I Know, It's Only Rock and Roll, But Did They Like It?: An Assessment of Causes of Action Concerning the Disappointment of Subjective Consumer Expectations Within the Live Performance Industry

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I. INTRODUCTION

December 29, 2002. Allstate Arena in Rosemont, Illinois. The ultra-popular, post-grunge rock band Creed is slated to perform to a sell out crowd.[1] An estimated fifteen thousand fans pack the stadium, each

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[1] Lara Weber & Drew Sottardi, *Creed Fans Sue Over Show*, REDEYE CHI. TRIB., Apr. 22, 2003, at 6.

one having paid over fifty dollars in ticket and parking prices to attend the show led by singer Scott Stapp.[2] A show is exactly what the fans got.[3] The band struggled through six songs out of their catalog of thirty plus songs.[4] Stapp allegedly mumbled and stumbled through his lyrics, gave the appearance of heavy inebriation, writhed around on the stage floor, and left his band mates for extended periods of time.[5] This type of behavior is sacred, and even expected, in the name of sex, drugs, and rock and roll, right? WRONG. Well, wrong at least in the opinions of certain Creed fans in attendance who, on April 20, 2003, filed a class action suit over the band's performance, or lack thereof, seeking compensation for ticket and parking prices.[6]

Four fans led the charge, claiming breach of contract and unjust enrichment against the band, Ticketmaster, and Jeff Hanson Management and Promotions, the alleged concert promoter.[7] The complaint alleged that: "Stapp's physical and mental condition and his inability to sing the lyrics to the Creed songs performed by [the rest of the band], was tantamount to a cancellation of the Creed concert."[8] Eventually, Creed and company were relieved of any liability to the concertgoers[9] but the legal questions left behind by the Creed case linger. What is a ticket? Is it a contract? Does it entitle audience members to certain rights regarding the quality of the performance? What possible causes of action are available when consumers are disappointed with a live concert? How bad must a performance be before it is tantamount to non-performance? Can a subjectively disappointed consumer bring action against the artist based on his own interpretation of the artistic expression? Should courts even be involved in these kinds of determi-

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[2] *Id.*

[3] For a general discussion of Creed performances see Larry Flick, *Wind-Up's Creed Has 'Weathered Success'*, BILLBOARD, Nov. 10, 2001, at 92 (describing Creed's reputation for delivering passionate, consistently sold-out live shows and quoting Stapp: "You can't hide anything onstage. There are no filters, nothing to hide behind").

[4] Blair R. Fischer, *Alter Boys: Creed's Original Members Move on – Minus Scott Stapp*; REDEYE CHI. TRIB., Sept. 27, 2004, at 46.

[5] Eric Gwinn, *Some Creed Fans are Singing a Different Tune After Concert*, CHI. TRIB., Apr. 28, 2003, § 5 (Tempo), at 2.

[6] *Id.*

[7] *Id.*

[8] Plaintiff's Second Amended Complaint at 31, Berenz v. Diamond Rd., Inc., No. 03 CH 7106, (Ill. Cir. Ct. Cook County, Ch. Div., July 13, 2004) [hereinafter 2AC] (on file with author) (alleging that: "Stapp's physical and mental condition and his inability to sing the lyrics to the songs performed by Tremonti and Phillips, was tantamount to a cancellation of the Creed Concert and was inconsistent with Stapp's reputation, [and] representations to the public about his disdain of drugs and alcohol prior to a performance live or otherwise.").

[9] *See* Memorandum and Order from Judge Peter Flynn, *Berenz* (No. 03 CH 7106) [hereinafter Memorandum and Order] (on file with author).

nations in the first place? This Article will attempt to answer these and related questions based on existing case law regarding the live performance industry.

II. THAT'S THE TICKET

A. *Legally Speaking, What is a Ticket?*—Collister v. Hayman *and* Soderholm v. Chicago Cubs

The legal significance of a ticket is explained in *Collister v. Hayman*, one of the earliest American cases dealing with this issue.[10] In *Collister*, a ticket scalper sued the circus for not honoring tickets that he sold "on the sidewalk" in violation of a circus policy that forbade such practice.[11] Finding in favor of the circus, the court determined that

> [a] theatre ticket is a license, issued by the proprietor pursuant to the contract as convenient evidence of the right of the holder to admission to the theatre at the date named with the privilege specified, subject. . .to his observance of any reasonable condition appearing upon the face.[12]

Taking into consideration the highly visible nature of the circus's publicly posted policy, the court found the circus policy constituted a contract with original and subsequent purchasers, and that the license could be revoked upon breach of that contract.[13]

Flashing forward to late twentieth century Chicago, the case *Soderholm v. Chicago National League Ball Club* provides a similar analysis.[14] In *Soderholm*, a Chicago Cubs season ticket holder and sus-

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[10] Collister v. Hayman, 76 N.E. 20 (N.Y. 1905). *See also* Horney v. Nixon, 61 A. 1088, 1090 (Pa. 1905) (explaining that "'[a] theatre ticket being a mere license to the purchaser which may be revoked at the pleasure of the theatrical manager, upon such revocation, if the person attempts to enter, or if, having previously entered, he refuses to leave upon request, he becomes a trespasser, and may be prevented from entering or may be removed by force, and can maintain no action of tort therefore.'" (quoting 21 Ency. of Pleading & Practice, 647)), and Buenzle v. Newport Amusement Assoc., 68 A. 721, 722 (R.I. 1908) (stating: "[w]e find it to have been the settled rule of law for many years, that a ticket of admission to a race-track, a theatre, a concert, or any such entertainment is a mere license. . . ."). For other early cases involving ticket related issues *see also* Johnson v. Wilkinson, 29 N.E. 62 (Mass. 1885), Burton v. Scherpf, 83 Mass. 133 (1861), McCrea v. Marsh, 78 Mass. 211 (1858), Taylor v. Cohn, 84 P. 388 (Or. 1906), Greeneberg v. Western Turf Ass'n., 73 P. 1050 (Cal. 1903), Pearce v. Spalding, 12 Mo. App. 141 (1882), Shubert v. Nixon Amusement Co., 83 A. 369 (N.J. 1912).

[11] *Collister*, 76 N.E. at 21.

[12] *Id.* The court went on to justify the court's revocation of the license by explaining that "The license, although granted for a consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein." *Id.*

[13] *Id.* at 22.

[14] Soderholm v. Chicago Nat'l League Ball Club, Inc., 587 N.E.2d 517 (Ill. App. Ct. 1992). For other cases discussing the legal nature of a ticket see Jacksonville Bulls Football, Ltd.,

pected ticket dealer sued the much maligned ball club to enjoin the team to sell him season tickets for the 1991 season.[15] The Cubs refused to renew the season ticket subscription because of suspected violations of a ticket resale policy, and the club warned the plaintiff to cease violating the policy.[16] Soderholm argued that his prior purchase of similar ticket packages from 1985 through 1990 gave him a contractual option to buy tickets for the 1991 season.[17]

Citing a lack of mutual assent, the court found that the alleged contract did not exist.[18] Apart from the contractual issues of the case, the court offered wisdom on the nature of the ticket which was quite similar to the findings in *Collister* offered nearly ninety years earlier.[19] The court explained that

> [e]ach individual ticket permits the holder to enter the ball park on the date and at the time stated on the ticket for the specific purpose of attending the identified game and sitting in the specified seat, subject to all terms, conditions, and policies established by the Chicago Cubs.[20]

This language almost identically tracks the above cited language in *Collister*.[21]

Accordingly, both historic and current case law indicate that the purchase of a ticket to an attraction allows the ticket owner to enter and remain in a specific seat or area within the venue for the event, subject to the seller's policies, terms, and conditions. Are there other possible legal characterizations of tickets? What about the contractual

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535 So. 2d 626 (Fla. 3d DCA 1988) and People v. Waisvisz, 582 N.E.2d 1383 (Ill. App. Ct. 1991).

[15] *Soderholm,* 587 N.E.2d at 518-519.

[16] *Id.* The Cubs sent the plaintiff a warning letter stating: "The Cubs will not sell tickets to people who resell tickets at inflated prices. Our security reports indicate that your tickets have been repeatedly sold at above face value prices . . . . If you continue to resell your existing tickets your account will be in jeopardy of not being renewed in 1991." *Id.* at 518.

[17] *Id.* at 518-519.

[18] *Id.* at 519. For more cases involving season tickets and contractual issues see Kully v. Goldman, 208 Neb. 760 (1981), and State Block, Inc., v. Poche, 444 So. 2d 684 (La. App. Ct. 1984).

[19] *See Soderholm,* 587 N.E.2d at 517; Collister v. Hayman, 76 N.E. 20 (N.Y. 1905).

[20] *Soderholm*, 587 N.E.2d at 521. The court continued: "Plaintiff conceded at oral argument that an individual ticket to a public attraction is a license, but suggested that the purchase of a series of tickets somehow amounts to a lease. We disagree. Neither an individual ticket holder nor a season ticket holder is entitled to enter the ball park except upon the terms and conditions specified on the individual tickets and by defendant's policies." *Id. See also* People v. Waisvisz, 582 N.E.2d 1383, 1386 (Ill. App. Ct. 1991) (stating that: [a] ticket to a sporting or entertainment event is a license which may be revoked at the will of the issuer").

[21] *See supra* note 12 and accompanying text.

nature of tickets? In both *Collister*[22] and *Soderholm*[23], there are contractual elements related and attached to the purchase and sale of a ticket which manifest themselves in various forms of terms and conditions imposed by the seller.[24] But is the ticket itself a contract guaranteeing a "quality" event?

B. *Is a Ticket a Guarantee?*

In the *Creed* case, the basis for the plaintiffs' breach of contract claim rested upon the theory that the ticket itself was a contract.[25] The plaintiffs put forth a variety of breach theories, including: "breach of express contract," "breach of contract—partly express, partly implied-in-fact," and "breach of contract—implied-in-fact."[26] More specifically, the claims were based on the assumption that "plaintiffs' tickets contractually entitled them to a 'lucid, sober and unintoxicated performance by Stapp,' . . . 'without [its] quality being impaired or significantly affected by drugs or alcohol.'"[27] Unfortunately for the plaintiffs, but fortunately for the live entertainment industry, this theory has not matured into law.

There is no established standard that reads an express contract promising a quality performance into the purchase of a ticket. Existing case law shows that the purchase of a ticket to a live event is nothing more than the purchase of a license that entitles the purchaser to enter and remain in the venue for the event, and perhaps entitles the purchaser to some form of performance.[28] By no means does the purchase

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[22] Collister v. Hayman, 76 N.E. 20 (N.Y. 1905).

[23] Soderholm v. Chicago Nat'l League Ball Club, Inc., 587 N.E.2d 517 (Ill. App. Ct. 1992).

[24] *See Collister*, 76 N.E. at 21; *Soderholm*, 587 N.E.2d at 518-519; *supra* note 16 and accompanying text.

[25] 2AC, *supra* note 8, ¶¶ 23, 24.

[26] 2AC, *supra* note 8, ¶¶ 23, 24. The plaintiffs also could have sued under a third party beneficiary theory, which was anticipated, but not done. *See* Carson, Pirie Scott & Co. v. Parrett, 178 N.E. 498 (Ill. 1931) (holding that in order to maintain a third-party beneficiary action in Illinois, the plaintiff must show that the parties intended the third-party to benefit directly from the contract). The plaintiffs would have had to argue: 1) that they were intended beneficiaries of a contract between Creed and the concert promoter by virtue of the monetary transaction for the right to see the band perform (no evidence or allegations as to the existence of any such contract was ever provided); and 2) that consideration was paid by the fans to the promoter for this privilege. The critical issue would have been whether the fans were intended beneficiaries of the contract. To make this determination, courts in Illinois follow the "intent to benefit" rule; that is, whether the contracting parties intended to confer a benefit upon a nonparty to their agreement. *See* XL Disposal Corp. v. Sexton, 659 N.E.2d 1312, 1316 (Ill. 1995).

[27] Memorandum and Order, *supra* note 9, at 5 (quoting 2AC, *supra* note 8, ¶¶ 23, 24).

[28] *See Soderholm*, 587 N.E.2d 517. *See also* Jordan v. Concho Theatres, Inc., 160 S.W.2d 275, 276 (Tex. App. 1941) (explaining that "[a] ticket . . . carries with it no obligation to do anything,—not even to supply the show or performance, and in case of such failure incurs no

of a ticket entitle the purchaser to any level of quality in an event or performance.[29] These conclusions can also be drawn from *Charpentier v. Los Angeles Rams Football Co.*, in which a disgruntled, season-ticket holding football fan sued the Rams, in part, because of poor performance and managerial decisions with which the fan disagreed.[30]

In *Charpentier*, the plaintiff alleged that while he held season tickets, he was in contractual privity with the Rams.[31] The plaintiff further alleged that because of this privity, the organization was under an obligation to attempt in good faith to provide "a quality, competitive football team product for season ticket holders."[32] The court found these claims to be "out of bounds," asserting that the "[p]laintiff did not buy the right to watch a good team or to have enlightened (in his opinion) management decisions made."[33] Along similar lines, the court in *Seko Air Freight, Inc. v. Transworld Systems, Inc.*, explained:

> That the Chicago Cubs turn out to be the doormat of the National League would not entitle the ticket holder to a refund for the remaining games, any more than [Pavarotti's] laryngitis entitles the opera goer to a refund when the understudy takes over the role.[34]

In the realm of musical performance, the points drawn from *Charpentier* make even more sense and draw a strong analogy that an express contract is not formed when a concert ticket is purchased. One could easily describe spontaneity and unpredictability as paradigmatic to rock and roll. Rock music is incontrovertibly united with revolution, inspiration, volatility, passionate defiance, and drug and alcohol use. As Judge Peter Flynn, who presided over the *Creed* case, stated:

> That Creed is a rock band is hardly a basis for inferring that it will be 'lucid [and] sober' onstage. If anything, one might normally infer the opposite, given rock's avowed predilection for shock and upending convention (a further reason for avoiding attempts to dictate how rock performers must behave).[35]

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obligation other than to return the price of the ticket and such incidental expense as may be incurred in the purchase of the ticket and in attending"); Charpentier v. Los Angeles Rams Football Co., 89 Cal. Rptr. 2d 115, 124 (1999) (A Rams season ticket holder made the failing argument that the team made no clear effort to provide a "quality, competitive football team product for season ticket holders" and that he was therefore entitled to compensation.).

[29] *See Charpentier* 89 Cal. Rptr. 2d at 124 (explaining that "[i]t is common knowledge that professional sports franchisees have a sordid history of arrogant disdain for the consumers of the product").

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Seko Air Freight, Inc. v. Transworld Systems, Inc. 22 F.3d 773, 774 (7th Cir. 1994).

[35] Memorandum and Order, *supra* note 9, at 6. Judge Flynn also quipped in his oral opinion regarding plaintiff's first complaint that "[r]ock singers are – at least so [The] Roll-

Even the most inexperienced of music listeners is familiar with rock's maturation into the rebellious soundtrack for the tumultuous 1960s and 1970s.[36] Rock and roll cannot be split from these elements and still be rock and roll. They are indissolubly linked. Take, for example, The Doors. Fronted by enigmatic and alcoholic lead-singer Jim Morrison, The Doors' performances were often at the whim of Morrison's rants and stage falls.[37] To that end, should not a ticket purchaser expect the possibility of the unpredictable occurring at a live performance, even with the ultimate result being a less than spectacular show?

After determining that the ticket itself does not create an express contract of quality, one must analyze the possible existence of an implied contract between the band and the fans.[38] The Creed fans argued that because of the band's reputation for being drug and alcohol free, the kind of performance delivered in Rosemont was unacceptable and would not have been attended had plaintiffs known "that Stapp would break his promise."[39] This argument was based on the theory that the band's reputation had matured into a promise or representation to remain sober while performing.[40] Even if the band had explicitly held itself out to be chaste and pure, there is no legal basis that a deviation from that image would necessarily lead to any sort of liability to the fans.[41] The court disposed of the implied contract through promise or representation argument by stating that Creed's "reputation *per se* is not a promise (much less a legally binding one) that the reputation will continue or that the band's conduct will always match it. . . ."[42]

Implied contracts have, of course, long been recognized in Illinois.[43] Critical to implied contracts is the notion of the promise as consideration for a supposed implied contract. The Creed fans alleged that they relied on the band's promise to remain sober during performances

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ing Stones would like us to believe – the unconstrained element in our society. Lawyers are the precise opposite." Transcript and Proceedings, Judge Peter Flynn, Sept. 10, 2003 at 40, Berenz v. Diamond Rd., Inc., No. 03 CH 7106, (Ill. Cir. Ct. Cook County, Ch. Div., July 13, 2004) [hereinafter Flynn Oral Opinion] (on file with author).

[36] For a general discussion of Rock music see PAUL FRIEDLANDER, ROCK AND ROLL: A SOCIAL HISTORY (Westview Press 1996).

[37] For more information on Jim Morrison and the Doors see RAY MANZAREK, Light My Fire: My life With the Doors (Diane Publishing Company 1998).

[38] For a general overview of implied contracts see CORBIN ON CONTRACTS, § 1.18, (MATTHEW BENDER & CO. 2005).

[39] 2AC, *supra* note 8, ¶¶ 31, 32.

[40] 2AC, *supra* note 8, ¶ 31.

[41] *See infra* section IV. C.

[42] Memorandum and Order, *supra* note 9, at 10.

[43] *See* Beatrice Foods Co. v. Gallagher, 197 N.E.2d 274 (Ill. App. Ct. 1964). *See also* Bd. of Highway Comm'rs v. Bloomington, 97 N.E. 280, 283-284 (Ill. 1911).

and that this reliance entitled them to a quality performance.[44] The plaintiffs placed too much reliance on this "promise," as the court held it not to be a promise at all.[45] The court explained that

> [R]eputation alone . . . requires some deliberate, explicit action adopting the reputation and holding it out as a promise or representation. Without such action, others' beliefs about one's reputation, no matter how fervently held, do not alone suffice. Here no such action by Creed is alleged.[46]

Apart from the alleged "promise" made by the band, the plaintiffs alleged Creed had a put forth a representation of sobriety through evidence relating to Creed performances between June 1997 and December 2002, in which "Stapp never appeared intoxicated or medicated."[47] In similar fashion to the determination regarding the alleged "promise," the court explained that the plaintiffs read too much in to this representation.[48] The complaint itself indicated that Stapp "said publicly on television that he *did not* consume drugs or alcohol prior to performances of Creed."[49] Despite these affirmations, the complaint does not indicate specifically that Stapp or Creed ever guaranteed that they would never dabble in drugs or drink before a performance, which may have given the plaintiffs more solid ground on which to stand.[50] Creed's reputation qualified as neither a promise nor a representation, and certainly not an implied contract for a sober performance.

Paralleling courts' findings regarding sports tickets, it holds true that a concert ticket remains nothing more than a license to enter and remain within an arena, in a specific seat or location, and view some manifestation of the artist's performance.[51] Mere ticket purchase fails to guarantee any level of quality regarding the performance, which is left usually to the impulses and conceptual choices of the artists themselves. Whether or not fans are pleased with the performance holds little legal significance.

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[44] 2AC, *supra* note 8, ¶¶ 32 ("Had Plaintiffs known that Stapp would break his promise and ingest drugs or alcohol prior to the Creed Concert, they would not have purchased tickets to the Creed Concert.").

[45] Memorandum and Order, *supra* note 9, at 7.

[46] *Id.* The court went on to emphasize that paragraph 45 of the Second Amended Complaint referred to the reputation that Stapp himself had created, as opposed to the band as a whole. *Id.*

[47] Memorandum and Order, *supra* note 9, at 6 (citing 2AC, *supra* note 8, ¶¶ 40-41).

[48] Memorandum and Order, *supra* note 9, at 10.

[49] 2AC, *supra* note 8, ¶ 44, emphasis added.

[50] 2AC, *supra* note 8, ¶ 44.

[51] *See* Soderholm v. Chicago Nat'l League Ball Club, Inc., 587 N.E.2d 517 (Ill. App. Ct. 1992).

As the court noted in the *Creed* case: "disapproval alone, no matter how vehement, cannot create a cause of action."[52] Had Scott Stapp or Creed collectively promised to never consume drugs or alcohol before a performance, or represented that they would never do so, an implied contract may have been created if the ticket purchaser relied on that promise or representation. The same logic would apply where a concert attendee was disappointed in the quality of the show. Perhaps a particular performance was too brief, too long, too loud, or too mellow depending on individual fans at any given time. Each fan surely has a nuanced interpretation of any type of performance, ranging from utter disappointment to high-spirited approval.[53] Considering this, the law does not provide ticket price restitution for subjective dissatisfactions with the artistic decisions of the performer.

Fans are not, however, left without recourse. Not every wrong can be righted by the court system. Fans always have the possibility of market remedies. There are situations in which the market can correct itself. Fans upset because of a poor performance have the right to stop buying the artist's albums and attending the artist's live performances. Disappointed fans could also find recourse in the media by writing articles or reviews condemning the band and encouraging others to do the same. If enough fans share the same sentiment, the financial well would eventually dry up for the allegedly substandard artist. Instead of mere reimbursement for the costs of attending one substandard show, disappointed fans could have the pleasure of seeing their once-beloved rock idols fade away.

III. The Appropriateness of Class Action in Consumer Dissatisfaction Cases: Problems in Commonality of Class Concerns

The class action lawsuit is a popular vehicle for litigants to utilize when fans are disappointed in a particular performance, event, or concert. Critical to the viability of a class action, among other aspects, is the court's determination that common concerns exist in a chosen class.[54] More specifically there must be "questions of law or fact common to the class" in order for a class to be certified and the action to

[52] Memorandum and Order, *supra* note 9, at 7.

[53] *See* 2AC, *supra* note 8, ¶ 45 (laying out fifteen statements from fans posted on a Creed based web site, all of which reveal differing levels of disappointment with the Dec. 29, 2002 concert).

[54] *See* Fed. R. Civ. P. 23(a) (regarding class actions which states: "Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the

proceed.[55] This prerequisite has proven difficult to establish in certain instances. Like the cases in the above sections establishing a ticket to be a license rather than a contract, cases involving sports teams and sporting events provide relevant guidance in this issue as well.

In *Strauss v. Long Island Sports, Inc.*, a New York Nets[56] season ticket holder sought rescission of his purchase because the Nets traded Julius "Dr. J" Erving to the Philadelphia 76ers at the beginning of the 1976–77 season.[57] The claim was based on the assertion that all season ticket holders, himself included, purchased the tickets relying on the reasonable expectation stemming from a Nets advertising campaign, that Dr. J would play for the Nets that year.[58] The appellate court reviewed whether the suit could properly be maintained as a class action.[59] The court held that the class action was improper in this instance because "individual questions of reliance" on the Nets advertising campaign predominate over questions uniform to the class.[60] Elaborating, the court explained that:

> [I]n a case where common exposure to or reliance upon alleged misleading advertising cannot be readily inferred, there is no advantage to be gained from permitting the action to proceed as a class action since the proceeding is likely to 'splinter into individual trials.[61]

Essentially, because the plaintiff could not prove or "readily infer" that all of the season ticket purchasers relied on the advertising campaign in

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representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.").

[55] *Id.* at 23(a)(2).

[56] The team, now the New Jersey Nets, was the New York Nets at the time of the case.

[57] Strauss v. Long Island Sports, Inc., 401 N.Y.S.2d 233, 234 (N.Y. App. Div. 1978). For other cases involving sports ticket holder lawsuits see *supra* notes 27-33 and accompanying text; Bickett v. Buffalo Bills, Inc., 472 N.Y.S.2d 245 (N.Y. S. 1983) (holding that because a ticket is actually a revocable license, the defendant was not liable for the nonperformance of games due to the National Football Player's Association strike in 1982); Stern v. Cleveland Browns Football Club, Inc., 1996 Ohio App. LEXIS 5802 (Ohio Ct. App., 1996); Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So.2d 294 (Fla. Dist. Ct. App. 3d 1989). For a scholarly article on similar issues see Popovich, Jennifer M., *He Shoots, He Scores? The Potential for Future Success of Fan-Based Lawsuits Following Potechin v. Yashin*, 20 J.L. & COMM. 285 (2001).

[58] *Strauss*, 401 N.Y.S.2d at 234. The reasonable expectation arose, in part, from a Nets advertising campaign centered around the language: "See the fantastic Dr. 'J' in action. Designated league MVP and PRO player of the year. Sport magazine playoff-MVP." *Id.*

[59] *Id.*

[60] *Id.* at 235-236. The court continued: "It is elementary that in any action based upon representations in advertising . . . the plaintiff must prove knowledge of, and reliance upon, the representations alleged." *Id.*

[61] *Id.* at 235.

making the decision to purchase the tickets, the class action was deemed improper due to lack of commonality.[62]

In contrast to the *Strauss* case, the Indiana Appellate Court in *Skalbania v. Simmons* certified a class of season ticket holders through a finding of common question to all plaintiffs.[63] The plaintiff class sued the Indianapolis Racers hockey team, its owner, and the league seeking damages for economic loss after the team went out of business after playing only thirteen of forty scheduled home games.[64] The plaintiff class alleged that the season ticket packages were purchased on the basis of the team's promise to play forty home games.[65] The plaintiffs further asserted that the team did not reveal the dismal nature of the team's financial standing.[66] The court found that all season ticket holders were in the same situation as the class representatives because the plaintiffs sought compensation regarding the cancellation of more than half of the season.[67] Consequently, the court affirmed the class certification.[68]

Although the courts in these two cases reached opposing conclusions, *Strauss* and *Skalbania* can be reconciled. In *Strauss,* the plaintiffs filed suit not because multiple games of the team's season were canceled, but because the star athlete, Dr. J, was traded.[69] The court found class certification to be inappropriate because there could have been a multitude of reasons why any given fan purchased the Nets season tickets, *possibly* one of which was the presence of Dr. J.[70] In *Skalbania*, however, the court found class certification appropriate with regard to commonality because the plaintiffs sought reimbursement for the cancellation of twenty-seven games to which all members of the class had purchased in the season ticket package.[71] The court found class certifi-

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[62] *Id.* at 237-238. The plaintiff also made a failing argument that was based on the reasonable expectation that season ticket holding fans had to see Dr. J regardless of whether they saw or relied on the advertising campaign. *Id.*

[63] Skalbania v. Simmons, 443 N.E.2d 352 (Ind. App. 1982).

[64] *Id.* at 354. The plaintiffs based their claims on the theories of breach of contract, breach of warranty, tortious interference, common law fraud, misappropriation of funds, and negligent operation of the franchise. *Id.* at 353.

[65] *Id.*

[66] *Id.* at 354.

[67] *Id.* at 357-358.

[68] *Id.* at 356. The court held that: "[a]lthough it is not to be expected that they will represent as many as heroically as to prompt Winston Churchill's tribute to the Royal Air Force during the Battle of Britain, 'never . . . was so much owed by so many to so few,' they have been certified by the trial court as proper class representatives. . ." *Id.*

[69] *See* Strauss v. Long Island Sports, Inc., 401 N.Y.S.2d 233, 235-236 (N.Y. App. Div. 1978).

[70] *See id.*

[71] *See Skalbania*, 443 N.E.2d at 354.

cation appropriate because the cancelled games caused all season ticket holders the same amount of damage.[72]

Looking at *Strauss* and *Skalbania* in the context of the *Creed* case, it is clear that *Strauss* evokes closer similarities.[73] The Creed concert was not cancelled like the hockey games in *Skalbania*. The December 29, 2002, concert was, in fact, performed as scheduled and the plaintiffs stated a claim based solely on Stapp's lackluster routine.[74] Just as it would be difficult, if not impossible, to show that each of the Nets season ticket holders bought the tickets for the sole reason of viewing Dr. J, plaintiffs in the Creed case would be hard pressed to prove that all ticket purchasers were subjectively disappointed enough to desire reimbursement.

Class actions, ideally, are filed to vindicate civil wrongs that can be remedied from within the civil justice system, and not to provide compensation for subjective consumer disappointment.[75] For instance, people could be motivated to attend a Creed concert for any of the following reasons: 1) for a fun night out with something unique to do, 2) for the enjoyment of live music in general, 3) to be a part of the "scene" and people watch, 4) to see the opening act, 5) because they love Mark Tremonti's guitar skills or Scott Phillip's drum playing, 6) to see Creed's stage theatrics, 7) to take photographs of the band and the fans, or 8) to be in the same building as their idols. Possibilities abound. Dealing with these concerns would be a critical problem in any class action filed on behalf of concertgoers pursuant to subjective consumer disappointment of expectations.

Take, for example, a U2 fan who attends a 2005 performance hoping to hear the classic hits *With or Without You*[76] and *Where the Streets Have No Name*, [77] both originally recorded on the 1990 album *The Joshua Tree*.[78] The fan leaves the venue sadly disappointed after U2 only performs songs from their two latest albums *All That You Can't*

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[72] *See id.*

[73] *See supra* notes 57-66 and accompanying text.

[74] *See* 2AC, *supra* note 8, ¶ 26 ("Creed failed to substantially perform on December 29, 2002, at the Creed Concert, as Stapp, Creed's lead singer, an indispensable part of the band and the performance at the Creed Concert, was so intoxicated and/or medicated that he was unable to sing the complete lyrics of a single Creed song. Instead, Stapp's speech was slurred considerably due to alcohol or drugs he had intentionally ingested prior to the Creed Concert.").

[75] *See, e.g.*, Jones v. R. R. Donnelley & Sons Co., 541 U.S. 369 (2004) (a group of African-American employees brought a suit against their employer due to what they saw as a racially hostile environment).

[76] U2, *With or Without You, on* THE JOSHUA TREE (Island Records 1987).

[77] U2, *Where the Streets Have No Name, on* THE JOSHUA TREE (Island Records 1987).

[78] U2, THE JOSHUA TREE (Island Records 1987).

Leave Behind[79] and *How to Dismantle an Atomic Bomb*[80] released in 2000 and 2005 respectively. While this fan and others more interested in U2's earlier recordings are no doubt justifiably let down, they are not entitled to sue on behalf of all attendees of the show for ticket price reimbursement. It would be highly unlikely that all attendees were as let down as the fan in question, for there are actually U2 fans only familiar with and fans of the more recent records. While this hypothetical seems a bit extreme, it effectively illustrates commonality issues that would arise in class actions for the disappointment of consumer expectations.

In *Kass v. Young*, a Neil Young concert attendee filed a class action against the performer after Young performed for only an hour because of the oppressive behavior exhibited by security personnel at the venue.[81] Pursuant to Young's motion following his failure to answer the original complaint, the court set aside a default judgment because the jurisdictional issue of class certification was not decided.[82] The court then disclosed its opinion that the certification of the proposed class may be improper.[83] The court explained that

> [T]he representative plaintiff has simply assumed that all 14,000 patrons of the concert were equally damaged and that their damages amounted to the price of the average ticket. It may be that many of the patrons or 'fans' of the performer who had entertained them for an hour did not regard themselves cheated or that some may have sympathized with his antagonism toward a number of the security guards.[84]

As the court cautioned in *Kass*, certifying a class in a class action filed because of the disappointment of consumer expectations in the live performance industry can prove to be quite difficult, if not impossible.[85] It is simply too difficult to assess an equal amount of harm inflicted upon the concert attendees as a whole.[86] These problems are especially true in the realm of a musical or artistic performance. The nature of a fan's subjective interpretation is invariably going to differ

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[79] U2, ALL THAT YOU CAN'T LEAVE BEHIND (Island Records 2000).

[80] U2, HOW TO DISMANTLE AN ATOMIC BOMB (Island Records 2004).

[81] Kass v. Young, 136 Cal. Rptr. 469, 471 (Cal. Ct. App. 1977) (The plaintiff was one of an alleged 14,000 fans at the March 31, 1973 concert at the Oakland Coliseum.).

[82] *Id.* at 471-472.

[83] *Id.* at 473.

[84] *Id.* at 474. While the case was remanded on the issue of class certification, the court asserted that regardless of the class certification outcome, the default against Young should remain because Young "had flouted the process of the court" and evidence existed that Young ripped up the complaint and summons. *Id.*

[85] *See supra* notes 72-73 and accompanying text.

[86] *See supra* note 79 and accompanying text.

from fan to fan, running the full spectrum of satisfaction. Couple this disparity in subjective opinion with the calculation of damages according to ticket, travel, and other costs. Weighing these factors, the definition of class could prove to be quite difficult, if not impossible. As *Kass* and *Strauss* indicate, a disappointed ticket-holding plaintiff cannot group together all fellow ticket holders and assume for the purposes of a class action that they have a common nucleus of interest in ticket price reimbursement.[87]

IV. Possible Alternative Theories for Disappointed Fans

A. *Suits by Individual Plaintiffs*

The next logical step in the thought process of a class representative who is told that the class cannot be certified is naturally whether or not his own individual suit could survive. Individual plaintiffs may have certain claims based on reliance on advertising, promises, or representations.[88] For example, Strauss may have had some sort of ground to stand on if he were able to show: 1) the only reason he purchased tickets was to watch Dr. J, 2) this desire was sparked by the advertising campaign featuring Dr. J, and 3) he relied on the representation that Dr. J would be playing for the Nets unless he was injured. This position however is called into question by the nature of the sports business. As the court explained in *Strauss*, "In this age of 'team jumping ball players' and 'renegotiated' athletic contracts the risk that Dr. J might not be playing for the Nets might 'fairly . . . be regarded as within the risks that . . . [a purchaser] assumed under the contract.'"[89] Strauss's tenuous position based on reliance on advertising for the costs of season tickets could be easily countered with this sort of assumption of risk counter argument.[90]

The viability of suits by individual plaintiffs becomes even more disputable when musical or artistic performances are involved. Musical groups and theatre troupes, for example, surely wish to offer great performances, but should they offer refunds where the performance falls short of a given ticket holder's expectations? This policy concern will

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[87] *See supra* notes 54-60 and 83-84 and accompanying text.

[88] *See supra* notes 54-59 and accompanying text.

[89] Strauss v. Long Island Sports, Inc., 401 N.Y.S.2d 233, 238 (N.Y. App. Div. 1978).

[90] *Compare Straus* 401 N.Y.S.2d 233, *with* Potechin v. Yashin, 186 D.L.R. (4th) 757 (Ontario Super. Ct. 2000) (where an Ottowa Senators season ticket holding plaintiff filed a tortious interference with contract suit not because the player was traded, but because the star refused to play for the team following a contract dispute), *and* Skalbania v. Simmons, 443 N.E.2d 352 (Ind. App. 1982) (where a majority of a hockey team's games were not played, seemingly the season ticket holding individual plaintiff could have brought his own suit rather than a class action).

be addressed *infra* section V, but a more concrete example can be drawn from the *Kass* case.[91] How could Kass show that he was entitled to any more than the hour in which Young performed? He would have to attempt to assert that he bought the ticket only because of the history of Young's lengthy performances, but even if this could be shown, it is likely courts would be reluctant to give legal weight to this type of reliance. It would be unfair and improper for a court to impose legal standards on an artist based upon live performances which may have lasted longer in the past.

B. *Suits for Unjust Enrichment*

Another sports-based case, *Castillo v. Tyson*, provides relevant analogous insight into unjust enrichment suits based on disappointing live performances.[92] In *Castillo*, a group of boxing match attendees and pay-per-view purchasers sued Mike Tyson, his promoters, and cable companies, arguing that fans were entitled to view a legitimate bout, and that did not happen due to Tyson's disqualification.[93] The trial court rejected the unjust enrichment claim and held:

> [P]laintiffs have no right to a particular kind of fight. They were mere licensees who had the right to view whatever event transpired regardless of whether it ended in disqualification. Because it is undisputed that plaintiffs had access to view the fight, it cannot be found as a matter of law that they did not receive what they paid for.[94]

The appellate court emphasized that the viewers were not entitled to anything more than to view "whatever event transpired."[95]

Subjectively disappointed plaintiffs could similarly assert claims based on unjust enrichment grounds for lackluster live performances; however, the claims would be shaky at best. These claims would be based on assertions that it is unreasonable for a performer to retain revenue collected from ticket purchasers when those ticket purchases

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[91] *See supra* notes 81-85 and accompanying text.

[92] Castillo v. Tyson, 701 N.Y.S.2d 423 (N.Y. App. Div. 2000). For a general discussion of unjust enrichment see HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc., 545 N.E.2d 672, 678 (Ill. 1989) (explaining that in order "[t]o state a cause of action based on a theory of unjust enrichment, a plaintiff must allege that the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience").

[93] *Castillo*, 701 N.Y.S.2d 423 (Tyson was disqualified for biting the ear of opponent Evander Holyfield).

[94] Castillo v. Tyson, Case No. 114044/97 (N.Y. Supr.: Comm. Pt. 53, Oct. 22, 1998).

[95] *See Castillo*, 701 N.Y.S.2d at 424-425. The appellate court affirmed and stated that "[p]laintiffs' claim for unjust enrichment was properly dismissed by the motion court on the ground that plaintiffs received what they paid for, namely, "the right to view whatever event transpired". *Id.* at 425.

were made with reasonable expectations of a quality concert. A critical component in unjust enrichment cases is that there must be some manner of improper or unjust conduct for a defendant to be charged.[96] The court in *Creed* explained that "the enrichment must be 'unjust' for some legally actionable reason."[97] In live performance cases, this issue will ultimately boil down to whether a "performance" actually occurred regardless of quality.[98] If a performance has indeed occurred, to categorize what the artist has received for the performance would, in effect, cause the courts to place a value on it: "That is exactly what *Charpentier* . . . and similar cases refuse to do. Our courts are not, and cannot be, rock critics."[99] This treatment indicates that actions by disappointed live event ticket purchasers based on unjust enrichment would be improper.

C. *Suits for Consumer Fraud*

A disgruntled ticket holder may also wish to pursue an action in fraud against a live performer. In the *Creed* case, the plaintiffs asserted in Count One that Creed violated the Illinois Consumer Fraud and Deceptive Business Practices Act, which reads:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.[100]

The plaintiffs based the fraud claims on Creed's reputation for "lucid and sober" concerts and focused on the band's performances over the previous five years.[101] Claiming that Stapp never appeared "intoxicated or medicated" during live performances from 1997 to 2002 and that Stapp "said publicly on television . . . that he did not consume drugs or alcohol prior to performances of Creed," the plaintiffs alleged that Creed misrepresented themselves to fans.[102] These facts, according to the plaintiffs, created liability for fraudulent misrepresentation.

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[96] *See* Hayes Mech., Inc. v. First Indus., L.P., 812 N.E.2d 419, 428 (Ill. App. Ct. 2004).

[97] Memorandum and Order, *supra* note 9, at 8.

[98] *Id.* at 9 (citing 2AC, *supra* note 8, ¶ 45 (indicating that a Creed performance did actually occur)).

[99] Memorandum and Order, *supra* note 9, at 9.

[100] 815 ILCS 505/2 (2005).

[101] Memorandum and Order, *supra* note 9, at 10 (quoting 2AC, *supra* note 8, ¶ 44).

[102] *Id.* at 10 (quoting 2AC, *supra* note 8, ¶ 41, 43).

Just as the court dealt with the plaintiff's assertion of an implied contract, the court dismissed the consumer fraud allegation by focusing on the fact that "a reputation, even if well-earned is not *per se* a promise or representation."[103] The court also highlighted the fact that plaintiffs never alleged Stapp asserted he would never use drugs or alcohol before a show, only that he did not use drugs or alcohol prior to performances.[104] These statements were apparently true until the concert at Allstate Arena.[105] The truth of Stapp's statements proved to be the death knell for the fraud claim because of the lack of some form of "deception, fraud, false promise, misrepresentation, or the concealment suppression of any material fact" that is required for a violation of the statute."[106] The court noted that "[i]t is basic that a statement is not 'deceptive' much less 'false' or a 'misrepresentation,' if it is true when made."[107] To make out a claim for fraud under this or similar statutes, a disappointed fan would have to establish that an artist or group were holding themselves out to be something that they were not, and show that they intended consumers to buy into those false representations. In the *Creed* case, plaintiffs failed to establish these elements, and it seems that similarly situated fans would also have trouble proving these critical elements to a fraud claim.

D. *Suits Resulting from Event Cancellation or Events Tantamount to Cancellation*

While subjective disappointment may not provide a cause of action, an event cancellation may be actionable. Pursuant to *Miami Dolphins, Ltd. v. Genden & Bach, P.A.*, a disappointed ticket holder may have firm ground to stand on in the event of cancellation or a performance categorized as tantamount to cancellation.[108] In *Miami Dolphins*, club seat owning plaintiffs filed suit when, following a National Football League Players strike, the team cancelled one game and played one with replacement players.[109] The team offered a fifty percent credit for later games to fans who did not wish to attend the replacement player game. Plaintiffs sued alleging that they deserved a full credit because

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 10-11 (citing 815 ILCS 505/2 (2005)).

[107] *Id.* at 11 (citing e.g., Zankle v. Queen Anne Landscaping, 311 App.3d 308, 313 (2d Dist. 2000).

[108] Miami Dolphins, Ltd. v. Genden & Bach, P.A., 545 So. 2d 294 (Fla. 3d Dist. Ct. App. 1989).

[109] *Id.* at 295.

the replacement game was tantamount to a cancellation.[110] An important fact in this case was the presence of an agreement in the season ticket package that guaranteed full reimbursement in the event of a game cancellation due to a player's strike.[111] The appellate court ultimately affirmed the trial court's decision that the replacement player game was tantamount to a cancellation and awarded the ticket holders full abatement for the price of the replacement player game.[112]

This case appears to give hope to disappointed concertgoers because the court found that even though an event took place, the event was tantamount to a cancellation. This hope, however, only appears legitimate in fact specific instances in which a complete substitution is made solely in order to avoid an event cancellation. Also, *Miami Dolphins* does not hold that the ticket holders were reimbursed because the replacement players were actually of lesser quality than what the fans expected; rather, the holding was founded on the concept that a game played entirely with replacements was tantamount to a cancellation.[113] The court simply does not delve into a qualitative analysis of the replacements' performance, which is exactly what the plaintiffs in the *Creed* case were asking of the court and what other disappointed ticket holders would have to do in similar suits.[114] Perhaps if another band played instead of Creed, plaintiffs would have a viable claim. However, in *Miami Dolphins*, a contract existed between the ticket holders and the team.[115] No such contract existed between the Creed plaintiffs and the band, nor would such a contract be likely in other potential cases based on the disappointment of consumer expectation within the live performance industry.

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[110] *Id.*

[111] *Id.* at 294-295. Section nine of the contract stated:

> In the event of any strike or other labor disturbance which results in the cancellation of any scheduled stadium game or event . . . the License Fee payable hereunder shall, . . . be abated during the period of time that the seat is unusable. . . . Any such abatement shall be offset against the next succeeding installment of the License Fee payable by Licensee. . . .

Id.

[112] *Id.* at 295 (Fla. 3d D.C.A. 1989) ("Appellees claimed that a game . . . played with all replacement players, constituted a cancellation and therefore appellees were entitled to an abatement of the full seat price as provided in the agreement. The trial court did not err in interpreting the contract as it did under the circumstances presented.")

[113] *Id.*

[114] Memorandum and Order, *supra* note 9, at 7 ("To the extent plaintiffs imply, through 2AC ¶ 45 and similar expressions, that the Court should impose some audience-satisfaction standard (or some other standard of "professional[ism]" or adequacy, musical or behavioral), this Court strongly disagrees.").

[115] *See supra* note 109 and accompanying text.

V. JUDGES AND JURIES AS ENTERTAINMENT CRITICS?

In the event that claims similar to the ones filed against Creed are allowed to survive in court, judges and juries would be put in the peculiar position of performing qualitative analyses on live performances. Essentially, judges and juries would become legal rock critics. Their musings and evaluations would be published, not in the annals *Rolling Stone* or *Spin*, but in state and federal reporters, buried in between hundreds of other court opinions. Facing this apparent expansion in judicial duties, the court in the Creed case maintained firmly that "[o]ur courts are not, *and cannot be*, rock critics."[116] If this expansion of judicial duties actually occurred, numerous problems would appear. This is not to say that the evaluations and tastes of judges are any less refined than any other individual's, but the judicial system is simply not meant for such critiques.

Judges are judges based on legal experience, legal analytical skills, and general expertise in the legal arena, not for their experience in the Allstate Arena. What would be the result if a judge who loved classical music received a case calling on him to evaluate a performance of classic rock stalwart Black Sabbath? Could the fine tuned ear of a Beethoven aficionado effectively evaluate the jumbled lyrical rants of Ozzy Osbourne?[117] The opposite situation may be even less plausible. Would it be possible for a judge raised on metal anthems *Paranoid*[118] and *Iron Man*[119] to evaluate the nuanced composition of the second movement of Beethoven's *Ninth Symphony*? The point is that most judges are so wrapped up in the details and distinctions of the law that they would be unprepared to qualitatively break down a musical or artistic performance. Even if most judges were, in fact, able to do so effectively, should judges be entitled to serve as critics of artistic expression? This type of subjective evaluation is best left in coffeehouses rather than courthouses.

Assuming that courts and juries were, in fact, asked to take on the task of critiquing performances, it would be difficult to establish what standards to apply in order to assess the quality of a performance. Take, for example, the aforementioned 1973 Neil Young concert.[120] The plaintiff filed a class action suit because he felt the truncated per-

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[116] Memorandum and Order, *supra* note 9, at 7 (emphasis added).

[117] For more information on the life of Ozzy Osbourne see OZZY OSBOURNE AND HARRY SHAW, OZZY TALKING: OZZY OSBOURNE IN HIS OWN WORDS (Omnibus Press 2002).

[118] BLACK SABBATH, *Paranoid*, on PARANOID (Warner 1970).

[119] BLACK SABBATH, *Iron Man*, on PARANOID (Warner 1970).

[120] *See supra* notes 81-84 and accompanying text.

formance was too short.[121] How would the court possibly determine if the concert was, in fact, not long enough to qualify as a quality performance? Should records of Young's previous concerts be unearthed to see if this performance was comparable? Do these records even exist? If one hour is too short, is two, three, or four too long?

Timing concerns grow even thornier when less concrete variables such as general quality of the performance are added. Would it be sufficient if Neil Young played all of his greatest hits to the absolute best of his ability for ninety minutes? What if he was just so-so on a given night, but played for three and a half hours tossing in Bob Dylan covers and two versions of *Ohio*[122] just for fun? Which one is to be considered a quality performance worth the price of admission?

The plaintiffs in the *Creed* case asked the court to impose some sort of "audience-satisfaction standard (or some other standard of 'professional[ism]' or adequacy, musical or behavioral)."[123] The court refused to apply this standard and explained that "[p]laintiffs and others are entitled to express their disapproval with their patronage and their pocketbooks. They are not entitled to use the courts to impose or enforce their views of what is good or acceptable."[124] The court, in so many words, is asserting that the courtroom is no place for the evaluation of live performances or to assess the quality of a rock concert. Were the court to involve itself with such an assessment, the problems in applying the standards mentioned above—and many more—would surely come to light. Customers at Morton's could bring suit if their steak was slightly overcooked according to each individual's particular tastes. Museum visitors could sue because a Warhol exhibit wasn't as exciting and extensive as they expected. The courts are no place for resolving these issues.

These concerns are just a taste of the variables that could be considered if a court was asked to qualitatively assess a live event to determine if ticket holders got their money's worth. Another concern that must be addressed involves the nature of music and art as a whole. If

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[121] Kass v. Young, 136 Cal. Rptr. 469 (Cal. Ct. App. 1977).

[122] CROSBY STILLS NASH & YOUNG, *Ohio,* on SO FAR (Atlantic 1974).

[123] Memorandum and Order, *supra* note 9, at 7.

[124] *Id.* The court continued:

> It does not matter that their views may be widely shared. Our courts generally protect against, rather than enforce, the tyranny of the majority. Innumerable examples – Marcel Duchamp, John Cage, Charles Ives, James Joyce, Lenny Bruce – show the wisdom of that course. The corollary, which . . . we accept as a reasonable trade off, is that one cannot ordinarily get a judicially-coerced refund for a bad performance or concert or book.

Id. at 7-8.

courts were allowed to explore the realm of qualitative live performances, setting precedent and establishing bases for legal action, what effect would there be on the art community? Would artists be deterred from performing live for fear of potential litigation? Would the exhilarating spontaneity of musical performances give way to stagnant, over-rehearsed routines? Taken to the extreme, would musical groups tour at all? Would every live performance be subject to the ridicule of opportunistic, money-hungry fans? All these policy-based concerns seem to greatly overshadow and outweigh the subjective disappointments of consumers in the live entertainment industry.

Judge Flynn addressed these concerns in the hearing that dealt with the *Creed* case plaintiffs' first complaint. He cautioned that:

> If the promoters of rock concerts must be in the business of policing the condition and behavior of the performers before the concert even starts at their apparel of class action lawsuits, if one decides that the performance wasn't up to par, the obvious unavoidable result is that the promoters are going to opt for caution. That's called 'chilling,' and I do not think that our legal system should be in the business of chilling even outrageous innovation in the artistic field.[125]

Other courts facing similar claims relating to subjective consumer disappointment should give mind to Judge Flynn's concern about the chilling effect on artistic creation and innovation.

VI. Conclusion

That night in December of 2002, Creed fans viewed what so many other fans of rock and roll have viewed since the genre was born. The Creed performance exhibited the impulsive nature of rock and roll, its self-destructive tendencies, and a level of unpredictability that sometimes leads to greatness and sometimes leads to failure. For the named plaintiffs, the performance was just plain unacceptable, and they wanted their money back. Unfortunately for them and the other Creed followers in attendance that night, American jurisprudence simply does not allow for viable causes of action based on the disappointment of subjective consumer expectations within the live performance industry. This is especially true in the case of class action suits where, within the entirety of the alleged class, there must be a common sense of disappointment strong enough to desire ticket price compensation. In the end, concert attendees have little legal recourse following a poor performance by their favorite band. They get just what the named plaintiffs got: torn ticket stubs, awful memories, and legal fees. Despite the lack of judicially-based retribution, disappointed fans are not left en-

[125] Flynn Oral Opinion, *supra* note 35, at 64-65.

tirely in the cold. Fans are able to exercise their rights to stop buying albums and concert tickets. If enough fans share the disenchanted sentiment, the market will wield the ultimate judgment and dry up on bands that continually let down their fan base. Accordingly, the proper answer for disappointed concertgoers is to stay out of the record stores, stay out of the rock arenas, and stay out of the courthouse.