section 102a), this is true only for choreographic works that have been notated or otherwise recorded.\textsuperscript{36} A dance that exists only as a live performance or a speech that was presented to an audience but never written down or recorded cannot be copyrighted (Miller and Davis 1990:303). A performance that exists for no more than a transitory period is neither a publication nor protectable under federal copyright.\textsuperscript{37}

The hazards the concept of fixation creates for performance (and performers) are illustrated by the much-publicized case of \textit{Bright Tunes Music Corp. v. Harrisongs Music, Ltd.} (420 F. Supp. 177 [1976]), in which former Beatle George Harrison was sued for copyright infringement because his song “My Sweet Lord” strongly resembles the earlier song “He’s So Fine.” The question of whether the two songs are “substantially

\textsuperscript{35} In a report presented to the American Bar Association, a committee looking into “problems of creators of works of fine and applied arts” makes the following observation: “Although the exhibition of a motion picture or television film does not in and of itself constitute publication, offering to distribute copies of the picture or film to a group of persons for purposes of public performance would constitute publication” (American Bar Association 1981:6). By analogy, even though a public performance of a play does not constitute publication, making the play available for production (by placing it with a script service, for example) presumably would constitute publication even if the play were being circulated in manuscript form and were “unpublished” in the sense of never having been printed by a publishing company.

\textsuperscript{36} According to Adaline J. Hilgard (1994:766–7), the fixation requirement is particularly vexing for choreographers because “none of the available means of fixation—video, written notation, or computer graphics—is entirely satisfactory.” She also notes that some choreographers fear that fixing their works will either transform them into “museum pieces” or make it easier for others to pirate them. (See also Van Camp (1994:67–72) on the problems of fixing choreography.) To some degree, choreographers prefer to rely on the dance-world custom of ostracizing choreographers who steal from others rather than depending on copyright protection. Perhaps for these reasons, the federal copyright statute’s protection of choreographic works has been tested only once, in \textit{Horgan v. Macmillan, Inc.} (1986), a case that was settled before being decided on appeal. I discuss Horgan, and Hilgard’s analysis of it, below.

\textsuperscript{37} Julie Van Camp (1994:70–2) takes note of a suggestion advanced in the context of choreographic copyright “that the United States adopt the approach of German copyright law, in which protection begins at the moment of creation of the work, prior to any fixation” since dancers’ ability to transmit choreography as oral tradition is evidence that the setting of a dance on the bodies of the dancers is fixation enough to prove the existence of a work. As Van Camp indicates, the practical problems of litigating infringement claims in the absence of an independent record of the choreography are enormous.
similar” (the legal standard for copyright infringement) hinged in part on the presence of a “unique grace note” in Harrison’s song that had also appeared in the earlier piece. As the judge recounts in his decision, this grace note appears on the first recording of Harrison’s song, made by Billy Preston, and on the sheet music prepared from that recording, but not on Harrison’s own, much better-known recording or the sheet music derived from it (180). Even though it is likely that the success of Harrison’s own recording of the song was what prompted the suit (following the principle that “Where there’s a hit, there’s a writ”), the judge took the first fixation of the song, Preston’s recording, to be the object under scrutiny. According to Harrison’s testimony, the presence or absence of that particular note on Preston’s recording was attributable to performative accident: “[Billy Preston] might have put that there on every take, but it just might have been on one take, or he might have varied it on different takes at different places” (181). It was Harrison’s misfortune that the particular take on which the sheet music deposited for US copyright was based included the incriminating note. According to the judge, Harrison himself takes a performative view of music: he “regards his song as that which he sings at the particular moment he is singing it and not something that is written on a piece of paper” (180). Copyright, however, acknowledges only fixed texts, not intangible performances. The result in the Harrison case was that one moment of performance, frozen in textual form, became the song “My Sweet Lord” in the eyes of the law.

_Columbia Broadcasting System, Inc. v. DeCosta_ (377 F. 2d 315 [1967]) is a good case to examine in this context because it offers a particularly clear illustration of the legal status of live performance. Victor DeCosta, a Rhode Island mechanic with an enthusiasm for the Old West, developed a cowboy character he called Paladin, which he performed at “parades, the openings and finales of rodeos, auctions, horse shows,” and other events. He would also distribute photographs of himself in costume and a business card reading “Have Gun Will Travel, Wire Paladin, N. Court St., Cranston, R.I.” (316). After he had performed this character for ten years, he saw a television program called _Have Gun Will Travel_ in which the main character, played by Richard Boone, was a cowboy called Paladin whose costume, business card, and personal idiosyncrasies (e.g., his use of a chess knight as an adornment and of a derringer in shoot-outs) were identical with those created by DeCosta, save for the address on the card. DeCosta sued the Columbia Broadcasting Corporation (CBS) for pirating his character and won a judgment that was reversed on appeal. The appellate judge did not reverse the jury’s decision because he felt that no piracy had taken place. To the contrary, Judge Coffin
sympathized with DeCosta and agreed with the jury that the resemblances between the two Paladins were more than just coincidence and that CBS had stolen the Paladin character from DeCosta (317). He nevertheless reversed the decision, on the grounds that the federal copyright statute protects only works that can be reduced to “some identifiable, durable, material form” and that “the plaintiff’s creation, being a personal characterization, was not reduced and could not be reduced to such a form” (320). Because DeCosta’s Paladin existed only as a live performance, he could not prevail, despite the striking resemblances between his character and the television show’s. The judge observed that DeCosta could have sued CBS for duplicating his business card, the one fixed and tangible artifact of his performance, but since he had never copyrighted the card, he had no cause of action (321).38

When live performances are fixed through writing, recording, or documentation, only the underlying text is protected against unauthorized usage, not the live performance as a text. For example, a videotape of choreography may be submitted to the Copyright Office as part of a registration. Although the choreography itself (the underlying text, in this instance) is thus protected against copying, the particular performance of that choreography on the tape is not protected. While Balanchine (as an “author”) might be able to copyright his choreography of The Nutcracker, no dancer could copyright his particular interpretation or performance of the Mouse King in Balanchine’s ballet; nor could the New York City Ballet copyright the company’s performance on that tape. A similar limitation would apply to live theatrical productions, many elements of which—the script, set and costume designs, choreography, music and lyrics—can be copyrighted, but the performance itself, including the staging and the interpretation of characters, cannot be. A letter from the US Copyright Office concerning a director’s application for copyright in his staging of a play states: “reference to ‘stage directions’ in an application . . . does not imply any protection . . . for the actions dictated by them. The authorship on the application in this case is ‘text of stage directions.’ We understand this to represent a claim in the text” (quoted in Freemal 1996:1022). This

38 Under the 1976 revision of the copyright statute, registration is no longer required in order for a work to enjoy copyright protection. Any work of authorship is automatically copyrighted. A work does have to be registered if a claim of infringement is to be brought, however. I cite the relevant section and discuss this requirement below, in the main text. After the 1976 revision took effect, DeCosta could have won a judgment for CBS’s infringement of the copyright in his business card, provided that he registered it before filing suit.
letter makes it abundantly evident that while the director could 
copyright a text describing his stage directions, and thus protect himself 
against unauthorized copying of that text, he could not copyright the 
execution of those directions in live performances.39

Live performance is excluded from copyright protection because of the 
belief that, as an unfixed mode of cultural production, it cannot be 
copied and therefore lies outside the economy of reproduction. Glossing 
Raymond Williams and Walter Benjamin, Celia Lury (1993:15, 18) 
describes the historical shift from cultural production dominated by 
replication to the dominance of replication40 in a way that makes this 
assumption explicit:

the dependence [of early cultural forms] upon “inherent, 
constituted physical resources” means not only that the artist’s

39 It may seem strange that copyright protects choreography, but not stage directions, 
from unauthorized performances since the execution of choreography does not seem 
like a very different activity from the execution of stage directions. Both are 
fundamentally the realization of a set of instructions for movement, expression, the 
interpretation of a character, and so on. One simple but crucial difference, however, 
is that choreography is expressly protected under the federal copyright statute. Stage 
directions are not, and it is difficult to see under what category of copyrightable 
expressions they might fall. It has been argued that stage directions are analogous to 
choreography and should therefore enjoy the same protection. As Beth Freemal 
(1996) points out in her thorough discussion of this question, however, stage 
directions are dependent on another text (the play) in a way that choreography is 
not. Even if a dance is set to music, the dance retains its integrity in the absence of 
the music. But if the play text is removed and stage direction is left to stand on its 
own, of what does it consist? This also presents a problem for the fixation of stage 
directions: how can a director notate or fix her directions without reproducing the 
play text, in which she does not hold the copyright? (Choreography can be notated 
or fixed without reproducing the musical score.) A play that consists only of stage 
directions (Beckett’s Act without Words comes to mind) presents no problem. In such 
a case, the stage directions are coextensive with the dramatic work and can be 
copyrighted as such. In a case where the direction is based on an existing text by an 
author other than the director, however, the director’s contribution can be seen only 
as a derivative work based on the play. Under American law, the copyright in 
derivative works is owned by the copyright holder in the primary work. If the 
playwright holds the copyright in a play, then the playwright, not the director of the 
play, would hold the copyright in stage direction as a derivative work. Although stage 
directors in the US have been pressing for explicit copyright protection for their work 
for at least a decade, the discussion has not advanced past the analysis suggested here 
and the possibility of a strong copyright in direction is slight (see Yellin 2001).

40 Lury’s terms “repetition” and “replication” are equivalent to Attali’s (1985) terms 
“representation” and “repetition,” respectively. I cite Attali’s terminology and 
historical scheme in Chapter 2.
physical presence in front of an audience is required for a cultural work to come into being, but that the work's “material” existence is coterminous with its performance . . . Within this class of means of cultural production, then, copying takes the form of physical or bodily repetition . . . [O]nce the art work has a fixed material form in which the signs of the creative labor are imbedded, it can . . . be copied by someone other than the originating artist. It is this possibility—what Benjamin referred to as mechanical reproduction—[that] will here be called replication.

In this historical overview, live performance is the cultural mode associated with the era prior to the arrival of the technologies of reproduction that brought copyright law into being. In arguing that because live performance is not fixed in a material form it can be repeated but not replicated, Lury reproduces the ontological assumptions about live performance that I addressed in Chapter 2. However, my argument there concerning the possibility of mass-producing live performance problematizes both this distinction and the exclusion of live performance from copyright. It is apparent, for example, that a production such as Tamara was made to “be copied by someone other than the originating artist[s]”; that is, it was intended to be replicated, not repeated, even though the replications take the form of live performances. From this point of view, it becomes possible to imagine that these live productions could be copyrightable, despite the general exclusion of live performance from copyright protection.

That the copyright statute does not presently grant standing to live performance as intellectual property is very clear. A close examination of copyright also reveals that even in instances where performances have been recorded, the performance captured on the recording is not copyrightable in itself. In the case of a sound recording, any underlying texts and, since 1971, the recording itself may be copyrighted, but the performance on the recording cannot be. In Supreme Records v. Decca Records (90F. Supp. 904 [1950]), one record company sued another for producing a recording of a song that supposedly imitated the first company's recording of the same song.41 The judge found, however, that

---

41 Supreme Records is fascinating for reasons that go beyond my focus here. In its decision, the court compares the two recordings and notes “that the Supreme record is clearly identified as 'a race or blues and rhythm' recording, while the Decca record is 'popular.'” The judge characterizes the “race” recording as inferior to the “popular”
the first company could not assert a “right of ownership in a musical arrangement,” by which he meant not just an instrument or vocal score but the whole style of the performance on the record (909). *Supreme Records* was decided well before the 1976 revision of the copyright statute, which includes the following, more extensive limitation:

> The exclusive rights of the owner of copyright in a sound recording . . . 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.  
> (Section 114b)

Thus, it is unlawful to duplicate a recording in which you do not hold the copyright, yet it is perfectly legal to replicate the performance on that recording in order to make your own recording of it.42 This example one, which he describes as possessing “clearer intonation and expression” and making use of a “more precise, complex and better organized orchestral background” (912). Anyone familiar with the vexed history of race relations in American popular music might wonder to what extent the judge’s characterization of the “race” record as inferior was a product of musical racism. More important, perhaps, is the possibility that this case constitutes an attempt to use the legal system to redress the problem of White artists’ “covering” successful recordings by Black artists and reaping the benefits of the Black artists’ efforts by virtue of the superior distribution and airplay granted to “popular” (i.e., White) recordings. This problem would become even more acute with the advent of the rock and roll era in 1955, especially given the propensity of White artists and their producers to fail to pay royalties to Black songwriters. For a summary discussion of this situation, see Szatmary (1991:27–31).

42 Although it may seem extraordinary that the law explicitly permits the imitation of existing sound works, this clause reflects the underlying principles of copyright as they pertain to written texts. The copyright statute protects “original works of authorship” (section 102a). As Miller and Davis (1990:290) note, however:

> a work of originality need not be novel. An author can claim copyright in a work as long as he created it himself, even if a thousand people created it before him. Originality does not imply novelty; it only implies that the copyright claimant did not copy from someone else.

In principle, if a writer were to produce a book that was identical, word for word, with another, previously copyrighted book and could prove that he/she had had no access to the earlier book, and that her work was purely the result of independent effort, she could have a copyright in her book, despite its lack of novelty. Similarly, as long as the producer of a recording does not copy an existing recording but makes a new recording that sounds identical to the existing one, the new recording is
shows that even a performance that has been fixed and rendered replicable through reproduction is not protected by copyright. Virtually every component of a sound recording can be protected, including the underlying text and the recording itself. The only thing that cannot be is the performance of the text or materials in question, which can be imitated with impunity. Whether live or recorded, performance qua performance cannot be copyrighted.

The copyright statute’s refusal to recognize performance as intellectual property has been articulated broadly in the statutory concept of fixation and in terms of specific performance genres through case law. Writing in 1950, the appellate judge in the Supreme Records case observed that “there is a line of cases which holds that what we may call generically by the French word representation,—which means to perform, act, impersonate, characterize, and is broader than the corresponding English word,—is not copyrightable” (909). Until a 1971 amendment to the law, for example, sound recordings were uncopyrightable because they were considered, in the words of a 1912 decision, “captured performances” (Gaines 1991:131, 270 n. 80). Supreme Records applies this doctrine to theatrical performance: “the mere portrayal of a character by an actor in a play which is the creation of another is not of itself an independent copyrightable as an “independent fixation.” Although the two circumstances are not identical (in the case of the book, the resemblance between the older and newer texts must be coincidental; this is not the case for identical sound recordings), the concept of “independent fixation” can be understood as the correlative of an “original work of authorship” in the realm of sound recording. In both cases, the fact that the later object lacks novelty is no obstacle to its being copyrighted, as long as that lack of novelty is not due to illicit copying of the protected object.

The practical ramifications of this clause were brought home to me by a compact disc entitled Back to Rock N Roll, an anthology of American pop songs from the 1960s. Most of the recordings on the disc are recreations of the original recordings by the same singers, who have earned their livings for the past twenty-five years by performing their early hits. Keep in mind that the owner of the copyright in a sound recording need not be the performer; considering the practices of the music and film industries, it is in fact unusual for performers to own the copyrights in their own recordings. If the copyright law permitted the owner of the copyright in a sound recording to prevent others from making another recording that sounds the same, the performers on this disc could be deprived of a significant portion of their livelihood. This clause also permits musical artists who traffic in pastiche, such as the Manhattan Transfer and Bette Midler (about whom more below), to make records that do, indeed, sound like other records; it allows performers who, by whatever trick of nature, sound exactly like performers who recorded before them to record; and it presumably discourages recording artists from litigating over matters of style. (My examples derive primarily from musical recordings but the principle extends to all types of sound recording.)
“creation” and therefore cannot enjoy copyright protection (908). The most often-cited reason why copyright protection does not apply to performance is that to grant a performer exclusive rights to particular performed gestures or intonations would severely limit the vocabulary available to other performers and thus “impede rather than promote the useful arts” (Booth v. Colgate-Palmolive [1973] as quoted in Gaines 1991:124). If such a right of ownership in performance existed:

we would have to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of Hamlet.

(Supreme Records v. Decca Records, 909)

Section 1101, added to the Copyright Act in 1997, provides for a very limited copyright in performance. This section prohibits “fix[ing] the sounds and images of a live musical performance in a copy or phonorecord . . . without the consent of the performer or performers involved” and the unauthorized reproduction, transmission, or distribution of “the sounds or sounds and images of a live musical performance.” This addition to the law is distinctive because it is the only part of the federal statute to refer explicitly to performers as having copyrights in their performances. It clearly applies only to musicians, however. More important in this context, it prohibits only unauthorized recordings of live performances: it does not prohibit the live recreation of a previous performance. Whereas section 1101 would prohibit me from making a video of a Rolling Stones concert without their permission, it would not prohibit me from recreating their concert as a live performance (as long as I pay royalties for using their songs, of course).

There have also been a few decisions that seem to impute to performers a copyright in their performances. In Baltimore Orioles v. Major
League Baseball Players (805 F. 2d663 [7th Cir. 1986]), the court decided that baseball players' performances in game broadcasts “created a copyrightable interest” (Helfing 1997:10). In Fleet v. CBS (50 Cal. App. 4th 1911 [2d Dist. 1977]), a case in which actors who were not paid for appearing in a film attempted to block release of the film by arguing that the distributor did not have the right to use their names or likenesses to publicize it, the court concluded that the actors’ “individual performances in the film . . . were copyrightable [as] dramatic works” (quoted in ibid.). Clearly, these decisions fly in the face of the historical view of performance’s relation to copyright, and they are probably isolated instances. It is once again the case that the decisions apply only to specific mediatizations of performances, not to the performances themselves. That is, the Fleet decision would give performers ownership rights only in the particular portions of a specific film-text in which they appeared. Recreations of their performances in other media would not be affected.45 Assuming that these decisions are valid, they show once again that only fixed performances are copyrightable; live performance is not.

The suspicions of theorists who see performance’s evanescence as a site of resistance to a cultural economy based in reproduction may seem justified by the vagaries of some of the decisions I have cited. George Harrison certainly learned the hard way that copyright law has no respect for what Henry Sayre (1989) has called the “aesthetic of impermanence.” The lesson of DeCosta is that, in a capitalist representational economy, the entity legally defined as the “author” of a creation is the one who can extract profit from it.46 Given these considerations, it is easy to understand the appeal of seeing performance as a discourse that

45 Helfing (1997:10) argues that Baltimore Orioles did not hold that the players’ performances were copyrightable, “only that the telecast of a baseball game is copyrightable” and that “the copyright interest arises, not from the performances in themselves, but from the players’ ‘creative contribution’ to the telecast.” The irony of both Fleet and Baltimore Orioles is that arguments that appear to support performers’ ownership interests in their performances were used to justify finding against the performers. The actors in Fleet sued under California’s right of publicity statute. In finding that their performances were copyrightable, the judge also invalidated their suit, since the federal copyright statute preempts the state-level right of publicity. Under this interpretation of the case, the actors would have had to sue all over again in federal court. In Baltimore Orioles, the contribution of the baseball players to the copyrighted game broadcast was determined to be “work for hire” owned by the owner of the copyright in the telecast as a whole.

46 For an outstanding analysis of entertainment law as a product of and a means of sustaining capitalism, see Gaines (1991).
escapes and resists the terms of this cultural economy. That sword is double-edged, however, for it is also easy to sympathize with performers who might want to put that economy to work for themselves by acquiring greater control over their creations, even though that would mean sullying their performative purity.

It is amply clear that federal copyright law shares with some performance theorists the premise that live performance exists only in the present and has no copy, that it is constituted by an ontology of disappearance (Phelan 1993b:146): that is why it is not protectable under copyright. To copyright law, an undocumented performance is less than invisible: in as much as it has no copy, it was never created; it does not exist at all. As we have seen, even performance that has been fixed through reproduction is not actually governed by copyright—only the rights in the underlying texts and the right to reproduce the fixation are protected. Whether that makes performance a site of meaningful resistance to that economy is more problematic. If performance may be said to slip through the legal net of copyright, it does so because that net was designed specifically not to catch it. Whatever resistance performance’s ontology of disappearance may enable has been allowed it by the very cultural and political discourses it is said to resist.

Before concluding that performance escapes the jurisdiction of US intellectual property law, however, we must recognize that among the significant developments in this field over the course of the twentieth century were a number of decisions in which performers were determined to have rights of ownership in their performances, both live and recorded. That these decisions were made under legal theories other than copyright suggests a trend toward making ever more aspects of performance “ownable” in ways not possible under the federal statute. These theories include “common law copyright,” unfair competition, right of publicity, and trademark.

The most important of these legal concepts, from a theoretical perspective, is “common law copyright,” which derives from a presumptive Lockean natural right of ownership in the things one creates. It exists only at the level of state law and is generally assumed to protect works of authorship prior to publication, at which point they fall under the jurisdiction of federal copyright (DuBoff 1984:190–1). Of particular interest in this context is section 301 of the federal copyright statute, which states, “Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to ... subject matter that does not come within the subject matter of copyright ... including works of authorship not fixed in any tangible medium of expression.” In other words, common law copyright, the terms of which
some states have defined explicitly, is the legal theory under which live performance may be copyrighted. As such, it should be of particular interest to students of performance. Even though state-level statutes are always subject to preemption by federal statute, there is no conflict between common law and federal law in the matter of live performance, since live performance is explicitly excluded from the purview of the federal law.

Nevertheless, there has been very little case law concerning the protection of unfixed performances as intellectual property. Arguing for a federal copyright in improvised performance, Gregory S. Donat could point to only two published cases, both of which concerned the ownership of statements made during conversations. Donat (1997:1376) points out that “in both cases, courts refused to recognize a common law copyright in spoken words because there was no clear demarcation between the spoken words and ordinary discourse.” As he suggests, however, this issue would not stand in the way of copyrighting performance, for “demarcation [from] ordinary discourse” is often posited as one of the defining elements of performance. As Richard Bauman (2004:9) puts it, “In this sense of performance, then, the act of expression itself is framed as display: objectified, lifted out to a degree from its contextual surroundings.” Both the fact that common law copyright is applicable to unfixed expression and the apparent requirement that the expression be distinguishable (“lifted out”) from ordinary behavior qualify it eminently as a legal theory under which live performance might be copyrighted.47 Although I introduced the concept of common law copyright as being primarily of great theoretical importance in part because its use to protect live performance as intellectual property remains largely hypothetical, the New York Court of Appeals’ recent decision in Capitol Records v. Naxos of America (NY Int. 27 [2005]) reaffirmed the power of common

---

47 Pressing the issue beyond common law, Donat (1997:1384–91) proposes an ingenious way of making a copyright in live performance palatable under the terms of the federal statute, which does require fixation. Noting that the content of live broadcasts is copyrighted if the broadcast is recorded as it is transmitted, Donat argues that the same principle of simultaneous fixation applies to live performances. As in broadcasting, a recording could be made simultaneously with the performance solely for archival and copyright purposes—the audience could have access only to the live performance. Unlike the cases discussed in which performers were found to have ownership rights only in portions of films or television programs in which they appeared, this application of the simultaneous fixation doctrine would protect the underlying content, not just the fixation itself. In short, it would extend federal copyright protection to live performances.
law copyright, thus making the development of a body of case law in this area more likely.⁴⁸

Turning to decisions that have had the concrete effect of making performance ownable, we find that they have been made under such legal theories as fraud and unfair competition, right of publicity, and trademark. *Goldin v. Clarion Photoplays* (195 NYS 455; 202 AD 1 [1922]), for example, is a case in which the magician who invented the “sawing a lady in half” illusion successfully sued to protect his exclusive right to perform it. In 1928, Charlie Chaplin won a decision against another actor, Charles Amador, for imitating his Little Tramp character in films (93 Cal. App. 358, 209). Bert Lahr won a judgment against a company that used a voice that sounded like his in a television commercial (*Lahr v. Adell Chemical Co.*, 300 F.2d 256 [1st Cir. 1962]). An important case is *Midler v. Ford Motor Company* (849 F.2d 460 [1988]), in which singer Bette Midler sued the automobile company and its advertising agency for using a singer who sounded exactly like Midler in a commercial. She lost her initial case but won on appeal.⁴⁹

Each of these cases had the effect of extending legal protection to specific performances (a magic trick, a distinctive character) or performance styles (speaking and singing voices), though each was decided on a different basis. In *Chaplin v. Amador* (546), the court stated:

> the case of plaintiff does not depend on his right to the exclusive use of the role, garb, and mannerisms, etc.; it is based upon fraud and deception. The right of action in such a case arises from the fraudulent purpose and conduct of appellant and

---

⁴⁸ *Capitol Records* addresses a dispute between two record companies over recordings made by one of them in the 1930s and issued on CD by the other in the 1990s. The court concluded that although sound recordings made prior to 1972 are not protected by federal copyright, they are protected under New York State law. Another interesting aspect of this case is the assertion that, for the same reason, the distribution or sale of recordings made before that date does not constitute publication in the legal sense.

⁴⁹ As Judge Noonan noted in his decision, the commercial in which a voice like Midler’s was used was part of a series known within the agency as “The Yuppie Campaign” in which “the aim was to make an emotional connection with Yuppies, bringing back memories of when they were in college” in the 1970s. The agency used a different song in each commercial, and tried to recruit the artist who had originally popularized it to rerecord it. When Midler declined to rerecord “Do You Want To Dance,” a song she had originally recorded in 1973, the agency employed Ula Hedwig, who had once worked for Midler as a back-up singer, to imitate Midler’s voice for the commercial (849 F.2d 460 [1988], 461).
injury caused to the plaintiff thereby, and the deception to the public.

This theory of the case arose from the fact that Amador had not only imitated the Little Tramp but had billed himself in the films as Charlie Aplin. The decision stemmed from the conclusion that Amador had practiced fraud and was guilty of "unfair competition in business," not from the theory that Chaplin had a copyright in his performance as the Little Tramp. The original dismissal of *Lahr v. Adell Chemical* was reversed on a similar basis: the appeals court found that using a voice that sounded like Lahr’s could constitute “passing off” and, therefore, unfair competition. The decision in *Goldin* also was based, in part, on grounds of unfair competition. Clarion Photoplays had made a film revealing how the illusion was achieved; the court found against the company on grounds of unfair competition, since distributing the film would render Goldin’s illusion worthless and thus deprive him of “the fruits of his ingenuity, expense, and labor” (202 AD 1, 4).50

*Midler v. Ford Motor Company* was an explicit effort to protect performance in ways not possible under federal copyright. Judge Noonan states bluntly in his decision that “a voice is not copyrightable. The sounds are not ‘fixed’” (462). In this case, the decision was made on the basis of a California statute enshrining what has come to be called the right of publicity—Civil Code, section 990b, also known as the Celebrity Rights Act—originally designed to allow the estate of a deceased celebrity to continue to control the use of the name, voice, signature, photograph, and likeness of that celebrity.51 Judge Noonan interpreted this statute as protecting a living celebrity’s identity or personhood and found that Midler has a property right not in her voice or performance but in her identity, her self. “A voice is as distinctive and personal as a face,” he wrote. “The singer manifests herself in the song. To impersonate her voice is to pirate her identity” (463).52

---

50 In addition to unfair competition and related concepts in business law, performances can sometimes be protected as trademarks or service marks: “Under certain circumstances, it may be possible to register a comedian’s tag-line, name or stage name (or name of his ‘persona’) as a service mark identifying the comedian or the entertainment services provided by the comedian” (Nelson and Friedman 1993:256).

51 For an entertaining overview of several right of publicity cases brought and decided under this statute, see Weinstein (1997). For a cultural analysis of *Midler*, see Auslander (1992a).

52 In *Sinatra v. Goodyear Tire and Rubber Co.* (435 F.2d 711 [1970]), Nancy Sinatra lost her case against the company and its advertising agency for using a recording of “These Boots Are Made for Walking” that sounded like her own. Since Sinatra did
The central difference between copyright and the right of publicity is that while the former protects works of authorship, the latter protects personhood and, therefore, applies only to those whose persons have market value, to celebrities. Judge Noonan’s decision carefully spells out Midler’s claim to celebrity by summarizing her career, quoting her reviews, and indicating her status as a cultural icon appealing to baby boomers. In the last paragraph of the decision, he states:

We need not and do not go so far as to hold that every imitation of a voice to advertise merchandise is actionable. We hold only that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs.

(463)

This implies that even if an advertising agency set out deliberately to replicate the voice of an unknown singer in a commercial, that singer

not have the benefit of California’s Celebrity Rights Act, she advanced a different argument: “that the song has been so popularized by the plaintiff that her name is identified with it; . . . that said song . . . has acquired a ‘secondary meaning’” (712). “Secondary meaning” is a concept derived from trademark law referring to “a mark [that] has been used so long that it has come to be synonymous with the goods or services with which it is connected” (Miller and Davis 1990:165). Sinatra argued, by analogy, that the close association of the song with her performance of it means that the song inevitably refers to her. Had this right been recognized, Sinatra would have had control over all performances of the song, since any rendition of “These Boots Are Made for Walking” would presumably evoke her as a secondary meaning. The central difference between Sinatra’s argument and Midler’s is that whereas Sinatra was claiming a kind of ownership in the song itself as a consequence of her having executed a famous performance of it, Midler’s claim was based only on her proprietorship of her voice. The appellate judge upheld the original decision against Sinatra because granting her the right to control performance of the song on these grounds would conflict with the federally sanctioned rights of the copyright holders in the song to do so. “Moreover,” the judge observed, “the inherent difficulty of protecting or policing a ‘performance’ or the creation of a performer in handling copyrighted material licensed to another imposes problems of supervision that are almost impossible for a court of equity” (717–18). For a detailed analysis of Sinatra and a comparison of it with Midler, see Gaines (1991:105–42).

53 A conceptually convoluted case illustrates this point well. In Onassis v. Christian Dior—New York, Inc. (122 Misc.2d 603 [1984]), Jacqueline Kennedy Onassis sued Christian Dior for using a model who looked like her in a magazine advertisement. The model had done nothing to make herself look like Onassis—she simply bore a striking natural resemblance to the other woman. Onassis won her case. As a celebrity, her appearance is her property to exploit, even when it is actually another person’s own appearance. For a full discussion of this case, see Gaines (1991:84–104).
would not enjoy the same rights as Midler because that singer's identity, unlike Midler’s, has no generally established value.

Jane Gaines (1991:142) observes that the Midler decision “signaled a new development in intellectual property law, one that had been evolving since the fifties but that was not recognized in common law until the early seventies: the right of publicity paradigm.” The origins of this development can be traced back even further in case law. The illusionist in Goldin v. Clarion Photoplays, for instance, was able to control the performance of the “sawing a lady in half” illusion because the illusion and its title “have become identified with plaintiff’s name to such an extent that theatre managers and the public immediately connected the two” (202 AD 1, 3). DeCosta, too, can be seen as a step in the evolution of the right of publicity paradigm and has nuances that are worth examining in that light.

In his DeCosta decision, Judge Coffin did not discount the possibility that a character could be copyrighted and even imagines “a procedure for registering ‘characters’ by filing pictorial and narrative description [of them] in an identifiable, durable, and material form” with the Copyright Office. Why, then, does he say not only that DeCosta could not prevail because he had not “reduced his creation to a fixed form” (Miller and Davis 1990:305) but that “the plaintiff’s creation, being a personal characterization . . . could not be reduced to such a form” (320, my emphasis)? The answer lies in the judge’s use of the phrase “personal

---

54 See Apflebaum (1983:1570–4), Gaines (1991:187–91), Levine (1980:130–8), and Wohl (1988:447–50) for overviews of the right of publicity and its origins. Gaines, Levine, and Wohl discuss the right of publicity in relation to the right to privacy, while Apflebaum compares right of publicity with copyright. Whereas Levine and Wohl argue for broad construal of the right of publicity, Apflebaum (1983:1593) claims that right of publicity can be appropriately used only to protect “works of authorship not fixed in tangible form.” In Apflebaum’s view, all other applications of right of publicity are preempted by federal copyright statute. Gaines suggests that the right of publicity may not have evolved organically through common law but may have been codified to justify existing economic practices in the entertainment industry, then provided with a genealogy in case law after the fact. If so, I am contributing to the latter process in the discussion that follows.

55 Only characters that are very specific in their development can be copyrighted:

The general idea of a character is unprotected. Stock figures, prototypes, or stereotypical figures likewise are unprotected . . . Characters become more protected as they become more detailed. But the attribution of general qualities—such as strength—or emotional features—such as compassion—is not sufficient to gain copyright protection.

(Miller and Davis 1990:344–5)
characterization.” In discussing this matter, the judge reveals himself to be a fairly sophisticated performance theorist, conversant with the concept of “everyday life performance.” “All human beings—and a good part of the animal kingdom—create characters every day of their lives,” writes Coffin, but he goes on to say that the kind of character people often invent “for their own and others’ amusement . . . is so slight a thing as not to warrant protection by any law . . . to the extent that a creation may be ineffable, we think it ineligible for protection against copying simpliciter under either state or federal law” (320).

The judge’s reasoning concerning everyday life performance is sound: to create a situation in which one person could seek legal remedy because another had copied his Halloween costume or his humorous performance at the office water cooler clearly would be intolerable. This reasoning extends logically to professional performance as well. What is interesting in DeCosta, however, is the judge’s refusal to treat DeCosta’s creation as anything more than a “personal characterization” on the order of a Halloween costume, even though it turned out to be considerably more than that to CBS. Coffin notes that, in the original trial, DeCosta’s attorneys had cited:

several cases . . . around the general proposition that it is an actionable wrong to appropriate and exploit the product of another’s creative effort; but all seem to involve distinguishable wrongs of at least equal or even superior significance. Most rest on the tort of “passing off”: appropriation not of the creation but of the value attached to it by public association . . . by misleading the public into thinking that the defendant’s offering is the product of the plaintiff’s established skill.

(317–18)

Certainly, there was no “passing off” in this instance: unlike Amador’s implying that he was Charlie Chaplin, CBS had no reason to state or imply that its Paladin was DeCosta because DeCosta’s name and reputation were of no value to CBS. Although Coffin does not express this conclusion, it is hard to believe that it played no role in his formulation of the concept of “personal characterization.” I suspect that if DeCosta’s performance had been professional rather than avocational and he had become famous for it (like the illusionist in Goldin), the result of the appeal would have been different even before the advent of the right of publicity paradigm, because then CBS unquestionably would have poached something of established value. The irony of DeCosta is that the plaintiff could have prevailed had he proved that CBS had
poached a creation of established value but, because DeCosta was not a
celebrity, the value of his creation could be proved only by the fact that
CBS found it worthy of poaching. The Midler decision makes it even
clearer that a present-day DeCosta could expect to have a right of
ownership in his performance only if he were a celebrity and CBS had
something to gain by appropriating his identity, not the character he
created.

In a discussion of whether ordinary people can benefit from the right
of publicity, Gaines finds that the law enshrines a paradox:

Before exploitation . . . the ordinary person and the unknown
actor can be said to have a right of publicity that, in its
dormancy, is both there and not there. It is inherent at the
same time as it must be produced by exploitation. What I mean is
that in current legal thought a person does not have publicity
rights in him or herself unless, at one time or another in the
course of a career, he or she has transferred these rights to
another party.

(Gaines 1991:190, original emphasis)

An author does not have to be well known, or even published, to enjoy
copyright protection for her work but a performer must be sufficiently
famous so that someone else would seek to purchase her identity to enjoy
protection of her performance under the right of publicity paradigm.
Even then, that protection is not of the performance as a work, but as an
extension of the performer’s identity, construed as having value in itself.
Although it is not clear that it is desirable to formulate a general property
right in performance, the success of the right of publicity paradigm
suggests that any attempt to do so would have to take the tack that all
performances are manifestations of the performer’s self and that, there-
fore, the unlicensed use of any performance is an appropriation of the
performer’s property in her identity.56

56 There has been a successful movement within American law to extend the rights of
visual artists over their productions, modeled on the European legal concept of droit
moral (usually translated as “moral rights” though the concept has more to do with
the artist’s morale than with morality). In as much as droit moral derives from a
conception of the work of art as an extension of the artist’s personality, not a work
created by but separate from the artist, it bears a certain resemblance to the American
legal doctrine of right of publicity. Whereas the right of publicity emphasizes
economic interests, however, droit moral equates damage to the work of art with
damage to the psyche and reputation of the artist. (For a general discussion of droit moral and comparison with American law, see DuBoff (1984:224–39). For a more theoretical and historical comparison of droit moral with copyright, see Saunders (1992.).) Droit moral is understandably very attractive to artists, in part because it gives them the right to control the integrity of their work, “to prevent their works from being altered, distorted or destroyed” (DuBoff 1984:233). A 1990 addition to Title 17 extended these rights to visual artists (Visual Artists Rights Act of 1990, section 106a). Their extension to performing artists would be highly problematic, however. To take but one example, it is conceivable that a film actor could argue that the director and editor altered, and thus distorted and destroyed, his performance in post-production. A successful claim could result in financial penalties to the filmmakers or an injunction against any release of the film. Performers who are, like most actors, musicians, and dancers, in the business of interpreting texts created by others certainly should hesitate before supporting droit moral legislation for playwrights, composers, choreographers, etc. Under droit moral, an author need only claim that a performance of her text distorts it to block public presentation of that performance. Opponents of the imposition of droit moral on American law stress the impossibility of defining an objective standard for distortion, and the consequent potential for capriciousness on the parts of authors (or their heirs) in determining which uses of a text are acceptable and which are not (Saunders 1992:207). Proposals to implement droit moral for American authors of performed texts seem to me not to avoid the pitfall of embracing overly subjective criteria. One writer suggests that “professional performing groups . . . should be required to obtain the specific written approval of the creator or the creator’s agent before departing from the creator’s intentions in significant ways” (Burlingame 1991:10). This plan allows the creator complete control over how the work is presented and interpreted and it disregards any possibility that the performers, too, may have rights as artists. Another approach tries to harmonize droit moral with the First Amendment by distinguishing protected and unprotected speech: “where an interpretive artist incorporates speech [understood in a broad sense as interpretation] into a performance of an author’s work that is consistent with the author’s message or the author’s expression of that message, the First Amendment protects the interpretive artist’s speech and prevents the government from regulating it.” Predictably, speech that is not consistent with the author’s message would be unprotected and subject to regulation (Konrad 1991: 1608). This proposal, too, gives too much power to the author and not enough to interpreters. To Konrad’s credit, the legal recourse he recommends involves neither a financial penalty nor an injunction against presenting the offending work, but a “labeling remedy.” “A labeling remedy for an integrity right violation would involve a court ordering the producer and/or the interpretive artist to indicate in the performance’s credits and/or advertisements that the interpretive artist has modified the author’s work against the wishes of the author” (ibid.:1641). In this way, the author’s personality rights would be respected without curtailing the activities of the interpreters.

My own proposal, which favors interpreters rather than authors, is to extend the concept of “compulsory license” from the realm of music into those of dramatic and other performing arts. This doctrine derives from early copyright legislation concerning sound recording. It holds that the composer of a piece of music has an absolute right to determine who makes the first recording of that piece (section 115). Once the composer has licensed one recording of the piece, however, anyone else who wishes has the right to make subsequent recordings of it in whatever style and
This is a highly problematic position from the perspective of acting and performance theory, in which the relationship between the performer's identity and her performance is much thornier and more ambiguous than the law would seem to allow. While some performers may see their performances as manifestations of identity, others may prefer to see their performances more as “works of authorship” created and embodied by, but finally distinct from, themselves. Arguably, the ambiguity of the relationship between self and other is at the heart of performance; Richard Schechner (1981:88), for example, argues that the actor is not the character, but is also “not not” the character. To eliminate this inherent ambiguity in favor of defining performance as necessarily a manifestation of the performer’s self would be a reductive enterprise. In saying this, I am not suggesting that the law is wrong about the nature of performance, though it would surely benefit from a review of performance theory. The more important point is that the law, through its particular historical evolution, has constructed the concepts of performance and performer, and therefore of performers’ rights, in particular ways that may not accord with the ways that acting and performance theory have constructed these terms through their own historical evolutions.

Tom Waits v. Frito-Lay (1978 F.2d 1093 [9th Cir. 1992]), the final case to be considered in this context, arose from circumstances very similar to those of Midler. The Frito-Lay Company hired an advertising agency to develop a campaign for a new brand of corn chips. Inspired by one of Waits’s songs, the agency composed a similar song and asked Waits if he would perform it. He declined on the grounds that he is philosophically opposed to endorsing products. The agency therefore held auditions for someone who could sound like Waits and found a vocalist who performed Waits’s songs in the more famous singer’s style as part of his act. Waits successfully sued and the verdict was upheld on appeal.

interpreted howsoever they see fit, provided they pay statutory licensing and royalty fees (Miller and Davis 1990:314). Although I’m sure there would be problems to be confronted were this doctrine applied to dramatic and other performed texts, I feel that it would ultimately serve the interests of free and creative expression far better than an Americanized droit moral.

In a comparative discussion of the relation of self to performance in the theories of Stanislavski, Brecht, and Grotowski, I suggest that although that relationship is configured differently in each case, each theorist grounds performance in a concept of “self” that precedes performance. My deconstruction of these theories finds that all of those “selves” are, in fact, products of the performance theories they are said to ground (Auslander 1997:28–38).
The decision in *Waits* drew to a large extent on *Midler* and effectively reaffirmed the idea that a performer’s voice is a protectable aspect of the person. More important, the court found that Waits’s case could be considered not only in terms of right of publicity but as an instance of false endorsement, as defined under the Lanham Act governing trademarks. The court found, in other words, that Waits’s voice could be considered not only an aspect of his person but his intellectual property: Waits’s trademark as a business. Therefore, as stated in the decision on appeal, “the wrongful use of his professional trademark, his unique voice, would injure him commercially” (978 F.2d 1093; 1992 US App.). The idea that a performer’s voice can serve as a trademark has important implications. “By expanding the possible theories of recovery from a state law tort action to a Federal . . . trademark infringement action, *Waits* theoretically permits performers anywhere in the country a cause of action” (McEwen 1994:134). The *Waits* decision may mean that performers outside of states that have right of publicity statutes can look to federal law for trademark protection of their attributes as performers. If so, it will also expand the right to protect at least the voice of performers who are not celebrities, since ownership of a trademark is not dependent on fame—in this respect, trademarks are more like copyrights than like the right of publicity. Unlike copyrights, however, which are in force for a limited period of time, trademarks exist in perpetuity as long as they are in active use. Although it is clear that copyright law is based on assumptions about the nature of performance that specifically exclude it, it is equally clear that there has been a general trend toward making ever more aspects of performance into property through the interpretation of concepts in business law and the coinage of such new legal theories as right of publicity.

**The Gollum problem**

As it has in so many other areas of social and cultural life, the digital has created new issues in the relationship between performance and intellectual property law, issues that necessitate careful consideration of just what we judge the relationship between performer and performance to be. In an article on video games worth quoting at length, Derek Burrill

---

58 An interesting aspect of *Waits* is that the defense sought to distinguish the case from *Midler* by arguing that Frito-Lay sought only to imitate Waits's singing style, not to appropriate his voice. This attempt to distinguish style from voice did not convince the court.
During the period of preemptive gossip leading up to the 2002 Academy Awards, a bustling debate erupted around Anthony Serkis’ digitally enhanced portrayal of the subhuman character, Gollum, in the film *Lord of the Rings: The Two Towers*. Serkis’ performance was digitally recorded using motion capture and CGI [Computer Generated Image] technologies that mapped his actions and facial movements (the actor’s voice was not adjusted or enhanced) into a software program to which digital graphic elements were added. The ensuing performance was sufficiently hybridized that Serkis’ status as live actor/referent seemed to fall into question, so much so that his inclusion as a possible nominee for Best Supporting Actor became a conundrum for the Academy. The debate circulated around whether Serkis’ performance could be considered “live” (regardless of the long history of analog and digital editing and “adjusting” in film acting production). Was Serkis present enough in the performance? At what point is something too digitized? If something is partially digitized, what of its ontology, its presence? Can someone (or something) perform, in the traditional sense, in the digital?

Burrill’s suggestion that traditional film acting, often characterized heretofore as lacking in direct presence when compared with stage acting, seems “live” when contrasted with the methods used to create digitally enhanced characters supports a central thesis of this book: that liveness is defined historically and is always open to redefinition with the appearance of new technologies. As I proposed in Chapter 2, the arrival of such digital entities as chatterbots has raised the question of just what kind of entity can now be considered a performer. More than one commentator has proposed that we need a new name, and perhaps a new award category, for human performers who submit themselves to

---

59 There is more to be said about the process Burrill describes here. Serkis was initially filmed playing his role while interacting with other performers. He then played the part again in the isolation of a motion capture studio, where the data generated by his movements and facial expressions were captured. This data served as the basis for the creation of Gollum as a hybrid human/CGI character. Serkis’s original performance was digitally erased from the film and replaced with the hybrid (see Askwith 2003).
extensive digitization and the resulting performances: the term “synthespian” for the digital performer (Askwith 2003) has been proposed, as has the somewhat more soberly descriptive “source-actor” for the underlying human subject (Anderson 2004/5). It will be interesting to see what kinds of standards evolve over time for assessing creditworthiness and creativity in this kind of performance.

The primary question the synthespian raises for intellectual property law is directly connected to the ontological question that makes Gollum a problem for existing conceptions of acting: whose performance is it, anyway? From the legal perspective, the Gollum problem is one of a series of interrelated scenarios in which digital information derived from a performer is used to create performances, and often performers, with varying degrees of independence from the source. Digital clones of performers, living or dead, can be constructed directly from scans and captures of the performers themselves (Serkis participated in such a process) or from digital reconstructions that do not necessitate the participation of the actual performer. Once created, a digital clone can undertake an infinite variety of performances the actual performer never executed; such performances can also be extrapolated from other forms of information, such as motion capture data. Whether generated in a special-effects studio or a live, interactive dance performance, motion capture data can be stored and used to produce future performances that were, in some sense, executed by the performer but without that performer’s direct participation. One unresolved question that looms is: “at what point does the actor who provides the raw movements, persona, and appearance to an image no longer count as a ‘creator’ to future manipulation of that image down the line?” (Pessino 2004:99).

Some uses of digital clones are subject to straightforward legal analysis. It seems fairly clear, for example, that using a digital clone of a famous person to endorse a product without the person’s permission would run afoul of both the right of publicity and the Lanham Act, and that using a clone after an actor had turned down a role would constitute unfair competition. (On the other hand, there are potentially unexpected outcomes, too. One legal scholar (Beard 2001) suggests, for example, that the First Amendment might well allow a political candidate to debate with an opponent’s digital clone in an advertisement, especially if the opponent had refused a “real” debate!) Although one can imagine

---

60 For more information on the variety of technical processes used for these purposes, see Anderson (2004/5:171–3), Beard (2001), and Pessino (2004:89–94).
any number of futuristic scenarios in which unauthorized digital clones run amuck, the more immediate questions pertain largely to the permissible uses of authorized ones, questions that turn on definitional issues not entirely different from those the Academy had to confront when considering the status of Serkis/Gollum.

It is quite possible, for instance, that a production company might decide to reuse the Gollum character in contexts that go beyond the original Lord of the Rings films and their immediate derivatives (e.g., DVDs, video games, books, etc.) and a future, unanticipated Gollum performance could be created from the data already obtained from Anthony Serkis, conceivably without the actor’s participation or permission. Or a digital clone of an actor made for one production might be used in a different way in another. This latter scenario is not hypothetical: “Actor Robert Patrick’s digital clone performed as the liquid metal cyborg in Terminator 2: Judgment Day. That same clone was later devoured by a digital T-Rex in Jurassic Park . . . apparently without Patrick’s knowledge or permission” (Beard 2001). The question of whose rights are involved in such instances, and even of whether digital clones themselves may have rights, are currently under consideration in legal scholarship. Because this is still a new development that has given rise to very little relevant case law, the discussions thus far are primarily anticipatory, and my purpose in this section is to point to issues on the horizon rather than engage in specific argument.

To determine who owns and controls a synthespian and its underlying code, it is necessary to determine what such a thing is in relation to existing categories in intellectual property and related law. For example, is a synthespian like Gollum a work of authorship? If so, it is subject to copyright. But who is the author? Unless the source-actor is also the producer, the normal assumption would be that the actor was working for hire and the copyright in the synthespian is the property of the producer. (Note that it is precisely because traditional performances are not considered works of authorship, but extensions of the person, that performers enjoy certain rights in them.)

The same question pertains to the data set from which the synthespian was constructed. Who (if anyone) should own the scan and motion capture data derived from a performer’s body, movements, and facial expressions? This question, too, hinges on the matter of authorship. Can digital data of this kind be considered a work of authorship and, if so, who is the author? Although I agree with Beard (2001) that there is almost no doubt that data of this kind will come under copyright, simply because of the seemingly unstoppable expansion of that category, there is also a persuasive argument suggested by Beard and others that scan
data in themselves do not constitute a work of authorship because they do not reflect even the minimum degree of creativity required for that category. In principle, such data are meant to be purely a record, not a creative reflection, of a performer’s appearance, movement, facial expression, and so on. As such, they are more akin to a medical x-ray than to a copyrightable photograph.61 Assuming that digital data of this kind are eventually judged to be copyrightable, the most likely outcome will be that producers will own the data as work for hire and be able to use them in any way they wish. As Pessino (2004:109) warns, “actors who commit to digital performances must be wary that they have very limited rights in that performance and its potentially unlimited derivative works.” Unless existing laws are interpreted, or even revised, specifically in favor of performers, they are well advised to retain ownership of the digital data they produce through contractual provisions, though this is unlikely to be possible for any but the most famous and powerful.

Even fame is relative when it comes to such power: as John Rockwell has pointed out, Savion Glover, extremely well known in the dance world for his innovative approach to tap, was not given adequate credit by the producers of the animated film *Happy Feet* (2006), for which he provided both the choreography and the motion captured dancing that brought to life the main character, a penguin named Mumble. In published advertisements for the film:

> The stars who provide the characters’ voices . . . are listed twice, once in the middle of the page above the title and again down below with still more voice-over actors, in the credits proper, those that cover those happily tapping feet. There is a special oval boasting about the presence of Prince and Gia Farrell on the soundtrack. There are the four writers and the one composer and four executive producers and three producers. But no mention whatsoever of Savion Glover, the artist without whom Mr. Miller [the director] felt the picture could not have been made.


61 The copyrightability of motion capture data may depend on the nature of the motion captured. As Beard (2001) indicates, “motion capture data would not be copyrightable to the extent that it reflects ordinary movement. If the dynamics captured are sufficiently creative as to constitute choreography, however, copyright would of course be implicated” since choreography is explicitly considered a work of authorship under US law.
Instead, acknowledgment of Glover’s contribution as choreographer and dancer was buried deep in the end credits for the film. This slight suggests an unfortunate potential side-effect of the use of virtual performers: the development of a caste of anonymous or barely acknowledged source-actors, some of whom may be quite accomplished and famous, whose sole purpose is to provide the data from which synthespians can be cloned.

For the most part, legal scholars do not perceive synthespians and digital clones simply as copyrightable works of authorship. Joel Anderson (2004/5:189–90) explains:

Virtual clones complicate traditional analysis because a copyrighted virtual clone represents not just one specific copyrightable performance; it literally contains all potential performances by its source-actor. This goes beyond the scope of copyright concerns because copyright law was generally meant to apply to only one original or derivative expression at a time, but a copyrighted virtual actor literally contains unlimited latent original expressions. Similarly, a typical right of publicity case involves possible infringement in only one work at a time.

It is the synthespian’s status as a performer in its own right capable of further performances, not just a specific performance by a human being, which complicates matters. For Pessino (2004:108), the synthespian is essentially a doppelgänger of the source-actor. As a version of “the [performer] himself” the digital clone falls squarely within the purview of right of publicity (not copyright) which, Pessino argues, should be strengthened and further codified as legal doctrine to allow performers to protect their digital selves just as much as they are able to protect their voice and appearance as aspects of themselves. Right of publicity would certainly need to be expanded to cover digital clones, since those clones need not necessarily possess the protected characteristics of the actor traditionally included under that doctrine. In the case of Robert Patrick, for example, the clone created to portray the metallic version of the T-1000 robot in * Terminator 2* was derived from his physical features yet did not resemble him.

Anderson (2004/5:189) takes a different approach: “a virtual clone can be defined as an inextricably intertwined combination of a person and that person’s copyrightable expressions.” For Anderson, then, the clone is a hybrid of the performer as human being and the performances as works of authorship, a position derived from the analysis that the clone, produced in the first instance by the voice, appearance, and
actions of a specific author-performer, can be used to generate an infinite variety of subsequent individual performances. This hybrid entity requires a hybrid legal status: “both right of publicity and copyright protection are inextricably intertwined in the hybrid virtual clone” (ibid.:190). Beard (2001) also understands the digital clone to be a hybrid, but of a different kind: in his view, the clone is a combination of the person and a representation of that person. Beard’s emphasis on representations rather than works of authorship implies that right of publicity, rather than copyright, will be the primary legal theory used to define rights in this area. He even goes so far as to ask whether digital performers may themselves possess rights of publicity. Although he quickly concludes that this right pertains only to human beings, the fact that he poses the question indicates a possible future dimension of the Gollum problem. However the status of synthespians and the data sets on which they are based is worked out legally, one thing is clear: because it is understood that digital captures and clones are not primarily records of particular performances but, rather, matrices from which an infinite number of new performances may be produced, the digital has made it inevitable that aspects of performance beyond the voice and the face (e.g., facial expression, physical movement) will be understood as proprietary and regulated by some combination of copyright, trademark, business law, and right of publicity.

It is notable that comparable and equally thorny legal questions have come up in the fields of medical research and bioethics. Moore v. Regents of the University of California (215 Cal. App. 3d 709 [1988]) is a notorious case:

A hairy cell leukemia patient, John Moore had his spleen removed at the University of California/Los Angeles School of Medicine. His physician, Dr. David Golde, patented certain chemicals in Moore’s blood without his knowledge or consent and sold the rights to develop parts of the cells to Sandoz, the Swiss pharmaceutical company, for $15 million. Drugs produced from the Moore cell lines are reported to be worth about $3 billion . . . When Moore discovered [what had happened] he sued the doctor for malpractice and property theft.

(Andrews and Nelkin 1997:210)

While I would not suggest that the unauthorized use of a performer’s attributes in the construction or use of a digital clone (as happened to Robert Patrick, for instance) and the unauthorized use of a patient’s biological materials to produce drugs are exactly analogous, both situa-
tions raise issues concerning the ownership of parts (for lack of a better word) of the body and the self. It is also fascinating to discover that the judge who wrote for the majority after Moore appealed the dismissal of his case invoked the right of publicity as partial grounds for arguing that Moore had a proprietary interest in his cells: “Plaintiff’s cells and genes are a part of his person . . . If the courts have found a sufficient proprietary interest in one’s persona, how could one not have a right in one’s own genetic material, something far more profoundly the essence of one’s human uniqueness than a name or a face?” (508).

As it turns out, the two key phrases in this decision are “proprietary interest” and “uniqueness.” A subsequent court found that although right of publicity rulings do indeed grant a proprietary interest in a persona, such rulings derive from business law rather than property law and explicitly refuse to construe the persona as property (51 Cal. 3d 120 [1990], 138). One cannot steal another’s persona—one can only misuse it. The later decision also emphasizes that while Moore’s cells are genetically unique, the product made with them is not:

the goal and result of defendants’ efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being’s immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

(138–9)

Here, the judge implies that right of publicity might be relevant if the cells extracted from Moore were unique in some way and the purposes to which they were put depended on their uniqueness, just as a distinctive persona is protected.

The triangulation of performance, biomedicine, and right of publicity yields boundary-crossing questions. Are cells extracted from a person’s body and digital data “extracted” from a person’s movement, appearance, voice, and so on comparable (the use of the term “clone” in both contexts suggests at least some degree of perceived similarity)? If so, are they best understood as parts of the person (similar to the public persona) or as properties produced by, but separate from, the person (similar to
works of authorship)? If they are to be understood as property, whose property are they: the individual of whom they are (or were) a part, or those in the position to exploit them? How much control over the use and reuse of the cloned materials should the donor have and to what extent should that person participate in the material gains derived from them? These are extremely high-stakes questions in both biomedicine and performance. It is important to monitor how these issues are addressed legally in both fields and the points at which they overlap.

Law and remembrance

As noted at the start of this chapter, some performance theorists see performance’s evanescence and its existence only in spectatorial memory as placing performance outside the purview of reproduction and regulation. The relationship of the view of memory suggested by these performance theorists to the concept of memory implicit in copyright law would seem to be one of opposition. As Pavis (1992:67) suggests, the version of performance that lives beyond the moment is distorted and inaccurate, a product of “the spectator’s more or less distracted perception.” Phelan (1993b:148) valorizes the unreliability of spectatorial memory because it gives rise to unrecuperably subjective versions of performance that are faithful to performance’s ontology of disappearance. Copyright law, by contrast, valorizes technological memory (fixation) because it provides an ostensibly reliable record of the protected object against which claims of infringement may be judged objectively: either the questionable object is “substantially similar” to the protected one or it is not. Upon closer examination, however, it becomes clear that this opposition between performance theory and copyright law is only apparent, for copyright finally privileges human memory over technological memory as well. Even when a performance is fixed in tangible form, the tangible version has no absolute authority. If a question of copyright infringement were to come up, it would not be possible to resolve that question simply and self-evidently by looking at the reproduction of the performance. In order to enter into legal

62 The binary opposition between unreliable human memory and reliable technological memory I am using here is generated by the juxtaposition of Phelan and Pavis with copyright law, not from my own epistemology. If anything, I find technological memory, especially in the form of computer hard drives, to be every bit as unreliable and subject to degradation as human memory.
discourse, the performance must be retrieved from the technological memory-form in which it is preserved and subjected to the vagaries of human memory and interpretation.63

In *Horgan v. Macmillan, Inc.* (1986), the estate of George Balanchine sued a publishing company for printing photographs of *The Nutcracker* that the estate claimed violated the copyright in his choreography, a videotape of which he had submitted along with his copyright application. “The trial court stated that choreography is essentially the movement of steps in a dance and that photographs merely catch dancers at specific instants in time. Therefore, the court reasoned, photographs could not capture movement, which is the essence of choreography” (Hilgard 1994:770–1). But the appellate court felt that the trial court had not employed the appropriate standard for infringement and sent the case back to be tried on its merits. The appellate court proposed two theories of how photographs might infringe the copyright on choreography, the second of which is of interest here.64 “The court stated that a photograph could elicit in the imagination of a person who had recently seen a performance the flow of movement immediately preceding and following the split second recorded in the photograph” (*ibid.*:776). Although the case was settled before it was decided on appeal, *Horgan* is the only extant decision in a copyright infringement case involving choreography under the 1976 statute. One legal scholar suggests that “the court’s approach would provide a choreographer with a claim based on an observer’s recall of the movement surrounding the moment captured in the photograph” (*ibid.*:780–1).65 In this interpretation of *Horgan*, spectatorial memory is far from being out of the reach of

---

63 As we saw from the Rodney King trials, this also holds true for criminal or civil trials in which videotaped evidence is used. The reproduction of the event at issue is not permitted to “speak for itself.” Rather, it is tested against the memories of the witnesses, and the discursive construction of the videotaped evidence that emerges from the live courtroom performance is what counts.

64 Elisa A. Alcabes (1987) recommends addressing the difficult question of whether still photographs can infringe the copyrights in performances by simply adding to the law a rule under which all unauthorized photographs of performances would be presumed to be infringing derivative works. This seems rather a reductive solution to an intriguing theoretical problem.

65 Hilgard (1994:787) writes disapprovingly of this decision. She finds substantial fault with the *Horgan* court and suggests an alternate standard for infringement of choreography: “an artist must copy both the movement and timing of a piece for a court to find copyright infringement.” This would mean that no static representation of dance movement in photography or painting could infringe the copyright on the choreography depicted.
regulatory processes; in fact, it is pressed into service by the law. (Even if the deposited videotape, rather than spectatorial memory, were used to decide the case, the comparison between the photographs and the video would still be made by means of human memory, for no human being could look at the video and the photos simultaneously.) When it comes to the evaluation of copyright infringement claims, human memory is not the safe haven from regulation and control that Phelan (1993b:148) proposes. Rather, it becomes a mechanism for the enforcement of regulation. Performance’s presumed ontological resistance to objectification does not make performance a privileged site of ideological resistance to a cultural economy based in capital and reproduction. If performance persists only as spectatorial memory, then it persists in precisely the form in which it can be useful to the law that regulates the circulation of cultural objects as commodities.

Memory is not only an agent of control but a site of regulation. In Bright Tunes Music Corp. v. Harrisongs Music, Ltd., the court did not find that Harrison had deliberately plagiarized “He’s So Fine” but concluded that “his subconscious knew . . . a song his conscious mind did not remember . . . This is, under the law, infringement of copyright, and is no less so even though subconsciously accomplished” (180–1). In such cases, memory and other psychic operations are subject to policing. The very undependability of memory becomes the object of legal surveillance. Even the processes by which subconscious materials enter into consciousness and the relation between the subconscious and memory become matters of legal scrutiny. In Harrison’s case, a subconscious memory of a performance manifested itself in his own performance in a way that rendered him subject to legal discipline.

In a previous section of this chapter, I showed that testimony is understood specifically as a performance of memory retrieval in the present moment of the trial. Copyright infringement claims may police the memories of accused infringers and draw on spectatorial memory as a means of adjudication. Arguably, then, memory is the very foundation of law, not just in the sense that Anglo-American common law is “an inscription of the past in the present” (Goodrich 1990:36) but in the larger sense Peter Goodrich (ibid.:35) invokes when summarizing the thought of a late sixteenth-century legal scholar:

66 Gaines (1991:117–18) suggests that one reason sound recordings originally were not recognized under copyright law is because it was thought that the unreliability of aural memory would make the resolution of claims of infringement overly subjective; this further reinforces my point.
memory governs law not as a series of established particularities, precedents that will always differ from circumstance to infinite circumstance, but as “essential law,” as a method of handling, defining and dividing a system of argument . . . Memory establishes legal institutions and not the banal specificity of individual cases.

Legal memory is not just a matter of being able to cite precedents relevant to specific circumstances. Memory is the deep structure of a language of law whose utterances take the form of specific acts of recollection.

In as much as memory is brought into the legal discourse as both a policed site and a mechanism of regulation, Phelan’s proposition that memory eludes regulation and control, cited at the beginning of this chapter, seems true only of materials stored in memory and never retrieved from it. As long as a memory remains stored, it apparently has no engagement with mechanisms of regulation and control. But once a memory is retrieved, it can no longer claim to take up a position outside the reach of those mechanisms; it becomes both a subject and a means of regulation and control. If a witness cannot or will not retrieve memories of the matter at issue, the court considers that witness to be unavailable to the legal discourse and, therefore, to be equivalent to a dead witness. If George Harrison had not retrieved “He’s So Fine” from his memory, even subconsciously, his psychic processes would not have been the subject of a court decision. “Visibility is a trap,” Phelan (1993b:6) warns, “it summons surveillance and the law.” Although Phelan is referring here to visibility politics, not to memory, the making present of memories surely must run the same risk. Once they emerge from the safe haven of memory, recollections become visible and, therefore, subject to surveillance and to being pressed into service as testimony. It would seem that as soon as a memory is retrieved, it becomes available to the law.

The question that emerges from this analysis is: at what point in the process of memory retrieval does this risk appear? Does a memory become visible and, thus, summon the law simply by being retrieved; or is visibility the legacy of the moment at which the retrieved memory explicitly enters into discourse? In other words, is it possible for a memory to remain safe from surveillance at some moment after it has been retrieved but before it has been entered into discourse? My argument is that there is no such moment, that memory itself solicits discourse. This idea is staged by copyright law. Title 17 states that a copy of a work need not be deposited with the Copyright Office for that work to receive copyright
protection, but a copy must be deposited to support a claim of infringement (sections 407a, 411a). The sole purpose of storing a copy of the work in the governmental memory bank is to enter it into (legal) discourse. In a provocative passage, Goodrich (1990:9–10) provides a context for considering the question of when memory may be said to enter into discourse and thus summon the law:

The path of the law is that of experience, in the words of one American judge. Could we not take that to mean that we live the law, that what is interesting and at the same time frightening about the law is precisely that it is integral to experience, that it is everywhere present, not as command or facile rule but rather as an architecture of daily life, a law of the street, an insidious imaginary. In terms of any phenomenology of the law in its forms of daily life, we would need to study the images of possibility, the imagery, the motive and affective bonds that tie the legal subject quite willingly, though not necessarily happily, to the limits of law, to this biography, to this persona, to this body and these organs.

Goodrich’s Foucauldian suggestion that law is not a secondary overlay on individual experience but a constituent of that experience itself has important implications. From the perspective afforded by Goodrich’s account, it becomes clear that the experiences stored in memory were themselves shaped in relation to the law as part of the phenomenology of daily life. Perhaps Goodrich’s reference to the legal subject’s persona can be taken to suggest that the psychic functions of memory storage and retrieval (or, in legal parlance, recordation and recollection) also do not occur outside the context of law as a constituent of experience. In view of Goodrich’s discussion of the phenomenology of law, it is clear that memories do not summon the law by becoming visible or by being entered into discourse, because there is no moment at which a memory exists prior to its inscription in and by the law. The content of any memory has already been shaped by law as part of the phenomenology of daily life. In that sense, all memory is inhabited by the structures of law, is always already entered into legal discourse.

The extent to which memory is both embedded in and structured by legal discourse problematizes it as a site of resistance to that same discourse. Much the same can be said of liveness, the ontological quality some performance theorists see as placing performance beyond the reach of regulation. This is true only in the limited sense that live performances cannot be copyrighted. To the extent that the law itself embraces live
performance at a procedural level, however, liveness, like memory, enters into the service of the law. It is perhaps for this reason that Jacques Derrida (1978 [1966]:247) suggests that in order for performance to escape objectification, “its act must be forgotten, actively forgotten.” Unlike Pavis and Phelan, both of whom seem to see memory as functioning outside of reproduction, at least where performance is concerned, Derrida suggests that the recording of an event in memory is itself a form of reproduction. The memory thus assumes the form in which it can be appropriated by such regulatory agencies as the law. In order to escape regulation and the economy of reproduction, performance must not only disappear but must be excluded from memory.

As I have described it here, the relationship of performance to current American jurisprudence is complex, especially when considered through two different bodies of law. One way of summarizing these complexities is to compare the implications of a copyright case for the legal status of a performance with those of a case focused on evidentiary issues. George Harrison’s argument in *Bright Tunes* that a song is not a fixed text but an evanescent performance fell on deaf ears, with the result that the textualized version of one performance of his song became the song as far as the law was concerned. When Justice Connor argued in *Stores* that the fixed (videotaped) version of the doctor’s testimony was not an acceptable substitute for her live presence, he seemed to respect the ontology of performance in a way that copyright does not. In the former case, the possibility of what I have called performative accident is effaced: the song is identified with a written text, regardless of how that text came into existence. In the latter instance, performative accident is valorized: the doctor’s testimony is valid only if given under circumstances allowing for such accident. Despite this apparent contradiction, the argument that performance ontologically resists fixation is accepted at a fundamental level by both branches of the law. Because it cannot be fixed, performance has no standing under copyright. Therefore, a cultural object such as “My Sweet Lord” cannot be defined as a performance for the purposes of copyright litigation. The same recognition, that performance cannot be fixed without ceasing to be performative, yields the procedural preference for live testimony over videotaped depositions. In a mediatized culture, the legal arena may be one of the few sites left where liveness continues to be valued.

The fact that the grounding of performance in an ontology of liveness and disappearance is as fundamental to the understanding of performance in and of the law as it is to many accounts of performance emerging from performance theory problematizes the desire to see that ontology as a source of resistance to reproduction and regulation. I have
shown here that liveness—performance in the present—and memory are privileged terms within the procedural discourse of law, and central mechanisms by which law, including the laws that govern the economy of reproduction, is actualized. In a double gesture of recuperation, which is based in the same understanding of the ontology of performance as that advocated by some performance theorists, federal law denies performance legal standing as intellectual property and recuperates it as central to the legal process itself.
CONCLUSION

My project here—analyzing the situation of live performance in a mediatized culture—has entailed documenting many of the ways in which mediatization impinges upon live events. Almost all live performances now incorporate the technology of reproduction, at the very least in the use of electric amplification, and sometimes to the point where they are hardly live at all. But the influence of mediatization on live events is not simply a matter of equipment. Some live performances, such as certain Broadway plays, many concerts, and most sports events, are now literally made for television: the live event itself is shaped to the demands of mediatization. Others, like Madonna’s concerts and Disney’s *Beauty and the Beast*, recreate mediatized performances in a live setting. Still others, such as the Nashville Opera’s *Roméo et Juliette*, seek to make the live event resemble mediatized forms.

In many instances, the incursion of the mediatized into the live has followed a particular historical pattern. Initially, the mediatized form is modeled on the live form, but it eventually usurps the live form’s position in the cultural economy. The live form then starts to replicate the mediatized form. This pattern is apparent in the historical relationship of theatre and television. Those involved in early television production first took the replication of the theatre spectator’s visual experience as their objective. And the cultural discourse surrounding television successfully defined the new medium as delivering the same experience as the theatre, only under conditions better suited to postwar suburban culture. This understanding of television contributed to its ability to displace the theatre within the cultural economy of the postwar period. I have argued here that, since the late 1940s, live theatre has become increasingly like television and other mediatized cultural forms. To the extent that live performances now emulate mediatized representations, they have become second-hand recreations of themselves as refracted through mediatization.
This historical dynamic does not occur in a vacuum, of course. It is bound up with the audience’s perception and expectations, which shape and are shaped by technological change and the uses of technology influenced by capital investment. As Jacques Attali (1985) shows, an economy based in repetition and the mass reproduction of cultural objects emerged when the production of unique cultural objects was no longer profitable. Analyzing audience desires when mediatized culture was in its infancy, Walter Benjamin (1986 [1936]) concluded that audiences were responding to the perceptual possibilities offered by the film medium. What this new mass audience wanted, in Benjamin’s view, was a relationship to cultural objects defined by proximity and intimacy. He saw the desire for reproducible cultural objects as symptomatic of these needs. Building on Benjamin’s analysis, I have suggested that our current concepts of proximity and intimacy derive from television. The incursion of mediatization into live events can be understood as a means of making those events respond to the need for televisual intimacy, thus fulfilling desires and expectations shaped by mediatized representations.

At various points, I have described the relationship between the live and the mediatized as competitive, conflictual, and agonistic. I must stress, however, that I consider this relation of opposition to exist only at the level of a cultural economy that responds to changing historical and technological circumstances. It is not an opposition rooted in essential differences between the live and the mediatized. Some contemporary performance practitioners and theorists like Eric Bogosian and Peggy Phelan derive a notion of live performance as a socially and politically oppositional discourse from ostensible ontological differences between live and mediatized representations. I have argued here that the qualities performance theorists frequently cite to demonstrate that live performance forms are ontologically different from mediatized forms turn out, upon close examination, to provide little basis for convincing distinctions. Mediatized forms like film and video can be shown to have the same ontological characteristics as live performance, and live performance can be used in ways indistinguishable from the uses generally associated with mediatized forms. Therefore, ontological analysis does not provide a basis for privileging live performance as an oppositional discourse.

In rejecting the argument for ontological differences between live and mediatized cultural forms, I suggested that the best way of thinking about that relationship is to understand liveness as a historically contingent concept continually in a state of redefinition and to look at the meanings and uses of live performance in specific cultural contexts. To that end, I offered a detailed analysis of the relationship between live and recorded
performances in the culture of rock music. The historical narrative of the relationship between theatre and television applies as well to the general relationship between popular music and sound recording. Live performance ceased long ago to be the primary experience of popular music, with the result that most live performances of popular music now seek to replicate the music on the recordings. Even in the case of a musical genre like jazz, where the artist is expected to produce a performance different from the recorded one, the recording is the standard according to which the live performance is judged.

The particular relationship of live and recorded performances in rock culture revolved around a complex articulation of the concept of authenticity that was central to the rock ideology of the 1960s and 1970s. I have argued here that rock authenticity is a concept that depends on a specific interaction of recordings and live performances rather than the nomination of one or the other as authentic. The primary experience of the music is as a recording; the function of live performance, therefore, is to authenticate the sound on the recording. In rock culture, live performance is a secondary experience of the music but is nevertheless indispensable, since the primary experience cannot be validated without it. Although some rock fans do insist that live music is authentic in a way that recorded music is not, the relationship of live and mediatized performances in rock culture was never a relation of opposition in which the live was seen as authentic and the recorded as inauthentic. Rather, authenticity was produced through a dialectical or symbiotic relationship between live and mediatized representations of the music, in which neither the recording nor the live concert could be perceived as authentic in and of itself. In yet another iteration of the historical narrative I have proposed, music video displaced live performance in its relationship to sound recordings by taking over live performance's authenticating function. A relationship that had previously centered on a couple became a threesome: live performance of rock did not cease to exist, but was reduced to replicating and, thus, authenticating the video rather than the music itself. Although the importance of live performance as the certifier of authenticity has diminished considerably in rock culture, rock ideology itself has survived a number of threats. MTV Unplugged—with its emphasis on liveness and acoustic musicianship—and the strategic awarding of Grammys enabled the industry to simulate the ideological distinctions on which rock culture is based (e.g., the distinction between the authentic and the inauthentic), thus maintaining its power as the arbiter of those distinctions. As the response to the later Ashlee Simpson lip-synching scandal shows, this effort at damage control not only reinstated rock
ideology but helped extend its influence to genres of popular music formerly not under its dominion.

After devoting most of this book to examining the status of live performance in cultural realms over which mediatization has achieved dominion, I turned to one social realm that has offered significant resistance to the incursion of mediatization: the legal arena. By discussing the failure of the prerecorded videotape trial to take root, I showed that the assumption that a trial is an ontologically live event is embedded so deeply in the discourse of American law that the mediatized trial simply could not become the dominant form. To demonstrate the centrality of live performance to legal procedure, I discussed both the system's strong preference for live testimony and the ways in which testimony is defined as a live performance of memory retrieval in the present moment of the trial.

It is ironic that the legal system may be the one place in a mediatized culture in which live performance retains its traditional functions and values, since some performance theorists claim that live performance's ontology of disappearance and its persistence only in memory allow it to escape the reach of regulation and, thus, make it a site of resistance to the law. As we have seen, the privileging of liveness at a procedural level in American jurisprudence remains strong despite periodic efforts to remodel trials around the possibilities offered by new technologies. In examining intellectual property law, we see that although a live performance cannot be copyrighted, the law as a whole has increasingly approached the idea of making performance "ownable" as a cultural commodity through the interpretation of performance style as a trademark, the development of the right of publicity, the area of law that governs performance as a part of the performer's self, and the use of aspects of business law to address performance.

The notion that performance's disappearance into memory exempts it from regulation is untenable. As I showed, memory is both a site policed by the law and a central mechanism of law enforcement. The workings of memory themselves can be the objects of legal discipline, as George Harrison learned from the lawsuit over "My Sweet Lord." Far from providing a safe haven from regulation, spectatorial memory can be brought into legal discourse to determine whether a performance has infringed a copyright. Most significant of all, live performance and memory both enter the service of the law in the form of testimony, the live performance of memory retrieval. Given all the ways in which the legal system subjects memory to surveillance, adjudicates its operation, and presses it into service as an agent of legal procedure, the suggestion that memory is a realm exempt from regulation is clearly erroneous.
A colleague once told me that my historical narrative describing the relationship between the live and the mediatized brought to her mind an image of two mirrors facing each other and bouncing an image back and forth between them. If the relationship between the live and the mediatized could be understood as the infinite regress this image suggests, then one would expect that after live performances had become more like mediatized ones, mediatized performances would start to resemble live performances that had internalized mediatization. Subsequent live performances would mirror those mediatized representations, and so on. To think about the relationship between the live and the mediatized in this way is implicitly to assume that each category has comparable cultural standing, that each has an equally strong interest in reflecting the other. But my view of cultural economy holds that at any given historical moment, there are dominant forms that enjoy much greater cultural presence, prestige, and power than other forms. Nondominant forms will tend to become more like the dominant ones but not the other way around. At present, television is the dominant cultural form. Since television usurped the theatre’s position in the cultural economy, theatre has become more like television. But has television gone on to become more like theatre-as-television? The relationship between the live and the mediatized is volatile and subject to significant change over time, as is the definition of liveness itself. If the cultural prestige of live performance were to increase in the future, a kind of back-and-forth exchange among different cultural forms might well occur. That seems unlikely, however. Currently, with the increased dominance of digital media and the concomitant redefinitions of liveness, mediatized forms still enjoy far more cultural presence and prestige—and profitability—than live forms. In many instances, live performances are produced either as replications of mediatized representations or as raw materials for subsequent mediatization. As I have argued here, any change in the near future is likely to be toward a further diminution of the symbolic capital associated with traditional live events.


BIBLIOGRAPHY


Berland, Jody (1993) “Sound, image and social space: music video and media


Cook, Bruce (1973) Listen to the Blues, New York: Scribner’s Sons.


BIBLIOGRAPHY


BIBLIOGRAPHY


Taylor, Natalie and Joudo, Jacqueline (2005) The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on
BIBLIOGRAPHY

Jury Decision-making: An Experimental Study, Research and Public Policy Series 68, Canberra: Australian Institute of Criminology.


Vardac, A. Nicholas (1949) Stage to Screen: Theatrical Method from Garrick to Griffith, Cambridge, MA: Harvard University Press.


BIBLIOGRAPHY


Wurtzler, Steve (1992) “She sang live, but the microphone was turned off: the live, the recorded, and the subject of representation,” in *Sound Theory Sound Practice*, Rick Altman (ed.), New York, London: Routledge, pp. 87–103.


INDEX

Note: The letter n following a page number indicates a reference in the notes

Abdul, Paula 73, 125
accident, performative 150, 181
acoustic performance 110, 111
adaptations 30
Addis, Matthew J. 50
Adell Chemical Company 160, 161
Aerosmith 111
Albarn, Damon 106
Alcabes, Elisa A. 177n
Alessi, Ana Maria 30n
alternative rock 83
Altman, Rick 12, 27n
Amador, Charles 160–1
American Bandstand 100
amplification in live performance 37–8, 57
Anderson, Joel 170, 173
Anderson, Laurie 33, 36
Andrews, Lori B. 174
Apflebaum, Marc J. 163n
Armstrong, James J. 140
Arrested Development 112
art rock 83
Askwith, Ivan 169n, 170
Attali, Jacques 9, 27–8, 35, 47n, 59, 76n, 117, 122, 123, 152n, 184
audiences 23–4, 122, 184; feedback 68–9; “internal” 27n;
manipulation of 27; sense of community 64–6; studio 22, 27n
audio books 30n
aura, disappearance of 37–9, 55, 95–7
Auslander, Philip 23n, 31n, 33, 34n, 35n, 36–7, 45n, 65, 72n, 82n,
101n, 104, 105, 121n, 148n, 161n,
167n
authentic inauthenticity 102, 114–15
authenticity 55, 126–7; rock 73–127,
185
avant-garde performance 32–4

Balanchine, George 177
Balanchine, George 177
Balanchine, George 177
Baltimore Orioles v. Major League
Banks, Jack 99n
Barker, David 20
Barker, Martin xi, 43n, 63–4
Barnouw, Erik 21, 22
Barthes, Roland 58
Baudrillard, Jean 4–5, 43–4, 56, 105,
109, 115, 116–17, 120, 121, 122,
123, 124
Bauman, Richard 159
Baumol, William J. 23
Beach Boys 91–2, 95n
Beard, Joseph J. 170, 171, 172n, 174
Beatles 68n, 80, 86–7, 88–9, 102
Beauty and the Beast 28, 34, 55
Belanger, Paul 20
Benjamin, Walter 31, 37–9, 55, 95,
97n, 136n, 184
Bennett, Tony 112
Berland, Jody 104
Big Brother 21n
biomedicine 174–5
black music 84n, 113
Blau, Herbert 1, 6, 65–6, 71, 72, 128
Blossom, Roberts 41–2
INDEX

blues music 84n, 113, 114
Boal, Augusto 65
body art, documentation of 31
Bogosian, Eric 4, 33, 33n, 184
Bolen, Murray 20–1
Bolter, Jay David 6, 24
Bolz, Norbert 36
Booth v. Colgate-Palmolive [1973] 156
“born digital” products 30n
Bots: The Origin of New Species 70
Bourdieu, Pierre 67n
Bowen, William G. 23
Bowie, David 101–2, 114–15
Brennan, Justice 135, 139n, 142, 143
Bretz, Rudy 21
Brewster, Ben 11–12
Bridgeport Music, Inc. v. Dimension Films [2004] 120
Bright Tunes Music Corp. v. Harrisongs Music, Ltd. [1976] 149, 178
Britt, Bruce 107
Broadhurst, Susan 70
bubblegum rock 87
Burden, Chris 31
Burger, Hans 14, 19–20
Burlingame, Beverly Ray 166n
Burnett, Robert 99n
Burrill, Derek 168–9
Butler, Judith 84

cable television 30
Cafarelli, Carl 87n
cameras 19–21, 47
Canby, Vincent 35
capital: cultural 43n, 67n; symbolic 66–8
Carey, Mariah 110, 112, 125
Carroll, Noël 6n, 52–4
Cavell, Stanley 49, 50
Celebrity Rights Act 161, 162n
Chambers Brothers 78–9n
Chandler, Chas 93n
Chaplin, Charlie 160–1
Chaplin v. Amador [1928] 160–1
characters, copyright in 163–5
chatterbots 69–72
Cheap Trick 29n
Chin, Daryl 33
choreography: copyright in 149, 151, 152n, 177; virtual performers and 172–3
cinema see film
cinematic paradigm in television 21
Clapton, Eric 110, 111, 113–14, 121–2
claques 27
classical music 76n, 85, 90n, 93
clones: digital 117, 121, 170–1, 173–4; hybrid virtual 174;
posthumous 121n
Cobain, Kurt 123–4n
Coffin, Judge 150–1, 163
Cohn, Marc 110
Cole, Natalie 110, 121
Colgate-Palmolive 156
Collins, Phil 110
Collins, Ronald L. K. 131n, 145n
Columbia Broadcasting System (CBS) 14, 157
comedy: improv 64, 69; rock and 101n; stand-up 34–5
commodification 52, 67, 95n
common law copyright 158–9
community building and live
performance 64–6
compact discs 117–18
competition, unfair 158, 160, 161
compulsory license 166n
Computer Generated Images (CGIs) 169
Confrontation Clause 137–8, 139–41
Connor, Justice 140, 181
Connor, Steven 35–6, 56–7, 134
Cook, Bruce 114
Cook, Nicholas 80n
Cooper, Alice (Vincent Furnier) 101, 101n
Copeland, Roger 37–8
copyright law 119–20, 147–82, 186
Coulson, Nick 60–1
Crimp, Douglas 96
“cross-over” performance artists 33–4
Croyder, Leslie 135
Crystals 108n

202
“CSI effect” 130, 146
Cubitt, Sean 45, 48, 49, 51, 65, 68
cultural capital 43n, 67n
cultural value of live presence 66–8
Curtis, Jim 76, 89n, 92, 99n, 100, 101
Davis, Michael H. 147n, 148, 149, 154n, 162n, 163
De La Soul 107
death: in the economy of repetition 123, 123–4n; posthumous performance and 121
Decker, Bethany 125
DeCosta, Victor 150–1, 157, 163, 164–5
Dafoe, Willem 33
Densmore, John 10
depositions, legal 138–9, 141, 144
Derrida, Jacques 181
digital cloning 117, 121, 170–1, 173–4
digital file sharing 29
digital music services 106
digital samplers 103, 118
digital technology: chatterbots 69–72; hybrid human/digital characters 168–74; mixed-media performances 42; musical instruments 83–4, 98n, 103, 118; in musical reproduction 103, 117–19
Dimension Films 119n
Dior, Christian 162n
Disney 28, 34, 55
distribution 45, 46
Dixon, Steve 40
Donat, Gregory S. 159
Doors 10
Doret, David M. 136n, 138n, 145, 146
Douglas, Susan 81
drawing 58
droit moral 165–7n
DuBoff, Leonard D. 158, 166n
Duffy, Kevin Thomas 119, 121
Dumont 14
Dunlap, Orrin E. 15, 16
Dupuy, Judy 15
Duran Duran 84
Durant, Alan 82
Dylan, Bob 111, 113
e-books 30n
economy: of repetition 27–8, 30, 44, 45, 46–7, 117, 123, 123–4n; of representation 27–8, 122
editing, television 19–20
Eisenberg, Evan 38, 76n, 85–6, 93
Eisenstein, Sergei M. 40n
electronic music 98n
electronic ontology 48
evanescence 50, 55, 67
evidence law 129–47
fan cultures 67n
Federal Theater 51, 52
Ferrer, Jose 18n
Festa, Angelika 45
Feuer, Jane 12
film 15, 49, 53; as evanescence 50; as repetition 50–1; theatre and 5, 11–12, 13, 19–20, 25n, 53–4
film acting as nonmatrixed representation 32
Filmstage 41
fixation, statutory concept of 149n, 155–8, 159n
Flagstad, Kirsten 76n
Fleet v. CBS [1977] 157
Fontes, Norman E. 133n, 135, 136, 145n
Ford Motor Company 160, 161, 162n
Foster, John 141–3
fraud 160
Freemal, Beth 151, 152n
Frere-Jones, Sasha 126n
Friedlander, Paul 78–9
Friedman, Dawn G. 161n
Friedman, Ted 73n, 124, 125
Frith, Simon 67n, 76, 77–8, 81n, 86, 88, 95n, 99, 100, 102–3, 105, 119
Frito-Lay 167–8
Fry, Tony 2
Fuchs, Elinor 52
Furnier, Vincent see Cooper, Alice
Gaar, Gillian 108n
Gaines, Jane 155, 156, 157n, 162n, 163, 163n, 165, 178n
Glebbeek, Caesar 93n
INDEX

Glover, Savion 172–3
Godlovitch, Stan 90n
Goldman, Albert 89, 100, 101
Goldsmith, Alfred N. 15
Goldstein v. California [1973] 148
Gollum 169, 171
Gomery, Douglas 14n, 16n
Goodrich, Peter 178–9, 180
Goodwin, Andrew 26, 38, 83, 86, 91, 103–4, 111, 113, 118
Goodyear Tire and Rubber Co. 161–2n
Gorillaz 106–7, 122
Gracyk, Theodore 8, 64–5, 74–5, 76, 77, 81, 94, 99n
Graham, Michael H. 141, 144
Grammar awards 73, 107, 108–9, 110–11, 112, 116
Grateful Dead 94n, 95n
Gray, Spalding 33, 33n, 36–7
Grease 28
Grease: You’re the One that I Want 28–9
Greek theatre 57
Greenwald, David 141n, 143n
Groove Tube, The 13
Gross, David 95n
Grossberg, Lawrence 75n, 79, 80, 81n, 83, 84–5, 87, 90–1, 99, 102, 113
Grotowski, Jerzy 65
“group liveness” 60–1
Grusin, Richard 6, 24

Hall, Russell 101n
handclaps, synthesized 38
Happy Feet 172
Harrington, Wendall K. 26
Harrison, George 149–50, 178, 179, 181
Heath, Stephen 49
Hedwig, Ula 160n
Helfing, Robert F. 157, 157n
Hendrix, Jimi 86n, 92–3, 94n
Hewlett, Jamie 106
Hibbitts, Bernard J. 131n, 144n

Hilgard, Adaline J. 149n, 177
Hodgson, Cheryl 156n
Holder, Roger L. 68–9n
Holmes, Stephanie Ann 138
“home field advantage” 68–9n
home theatre 16
Hopkins, Jerry 93n
Horgan v. Macmillan, Inc. [1986] 149n, 177
How to Succeed in Business without Really Trying 26
Hunter, Mary 17, 19
hybrid human/digital characters 168–74

identity, copyright protection of 161–3, 165, 167
ideology of rock authenticity 73–127
immediacy of television 14–15, 16, 17, 18n, 20–1, 36
improvisation: comedy 64, 69;
musical 93–4
independent fixation 155n
Information: No Theory 47n
intellectual property law see copyright
law; publicity, right of interactive computer technologies 62
interactive theatre 51–2
Internet liveness 60–1
interpretation of texts, generation of performances from 53
intimacy 36, 39; of television 14–15, 16, 17, 18n, 36, 184
iPods 26, 105
Ippolito v. Lennon [1989] 74n
ironic inauthenticity 102n
It Can’t Happen Here 51
iTunes 106

Jackson, Michael 73
Jacobs, Lea 11–12
Jameson, Fredric 5
jazz music 29n, 85, 93–4
Jefferson Airplane 87
John, Elton 101
Johnson, Randal 67n, 68n
Jones, Amelia 31
Jones, Quincy 108–9, 110
Jones, Robert Edmond 40, 41
INDEX

Kaplan, E. Ann 104n, 111
Katsh, M. Ethan 119
kinescope 12, 13–14n
King, Rodney 177n
Kirby, Michael 32
Klein, Richard B. 146n
Knopper, Steve 106
Konrad, Otto W. 166n
Kooper, Al 111
Kozlov, Christine 47n, 48n
Kramer, Eddie 94n
Kroeker, Arthur 115

Lahr v. Adell Chemical Co. [1962] 160, 161
Laing, Dave 85
Lanham Act 168
Lavender, Andrew 21n
law: copyright 119–20, 147–82, 186; evidence 129–47
Leach, Elizabeth Eva 125n
Lederer, Fredric 131
Lee, Brandon 121n
Lehner, Marla 126
Leonard, Andrew 70
Levine, Marla E. 163n
Lion, Margo 6
lip-synching 73–4, 97, 100, 103
live broadcasts 60, 61, 63
live recordings 60, 61
Living Colour 111
Loeffler, Charles 130n
Lohr, Lennox 14–15, 16, 17–18
Lury, Celia 152–3
Lyman, Rick 6

McCall v. Clemens [1971] 132, 133, 134
McCrystal, James L. 132, 134, 135, 137, 146
McEwen, Richard 168
MacKaye, Steele 11–12
McLaren, Bronwyn 74n
McLuhan, Marshall 6
Macmillan, Inc. 177
MacNamara, Mark 142n
Madonna 34, 39, 57, 73, 107
Magnuson, Ann 33, 33n
Major League Baseball Players 156–7
Mancini, Henry 109
Markie, Biz 119n
Marks, Peter 27, 51n
Marshall, John McClellan 134, 135
Martin, Christopher 73n, 91n
Marx, Karl 1–2
Maryland v. Craig [1990] 140
Maschari, Ann B. 134, 135, 146
mass-reproduction 45–58; authenticity of recordings 95–6; of live performance 39, 51–5; musical technologies of 116–20
Matthews, Justice 139
Mayor v. Palmerio [1975] 138
medical research 174–5
Meltzer, Amy R. 148n
Meltzer, Richard 80, 86, 87, 88n, 102n
memory: legal testimony and 140–1, 178–81, 186; repressed 142; spectatorial 128–9, 176, 177–8; technological 176
Metz, Christian 49n
Meyer, Ursula 47n
Meyerhold, Vsevolod 25n
microphones 38, 57
Miller, Arthur R. 147n, 148, 149, 154n, 162n, 163
Miller, Gerald R. 133n, 135, 136, 145n
Milli Vanilli scandal 73–4, 97–8, 103, 107–8, 109, 115, 120, 124–5
Miss Saigon 26
mixed-media performances 40–3
Molderings, Herbert 45–6, 47
Monkees 87–8, 89, 90, 92–3, 99–100, 114n
monophonic recordings 85
moral rights 165–7n
Mordden, Ethan 27
Morrill, Alan E. 132, 134, 135n, 137
Morse, Margaret 61–2
Mortimer, Julie Holland 29
motion capture data 169, 170, 171–2, 174
MTV 100, 103, 105, 107, 110, 111–12, 113n, 122, 123
INDEX

MTV Unplugged 110, 111–13, 115, 122, 123
Murray, Thomas J. 132
music: black 84n, 113; blues 84n, 113, 114; classical 76n, 85, 90n, 93; jazz 29n, 85, 93–4; “pop” 79–80, 81, 99n; popular 29, 57, 79n, 126, 185–6; rock 73–127; rock and roll 78–9; videos 34, 39, 100n, 101, 102–7, 119, 122, 123; see also sound recordings
musical instruments, digital 83–4, 98n, 103, 118
musical reproduction, technologies of 116–20

Nance, Scott 113n
Nashville Opera xi–xii, 26, 183
National Academy of Recording Arts and Sciences (NARAS) 73, 107, 108–9, 110–11, 115, 116
National Broadcasting Company (NBC) 14, 15, 28
National Endowment for the Arts (NEA) 23
naturalisation of performance 38, 43
Naxos of America 158–9
Negus, Keith 80–1, 100n
Nelkin, Dorothy 174
Nelson, Peter Martin 161n
Nesmith, Michael 100n
Nevill, Alan M. 68–9n
New York Philharmonic 26
Newman, Charles 30
Nichols, Carolyn M. 137n, 138n, 140
nonmatrixed representation 32–3, 34
Noonan, Judge 160n, 161, 162

O’Dell, Kathy 31
Ohio Express 87, 89
Ohio v. Roberts [1980] 139n
“online liveness” 60–1
ontology of performance 43–63
orchestras 26
O’Sullivan, Gilbert 119n

Palmer, Robert 78n, 79, 111n
Pane, Gina 31

Paramount Intermediate Film System 13–14n
Pareles, Jon 97–8
Patrick, Robert 171, 173
Paul, Les 77
Pavis, Patrice 26–7, 45–6, 55, 176
Peel, Heather 70
performance art, documentation of 31
performative accident 150, 181
Perritt Jr., Henry H. 133n, 134, 136, 138n, 145, 146n
Pessino, Anthony L. 170, 172, 173
Pet Shop Boys 91
Phelan, Peggy 44–8, 57, 71, 72, 128, 176, 178, 179, 184
photography 31, 55, 58, 177
Poggi, Jack 12, 41n
Pogrebin, Robin 26
Pôles (dance) 42
“pop” music 79–80, 81, 99n
“pop-rock” 81
popular music 29, 57, 79n, 126, 185–6
Porcello, Thomas 118
Post-Modern Aura, The 30
posthumous performances 121
power and simulation 109, 115, 123, 124
Pps Danse, Montreal 42
Preston, Billy 150
Price Waterhouse 130–1
Primer for Playgoers, A 16–17, 22
progressive rock 83n
promotion of mass-produced cultural objects 28, 76, 77, 86
Prosthetic Head 70
proximity, desire for 38–9, 42, 52, 184
psychedelic rock 80n, 84, 87
publication, statutory definition of 149n
publicity, right of 160, 161–8, 173, 174, 175
publishing industry 30n
Queen 83

racial bias 153–4n; in music programming 113n

206
INDEX

radio 14, 16, 59, 71
Radish 90
Raitt, Bonnie 111
recorded music see sound recording
REM 111
remediation 13, 24
repetition 50–2; economy of 27–8, 30, 44, 45, 46–7, 117, 123, 123–4n
replication 152–3
representation, economy of 27–8, 122
reproduction see mass-reproduction
Rhythm and Noise: An Aesthetics of Rock 74
Ritchie, Michael 14
Robertson, Elizabeth M. 119
rock and roll 78–9
rock music 73–127, 185
rockism 126
Rockwell, John 172
Rolling Stones 68n, 84, 88, 94n
romanticism, rock 81–2
roots rock 83n
Rose, Brian G. 17n, 30n
Rosen, Jody 126n
Rothstein, Paul F. 129, 144
sales promotions 28, 29, 76, 77, 86
Saltz, David 54n
sampling 103, 119–20
Sanneh, Kelefa 126n
Saturday Night Live 100–1n, 125, 126
Saunders, David 147, 166n
Sayre, Henry 157
Scalia, Justice 142–3
Schechner, Richard 167
Schipper, Henry 108, 109n, 110
Schloss, Andrew 98n
Schneeman, Carolee 41n
Schwarzkopf, Elizabeth 76n
Seabrook, John 90
search engines 69
Seidelson, David E. 138n
self (identity), copyright protection of 161–3, 165, 167
Seltz, Claire 143n
sense perception 37–8
Serkis, Anthony 169, 171
Shapiro, Harry 93n
Sherman, Rorie 131
Shuker, Roy 67n, 76, 80, 81n
Shtokin, John A. 134, 145–6
Simpson, Ashlee 125–6
simulation 43–4, 98, 104n, 109, 112, 116–27; videotape trials as 134
simultaneous fixation 159n
Sinatra v. Goodyear Tire and Rubber Co. [1970] 161–2n
Skirrow, Gillian 49
Sover, David M. 131n, 145n
Smith, Anna Deveare 47, 47n, 48
Snyder, Barbara Rook 138n
social liveness 60–1
Sontag, Susan 5, 20, 51n
Sorensen, Alan 29
soul music 84n
sound recording 29, 48n, 58–9, 74–7, 85, 91–7, 106, 185; copyright law 153–5, 160n, 166–7n, 178n
source-actors 170, 171, 173
Spector, Phil 108n
Spice Girls 125n
Spigel, Lynn 12, 16, 16n, 17, 19
sponsorship 28
spontaneity of live performance 63–4
sporting events 25–6, 39; sponsorship 28
stage directions, copyright in 152–3
Stage to Screen 11
stand-up comedy 34–5
Steely Dan 89, 90
Stelarc 70
stereophonic recordings 85
Stores v. State [1980] 139
Stuart, Caleb 98n
Sudjic, Deyan 116
Survey of Public Participation in the Arts (SPPA) 23
Swift, Eleanor 138n
symbolic capital 66–8
synthesizers 83–4
synthespians 170–4
Szatmary, David P. 154n
Tamara 51–2, 53–4, 153