Neutral Citation Number: [2005] EWCA Civ 565

Case No: A3/2004/1518

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
MR JUSTICE PATTEN
[2004]EWHC 1530 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2005

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE MANCE
and
LORD JUSTICE JACOB

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Between :

HYPERION RECORDS LIMITED	**Appellant**
- and -	
DR LIONEL SAWKINS	**Respondent**

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- -

MR RICHARD SPEARMAN QC& MS JACQUELINE REID (instructed by **Messrs Wiggin & Co**) for the **Appellant**
MR RICHARD ARNOLD QC & MR ANDREW NORRIS (instructed by **Messrs Peter Carter-Ruck & Partners**) for the **Respondent**

Hearing dates: 15th and 17th March 2005

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Judgment

Lord Justice Mummery :

Introduction

1. Does copyright subsist in modern performing editions of the out-of-copyright music of Michel-Richard de Lalande, the principal court composer at the courts of Louis XIV and Louis XV? If, as Patten J held, it does and has been breached, the infringements are actionable by Dr Lionel Sawkins. He is the composer of the performing editions, the claimant in the action and the respondent to this appeal.

2. Copyright disputes about works of this character and quality are infrequent. They rarely reach trial and hardly ever come before the appellate courts. In this case some interesting copyright points have been argued in depth by leading counsel. In deciding the appeal this court should be specially attentive to the judge's findings of fact about the composition of the performing editions by Dr Sawkins and about the use made of them without his consent by the appellant, Hyperion Records Limited (Hyperion). The result of the appeal ultimately turns, in my judgment, on the application of familiar copyright principles to Patten J's findings of fact.

3. There has been litigation elsewhere. The court was informed that Dr Sawkins successfully brought proceedings in the French courts for infringement of the copyright in the same kind of performing editions of other music by Lalande. The court was shown a translation of the judgment of the Nanterre Tribunal de Grande Instance of 19 January 2005 **Sawkins v. Harmonia Mundi &Ors,** relating to his adaptation of Lalande's works *Miserere à grand Coeur* and *Dies Irae.* The legal content of the formal judgment is of more assistance to Dr Sawkins than it is to this court: we are concerned with different editions of different music governed by a different national law of copyright. The same comment applies to the extracts from Part II of the German law on Copyright and Neighbouring Rights (1965, as amended), which were cited as an instance of copyright protection for editions of non-copyright works.

The appeal

4. On 2 July 2004 Patten J held that sound recordings of music on a compact disc (the CD) made and sold by Hyperion infringed the copyright in 3 performing editions originated by Dr Sawkins. The judge ordered an account of profits or, at the option of Dr Sawkins, an enquiry as to damages for infringement. The judgment (to which I would pay tribute for its firm findings of fact, its clear conclusions and its careful treatment of the legal issues) is reported at [2005] RPC 47.

5. Hyperion, for whom Mr Richard Spearman QC appears, appeals with the permission of the judge in respect of the 3 performing editions on which Dr Sawkins succeeded. (The claim in respect of a 4th work was rejected by Patten J. Dr Sawkins, for whom Mr Richard Arnold QC appears, does not cross appeal against that ruling.)

6. Patten J also held that the moral rights of Dr Sawkins had been infringed. Hyperion had not identified him as the author of the 3 editions in question in accordance with

s77 of the Copyright, Designs and Patents Act 1988 (the 1988 Act). The judge ordered an enquiry as to the damage suffered by Dr Sawkins for acts of infringement of his "paternity right" in respect of the editions.

Performing editions of Lalande

7. Lalande composed the original music in Dr Sawkins' performing editions. Lalande was born in 1657 and he died in 1726. Any copyright that may have subsisted in his music in the United Kingdom obviously expired long ago. Until fairly recently his sacred music in the form of *grands motets* was largely neglected. Few of the original manuscripts have survived.

8. By August 2001 Dr Sawkins, who is a musicological scholar of high repute and a world authority on Lalande, had completed his modern performing editions of 3 of Lalande's *grands motets*. They contain sections, which are divided into vocal passages for single voices and for choirs, and orchestral interludes:

(1)*Te Deum Laudamus* (S32) This dates from 1684. Lalande later reduced its length and revised it. Dr Sawkins added a figured bass line. He made 1,139 corrections and additions to the notation necessary to make the music playable;

(2) *La Grande Pièce Royale* (S161) This orchestral piece dates from about 1695. It was published in a Paillard edition in 1964. Dr Sawkins re-created missing viola parts in respect of 153 of Lalande's 268 bars;

(3) *Venite, Exultemus* (S58) This dates from 1701. Dr Sawkins corrected 27 wrong notes. He made changes or additions to the figured bass (figuring for the *basse-continue*);

(4) *Sacris Solemniis* (S74) Only the 6th movement (*Panis Angelicus*) was included in the sound recording on the CD. As there was very limited editorial input by Dr Sawkins and his performing edition was not substantially copied on the CD, the judge held that no infringement had occurred. I say no more about it in this judgment.

9. Dr Sawkins spent about 300 hours working on each of the performing editions of the 4 pieces, making the changes and corrections and modernising the notation. He registered the completed editions with the Performing Right Society and the Mechanical Copyright Protection Society, who licence the performance and mechanical recording rights in copyright music on behalf of copyright owners. He asserted a claim to copyright with his name and the date on the front page of each of the scores of his editions.

10. He made a grand total of 3,000 editorial interventions in the 4 pieces. It is, of course, more relevant to consider the nature and amount of the work by Dr Sawkins on the individual editions, as he claims a separate and independent copyright in each of them.

The Hyperion CD

11. Hyperion is a small record company specialising in recordings of neglected works. In October 2002 Hyperion produced the CD "Music for the Sun King." It featured sound recordings of performances played from the scores of the 4 performing editions by the Ex Cathedra choral and orchestral ensemble. Ex Cathedra enjoys a reputation for the performance of French Baroque music. It was conducted by Jeffrey Skidmore. The sound recordings went ahead without the consent of Dr Sawkins. His prior assertion of copyright in the performing editions of the 4 pieces as "original musical works" was disputed by Hyperion. While agreeing that Dr Sawkins was entitled to a hire fee for his work in providing the scores of the editions for the recording (£1350), Hyperion denied that he had any rights in them and refused to pay him any royalties. Hyperion's position is that an editor should never obtain copyright in a performing edition of non-copyright music.

12. The scores produced by Dr Sawkins were used by the orchestral and vocal performers at Hyperion's recording sessions. The recording of the combination of sounds produced by the ensemble's use of the scores of the performing editions is embodied in the CD. It was accepted that none of the original Lalande music could have been performed by the Ex Cathedra ensemble using only the extant earlier Lalande scores.

13. Hyperion's principal point is quite simply that the recordings on the CD were of performances of the music composed by Lalande. They were not recordings of music composed by Dr Sawkins. That is the basis of Hyperion's denial of any legal obligation to pay royalties to him for using the non-copyright music of a composer, who died nearly 280 years ago.

Subsistence of copyright

14. In a copyright action it is necessary to identify the work in which copyright is claimed and then to determine (a) whether the work is one in which copyright subsists under the 1988 Act; (b) who is the author and owner of the relevant copyright; and (c) whether the work has been substantially copied without the consent of the owner.

15. As there has been some misunderstanding about the legal issues in the case, I should first make clear what the case is *not* about. Dr Sawkins has not made any claim in this action to any copyright in (a) the music composed by Lalande; or (b) an arrangement, transcription or interpretation of Lalande's music; or, (c) a compilation of Lalande's music; or (d) a typographical arrangement of Lalande's music.

16. The claim made by Dr Sawkins is confined to copyright in the particular works originated by him. They take the material form of musical scores embodying performing editions of 3 pieces of music by Lalande. Dr Sawkins originated the performing editions in the copyright sense: that is, he used his own substantial and independent effort, skill and time to create them. They did not exist as such before he produced them. He is the author (again in the copyright sense) of each of the editions.

17. The dispute is whether any of them fall within the statutory definition of an "original musical work" in the 1988 Act. In brief, Dr Sawkins' case is that they do because (a) he originated the performing editions by his own expert and scholarly exertions; (b) the editions did not previously exist in that form; (c) the contents of his editions affected the combination of sounds produced by the Ex Cathedra performers who

used them at the Hyperion recording session; and (d) the resulting combination of sounds embodied in the CD was music.

18. Each edition also exists in the form of printed musical scores produced by Dr Sawkins. They contain musical information in conventional modern notation with indications or directions for the performers. The performing indications either affect or potentially affect the sounds, which may be produced by the performers who use the scores: which instrument to play, whether it is to be played soft or loud, or fast or slow, and ornaments, such as trills or slurs. The performance of the editions creates a combination of sounds available for hearing and appreciation through the ears of the listeners.

19. In finding for Dr Sawkins on the subsistence issue, the judge held that the performing editions satisfied the statutory definition of "original musical works." Copyright subsists in an original musical work, which has been recorded in writing or otherwise: sections 1(1) (a) and 3(2). "Writing" includes any form of notation, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded: section 178. "Musical work" is defined in section 3(1) as

> " ..a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music."

20. Hyperion denies that the 3 performing editions are either "original" or "musical" within the meaning of the 1988 Act. The judge was wrong, it submits, in treating the "playability" of the editions as an indicator of the subsistence of an independent copyright in them.

The performing editions

21. At this point the relation between Lalande's original music and the performing editions produced by Dr Sawkins requires elaboration.

22. It was the aim of Dr Sawkins, so far as was possible, to reproduce faithfully Lalande's music in the form of an accurate edition close to the composer's original intentions (paragraph 13 of the judgment). This involved consulting and drawing on manuscript and printed sources dating from the late 17th and early 18th centuries. They were scattered in various libraries, mainly on the Continent. Work was necessary in order to select a version and to produce a score and a series of parts which would be playable. That involved transcription of the music from the original scores into modern notation and interpretation of the "shorthands", as in the case of the *Te Deum*, on the original scores for the benefit of the performers. (The detailed work of Dr Sawkins is described in detail by the judge in paragraphs 16 to 22 of his judgment.)

23. The work of Dr Sawkins did not, in general, involve re-composition of Lalande's music or making an "arrangement" of it in the copyright sense: see section 2(6)(b) of the 1988 Act. Nevertheless, the production of the performing editions required substantial effort, skill and time on the part of Dr Sawkins. As the judge said,

> "20. ….the process of editing undertaken by Dr Sawkins combines the scholarship and knowledge derived from a long and detailed study of the composer's music with a certain amount of artistic inventiveness."

> "63. There can be no doubt that Dr Sawkins has applied considerable skill and labour to the task of editing the four editions under consideration, based on his own expertise in respect of Lalande. The work was laborious and painstaking and extended over a considerable period of time."

24. The judge rejected Hyperion's contention that Dr Sawkins had not utilised "the right kind" of skill and labour to acquire an independent copyright, as he had not produced original music. Indeed, he accepted that he had, to a very large degree, reproduced the musical contents of the Lalande source material. The editions, Hyperion contend, are no more than transcriptions of Lalande's music and did not involve the creation of new music in the form of notes or sounds.

25. The response of Dr Sawkins (which was accepted by the judge-see paragraph 64) was that none of the music could have been played or performed by Ex Cathedra at the Hyperion recording session by using any of the earlier extant Lalande scores, except perhaps by using the 1964 Paillard edition of *La Grande Piece Royale*. To make the Lalande music playable Dr Sawkins had transposed the source material into conventional modern notation, corrected it where necessary and made certain other additions. He accepted that only in the re-creation of the viola part in the case of one work (*La Grande Piece Royale*) had he actually composed new notes.

26. The judge made detailed findings of fact in respect of each of the 3 editions, which I will summarise:

A. Te Deum Laudamus (1684) (paragraphs 32 –37 of the judgment)
Dr Sawkins made necessary corrections and additions to the notation to make the music playable (see paragraph 65). The corrections and re-compositions totalled 141. He added figuring to the bass line. The construction of a figured bass accounted for 672 of 1,139 corrections to the score, either by correcting mistakes or enhancing the performers' comprehension of the chords to be played by adding extra figures. 319 of these were his own interventions. They were not derived from other source materials. Ornamentation in the form of trills on notes was also added.

B. La Grande Piece Royale (1695-Paillard edition 1964) (paragraphs 23-31 of the judgment)
This orchestral suite in 6 linked movements was derived from 4 sources. Dr Sawkins re-created viola parts for passages of it that were missing. This took up 153 bars of the work's 268 bars. It was the bulk of the work done by Dr Sawkins. There were also 34 editorial interventions. Patten J found (paragraph 64) that Dr Sawkins had made the music playable by transposing from the source material the common notation and, where necessary, had corrected it. Hyperion now accepts that the viola part is a significant re-composition and that it is music in which copyright can subsist, but submits that it was copied from the Paillard edition and that Dr Sawkins has no copyright in it. The judge held, however, that Dr Sawkins did not consciously or unconsciously copy from the Paillard edition (paragraph 31). I shall return to this point later in the judgment.

C. Venite Exultemus (1701) (paragraphs 43-47 of the judgment)

This is a large scale choral and orchestral piece in 8 movements. It lasts for 26 minutes. Dr Sawkins derived it from various scores and from editions by Cauvin in 1715 and Hue 1729-34. Most of the work done by Dr Sawkins was in adding the figured bass. The changes and additions also included the correction of 27 wrong notes and re-composition of the text. There were 659 corrections to figured bass. 134 of them were not derived from any of the sources, such as Hue. He made a total of 747 interventions.

Principles of copyright law

27. I now turn to consider the policy of copyright law, its governing principles and their application to the facts found by the judge.

A. Originality

28. The general policy of copyright is to prevent the unauthorised copying of certain material forms of expression (literary, dramatic, artistic and musical, for example) resulting from intellectual exertions of the human mind. The scope of protection available is subject to numerous qualifying conditions, restrictions, exceptions and defences, which are not relevant to this case.

29. The important point is that copyright can be used to prevent copying of a substantial part of the relevant form of expression, but it does not prevent use of the information, thoughts or emotions expressed in the copyright work. It does not prevent another person from coincidentally creating a similar work by his own independent efforts. It is not an intellectual property monopoly in the same sense as a patent or a registered design. There is no infringement of copyright in the absence of a direct or indirect causal link between the copyright work and the alleged copy.

30. Thus, if the claim of Dr Sawkins to copyright in the performing editions were upheld, that would not prevent other musicologists, composers, performers or record companies from copying Lalande's music directly or indirectly or from making fresh performing editions of their own. All that Dr Sawkins can prevent them from doing, without his consent, is taking the short cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them.

31. The policy of copyright protection and its limited scope explain why the threshold requirement of an "original" work has been interpreted as not imposing objective standards of novelty, usefulness, inventiveness, aesthetic merit, quality or value. A work may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music. A work need only be "original" in the limited sense that the author originated it by his efforts rather than slavishly copying it from the work produced by the efforts of another person.

32. The first question is whether the performing editions are incapable of being regarded as "original" works because Lalande composed the music and Dr Sawkins made his editions of that music with the intention that they should be as close as possible to the Lalande originals.

33. The essential elements of originality were expounded by the House of Lords over century ago in **Walter v. Lane** [1900] AC 539, a decision on the Copyright Act 1842.

It remains good law: **Express Newspapers plc v. News (UK) Ltd** [1990] FSR 359 at 365-366. The House of Lords held that copyright subsisted in shorthand writers' reports of public speeches as "original literary" works. The speeches were made by the Earl of Rosebery in public when reporters were present. The reporters made notes in shorthand, transcribed them, corrected, revised and punctuated them and published them in newspapers as verbatim reports of the speeches. A speech and a report of a speech are two different things. Lord Rosebery was the author of his speeches. The shorthand writers were the authors of their reports of his speeches. They spent effort, skill and time in writing up their reports of speeches that they themselves had not written.

34. The reports were held to be "original" literary works, even though the intention of the reporters was to produce as accurate a report as possible of a work of which they were not the authors. (As the shorthand writers were employed, the copyright initially vested in The Times as their employer, but that fact does not affect the basic principle). The copyright in the newspaper reports was infringed when a book was published by the defendants containing unauthorised copies of the reports of the speeches.

35. Lord Halsbury LC held that the law did not permit "one man to make profit and appropriate to himself the labour skill and capital of another."(p545) The reporter was the author of his report and the report of the speech was the original work of the reporter, even though "he obtained his words and ideas from somebody else."(p.547). If there was more then one reporter reporting the particular speech, each reporter would be entitled to the copyright in his own report of it (p549). Each is entitled to write his own report of the event. (Even if the reports are very similar they would not be copies of other reports, the similarity being attributable to the common source of the speeches reported).

36. In my judgment, on the application of **Walter v. Lane** to this case, the effort, skill and time which the judge found Dr Sawkins spent in making the 3 performing editions were sufficient to satisfy the requirement that they should be "original" works in the copyright sense. This is so even though (a) Dr Sawkins worked on the scores of existing musical works composed by another person (Lalande); (b) Lalande's works are out of copyright; and (c) Dr Sawkins had no intention of adding any new notes of music of his own.

B. Music

37. The next question is whether the performing editions are "musical" works within the meaning of the 1988 Act. A first reaction (and a reasonable one, in my view) is to ask: why not? If the creative work contributed by Dr Sawkins, as evidenced by his scores of the performing editions, enables musicians to participate in the organised production of combinations of sound, why is that not music?

38. Hyperion's principal objection is that a performing edition does not amount to "a new and substantive musical work in itself." The edition does not, it submits, make an impact on the sound over and above that belonging to Lalande's musical work. The critical question is whether the effort spent by Dr Sawkins resulted in a new musical

work. On the "sound test" approach Dr Sawkins' editing work on the texts had not made any significant relevant contribution to the musical content (i.e. sound) of Lalande's original music. For example, transcription from one form of notation to another in the marked up scores was only a matter of the form of presentation of the original work. It did not result in the creation of a new musical work: all the notes and harmonies of the original work were retained. It was no different from the case of a person making a copy of another's work (such as the copy of a painting or the enlargement of a photograph): the process might call for effort, skill and judgment, but it did not transform a copy of a work into an original work attracting a fresh copyright: **Interlego v. Tyco** [1988] RPC 343 at 370, 371 per Lord Oliver (a case of artistic copyright). The Judicial Committee approved the test laid down in **Blacks v. Murray** (1870) 8 SLR 261 (a case of literary copyright) for the creation of a copyright in the new edition of a literary work. It is necessary to make extensive and substantial alterations in order to create a new literary work, not just a few emendations and the addition of a few unimportant notes.

39. Hyperion also submitted that, as a matter of public policy, the claim made by Dr Sawkins to musical copyright in his editions was objectionable. It was acknowledged that his work of applied scholarship was meritorious; that it might attract copyright in the typographical arrangement, which would protect him against the activities of photocopyists; and that he was possibly entitled to literary copyright in the additional notation and in the compilation of Lalande's works. But no copyright of that character was claimed by him in these proceedings.

40. An objection to his claim to musical copyright was that there was public interest in the availability of ancient music. Attributing new periods of musical copyright to editorial work of the kind performed by Dr Sawkins would expand the proper limits of intellectual property protection by extending the life of the copyright and even creating "a perpetual monopoly": see **Interlego** at 364 (re-drawings with minor alterations). This development would have an impact on the performance and recording of non-copyright music and its cost. More consents would have to be obtained for performances and recordings. The impact would be felt by the record industry, by performers and by orchestras.

41. The effect of the editorial interventions of Dr Sawkins was, as he asserted was his intention, only to produce more faithful and better copies of Lalande's original music and to make it playable, rather than to create new music of his own. The kind of effort and skill expended by Dr Sawkins was not appropriate or relevant to the creation of a fresh musical copyright, such as might be achieved by changes to the melody and harmony of the underlying work.

42. On the approach advocated by Hyperion most of the exertions of Dr Sawkins, such as researching the source materials, selecting the best versions to edit, transcribing them into modern notation, making them playable, or more easily playable, correcting errors, inserting missing material from other sources, the inclusion of the figured bass and determining such matters as layout of the scores on the page and inserting "advisory" or courtesy indications, such as tempo and ornamentation, are irrelevant to the issue whether he created an original musical work. They were not part of the music. Thus the material shown on the marked up copies of the scores adduced in

evidence by Dr Sawkins, in order to illustrate the nature and extent of the editorial interventions by him to the text bar by bar, might be academically sound and valuable, but was insufficient to attract musical copyright. It was not "the right kind of skill and labour." Its effect on the sound of Lalande's music was not such as to amount to a new and substantive musical work in itself: **Hadley v. Kemp** [1999] EMLR 589 at 643 (a case on the different question of whether a joint work was created by contributions to its performance and interpretation, as distinct from creation of a musical work, sufficient to give the contributors shares in the copyright).

43. Although I agree that some aspects of Dr Sawkins' exertions, such as time and labour spent on the discovery or retrieval of the original scores and in their layout on the page, are irrelevant to the subsistence of copyright in a musical work, I do not accept the narrow approach advocated by Hyperion as to the type and nature of the work required to attract musical copyright.

44. Hyperion's emphasis is on the necessity for composition or re-composition of new notes of music, as in a musical adaptation or arrangement, in order to produce an original combination of sounds appreciated by the ear, rather than on the exacting scholarly exertions of Dr Sawkins on the notation of the scores and the inclusion of performing indications and directions.

45. The 1988 Act stipulates for three essential ingredients of an original musical work in which copyright subsists: it must consist of "music" and accompanying words or action are excluded; it must be "original" in the "originating" sense already discussed; and it must be "recorded" in some form, such as being fixed in writing. The real contest is on the first point. It is not disputed that Dr Sawkins both originated and recorded the editorial interventions on the scores, which, Hyperion contends, are not "music" and do not originate a new musical work. This submission is illustrated in the arguments and in the findings of the judge on the insertion of the figured bass in the score of 2 of the 3 works.

The figured bass

46. The inclusion by Dr Sawkins of the figured bass (basse-continue) in *Te Deum Laudatum* and *Venite Exultemus* was particularly relied on by the judge in his finding of subsistence of copyright claimed by Dr Sawkins. (The figured bass in *La Grande Piece Royale* was derived from the sources). The judge's findings were that-

> "14. …*Basse-continue* (meaning continuous bass) is, as Mr Guy Protheroe, the defendant's expert, explained, a feature of most music of the baroque period. It consists of a bass line only, which is to be played on instruments such as the cello, viola de gamba, double-bass or bassoon. Another chord-playing instrument such as an organ or harpsichord also plays the bass line, but adds the chords above it, which are drawn from and match the music in the lines above. In order to save the player from having to read all the orchestral parts to work out what chords to play, composers developed what came to be described as a figured bass. This involved placing figures either above or below the notes in the bass line, although the modern practice (followed by Dr Sawkins) is to place them below. Where there is no figure under a note, the convention is that this denotes the most common chord, which Mr Protheroe describes as a root-position chord; i.e a triad with a root note, the third above

> and the fifth above. When (for example) the figure 6 appears, this means that instead of the top of the chord being the fifth note, it is to be the sixth.
>
> 15. Dr Sawkins said that he derived most of the figuring from other sources, where it was correct and compatible with the full score. Both Dr Sawkins and Mr Protheroe were agreed that the figured bass is intended to give the chord-player guidance, but not to provide what may be described as a complete and inflexible code. The figuring does not always tell the keyboard player what is the complete chord and Dr Sawkins' practice in producing the editions was to reproduce what he described as the minimum possible in order to avoid accidents. It acts in effect as a shorthand for reading the other orchestral and voice parts above the bass line and for playing the harmonies. The performer still has to use his own skill and experience to play what he considers to be the appropriate notes, but Dr Sawkins accepted that this was a skill which nowadays is usual in the case of anyone who is adept or experienced at playing baroque music. One way of assisting the keyboard player is to fully realise the figured bass, and in earlier editions that was occasionally done. But both Dr Sawkins and the experts told me that the practice is now very rare, largely because of the increase in the number of skilled players of baroque music. A fully realised figured bass is also restrictive, and most experienced players prefer to realise the figured bass themselves during performance. Dr Sawkins said that the aim of a modern editor is usually, even when providing a realisation of the figured bass, to give the simplest possible realisation and not to write in what he described as a lot of fancy detail. In the case of the editions which are the subject-matter of this claim, no attempt was made by Dr Sawkins to realise the figured bass at all. This was in contrast, for example to the Paillard edition of *La Grande Piece Royale* , where there is a full realisation of the figured bass line. The inclusion of the figuring without any realisation leaves the keyboard player with a considerable amount of freedom to play what he considers to be tasteful and useful. These were the adjectives used by Dr Sawkins. In the present case this is what in fact happened during the recording session. It is evident from the score used by the *basse-continue* player (Dr Ponsford) that he has added his own figuring in a number of places to that provided on Dr Sawkins' edition. Dr Sawkins said that a lot of what Dr Ponsford had added was not strictly necessary in order to read the music, but simply acted as an *aide-memoire* to ensure that during the recording session he did not accidentally play the wrong chord."

47. Hyperion submits that the judge was wrong to place reliance on this kind of editorial intervention, as its inclusion or omission had no "aural impact" on the listener. It was an academic exercise using material derived by Dr Sawkins from the existing music of Lalande. It did not dictate what was to be played. The *basse- continue* players (including Dr Ponsford on the organ) had considerable freedom in what he played and he exercised it by making interventions of his own without expecting to receive any rights in respect of his contribution.

Conclusion on subsistence

48. As Patten J pointed out (paragraph 50) the premise of Hyperion's submission on subsistence was that in essence

> "unless the edition includes the composition of new music in the form of the notes on the score (and not merely the correction of wrong or unsatisfactory notes in the scores used) then no copyright would exist in the edition as a musical work."

49. In my judgment, the fallacies in Hyperion's arguments are that (a) they only treat the actual notes in the score as music and (b) they approach the issue of subsistence from the wrong direction by dividing the whole of the performing edition into separate segments and by then discarding particular segments on the basis that they are not music and not therefore covered by copyright. That is contrary to the correct approach to subsistence of copyright laid down by the House of Lords in **Ladbroke (Football) Ltd v. William Hill (Football) Ltd** [1964] 1 WLR 273 at 277,284,285,290 and 291. The subsistence of copyright involves an assessment of the whole work in which copyright is claimed. It is wrong to make that assessment by dissecting the whole into separate parts and then submitting that there is no copyright in the parts. Hyperion's arguments ignore the fact that the totality of the sounds produced by the musicians are affected, or potentially affected, by the information inserted in the performing editions produced by Dr Sawkins. The sound on the CD is not just that of the musicians playing music composed by Lalande. In order to produce the sounds the musicians played from Dr Sawkins' scores of his edition. Without them Ex Cathedra would not have produced the combination of sounds of *Te Deum, La Grande Piece Royale* or *Venite Exultemus* for recording on the CD.

50. There is nothing either in the 1988 Act or in the general principles of copyright law emerging from the cases to support the restrictive approach advocated by Hyperion to the definition of a "musical work". As already observed, the definition in s.3(1) has an inclusive part ("consisting of music") and an exclusive part (" exclusive of any words or action intended to be sung, spoken or performed with the music"). It is not contended that the work of Dr Sawkins falls within the exclusion: the argument has to be that it does not consist of "music." That submission rests on an unduly narrow view of what constitutes "music" for copyright purposes.

51. Patten J pointed out (paragraph 54) that the 1988 Act did not define what is meant by "music". As he observed, however, that is what this case is really about.

> "…the real issue which divides the parties is whether a musical work includes items such as the figuring of the bass, ornamentation and performance directions or is really limited for copyright purposes to the notes on the score, so that in the case of an existing work nothing less than significant rearrangement of, or significant additions to, the melody will create a new copyright in the edition of a musical work."

52. I agree. I am also with the judge in rejecting Hyperion's contention that Dr Sawkins did not acquire any copyright by virtue of the considerable effort, skill and time spent by him on the task of creating the performing editions of the three works in question.

To argue, as Hyperion does, that the work of Dr Sawkins is not "the creation of new music" begs the question of what is "music" and what amounts to "creation" of music.

53. In the absence of a special statutory definition of music, ordinary usage assists: as indicated in the dictionaries, the essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it. Music must be distinguished from the fact and form of its fixation as a record of a musical composition. The score is the traditional and convenient form of fixation of the music and conforms to the requirement that a copyright work must be recorded in some material form. But the fixation in the written score or on a record is not in itself the music in which copyright subsists. There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes.

54. The fact that in musical copyright the sounds are more important than the notes in the text is recognised, for example, in the approach to infringement. The test of substantial reproduction is not a note-by-note textual comparison of the scores. It involves listening to and comparing the sounds of the copyright work and of the infringing work. So it is possible to infringe the copyright in a musical work without taking the actual notes. See **Austin v. Columbia Gramophone Co [**1917-23] Macg. Cop. Cas. 398

55. In principle, there is no reason for regarding the actual notes of music as the *only* matter covered by musical copyright, any more than, in the case of a dramatic work, only the words to be spoken by the actors are covered by dramatic copyright. Added stage directions may affect the performance of the play on the stage or on the screen and have an impact on the performance seen by the audience. Stage directions are as much part of a dramatic work as plot, character and dialogue.

56. It is wrong in principle to single out the notes as uniquely significant for copyright purposes and to proceed to deny copyright to the other elements that make some contribution to the sound of the music when performed, such as performing indications, tempo and performance practice indicators, if they are the product of a person's effort, skill and time, bearing in mind, of course, the "relatively modest" level (see Laddie, Prescott & Vitoria on The Modern Law of Copyright and Designs 3rd ed para 3.58) of the threshold for a work to qualify for protection. The work of Dr Sawkins has sufficient aural and musical significance to attract copyright protection.

Other matters

57. There are three other matters which can be dealt with shortly: infringement, the Paillard edition and moral rights.

A. Infringement of copyright

58. Patten J held that the copyright subsisting in the performing editions of Dr Sawkins had been infringed by Hyperion, except in the case of the *Panis Angelicus.* It had appropriated " a substantial part of the claimant's own skill and labour expended on the creation of the original work" i.e. his original editorial input as the source from which the infringing work is derived. (paragraph 68).

59. Hyperion criticised the judge for applying the wrong test to infringement, as well as to subsistence, of copyright. Some of the same arguments against subsistence of musical copyright in the performing editions also apply to the issue of infringement by substantial reproduction of a copyright work. Substantial reproduction depends on the nature of the copyright work in issue: see **Autospin (Oil Seals)Ltd v. Beehive Spinning** [1995] RPC 683 at 700 per Laddie J.

60. Hyperion submitted that Patten J failed (a) to consider which of the editorial interventions of Dr Sawkins impacted on the sound of the music and (b) to take account of the fact that the figured bass had added nothing to the sound of the music. It was without musical significance, either for the subsistence of copyright or for its infringement. The judge had simply found that the figured bass and most of the performing indications added by Dr Sawkins had been followed in the CD recording without assessing the musical impact of the interventions.

61. In my judgment, the judge was right on the issue of infringement. If copyright did not subsist in the performing editions, there could be no infringement. If, as the judge correctly held, copyright subsisted in them, the judge was entitled to find that the performers, who used the performing edition scores produced by Dr Sawkins, reproduced the "overwhelming majority of editorial interventions marked up by Dr Sawkins" in his scores, including the chords indicated by the figured bass and the corrected notes. The sound recordings on the Hyperion CD embodied the combined musical sounds made by the performers playing from the scores of the performing editions.

62. Evidence that some additional figures by Dr Ponsford on the organ were included and that there were some minor omissions of performing indications and ornamentation does not, in my judgment, invalidate the judge's conclusion that the sound recordings reproduced a substantial part of the performing editions. Infringement of copyright depends on the quality and importance of what has been copied from the copyright work without the consent of the owner. The substantial copying of the copyright material is not diminished by the infringer's addition of fresh material of his own to the unauthorised copy.

B. Originality of *La Grande Piece Royale*

63. Patten J rejected Hyperion's contention that there was no fresh copyright in this piece because he had copied it from the Paillard edition. Hyperion contended that there was such a high degree of similarity between the performing edition produced by Dr Sawkins and the Paillard edition, with which he was familiar, that the burden shifted to Dr Sawkins to explain how such similarity occurred.

64. Patten J dismissed the charge of copying, holding that there was no "attempt by Dr Sawkins to copy the Paillard edition, whether consciously or unconsciously." This conclusion was criticised by Hyperion as a misdirection on the ground that intention

was implicit in "attempt" and intention is irrelevant to the nature of unconscious copying; that the judge gave no other reason for rejecting the explanation that the similarity was due to some form of copying, as opposed to being the independent work of Dr Sawkins; and that Dr Sawkins had failed to discharge the burden of explaining the degree of similarity between his performing edition and the Paillard edition.

65. In my judgment, the judge was entitled to find as a fact on the evidence before him that Dr Sawkins had not copied the Paillard edition and that his performing edition was originated by him by his own independent effort. There was no misdirection of the judge on the ingredients of unconscious copying. The judge did not misdirect himself on the issue of unconscious copying in his reference to there being no "attempt" by Dr Sawkins to copy. As I read this part of the judgment the judge rejected the contention that Dr Sawkins attempted to copy the Paillard edition consciously and also rejected the claim of unconscious copying of it by him.

C. Moral rights

66. Section 77 of the 1988 Act confers on the author of a musical work the right to be identified as the author of the work in the circumstances specified in the section. It includes the right to be identified whenever copies of sound recordings of the work are issued to the public: section 77(3)(b). If the author in asserting his right to be identified specifies some particular form of identification that form shall be used; otherwise any reasonable form of identification may be used: section 77(8).

67. The judge held that the acknowledgement by Hyperion of the contribution of Dr Sawkins in the CD booklet ("With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording") was inadequate to identify Dr Sawkins as the author of the performing editions; that the form of identification required by him in his letter of 6 February 2002 was not followed by Hyperion (© Copyright 2002 by Lionel Sawkins); and that section 77(1) of the 1988 Act had not been complied with.

68. It was submitted that, as a matter of law, section 77(8) does not require the use of a specific form of words to describe the authorship of the work and that the judge's conclusion was contrary to evidence that the "performance materials" could only be understood as referring to the scores supplied by Dr Sawkins for the recording.

69. In my judgment, the judge was right to conclude that there was a breach of section 77. Although the CD sleeve named Dr Sawkins, it did not identify his authorship. This is hardly surprising, as it was Hyperion's case that Lalande and not Dr Sawkins was the sole composer of the music on the CD. The judge found (paragraph 49) that Hyperion had an established policy, based on its view of the law, that no separate copyright royalties would be paid to an editor or publisher, who supplies an edition of a composer's non-copyright music. According to its managing director, Hyperion's firm view was it is the composer's music which is recorded, not that of the editor. In those circumstances it is highly unlikely that Hyperion would intend to breach its own firm policy by deciding to identify Dr Sawkins as the author.

Result

70. I would dismiss the appeal.

Lord Justice Jacob:

71. I agree and have nothing to add on the issues of infringement of copyright and moral rights. I also agree with Mummery LJ's reasoning about the Paillard edition point. As regards the issue of subsistence at first I had great difficulty but in the end have concluded that Dr Sawkins is right. I must explain why.

72. The relevant statutory provisions (now in the Copyright Designs and Patents Act 1988, though there was no change in meaning from the earlier legislation) are simply these:

> "**1 Copyright and copyright works**
>
> (1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work –
>
> (a) original literary, dramatic, musical or artistic works,
>
> **3 Literary, dramatic and musical works**
>
> (1) In this Part –
>
> "musical work" means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.
>
> **9 Authorship of work**
>
> (1) In this Part "author", in relation to a work, means the person who creates it."

73. The definition of "music" is not a definition at all – its obvious purpose is just to separate out lyrics or choreographical directions or the like. They go into a different "box" for copyright purposes, for instance lyrics into "literary works" and choreographical works into "dramatic works." Clearly in this case we are concerned with "musical works". The question is whether what Dr Sawkins did was to "create" (the word of s.9) "original musical works."

74. Following the concession that Dr Sawkins' composition of the viola parts for *La Grande Pièce Royale* was a sufficient act of original creation to confer copyright, there remain two works in issue, the *Te Deum* and *Venite*. He did lesser work on the latter. So it follows that if there is a copyright in that, there will also be a copyright in the *Te Deum* as an *a fortiori* case. I have therefore primarily considered *Venite.*

75. I begin by recording the following cross-examination of Dr Sawkins:

> "Q.. Can I just be clear this is not one of the pieces that you actually claimed to have recomposed anything – there is no new music in Venite?

> A. No, there is no new music. There are corrections to the musical text, which you could argue are the same thing, but they are individual notes."

76. It is that answer – "no new music" – which lies at the heart of Hyperion's objection to the existence of an original musical work. Dr Sawkins was not, they say, engaged in creation of a musical work at all. It was that answer which also caused me to pause.

77. And it is an important factor to be borne in mind. But in the end, in my opinion it is essential to consider exactly what Dr Sawkins did to decide (both qualitatively and quantitatively) whether he created an original music work within the meaning of the Act. For, whilst it is trite that mere servile copying (for instance tracing or photocopying) does not amount to originality, there are clearly forms of "copying" which do – the shorthand writer's copyright is a paradigm example which has stood since *Walter v Lane* [1900] AC 539.

78. In this connection I accept the opinion of the authors of *The Modern Law of Copyright* at p.35 that it is "highly probable that it [*Walter*] is still good law", notwithstanding the addition of the word "original" to the Act in 1911. The reasoning in *Sands McDougall Proprietary v Robinson* 23 CLR 49 (High Court of Australia) adopted in *Express Newspapers v News (UK)* [1990] FSR 359 (Browne-Wilkinson V-C) is right. The authors of the 15th edition of *Copinger* (at para. 3-124) are of the same opinion (indeed do not qualify it with "highly probable"). Indeed we were not presented with a full frontal attack upon *Walter*.

79. Both textbooks maintain that view despite what was said *obiter* in *Interlego v Tyco* [1988] RPC 343 by Lord Oliver at p. 371 :

> "Take the simplest case of artistic copyright, a painting or photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an 'original' artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality."

80. The authors of the *Modern Law of Copyright* comment on this passage at para 4.39). Although the comment is long it is worth setting it out:

> "However, whilst the remarks made in *Interlego* may be valid if confined to the subject matter then before the Privy Council, they are stated too widely. The Privy Council was there considering fairly simple technical drawings. This is a rather special subject-matter. While the drawing of such a work is more laborious than it looks, it is a fact that any competent draftsman (perhaps, any conscientious amateur) who sets out to reproduce it exactly will almost certainly succeed in the end, because of the mathematical precision of the lines and measurements. This should be contrasted with, eg a painting by Vermeer, where it will be obvious that very few persons, if

> any, are capable of making an exact replica. Now, assume a number of persons do set out to copy such a painting, each according to his own personal skill. Most will only succeed in making something which all too obviously differs from the original – some of them embarrassingly so. They will get a copyright seeing that in each instance the end result does not differ from the original yet it took a measure of skill and labour to produce. If, however, one of these renders the original with all the skill and precision of a Salvador Dali, is he to be denied a copyright where a mere dauber is not? The difference between the two cases (technical drawing and old master painting) is that in the latter there is room for individual interpretation even where faithful replication is sought to be attempted while in the former there is not. Further, a photographer who carefully took a photograph of an original painting might get a copyright and, if this is so, it is rather hard to see why a copy of the same degree of fidelity, if rendered by an artist of the calibre aforementioned, would not be copyright. These considerations suggest that the proposition under discussion is suspect. It is therefore submitted that, for example, a picture restorer may get a copyright for the result of his efforts. Be that as it may, it is submitted that the *Interlego* proposition is anyway distinguishable where the replicator succeeds in preserving for posterity an original to which access is difficult."

81. The authors of *Copinger* (15th Edn. 2005) likewise take the view that the passage should be read as confined (see para 3-142).

82. I agree with the textbooks. I do not think the comment as a generality is consistent with *Walter v Lane.* I think the true position is that one has to consider the extent to which the "copyist" is a mere copyist – merely performing an easy mechanical function. The more that is so the less is his contribution likely to be taken as "original." Prof. Jane Ginsberg (*The Concept of Authorship in Comparative Copyright Law*, http://ssrn.com.abstract_id=368481) puts it this way:

> "Reproductions requiring great talent and technical skill may qualify as protectable works of authorship, even if they are *copies* of pre-existing works. This would be the case for photographic and other high quality replicas of works of art"

In the end the question is one of degree – how much skill, labour and judgment in the making of the copy is that of the creator of that copy? Both individual creative input and sweat of brow may be involved and will be factors in the overall evaluation.

83. Coming closer to this case, for instance, consider what was done by the 14 year old Mozart. After hearing Allegri's *Miserere* (a supposedly secret piece of music in that the manuscripts had never been published) at a performance in the Vatican he wrote it down. That seems to me to be the exact musical equivalent of what is done by a shorthand writer with a speech – indeed it involved even more skill for he wrote from memory whilst a shorthand writer writes as the speaker talks. Of course Mozart

"wrote no new music" but it would be logically impossible to deny him copyright *in his* transcription of the music but grant it to a shorthand writer for *his transcription* of the spoken word.

84. Therefore, as it seems to me, one is bound to have to consider whether what Dr Sawkins did involved enough to confer originality – did it go beyond mere servile copying? Patten J held that it did. He applied this test:

> "The question to ask in any case where the material produced is based on an existing score is whether the new work is sufficiently original in terms of the skill and labour used to produce it (para.58)"

85. That seems to me to be exactly right. Of course the test involves a question of degree – mere photocopying or merely changing the key would not be enough. But a high degree of skill and labour was involved. This must be considered as a whole – it would not be right to look at each contribution and say "that is not enough" and conclude that the same goes for the whole. Dr Sawkins started by choosing which original manuscript(s) to use (actually he used mainly 2 out of 4, using one to correct ambiguities in the other), he checked every note and supplied 27 "corrections" (i.e. his personal evaluation as to what note Lalande really intended), supplied many suggestions for the figured bass, and put the whole into modern notation. This was not mere servile copying. It had the practical value (unchallenged) of making the work playable. He re-created Lalande's work using a considerable amount of personal judgment. His re-creative work was such as to create something really new using his own original (not merely copied) work.

86. I therefore think Patten J was right and agree that this appeal should be dismissed. I would add two points:

i) This sort of question (sufficient work to be "original") is just the sort of value judgment by a trial judge with which the Court of Appeal should be slow to interfere, see *Biogen v Medeva* [1997] RPC 1 at p.45. Some error of principle is called for. Here there was none.

ii) The solution accords with a reasonable view of public policy – that the sort of work done by Dr Sawkins should be encouraged. It saves others the time and trouble of re-creation of near-lost works, but in no sense creates monopoly in them. If someone wants to use Dr Sawkins' short cut, they need his permission.

87. Finally Mr Spearman sought to make some submissions about the level of damages – suggesting that they might be lower for a derivative work of this sort than for a wholly fresh composition. He may be right, but the point simply does not arise at this stage.

Lord Justice Mance:

88. I agree both with the judgment of Mummery LJ and with that which follows from Jacob LJ. Like Jacob LJ, I had some initial doubts. These related, as a matter of law, particularly to the question whether it was possible to reconcile the House of Lords decision in *Walter v. Lane* [1900] AC 539, assuming it still to apply under the more

modern revised statutory wording, with the obiter dictum of Lord Oliver in *Interlego v. Tyco* [1988] RPC 343, and, as a matter of fact, particularly to the position in respect of the *Venite*, where Dr Sawkins' impact was on its face considerably less than in the case of the other two works. However, I have come to the conclusion, for the reasons set out in Jacob LJ's judgment, that the line should be drawn in the way he explains, and that on this basis the judge's judgment cannot be disturbed and that the appeal should be dismissed in respect of all the works under appeal.