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CONTENTS

NOTES FROM UNDERGROUND: ARTISTIC RISK AND POTENTIAL IN THE NEW YORK SUBWAY

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New York City lives by public transit and for thirty years its underground commutes have been illuminated with spontaneous, round-the-clock, freelance artistic performance. That public right to perform, granted by a forward-looking court decision in 1985, has thrilled New Yorkers and defined the subway for visitors. Despite this, the legal status of performance has remained unclear to many city residents, engendering official harassment of many performers. Sadly the astounding success of New York City's tolerant performance regulations has garnered little concern or attention among transit authorities and urban planners to date.

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I INTRODUCTION

On the occasion of the 30th anniversary of the legalisation of subway performance, this article will examine the causes of common misunderstandings of New York City's subway performance culture, with a particular focus on the tension between freelance performers and the Metropolitan Transportation Authorities ('MTA') performance program, Music Under New York ('MUNY'). Ultimately, it will examine the future of subway performance, asserting that permissive public performance policies — like those of New York City — are likely to gain popularity and may deeply impact the visibility of art and music in urban space.

II REVIEWING 30 YEARS

It is predictable that in a space with such enticing acoustics, music found a home in New York City's subway tunnels.[1] The early documentation of this musical history — a smattering of written references, official prohibitions, and occasional pop cultural references — hints at, rather than establishes, the scope and popularity of pre-legal performance. [2]

By the early 1980s, the social and economic conditions were fertile for subway performance to become the rule rather than the exception. Stephen Witt, a guitarist who began performing two years before the legalisation in 1983, observes that he was not alone and that public appreciation made his work good business.[3] It was clear by the early 1980s, there were sufficient performers and public support to move from illicit to approved status.

The beginning of constitutional protection came in the spring of 1985. Roger Manning, a guitarist and anti-folk musician, received a summons for "entertaining passengers". With the support of the New York Civil Liberties Union, he contested the charge on First

[1] See Susie J Tanenbaum, *Underground Harmonies* (Cornell University Press, 1st ed, 1995) 40-47.
[2] In an unusually prominent role, subway performance is featured on the cover of Simon and Garfunkel's 1964 album Wednesday Morning, 3 AM; Simon & Garfunkel, *Wednesday Morning, 3 A.M* (Columbia Records, Tom Wilson 1964).
[3] Email from Stephen Witt to Matthew Christian, 14 March 2015.

Amendment grounds. The court found in his favour, establishing that acoustic freelance music was constitutionally protected on transit authority property.[4]

This constitutional protection led the MTA — largely thanks to the efforts of guitarist Lloyd Carew-Reid and his advocacy group Subway Troubadours Against Repression[5] — to permanently revise its rules to permit artistic performance.[6] Since that revision in 1985, no permit or official approval is required to perform.

Since 1985, artistic performance has become one of the most positively viewed aspects of subway ridership in New York. Even on-train performances — unlike platform performances, on-train are specifically prohibited by MTA rules — exceeded 50 per cent approval ratings.[7] Behind the statistics remain millions of personal stories and a daily total of an estimated US$15 000 in donations.[8]

Ultimately, the great experiment of legal, permit-free public performance came out in favour. Images of subway performers have defined advertising,[9] television,[10] and film,[11] and contributed warmly to public regard for the subway. Most significantly, perhaps, these performances have offered every New Yorker the chance to hear world-class music of a broad range of styles, all for an admission price of a single fare.

III CURRENT CONDITIONS

Despite both the firmly established legal protection and the public popularity of subway performance, the musicians themselves remain at risk. Even those who follow MTA

[4] *People v Manning* (NY Ct Crim App, No 5NO38025V, 1985).
[5] Matthew Christian, '1985-1995: Forgotten History of Activism' on Matthew Christian, BuskNY (31 March 2015) < http://buskny.com/2015/03/31/1985-95-forgotten-history-of-activism/>.
[6] See *Official Compilation of Codes, Rules and Regulations of the State of New York*, Admin Code,1050.6(c) (1989).
[7] The New York Times 'On Subway Performers, The Straphangers Have Spoken', *The New York Times* (New York) 10 February 2012.
[8] Conservatively, this figure assumes roughly 300 performances per day, or six in each of roughly 50 core performance locations or "spots". Typically, each performance might last 2-3 hours and see an average earnings rate of US$20.
[9] *Different Drummer* (Directed by Spike Lee, Baker Street Advertising,1991).
[10] *Louie: Subway/Pamela* (Directed by Louis C.K, 3 Arts Entertainment, 2011).
[11] *The Visitor* (Directed by Thomas McCarthy, Participant Media, 2007).

regulations to the letter are periodically ejected from stations by police, given expensive tickets and fines or even arrested.[12]

According to many observers, this harassment is a result of inadequate training of police and station agents. Illustrating the aggressive policing practices in New York City and across the United States, a video of the wrongful arrest of one subway performer, Andrew Kalleen, reached over 1.5 million online views in October 2014.[13]

Another factor contributing to harassment of subway performers is the ambiguity created by the MTA's subway performance program, Music Under New York. Shortly after *People v Manning,*[14] MUNY began auditioning performers on a yearly basis. Those who are chosen are provided with a promotional banner, and are scheduled for specific time slots in high traffic stations. While MUNY membership does not grant any legal right, in the public eye MUNY is often perceived as a required permit, freelance performers are often assumed to be illicit or, at best, unofficially sanctioned.

This belief is a major cause in the arrests of freelance performers. In 1991, Susie Tanenbaum found during a survey of prospective MUNY members at the annual audition, that '10 of 12 candidates said they wanted to join MUNY at least in part to escape the police harassment that is directed against freelancers'.[15] More recently, media coverage of MUNY's annual audition has often erroneously implied MUNY membership to be a legal requirement.[16] Inaccurate reporting has led many New Yorkers to believe that some form of MTA permit is required. During a recent symposium on art and urban space at Fordham University's Urban Law Centre, I asked conference attendees for a show of hands on their beliefs regarding the permit requirement. An overwhelming majority affirmed the incorrect belief that a permit is required, with only a handful

[12] See, eg, Email from Natalia Paruz to Matthew Christian, 9 February 2012; Anne Craig, 'Subway Idol Arrested' on The Eastwind Online, *NYC Fox 5* <http://www.theoeastwind.com/video/freedomExpression.html>; Lauren Evans, 'Man Arrested for Playing Violin in Subway Station' on *Gothamist* (27 July 2013) <http://gothamist.com/2013/07/27/violinist_arrested_for_playing_viol.php>; Cady Drell, 'Why Was This Subway Musician Arrested For Playing Guitar?', *Rolling Stone* (online) 20 November 2014 <http://www.rollingstone.com/music/features/subway-musicians-arrested-20141120>.

[13] BuskNY, *7/27/13 Wrongful Arrest for Violin Playing, Full Footage* (25 July 2013) BuskNY <https://www.youtube.com/watch?v=TgeMApMUJTk>.

[14] (NY Ct Crim App, No 5NO38025V, 1985).

[15] Tanenbaum, above n 1, 143.

[16] Kate Hinds, 'Would-Be Subway Musicians Vie for Right to Be Legit', *WNYC* (online), 16 May 2012 <http://www.wnyc.org/story/209897-would-be-subway-musicians-audition-right-be-legit/>.

correctly asserting that members of the public can perform, inevitably this has resulted in wrongful arrests of freelance performers.[17]

MUNY has been criticised for contributing to, or even creating, the misconception that freelance performance is illegal. A key criticism is that MUNY serves the MTA's interests more than the public's. Susie Tanenbaum writes that the MTA created MUNY with more than beautification in mind, Tanenbaum goes on to say that it appears to displace and, in turn suppress freelance subway music.[18] Freelance subway performers who protested the 2015 MUNY audition,[19] note that despite ongoing harassment of legal freelancers, the MUNY website makes no mention to the legality of freelance performance.[20]

IV NEXT STOPS: FREELANCE OR AUDITIONED? OVERCROWDING AND BEYOND

As the 30th anniversary of New York City's great experiment in permitting freelance performance, 2015 offers a moment to reflect on the future of subway performance, and of public performance in urban spaces more generally. This section will address several concerns faced by performers, including the negative effects of MUNY and of overcrowding. It will also draw larger conclusions for other cities and transit systems and will reflect on the role that subway performance may have in a music industry.[21]

The first question is whether promotional programs such as MUNY contribute to or detract from the quality of public art in subway space. To be sure, arguments can be made for MUNY — it facilitates the entry of well-established performers into subway space by ensuring them a certain amount of publicity and a scheduled place to perform.[22]

Still, the scope of MUNY's contribution is limited. According to its own promotional materials, MUNY organises 'over 7500 annual performances at 30 locations',[23] or on a daily basis, some-21-odd performances. In a subway system with some 468 stations

[17] Musician arrested for singing in the subway, BuskNY, above n 13.
[18] Tanenbaum, above n 1, 133.
[19] Steve Witt, 'MUNY Audition and Informational Protest' on *Kings County Politics* (19 May 2015) <http://www.kingscountypolitics.com/bklyn-lawmakers-on-the-move-may-19/>.
[20] MTA, *Facts About the Program,* Metropolitan Transit Authority <http://web.mta.info/mta/aft/muny/factsheet.html>.
[21] Simon Frith, 'Live Music Matters' (2007) 1(1) *Scottish Music Review*, 2.
[22] See Tanenbaum, above n 1, 145.
[23] MTA, above n 21.

open around the clock, MUNY members account for a tiny percentage of the total number of performers.[24]

Consequently, the vast majority of performances are by freelancers. Freelance musicians suffer negative implications from MUNY by both lowering the status of freelancers relative to MUNY members, and by placing freelancers at risk for wrongful tickets, ejections, and arrests by police who believe a MUNY "permit" to be required.

In addition to the performers themselves, performance quality is negatively affected by MUNY — by way of domino effect the quality of freelance performance declines in the face of costs imposed by wrongful harassment. As Susie Tanenbaum writes, 'official performance frames … are reducing the amount and variety of music underground'.[25] Consequently, MUNY no longer contributes positively enough to subway performance to justify its existence in New York City. Its elimination would serve to promote the safety, equality, and musical quality of subway performance as a whole.

Another significant concern faced by subway performers in the near future is overcrowding. This has long been a point of concern. As early as 1983, Stephen Witt expressed appreciation for the limited number of competing performers, since they freed up better performance locations, informally known as "spots".[26] As legalisation increased the number of active performances, , spots have required increasing amounts of search time.

Importantly, overcrowding affects performance quality as well as performers. If competition increases greatly in highly desired spots, as some observers have suggested, it will raise the externality costs 'in the form of search costs and foregone tips',[27] perhaps sufficiently to disincentivise more talented musicians. Plausibly, this competition could discourage talented musicians from seeking spots at all. Still more practically, competition can lead to strife between performers over perceived monopolisation of preferred spots, leading performers to focus more on competition than on music-making.

[24] See, New York Times, above n 7, the conservative estimate of 300 daily performances.
[25] Tanenbaum, above n 1, 219.
[26] Witt, above n 3.
[27] James Graham Lake, 'Demsatz Underground: Busking Regulation and the Formation of Property Rights' (2012) 87(4) *New York University Law Review* 1121.

Still, there are factors working against overcrowding as well. Rapid growth in subway ridership does not only increase traffic in central stations, but also raises ridership (and affluence) in stations previously too "slow" for performers to consider.[28] This new financial viability generates performance in stations where, as little as a decade ago, live music was unheard of.

Despite the risk of continued competition for main stations, the general outlook for performers is positive. Of the MTA's 468 stations, few are currently used regularly by performers. Consequently, there is significant room for new performance locations as ridership continues to grow.

V FINAL THOUGHTS

Subway musicians have attracted increasing explicit attention and support from their audiences. In addition to notable viral videos created within,[29] and without[30] the performing community, performers have benefit from institutional publicity through performance series such as Subway Sets and Buskerball apps like Buskr, and independent media coverage. All of these future initiatives — largely unheard of a decade ago, point to a sustainable popularity. The quantity and quality of subway music thus seems likely to grow in New York City and perhaps to elicit imitation in other transit systems around the world.

The model of unrestricted public performance encountered in the New York City subway may do even more than influence other transit systems. If the subway, as the public urban space *par excellence,* provides a platform for performers to find revenue, a fan base, and a constant audience, it may well be the model of a new, more deeply sustainable role for artists and musicians in society at large. If independent artists have found millions of fans in the subway alone, which results in art, civic engagement, and community it may also result in a city where every street and sidewalk provides a new stage for performers.

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[28] *2013 Ridership Reaches 65-Year High* (24 March 2014) Metropolitan Transit Authority <http://www.mta.info/news-subway-ridership-l-r-g-b-d-4-7/2014/03/24/2013-ridership-reaches-65-year-high>.

[29] *Coyote and Crow at Bedford Ave* (4 December 2014) Jukin Media Verified <https://www.youtube.com/watch?v=g1tVbD2aQ7E>.

[30] Christopher Bucktin, 'U2's Latest Gig: Bono and the Boys Gisguise Themselves to Go Busking on the New York Subway', *The Mirror* (online) 6 May 2015 <http://www.mirror.co.uk/tv/tv-news/u2s-latest-gig-bono-boys-5648823>.

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