

Reflections on *The Triumph of Music: Copyrights and Performers' Rights in Music*

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Introduction

In his recent book *The Triumph of Music: Composers, Musicians and Their Audiences, 1700 to the Present*¹ Tim Blanning traces the unstoppable rise of music in Western, and now global, culture. One paragraph in particular caught my eye:²

“The first jazz musician to demonstrate the importance of recording was Louis Armstrong, whose *Hot Five* and *Hot Seven* recordings of 1925-29 included many undeniable masterpieces that still sound as fresh as the day they were played. Without those recordings, the superlative, peerless cornet playing on ‘West End Blues’ or ‘Potato Head Blues’ (the only two contenders for the title of ‘the greatest jazz record ever made’, in the view of Eric Hobsbawm) would have been lost forever. Ironically, the value of these recordings is underlined by Peter Ecklund’s transcription of Armstrong’s solo on the latter track. A competent trumpeter might well play the notes, yet still utterly fail to reproduce the original sound. This was the verdict of Humphrey Lyttelton, who wrote in his autobiography: ‘A transcription of a trumpet solo by Louis Armstrong, however detailed, cannot convey any idea of the actual performance on record. And no orchestral trumpeter, reading it off, could bring it to life, because so much of its quality lies in the originator’s personal tone and sense of timing.’ Indeed, as anyone who has listened to even a small amount of Armstrong’s playing will confirm, the tone he produced was so original that hearing only a bar or so reveals his identity. The same could be said of all the greatest jazz musicians.”

Read from the perspective of a lawyer interested in copyright and performers’ rights, this prompts a number of reflections.

What is music?

The first point illustrated by this passage is that music is what is heard, not what is written down or even capable of being written down. Section 3(1) of the Copyright, Designs and Patents Act 1988 defines a “musical work” as meaning:

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

This definition simply excludes words and actions, which are protected by other types of works, particularly literary and dramatic works. Understandably, the 1988 Act does not attempt to define what is meant by music.

¹ Allen Lane, 2008 (paperback edition Penguin, 2009).

² *ibid* at 204.

The *Shorter Oxford English Dictionary*³ defines “music” as follows:

“**1** The art or science of combining vocal or instrumental *sounds* with a view to beauty or coherence of form and expression of emotion.

2 a Melodic or harmonic vocal or instrumental *sound*; an example or kind of such a *sound*. **b** Pleasing *sound* produced by an agent or agency specified or understood, as the song of a bird, the murmur of running water, the cry of hounds on seeing the chase; something which it is delight to hear; an example of kind of such *sound*. **c** Melodic or harmonic vocal or instrumental *sound* as devised by a composer; musical composition [emphases added].”

These definitions have to be understood expansively, as can be seen for example from the same dictionary’s definition of *musique concrète*:

“Electronic music constructed by the rearrangement of recorded natural *sounds* [emphasis added].”

As the example of *musique concrète* also illustrates, the question “what is music?” for the purposes of the 1988 Act is not an aesthetic question. This is both because courts are unqualified to make aesthetic judgements and because they are inherently subjective.⁴ As is notorious, what is music to some is mere noise to others, particularly if there is a generational difference. The question is essentially a functional one: if sounds are presented and consumed as music, that is to say, for aural enjoyment, then they are music.

It has long been recognised by the courts that infringement of copyright in musical works is not a question of note for note comparison, but falls to be determined by the ear as well as by the eye: see *Austin v Columbia Graphophone Co Ltd*⁵ and *Francis Day & Hunter Ltd v Bron*.⁶ More recently, in *Sawkins v Hyperion Records Ltd*⁷ the Court of Appeal was directly confronted with the question of what is music in the context of an issue as to whether performing editions of 17th century French baroque music were original musical works and thus protected by copyright. In determining whether the editions were original, an important issue was whether aspects such as the figuring of the bass, ornamentation and performance directions were part of the musical work, since most of Dr Sawkins’ editorial interventions concerned those aspects. Mummery LJ answered this question in the affirmative:⁸

“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

³ 5th edition. Oxford University Press, 2002.

⁴ See Lord Reid in *George Hensher Ltd v Restawhile Upholstery (Lancs) Ltd* [1975] RPC 31 at 54.

⁵ [1917-23] MCC 398.

⁶ [1963] Ch 587.

⁷ [2005] EWCA Civ 565, [2005] 1 WLR 3281.

⁸ *ibid* at [53], [55]-[56].

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.

...

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...

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”

On this basis that he went on to hold that Dr Sawkins' editions were original musical works even though Dr Sawkins had tried as best he could to reproduce the compositions of Michel Richard de Lalande.

Although *Sawkins v Hyperion* concerned written scores for musical performance, Mummery LJ's reasoning makes it clear that the position is the same with regard to electronically recorded music. It follows that all aspects of the music which affect the recorded sounds form part of the musical work contained in the recording.

Different methods of fixation

The second point illustrated by the quotation from *The Triumph of Music*, and touched on by Mummery LJ in *Sawkins v Hyperion*, is the effect of different methods of fixation. Section 3(2) of the 1988 Act provides:

“Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded.”

As has been widely recognised, the words “or otherwise” in subsection (2) cover electronic recordings. What has been less well recognised until recently is that electronic recording methods permit far more to be recorded than traditional methods of written notation.

Prior to the advent of electronic recording, the only way in which music could be fixed was by means of a score. In the classical tradition, fixation in a score normally preceded realisation of the music through performance.⁹ It is important not to mistake the medium for the message, however. The 1988 Act requires fixation as a

⁹ This was not always the case. Handel and Mozart, among other composers, sometimes improvised a piece of music first and then wrote it down.

condition precedent to subsistence of copyright, but it also recognises two distinct classes of copyright work: those where the work is the message and those where the work is the medium. Literary, dramatic, musical and artistic works fall into the first class. Sound recordings, films, broadcasts and typographical arrangements fall into the second class. The difference is that the second class of copyrights is only infringed if the medium is copied, whereas the first class of copyrights may be infringed even if the medium is not copied.¹⁰ The distinction between the two is clear even though the legislature has failed properly to apply it in at least two instances.¹¹

It is plain that a musical work may exist in a composer's mind before it is written down or otherwise recorded. Equally, it may not: even in the classical tradition, many composers work by a process in which composition and recording are effectively simultaneous. Even where a composer has something in his mind, he may change it when he sees it written down. Where a musical work is recorded in a written score, the score constitutes directions for performance of the work, that is to say, directions to the performers as to what sounds they should produce. The degree to which the score determines what is heard when the score is performed obviously depends on a number of factors. These include: the system of notation employed; the performance conventions under which the composer operated (such as whether he or she lived at a time when performers were expected to improvise to a greater or lesser extent or at a time when performers were not expected to improvise); the rigidity of the composer's attitude to performances of his or her music (some composers want to dictate every last detail, others are content to give the performers more latitude); the extent to which the person writing the score (who may not be the composer) has fully recorded the composer's intentions even within the limitations and conventions under which the composer was operating (e.g. whether it is a full score or some kind of short score); the performance conventions under which the performers are operating (such as whether fidelity to the written score is thought to be a virtue or not); and individual choices by performers (such as whether to observe or depart from various instructions in the score e.g. metronome markings). In general, the more detailed the score is, the less latitude there will be for performers to improvise if they are following the score faithfully. Even the most detailed score will leave a series of decisions to the performers, however.

Since the advent of electronic recording, it has been possible to fix music itself and not merely instructions for the production of music. The difference becomes apparent, as the example of Potato Head Blues shows, when one considers music that is created through performance and subsequently transcribed. Electronic recording with reasonable fidelity enables almost every detail audible to the human ear to be captured, including small details of tempi, dynamics, phrasing and so on. Even with a detailed score, this is not possible.

¹⁰ See *Telmak Teleproducts Australia Pty Ltd v Bond International Pty Ltd* (1985) 5 IPR 203, *CBS Records Australia Pty v Telmak Teleproducts (Aust.) Pty Ltd* (1987) 9 IPR 400 and *Norowzian v Arks Ltd* (No 1) [1999] EMLR 57.

¹¹ First, photographs are wrongly placed in the first category by virtue of section 4(1)(a) of the 1988 Act. A photograph is medium not message, just like a film. It may be that the content of the image is deserving of protection as an artistic work, but that is another matter: see Arnold, "Copyright in Photographs: A Case for Reform" [2005] EIPR 303. Secondly, when section 13B was inserted into the 1988 Act by the Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995/3297) purportedly to implement the EC Term Directive (Council Directive 93/98/EEC of 29 October 1994 harmonising the term of protection of copyright and certain related rights, now codified as Parliament and Council Directive 2006/16/EEC), the legislature failed properly to differentiate between a film and the drama it records: see Arnold, "Joy: a Reply" [2001] IPQ 10.

As Professor Blanning points out, electronic recording also captures a performer's tone, that is to say, the quality of the sound he or she makes with his or her instrument or voice. I shall return to the significance of this later.

Different methods of creation

The third point illustrated by the quotation from *The Triumph of Music* is that there are different methods of creating music. Simplifying drastically, there are two basic methods. The first is that employed by composers in the classical tradition, which is to create a written score which is subsequently performed. As I have discussed, such a score constitutes instructions for the production of music by the performers. It may give the performers relatively little discretion as to what sounds they produce or it may give them some degree of freedom. Even so, there is a clear distinction between the role of the composer and the role of the performer.

The second basic method is that commonly employed by jazz and other non-classical musicians, which is to create music through performance which is electronically recorded. In this case the music is created directly by the performers. In such circumstances the distinction between the role of the composer and that of the performer is much less clear, particularly if one focuses on the music as recorded and not on any antecedent work from which it may have been derived.

The difference between these two methods of creation has implications when we come to consider the authorship of musical works for the purposes of copyright.

Authorship of musical works

Before turning to the law on this subject, I shall put the matter in context by saying a little more about Potato Head Blues. It was recorded by Louis Armstrong and his Hot Seven on 10 May 1927. Apart from Louis Armstrong on cornet, the personnel were Johnny Dodds on clarinet, John Thomas on trombone, Lil Armstrong on piano, Johnny St. Cyr on banjo, Pete Briggs on tuba and Baby Dodds on drums. As well as two solos by Louis Armstrong, there is a fine solo by Johnny Dodds. The composition is credited to Louis Armstrong. If one considers the music which one hears on the recording, however, it is manifest that it is the product not merely of composition in the traditional sense, but also of both collective and individual improvisation.

It is, of course, conventional in the field of jazz for the creator or creators of the basic musical material from which a performance is elaborated to be credited as the author of the entire musical work no matter how much input there may be from other musicians whether collectively or individually. Indeed, it has often been the case that band leaders have claimed credit for musical material actually originated by others, as with Miles Davis and some of the tracks on the album *Kind of Blue*.¹² Similarly, it is conventional for the author of a pre-existing composition such as "My Favourite Things" written by Richard Rodgers (with lyrics by Oscar Hammerstein II) to be treated as the author of the entire recorded musical work even when it is used as the point of departure for a 30 minute musical voyage by John Coltrane and his band. This convention does not reflect musical reality, however, nor is it legally correct.

The key to the legal analysis is provided by the first three points I have discussed: music is what is heard, electronic recording fixes music and music may be directly created through performance rather than indirectly through written

¹² See Khan, *Kind of Blue* (Granta Books, 2001) at 98.

instructions. It follows that, when analysing subsistence and ownership of copyright in music which has been created through performance, the musical work is constituted by the contents of the recording of the performance.

Once one has grasped these points, it becomes much easier to address two issues which have frequently arisen in the context of disputes as to the authorship of, and hence ownership of the copyright in, musical works. These concern, first, the originality of the recorded musical work vis-à-vis an antecedent work from which it has been derived; and, secondly, the contribution required for joint authorship of a musical work in accordance with section 11(3) of Copyright Act 1956 or now section 10(1) of the 1988 Act. Section 11(3) of the 1956 Act provided:

“‘Work of joint authorship’ means a work produced by the collaboration of two or more authors in which the contribution of each author is not separate from the contribution of the other author or authors.”

Section 10(1) of the 1988 Act is the same except that “distinct” has been substituted for “separate”.

There have been a considerable number of disputes over the authorship of musical works in this country over the last 15 years or so. I will focus on four key cases during that period.

Godfrey v Lees

In *Godfrey v Lees*¹³ the claimant (Robert Godfrey) was a pianist and arranger who had been associated with the group Barclay James Harvest for a period of about 18 months, during which time the group had recorded its first two albums. The first four defendants (the guitarist John Lees, the bass player Leslie Holroyd, the drummer Melvin Pritchard and the lead singer and keyboard player Stuart Wolstenholme) were the members of the group during that period. Claims against four publishing and record companies had been compromised. Robert Godfrey claimed joint authorship of, and therefore joint ownership of the copyright in, six musical works in the versions recorded on the group’s albums. In four cases he had composed orchestral passages, or made orchestral arrangements, for the songs. In the other two cases he had provided piano or organ accompaniments. He also made a separate claim that there had been an oral agreement, or at any rate a common understanding, that the income from the group’s activities would be shared equally between the four members of the group and himself. The latter claim wholly failed.

In considering the copyright claims, Blackburne J held:¹⁴

“What the claimant to joint authorship of a work must establish is that he has made a significant and original contribution to the creation of the work and that he has done so pursuant to a common design. ... It is not necessary that his contribution to the work is equal in terms of either quantity, quality or originality to that of his collaborators. Nor, in the case of a song, does it matter that his contribution is to the ... arrangement of the song rather than to the song itself.”

¹³ [1995] EMLR 307.

¹⁴ *ibid* at 325.

He went on to say:¹⁵

“[In *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109] Robert Goff J accepted the defendant’s submission that the degree of originality required is merely that the manner of expression in permanent form is such that it can be seen to have originated from the arranger rather than copied from the original but that, subject to that, an arrangement could attract copyright notwithstanding that it is no more than a straightforward arrangement of a well known song employing for the purpose well known musical devices and clichés. That case was not concerned with joint authorship but it well illustrates how little originality is required of a person's contribution to a piece of music in order to attract copyright in the altered work which results.”

As this passage rightly recognises, the threshold for originality in the context of musical adaptations or arrangements is the normal one in copyright, namely that the resulting work is the product of skill and labour on the part of the author or authors. It can now be seen from the subsequent decision of the Court of Appeal in *Sawkins v Hyperion* that, if anything, Blackburne J understated how little is required by way of changes to an antecedent musical work in order for the altered work to be original so as to attract a fresh copyright.

On this basis the judge found that Godfrey was indeed a joint author of all six musical works in question. For present purposes, his assessment of the claim in relation to one work, “Song for Dying”, is of particular interest:¹⁶

“I regard the plaintiff's claim to joint authorship of this and the next work as very borderline. The plaintiff accepts that Song for Dying was a largely finished work, composed by John Lees, when he came to make his contribution to it ... when the song was being recorded in the EMI studios for the album ‘Once Again’. His contribution to the song in [that] form ... consists of a piano accompaniment which is most prominent during the vocal sequences. Although the accompaniment is of a straightforward and largely repetitive nature, to my ear it forms a feature and, where it is clearly audible (as when accompanying the two vocal passages) a significant feature of the recording. ... in my view, the plaintiff's piano contribution is sufficient but only just to qualify him as a joint author of the work in the form which it took on the recording....”

Despite the finding of joint authorship, Godfrey failed in his claim because the judge held that he was estopped from revoking the gratuitous licence which he had impliedly granted the defendants to exploit the copyrights in the works.

Hadley v Kemp

In *Hadley v Kemp*¹⁷ the claimants were the lead vocalist (Tony Hadley), drummer (John Keeble) and guitarist/saxophonist/percussionist (Steve Norman) in the band Spandau Ballet. The first defendant (Gary Kemp) was the group’s

¹⁵ *ibid* at 326.

¹⁶ *ibid* at 328.

¹⁷ [1998] EMLR 588.

guitarist/keyboard player/back-up singer. The fifth member of the group, the bass guitarist Martin Kemp, was not a party. The other defendant was Gary Kemp's publishing company Reformation Publishing Co Ltd. Gary Kemp had always been credited as the composer and lyricist of all the group's songs bar one. The principal dispute in the case was about an alleged oral agreement between Gary Kemp and the other members of the group to share publishing income from the songs. In the alternative to their contract claim, the claimants claimed that they were the joint authors of, and hence joint owners of the copyrights in, the music for the songs on the band's first four albums. More precisely, there were two copyright claims or sets of claims. The first was a general claim that, although Gary Kemp had composed the basic musical material, the final form of the songs had been collectively devised during rehearsal and recording sessions. The second was a series of claims that the claimants had made specific individual contributions to the songs as recorded. Park J rejected the first claim and, with one exception, the second set of claims.

For present purposes, the most significant claim was that of Steve Norman to be joint author of the song "True" as recorded by Spandau Ballet. Norman's saxophone solo in True is 16 bars long, and it lasts 35 seconds, just under 9% of the whole track. Park J said this was "the most famous" of Norman's saxophone solos, and described it "particularly attractive" and "particularly felicitous".¹⁸ It was conceded to be memorable by the defendants' expert musicologist, of whom more in a moment. The judge found as a fact that, in common with Norman's other saxophone solos, the notes which Norman played were not devised by Gary Kemp, but were improvised by Norman. Despite this, he held that Gary Kemp was the sole author of True.

As I have commented elsewhere,¹⁹ the decision is problematic for a number of reasons. First, it fails to distinguish between the original songs created by Gary Kemp accompanying himself on the guitar or piano and the arrangements of the songs which were recorded by Spandau Ballet for commercial release. Indeed, the learned judge did not even use the word "arrangement" in the parts of his judgment dealing with the claimants' claims. As I have said, in assessing claims to co-authorship of musical works, the vital first step is for the court correctly to identify the work the subject of the claim to copyright and to distinguish it from any antecedent work.

Secondly, in determining the issue as to joint authorship Park J required that the putative joint author should have made a contribution which possessed "significant creative originality".²⁰ This conflates two distinct questions: first, whether the work the subject of the claim is original over any antecedent work so as to attract a fresh copyright; and secondly, who made a sufficient contribution to the work to rank as one of its authors.

Thirdly, in applying his criterion of "significant creative originality", Park J expressly discounted what he termed "significant performing originality",²¹ holding that this was the wrong kind of skill and labour to be protected by the copyright in a musical work. In this regard, the judge placed considerable weight on evidence given

¹⁸ *ibid* at 650.

¹⁹ Arnold, "Are Performers Authors? *Hadley v Kemp*" [1999] EIPR 464. See also "The Myth of the Auteur: Performers as Authors" [2000] Yearbook of Copyright & Media Law 3 and *Performers' Rights* (4th ed, Sweet & Maxwell, 2008), paras 10.02-10.32.

²⁰ [1998] EMLR 588 at 644.

²¹ *ibid*.

the defendant's expert musicologist Guy Protheroe which the judge summarised as follows:²²

“Mr Protheroe said [Norman's saxophone improvisations] were of the kind often referred to by musicians as “fills” ... Mr Kemp, in his construction of a song, took it to a point where the vocalist rested for a few bars and Mr Norman played a saxophone fill. ... *Often in his improvisation he reflected to some degree the basic melody of the song, and Mr Protheroe interestingly demonstrated ... how an improvising soloist often does this unconsciously.* The underlying rhythm ... continued during a saxophone fill, and after the fill the melody ... typically resumed.

Mr Protheroe said that *in general the saxophone fills ... played by Mr Norman were exactly what was required at that point in the song*, but they were not in themselves particularly memorable, tuneful or original. It was no criticism of Mr Norman to say that they were just the sort of thing which any accomplished professional saxophonist would have provided. *Mr Protheroe did not consider that they were in themselves elements in the musical work.* I accept his evidence. I should perhaps make clear that, as I understand him, he does not dispute that the existence of a space for a saxophone improvisation may be an element in the work. His point, with which I concur, is that the particular improvisation which Mr Norman played and which featured on the master recording was not in itself a significant part of the musical work. [emphases added]”

This led Park J to suggest *obiter* that another potential obstacle to Norman's claim was the requirement that the contribution of each joint author not be separate from that of the other or others:²³

“... there is an obvious argument that a wholly improvised passage which Mr Norman supplied at a point where Mr Kemp left a space for him to supply it was separate from Mr Kemp's contribution to the song.”

The suggestion that an improvising soloist unconsciously reflects the basic melody of a song appears to be an attempt to downgrade the soloist's skill and labour. It is not in fact an accurate description of the art of improvisation, since it is conventional for a soloist consciously to improvise more or less closely upon the theme. Whether it is conscious or unconscious does not matter, however. What matters is the end result. The end result of Park J's analysis is either that the 16 bars of notes comprising the saxophone solo have no author at all or that their author was Gary Kemp. Both conclusions are irreconcilable with the judge's finding that the notes were improvised by Norman.

Park J went on to hold that a separate reason why the claimants' copyright claims failed was that, as in *Godfrey v Lees*, they were estopped from revoking the licence they had impliedly granted the defendants to exploit the works.

²² *ibid* at 649-650.

²³ *ibid* at 650.

Beckingham v Hodgens

In *Beckingham v Hodgens*²⁴ the claimant (professionally known as Bobby Valentino) was a violinist and a session musician. The first defendant (Robert Hodgens) was the guitarist and leader of the band The Bluebells. There were a number of other defendants, proceedings against whom were stayed pending resolution of the dispute between the claimant and the first defendant. The dispute concerned the authorship of the song “Young at Heart”. The song was originally written by Robert Hodgens with his then girlfriend Siobhan Fahey for the group Banarama and recorded by them. Hodgens wrote the music, and he and Fahey co-wrote the words. It was originally performed in a Northern Soul style. Subsequently it was covered by The Bluebells in a country style. Bobby Valentino was hired to play the violin on the recording. There was a conflict of evidence between Valentino and Hodgens as to how the violin part, and in particular the introductory section of four bars, was created. Christopher Floyd QC sitting as a Deputy High Court Judge found that Hodgens gave Valentino an idea of the sort of thing he wanted by indicating the country style, the underlying chords and the rhythm, but held:²⁵

“That does not, however, mean that Mr Hodgens was the author of the violin part.”

Instead, the judge found that Valentino had created the violin part by reversing a country lick used elsewhere in the song and drawing on the introduction to a song he had composed previously

It was common ground in that case that the Bluebells’ version of Young at Heart was an original music work compared to the Banarama version. In considering whether Bobby Valentino was a joint author of the Bluebells’ version, Mr Floyd QC held that there were three requirements which had to be met under section 11(3) of the 1956 Act:²⁶

- “i) there must be collaboration in the creation of the work;
- ii) there must be a contribution from each joint author;
- iii) the contribution must not be ‘separate’.”

He went on to find that each of these requirements was satisfied. So far as the second requirement was concerned, he found that the violin part made “a significant and original contribution of the right kind of skill and labour to the Bluebells’ version”.²⁷ As to the third, he said:²⁸

“I do not believe that a contribution to the arrangement of a song of the kind I am concerned with in this case is ‘separate’ in the sense in which that word is used in the section. The added part is heavily dependent on what is there already. Stripped of the voices and other instruments, the violin part would sound odd, and lose meaning. The final musical expression—what the audience will hear—is a joint one.”

²⁴ [2002] EWHC 2143 (Ch), [2002] EMLR 45.

²⁵ *ibid* at [38].

²⁶ *ibid* at [43].

²⁷ *ibid* at [50].

²⁸ *ibid* at [46].

By contrast with *Godfrey v Lees* and *Hadley v Kemp*, Mr Floyd QC held that Bobby Valentino was not estopped from revoking the gratuitous licence he had impliedly granted to exploit the work.

The Court of Appeal subsequently refused Mr Hodgens permission to appeal against the judge's findings of fact with regard to joint authorship.²⁹ Permission was granted to challenge his conclusion with regard to estoppel, but the appeal was dismissed.

Fisher v Brooker

The facts of *Fisher v Brooker*³⁰ are now so well known that they barely need repeating. The claimant (Matthew Fisher) was the organist in the original line-up of Procul Harum from 1967 to 1969. The first defendant (Gary Brooker) was the band's singer and pianist. The second defendant claimed to be the assignee of the rights of Essex Music Ltd under the group's publishing and recording contracts. In early 1967 Brooker wrote the music and Keith Reid wrote the lyrics for the original version of "A Whiter Shade of Pale" (referred to in the judgment of Blackburne J as "the Song"), and Brooker made a demo tape of himself singing the Song to his own piano accompaniment. Subsequently, Matthew Fisher was recruited as the band's organist. After rehearsals, the band recorded the version of the Song (referred to in the judgment as "the Work") performed by Brooker, Fisher, Ray Royer (guitar), David Knights (bass) and Bill Eyden (a session drummer) which was commercially released in May 1967. The Work consists of 74 bars made up as follows: an 8-bar introduction, a 16-bar verse, an 8-bar chorus, a repeat of the 8-bar introduction, a second 16-bar verse, a repeat of the 8-bar chorus, a variation of the 8-bar introduction and a 2-bar reprise of the start of the chorus. The repeated 8-bar introduction features the famous solo on the Hammond organ by Matthew Fisher.

On the question of who created the organ solo, there turned out to be little dispute between Fisher and Brooker that Fisher had created it to fit the musical context provided by the Song. In cross-examination Brooker substantially accepted Fisher's account, which the judge summarised as follows:³¹

"His evidence was that just as the vocal part and chorus, together with the descending bass line which underlies the organ solo, were written by Mr Brooker and inspired by JS Bach's Air on a G String ..., he, Matthew Fisher, found inspiration for the organ solo in another of JS Bach's works, namely 'Wachet auf, ruft uns die Stimme' ... Having decided that he wanted to incorporate something which reflected that piece in the organ solo, he adapted it, by small changes in note value and pitch, so that it could be combined with the descending bass line provided by Mr Brooker with its echoes of Air on a G String. The working in of this reference to Wachet Auf led to Mr Fisher making, he said, a small alteration to the bass line in bar 8...."

²⁹ [2003] EWCA Civ 143, [2003] EMLR 18 at [3].

³⁰ [2006] EWHC 3239 (Ch), [2007] EMLR 9.

³¹ *ibid* at [36].

Blackburne J held that the organ solo was “sufficiently different from what Mr Brooker had composed on the piano to qualify, and by a wide margin, as an original contribution to the Work”.³² Accordingly, Fisher was a joint author of the Work.

The organ solo was not Fisher’s only contribution to the Work, however. Of his other contribution Blackburne J said this:³³

“... the organ is heard throughout the four minutes of the work. It accompanies the vocal parts (the two verses and chorus) but in a subsidiary role. I did not understand it to be in dispute, but in any event I find, that Mr Fisher wrote the organ accompaniment to the vocal parts. Its form in that subsidiary role is dictated by the melodic line of the sung part and in itself is not particularly distinctive (with the possible exception of two bars ...). Bars 17 to 20 of the section comprise eight descending chords struck on the first and third beats of each bar. They are of no particular originality and do no more than follow the descending bass line. If Mr Fisher's only contribution to the Work had been the organ accompaniment to the sung parts, it would be a nice question whether that contribution would qualify to entitle him, other things being equal, to be regarded as a joint author of the Work.”

Although the judge said that this would be a nice question, two factors suggest that the answer to the question would have been yes. The first is his own decision with regard to Song for Dying in *Godfrey v Lees*. The second is his admirably succinct summary of the law:³⁴

“ ... whether or not ... band members consider themselves to be joint authors of the song - if by that is meant the musical work that is the product of the collaborative rehearsal process ... - the fact is that, in law, whether under the Copyright Act 1956 ... or under the Copyright, Designs and Patents Act 1988 ..., provided the contribution of the individual band member to the overall work is both significant (in the sense that it is more than merely trivial) and original (in the sense that it is the product of skill and labour in its creation) and the resulting work is recorded (whether in writing or otherwise), that band member is entitled to copyright in the work as one of its joint authors and to any composing royalties that follow. This assumes, of course, that there is no contractual arrangement to the contrary.”

As in *Beckingham v Hodgins*, Blackburne J went on to hold that that Fisher was not estopped from revoking the gratuitous licence he had impliedly granted nor he was otherwise barred by reason of his delay of 38 years in asserting his claim.

Blackburne J’s findings as to Fisher’s contribution to the Work were subsequently upheld by the Court of Appeal.³⁵ Furthermore, although the defendants did not pursue that issue in the House of Lords, the House endorsed the Court of Appeal’s conclusion.³⁶ A majority of the Court of Appeal held that Fisher was disentitled to declarations that he jointly owned the copyright and had revoked the

³² *ibid* at [42].

³³ *ibid* at [41].

³⁴ *ibid* at [46].

³⁵ [2008] EWCA Civ 287, [2008] BusLR 1123 at [44].

³⁶ [2009] UKHL 41, [2009] 1 WLR 1764 at [41].

implied licence by his reason of his delay in making the claim, but that conclusion was unanimously reversed by the House of Lords.

Conclusion

As the dust settles on the *Fisher v Brooker* case, I suggest that the conclusion is clear. The law was correctly stated and applied by Blackburne J. It follows that (1) it will often be the case that a recorded piece of music created through performance is sufficiently original over any antecedent musical work to attract copyright and (2) that piece of music will often be a work of joint authorship between some or all of the musicians.³⁷

The position of the soloist

The next point illustrated by the quotation from *The Triumph of Music* is the special position of the soloist. It is no accident that most of the disputes as to the authorship of musical works in this country have involved soloists of one kind or another. In considering the position of soloists, two particular matters have exercised the courts.

I have touched on one already, namely the relation between a solo and the remainder of the musical work. As recited above, in *Hadley v Kemp* Park J was concerned that Norman could not be a joint author of True since his saxophone solo was separate from the song. As I have remarked elsewhere,³⁸ the logic of that argument is that the solo was an entirely separate musical work created by Norman and that the recording included both that work and the musical work created by Gary Kemp. From Norman's perspective, that would have been a satisfactory result, since it would have ensured that his solo was protected from plagiarism and that he was entitled to a share of the publishing income from True. Nevertheless, I would suggest that the analysis of Mr Floyd QC in *Beckingham v Hodgens* is more accurate both musically and legally. From the musical perspective, the whole point of a solo is to use the given musical material as the point of departure. As I have already noted, the soloist may range far and wide, but that does not alter the basic relationship. In the case of True, Park J himself found that Norman's solo had reflected the basic melody of the song. Furthermore, the solo is intended to be heard as part of the whole. From the legal perspective, I would suggest that the word "separate" in section 11(3) of the 1956 or "distinct" in section 10(1) does not mean "separately identifiable". What it means is that the contribution in question does not stand on its own. If the contribution does stand on its own, then it is a separate work of different authorship. If another artist were to record a cover version of True but omitting the saxophone solo, then the cover version would reproduce Gary Kemp's original song but it would not reproduce the arrangement recorded by Spandau Ballet.

The second matter is the share of the copyright to which a soloist is entitled. It is evident from his judgment in *Hadley v Kemp* that another of Park's concerns in that case was that it was common ground, and apparently supported by authority, that each joint author was entitled to an equal share.³⁹ This nettle was decisively grasped by

³⁷ For scholarly analyses which reach similar conclusions see Bently, "Authorship of Popular Music in UK Copyright Law", *Information, Communication & Society*, vol 12 no 2, 2009, 179 and Rahmatian, "The Concepts of 'Musical Work' and 'Originality' in UK Copyright Law – *Sawkins v Hyperion* as a Test Case" (2009) IIC ?.

³⁸ Arnold, "Are Performers Authors? *Hadley v Kemp*", note 19 above.

³⁹ See [1999] EMLR 589 at 636.

Hazel Williamson QC sitting as a Deputy High Court Judge in *Bamgboye v Reed*,⁴⁰ where she held that the nature and extent of the claimant's contribution as a joint author entitled him to a one third share in the copyright. Subsequently, Blackburne J held that Fisher was entitled to a 40% share in the musical copyright of *A Whiter Shade of Pale*, an assessment which went unchallenged on appeal. It may therefore be taken to be settled that a joint author is only entitled to such share in the copyright as his or her contribution merits.

Performers' rights in musical performances

My final reflection prompted by *The Triumph of Music* concerns performers' rights under Part II of the 1988 Act. A proper appreciation of the scope of musical copyright leads to the conclusion that musicians will often be protected against unauthorised exploitation of their work by copyright. This is not always the case, however. There are four principal reasons why performers' rights still have a valuable role to play.

The first is that, although the work of a musician will often give rise to an original musical work, I do not suggest that this is always the case. Classical musicians performing a conventional written score are unlikely to create an original musical work. Nor are pop musicians faithfully reproducing the recording of one of their songs. Such performers require the protection of performers' rights.

Secondly, not every performer will rank as a joint author even when an original musical work is created. On *Potato Head Blues*, for example, the rhythm section's claim to be joint authors would be much less strong than that of Johnny Dodds. By contrast, each performer in a musical performance has his or her own separate performer's rights.⁴¹

Thirdly, as Tim Blanning so eloquently demonstrates, a large part of what audiences value in a musical performance is the performer's individual tone. That can only be captured by electronic recording, and it means that the recording of the performance has a value which transcends that of the musical work itself even if an expansive view is taken of what the musical work encompasses.

Fourthly, by virtue of the recent amendments to Part II of the 1988 Act made by the Performances (Moral Rights, etc) Regulations 2006,⁴² performers have moral rights of paternity and integrity with regard to their performances even if they are not authors of any copyright works. I have suggested elsewhere that it is debatable whether the UK provisions fully comply with Article 5(1) of the WIPO Performances and Phonograms Treaty.⁴³ Even so, they go some way to ensuring that performers are properly credited, if not rewarded, for their performances.

⁴⁰ [2002] EWHC 2922 (QB), [2004] EMLR 5.

⁴¹ *Experience Hendrix LLC v Purple Haze Records Ltd* [2005] EWHC 249 (Ch), [2005] EMLR 18.

⁴² SI 2006/18.

⁴³ *Performers' Rights*, note 19 above, ch 7.