

Borrowed Voices

Legal Ownership of Insertion Arias in 18th-Century London

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1. Introduction

Practices of pasticcio or musical borrowing were immensely common in London's theaters throughout the 18th century, including both the Italian and English opera genres. "Borrowed Music can be found in about three out of four operas after 1762",¹ or "An opera without some borrowed material was a rarity in 18th-century England"² are judgments one can easily find in musicological studies on opera in London. One of the preconditions for this practice is the absence of a strictly enforced legal restriction, for example by copyright law. Such enforcement obviously did not exist, although Britain did have the earliest copyright legislation in the *Statute of Anne* (1710). But unlike later copyright laws, the *Statute of Anne* did not at all regulate performance rights.³ Furthermore, even the status of musical prints as objects being protected by copyright was unclear before being officially recognized in 1777 by Lord Mansfield's famous ruling of *Bach v. Longman*.⁴

This may suggest that the law's influence on opera has been negligible, but operatic performance and music publishing were not completely disparate worlds: anthologies of *Favourite Songs* from current productions were a popular format throughout the century, purchased as luxury items and for amateur home music making.⁵ For performance and publishing businesses alike, it might be said that single popular arias were crucial for attracting and satisfying customers, making them valuable commodities in both their

1 FISCHE, 1973, p. 274.

2 GIRDHAM, 1988, p. 471.

3 SMALL, 2011, p. 382.

4 SMALL, 1985, pp. 526-529; SMALL, 2011, p. 366.

5 BURDEN, 2017, p. 229.

immaterial and materialized forms. But who, legally speaking, owned them? After all, effective arias often happened to be borrowed material, often transported by singers from various sources.⁶ And even the production of arias in general is a plane of co-operative agency between, at a minimum, the “voices”⁷ of the composer, the librettist and the singer.

This paper will attempt to examine how these questions of authorship and cooperation were handled in the negotiation of legal ownership. It has been the merit of Curtis Price’s contributions⁸ to call attention to two lawsuits, both of which directly concerned the copyright over single insertion arias performed at the King’s Theatre and sold to publishers: *Storace v. Longman & Broderip* (1788-1789) and *Skillern & Goulding v. Longman & Broderip* (1792-1794). Their importance for the history of musical copyright might yet be vastly underappreciated in scholarship, perhaps due to misunderstanding. After providing some context to the development of copyright in the 18th century, this paper will critically re-examine these cases and the interpretations that have previously been drawn from them in hope of reaching a better understanding of the history of intellectual property and London opera, as they uniquely intersect in the question of legal ownership over operatic arias.

2. Intellectual property and music lawsuits before 1777

The *Statute of Anne*, authorship and intellectual property in cooperative situations

As aforesaid, the *Statute of Anne* had not been applied to music before 1777 and it was conceived as a ‘booksellers’ bill. Music sellers, due to the economic particularities of their market, considered it to be irrelevant.⁹ Music’s status under the law consequently remained a legal gray area for several decades until composers themselves took actions to clarify it, reacting to an increased sense of injustice.¹⁰ Meanwhile, literary copyright and its relation to authorship was subject to sophisticated legal and cultural debates in and surrounding cases like *Millar v. Taylor* (1769) and *Donaldson v. Becket* (1774).¹¹ Mark Rose has shown how the interpretation of the law has shifted its focus from the interests of booksellers to those of authors, thereby expanding from material copies of books to immaterial texts, which later became intertwined with ‘romantic’ conceptions of authorship as an expression of an individual’s originality or personality.¹² The legal

6 STROHM, 2011, pp. 64-66.

7 STROHM, 2002.

8 PRICE, 1989; PRICE, 1991.

9 SMALL, 2011, p. 262; KRETSCHMER/KAWOHL, 2004, p. 27.

10 HUNTER, 1986, pp. 276f.

11 KRETSCHMER/KAWOHL, 2004, pp. 27-29.

12 ROSE, 1993, pp. 91, 127-129.

difference between material and immaterial ownership may have originated in *Pope v. Curl* (1741), distinguishing the receiver of a letter, who owns the object from the sender, who owns the words.¹³ The concept of intellectual property is a relatively recent legal invention and its conceptualization in 18th-century England was strongly influenced by John Locke's "Labour Based Theory of Property", formulated in Chapter V of his *Second Treatise on Government* (1690):

"Though the Earth, and all inferior Creatures be common to all men, yet every Man has a *Property* in his own *Person*: this no body has any right to but himself. The *Labour* of his *Body*, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*."¹⁴

The reasoning that an individual's labor creates a private domain may be applied to intellectual property by considering either language itself or ideas as a kind of commons which may through mental labor be brought into a complex arrangement that belongs to its author. Locke himself did not extend the theory to the realm of ideas,¹⁵ but it subsequently became extremely influential for the theory of intellectual property. Its individualist conception of authorship is still at the core of modern copyright and makes situations of joint authorship appear as problematic exceptions.¹⁶ When two or more agents contribute their labor to a work, each of them has a claim to it but no one would be entitled to individually profit from the whole. This problem has to be somehow negotiated, for example by clarifying the nature of the property and reducing it to an object shared between the collaborators and defined by law, cultural norms or contract.

Copyright lawsuits relevant to opera before 1777

There have been very few actual legal disputes involving music before 1777. Amongst them, however, we find a few singular cases related to opera, which, although not leading to definitive judgement, illustrate the problem of joint authorship in pasticcio practices.

One example would be librettist Isaac Bickerstaffe's unsuccessful attempt to claim copyright over the musical parts of his popular ballad opera *The Maid of the Mill* (1765). He sued against instrumental arrangements of arias in *Bickerstaffe v. Thorowgood* (1765). "As Thorowgood noted in his answer, however, Bickerstaffe himself was not a composer but an author; in fact, Bickerstaffe did not have the rights to the music, since it was written by over 20 different composers and was very likely printed without their

13 ROSE, 1992, p. 215.

14 LOCKE, 1690, §27, cit. after ROSE, 1993, p. 5.

15 ZEMER, 2007, pp. 157-161 makes the case that mental labor was already implicit in Locke's theory.

16 *IBID.*, p. 188.

consent.”¹⁷ In later lawsuits surrounding *The Padlock* (1769), Bickerstaffe bought the rights to the music from the composer.

A remarkable earlier case is *Holt v. Lowe and Arne* (1752), featuring the composer Thomas Augustine Arne, tenor Thomas Lowe and the librettist Thomas Holt. Judith Milhous and Robert Hume summarize: “At the heart of this particular ruckus is a conflict concerning literary and musical copyright. Indeed, this lawsuit is an exceptionally early contribution to the gradually escalating dispute over property rights in artistic compositions [...]”¹⁸ The three of them had collaborated on the unsuccessful opera *Henry and Emma* (1748) and the librettist subsequently objected to Arne’s reuse of an aria from it in *Don Saverio* (1750). Arne stated that the aria had been inserted by request of a performer and that “this was done much more on Account of the music than of the words.”¹⁹ It was a quarrel between the librettist’s wish to be compensated for his labor while Arne and Lowe negated the value that his contribution added, “had it not been for the Addition of the Musick the Audience would never have suffered the same to have been Acted at all.”²⁰ Holt proposed a contract,²¹ which remained unsigned and was described as “revolutionary” by scholars for being so distant from common practice. “Holt and Arne would have received performance royalties, something unheard of at the time.”²²

This exceptional case demonstrates the great potential for complex legal struggles if cooperating agents are unable to find agreement on property rights. However, it appears to have been an almost universally accepted part of common practice that a composer may publish or reuse his arias along with the librettist’s words, without needing explicit consent.²³ And if a composer did decide to sell a manuscript to a publisher, he would do so in exchange for a single payment.²⁴ Performance rights and royalties were generally no concern for the law throughout the century.

For printed music, musical copyright gained official recognition in 1777: Because Johann Christian Bach partly based his Chancery lawsuit against unauthorized reprinting of a harpsichord sonata on the *Statute of Anne*, the King’s Bench was brought to finally clarify music’s status under the law. Lord Mansfield emphatically certified that music be considered “writing” under the act. On the basis of *Bach v. Longman* (1777), composers could now pursue copyright lawsuits with confidence that the law applied to their work and thus felt more encouraged to do so.²⁵ For the first full case after 1777 in which a composer directly used the *Statute of Anne* to assert his copyright as an author

17 MACE, 2016, p. 142; SMALL, 2011, p. 321.

18 MILHOUS/HUME, 1997, p. 52.

19 IBID., p. 61.

20 IBID., p. 63.

21 IBID., p. 57.

22 SMALL, 2011, pp. 318f.

23 GIRDHAM, 1988, p. 147.

24 HUNTER, 1986, p. 271.

25 SMALL, 1985, pp. 528f.

to an operatic aria against practices and contracts of an institution, we need to look at *Storace v. Longman* (1788-1789).

3. *Storace v. Longman & Broderip* (1788-1789)

Storace v. Longman pertains to the King's Theatre's 1787 production of Giovanni Paisiello's *Il Re Teodoro in Venezia*. The case's main protagonists are the composer Stephen Storace, his sister and soprano Nancy Storace, publishers Longman & Broderip and the copyist Leopoldo De Michele. Interestingly, Paisiello had originally written the role of Lisetta for Nancy Storace, but the *prima buffa* could not perform it at the Vienna Burgtheater (1784) due to illness.²⁶ The siblings returned to London in early 1787 and were important figures for music migration between Vienna and London, for example by bringing compositions by Mozart to the British capital.²⁷ Stephen Storace also acquired the score of *Il Re Teodoro* for the London performance upon the manager's request.²⁸ Once the music went through the adaptation process and into rehearsal, Nancy objected to an aria, and suggested a replacement be produced by her brother, who had no official employment at the theater at the time. The text to the jealousy aria "Care donne che bramate" was provided by the house librettist Carlo Badini. The aria was inserted into the production and was well received:

"Her [N. Storace] obligato song, in the second act, of *Care donne che bramate* was executed in style of brilliancy and taste hitherto unparalleled; the rapidity and articulation with which she executed the different arduous and masterly divisions, forced them on the imagination. This song is a charming composition by her brother and was encored una voce."²⁹

The lawsuit arose because Stephen Storace decided to register and self-publish the popular aria while the house copyist, Leopoldo De Michele, made use of his customary privilege to sell a copy of the entire score, now including the inserted aria, to Longman & Broderip, who consequently put a rival edition on the market.³⁰ Storace's authorship is undisputed, but both parties claimed the sole ownership over the copyright and lay out their case in their respective affidavits.³¹ Storace does not even mention the performance

26 VILLINGER, 2000, p. 104.

27 EMERSON, 2006, pp. 44, 48; GIRDHAM, 1988, pp. 19-26.

28 PRICE, 1989, pp. 67, 93.

29 *The Times*, 17 December 1787. See the compilation of reviews in PETTY, 1980, pp. 251-253. The celebration of the encored aria as an event within the event is contrasted by strong interest for the work and Paisiello as a composer, who was highly popular in London at the time, see FENNER, 1994, p. 119.

30 NEX, 2011, pp. 27f.

31 Both can be found in GIRDHAM, 1988, pp. 585-587.

nor his sister in the affidavit. He simply argues that he has composed and registered the song, thereby becoming the sole owner according to the law, and published it. The defendants later did the same without his permission and hence injured his property.³² Broderip and De Michele instead based their case on the common practice of the theater, which would grant them exclusive ownership over the composition:

“The Usage and Custom of the Proprietors of the said Theatre has been that all Musical pieces or Compositions introduced and performed [...] became and were the property of said Proprietors and under them the Copyist for the time being who has always been considered to have an absolute and exclusive power of disposing of the Copy right thereof it being part of his salary[.]”³³

The song in question thus, by being inserted into a production of the theater, was said to have automatically become the property of the theater. The arrangement between manager and copyist gave De Michele a powerful business opportunity: he effectively held a monopoly for Italian operatic music in London, making him a central figure for music circulation both within and outside of the theater. The deal was a win-win situation, but one that could only be sustained on the premise that composers would not have the motivation and means to lay claim to the products of their labor. Longman & Broderip also argued that they legally acquired the copyright to the words from Badini and registered the publication at the Stationers Company after having bought the music from De Michele.³⁴

The different kinds of ownership claims give rise to an array of legal questions: can the aria become the property of the house by becoming a material part of the production? Does the manager own the labor of singers commissioning or otherwise acquiring a new aria from outside the theater? Is the copyist allowed to sell the manuscripts as products of his own labor even if the copyright is unclear? Can their ownership of the words give Longman & Broderip publishing rights over the aria? Besides the common practice argument which the plaintiffs had focused on, there were some potential lines of reasoning available in favor of the plaintiffs: for instance, by Lockean appeals to the ‘value added’ by the house through providing the context in which the aria gets performed and advertised to the public. After all, the demand that the printed aria had as a commodity on the music market was almost entirely generated by the song’s exposure in the opera house.

The court evidently did not follow any of these arguments and instead upheld Storaice’s authorial ownership over the customary agreements of the King’s Theatre, a quite significant affirmation of composers’ rights. “The judge established that a composer retained ownership of his composition until he chose to dispose of it himself.”³⁵ The

32 Affidavit of Stephan Storaice, 28 January 1788. GB-Lpro, C31/237/39.

33 Affidavit signed by Leopoldo De Michele, Charles Francis Badini, and Francis Broderip, in reply to Storaice’s deposition, dated 31 January 1788. GB-Lpro, C31/247/81.

34 *IBID.*

35 GIRDHAM, 1988, p. 166.

judgement was later referenced in *Clementi v. Golding* (1809) as “Lord Kenyon said, [...] that the statute vests the property in the author; and that no such private regulation could interfere with the public right.”³⁶ Meanwhile, the court had corroborated the common practice that composers can publish or sell their arias along with the librettist’s words: they confirmed that Longman & Broderip lawfully owned the copyright to the words, but that did not entitle them to print Storace’s music. Storace won the case in July 1789 and was awarded the injunction against Longman, a token compensation and legal costs.³⁷

Price interprets Storace’s outcome as an emphatic affirmation of musical authorship, going so far as to conclude that later contractual agreements over copyright were now “technically illegal”,³⁸ because they did not account for the author’s right to his or her composition. This would apply to the 1790 signed contract of Gasparo Pacchierotti that Price reproduces in the appendix:

”[...] And further that in case he the said Gasparo Pacchierotti shall at any time during his attending the Operas introduce any New Music in any performance the Copy right of all such productions and all Emoluments to arise therefrom or from the sale thereof shall from the time of the same being respectively brought forward be and become the sole Right and property of the said Robert Bray O’Reilly his Executors Administrators [...]”³⁹

The contract refers to the singers’ practice of substituting arias, the possibility of which is being recognized but not explicitly guaranteed by contract. The contract makes sure to transfer the copyright to said “New Music”, a rather (perhaps purposely) vague term, to the manager. Michael Burden in a recent study sets justified doubt on the feasibility of this automatic transmission of property: “it seems wholly improbable that singers of the statute of Mara [...] would accept a situation in which their subsequent use of their own suitcase arias was restricted by the Opera House, an institution that was merely that season’s employer.”⁴⁰ It is true that suitcase arias were valuable pieces of property, sometimes singers even made financial investments to commission them.⁴¹ We must, however, keep in mind that the transfer of copyright cannot lead to loss of future performance rights. The singers could still use the aria in their later engagements and perhaps even profit from selling it to printers outside of London. Also, some crucial details have gotten mixed up regarding the case:⁴² Stephen Storace was not in fact the house com-

36 *Clementi and Others v. Golding and Others* (1809), 2 Camp. 25, English Reports, vol. 170, p. 1070.

37 NEX, 2011, p. 27; GIRDHAM, 1988, p. 166.

38 PRICE, 1989, p. 94.

39 Contract of Gasparo Pacchierotti, 16 August 1790, cit. after PRICE, 1989, pp. 103f.

40 BURDEN, 2017, p. 229.

41 FREEMAN, 1992, pp. 427-433.

42 BURDEN, 2017, p. 229.

poser of the King's Theatre while composing the aria. This post was held by Joseph Mazzinghi and Storace was able to assert in court to have received no payment from the manager for the composition.⁴³ The situation may have been very different if Storace had been an employee, and had himself taken part in a contractual agreement which would relocate the property rights to his work. Through a second copyright case, we may examine the hypothesis that this kind of private agreement would have been valid, while a 'third party contract' would not.

4. *Skillern & Goulding v. Longman & Broderip (1792-1794)*

Skillern v. Longman was based on a somewhat similar constellation: Elisabeth Gertrud Mara inserted a rearrangement of Paisiello's duet "Nel cor più non mi sento" as a solo aria into Sarti's *Idalide* in her benefit on 17 April 1791. The words were changed to "Ah che nel petto io sento" and a new accompaniment with harp and winds was added.⁴⁴ She also sang the aria in Arne's *Artaxerses* (1791) with English words ("Hope told a flattering tale") written by Peter Pindar. Mara sold the now popularized piece to Longman & Broderip while the King's Theatre had an exclusive publishing contract with Skillern & Goulding, who then sued their rivals over injunction of sales.

The authorship is not as clear as in *Storace v. Longman*: it is a melody by Paisiello to which a new arrangement has been produced through unclear circumstances, which was then further edited by the house composer. In his discussion of the case, Price frames the property over the copyright as a question of authorship: "whether the beguiling accompaniment was the work of Mazzinghi, who supported the plaintiff's rights to the song, or Madam Mara, who had originally claimed to be co-author."⁴⁵ Basically, he understands the case to be an affirmation of the authorship stance that the court took in *Storace v. Longman*, but presumes that the complicated situation led the court to (unjustly) affirm Elisabeth Mara, who 'plagiarized' the aria from Paisiello, as an author and thus the owner of the copyright.

The volume *The Pantheon Opera and Its Aftermath 1789-1795* features a more detailed account of the case,⁴⁶ quoting extensively from multiple interesting sources and witness accounts, e.g. about how Mara ordered the scores to be brought back to her dressing room after each performance or how she hosted a private rehearsal of the aria, leading to collective composition of the initial sketch she provided.⁴⁷ But the authors still frame the legal case itself under the same narrative as the earlier papers, namely that the arrangement of Paisiello's music "had evidently shifted copyright to the person responsible for the adaptation – the question was whether that person was Mara or

43 PRICE, 1989, p. 93.

44 IBID., p. 94; for a musical analysis of the aria, see: MILHOUS et al., 2001, pp. 486-493.

45 PRICE, 1991, p. 28.

46 MILHOUS et al., 2001, pp. 458-460, 486-493.

47 IBID., pp. 458, 491.

Mazzinghi.”⁴⁸ They also needed to admit that the reasoning behind the judgement seems rather “tenuous”, which was mainly explained by the court’s incompetence.⁴⁹ It is indeed plausible that the court had significant difficulties in dealing with this matter due to the lack of precedent with musical matters and the peculiar constellations of cooperation that they uniquely entail.⁵⁰ However, the alleged tenuousness of the reasoning may also hint at the possibility that scholarship has not yet found the appropriate way to interpret the case. In other words, there may be a misalignment between what scholars and what the historical agents themselves deemed relevant to the case.

Confusion of authorship and ownership

The premature equation of authorship and ownership is a frequent cause of such situations in scholarship. This has been convincingly demonstrated for the almost contemporaneous case of Haydn’s sale of piano trios by Ignaz Pleyel, which Haydn legally ‘owned’ due to them being ‘authored’ by Pleyel during his apprenticeship with the former:

“The real issue in Forster’s lawsuit [...] was not Pleyel’s authorship but Haydn’s ownership of the copyright. [...] In other words, the most sensational aspect of the case today was barely an issue at the time of the lawsuit. This reflects a mistake that is commonly made by historians and biographers in their discussion of copyright cases, that is, the confusion between authorship and ownership.”⁵¹

We indeed need to be mindful of the difference between the musicological question of authorship and the legal question of ownership, and it might very well be that this problem also deeply permeates previous readings of the cases, and may obstruct our view from a simpler, more consistent explanation for the sources, which would not have to rely on the notion that the courts were incompetent and inconsistent in their handling of the case. Price’s discussion of *Skellern v. Longman* focusses largely on Mara’s “plagiarism”, and he appears to be bewildered and outraged that the court did not take this fact into account:

“The law is an ass, you will say. The Court was in effect upholding the right of a performer to introduce arias and then sell them, even when authorship was uncertain or, as in this case, plagiarism had been admitted. [...] The case is also interesting because it raised but failed to tackle the moral question which lies at the heart of pasticcio process. Is it right to take other people’s arias, make cosmetic alterations, insert them into an alien dramatic context, then pass the whole thing off as one’s own,

48 IBID., p. 460.

49 IBID.

50 IBID., p. 493.

51 FISHER, 2010, p. 19.

often for considerable profit? [...] Madam Mara was, by her own clumsy admission, trying to deceive; she had stolen Paisiello's intellectual property and was covering her tracks."⁵²

We should keep in mind “that we should not judge actions that were permissible and legal in the past by the standards of our day (or indeed to confuse the standards of our day with universal moral principles).”⁵³ If the goal is to faithfully reconstruct the legal conditions and cultural preconceptions that surrounded these legal disputes, we need a keen awareness of how our modern concepts of intellectual property and their influence on aesthetics and economics may direct our focus to the wrong aspects.

In light of this issue, the following re-evaluation will not proceed from the vastness of archived claims and depositions, which lends itself to selective reading, but instead methodologically limit itself to the reporting that the London *Times* dedicated to the case. *The Times*' “Law Reports” can be treated as containing largely reliable information⁵⁴ and for this particular case we have the privilege of an unusually extensive reporting, even featuring quotes and details from within the courtroom. These texts will be read closely under the general assumption that what was written follows a somewhat consistent legal logic and would have made sense to a lawyer at that time, who would have read these “Law Reports” to gain insight on the judge's reasoning on the key legal questions of a case. The goal of this hermeneutic process is precisely to bring light into the questions that the case attempted to find an answer to.

Law Report 1: 18 December 1793

The Times dedicated two “Law Reports” to the case,⁵⁵ one dated 18 December 1793 and a much more extensive one spanning two entire sections, starting on the 10th and concluding on the 13th of February 1794. It is remarkable that such large public attention was dedicated to this case. The first report from December 1793 was already relatively lengthy, taking as much space in the column as the three other non-musical cases contained in the report combined, part of whose discussion was postponed to later issues as a result: “[We shall give a fuller statement of these causes the first opportunity.]”⁵⁶ This report on *Skillern v. Longman* first relates the circumstances of the case and the plaintiffs' desire to recover the penalty and in the second half outlines the critical points. The first point was the plaintiffs' claim, which seems to revolve around how the nature of the contract determines the issue of copyright:

52 PRICE, 1991, p. 30.

53 FISHER, 2010, p. 34.

54 OLDHAM, 1987, p. 177.

55 *The Times* (London, England), Issue 2862, Wednesday, 18 December 1793, p. 3; Issue 2908, Monday, 10 February 1794, p. 4; Issue 2911, Thursday, 13 February 1794, p. 4.

56 “Law Report”, in: *The Times*, 18 December 1793, p. 3.

“Mr. O’Reilly by his engagement with Madam Mara and that gentleman [Mazzinghi], secured himself to all the property in any musical composition that should arise in consequence of that engagement: and as this song constituted a part of that property, the plaintiffs, as assignees of Mr. O’Reilly [*sic*], laid claim to it.”⁵⁷

It then goes on to elaborate the question of ‘new music’ on which the case apparently depended. It also credits the composition of the main accompaniment not to Madam, but to Mr. Mara.

“It appeared in evidence, that the melody of the first part of this song was composed by Signior *Paesiello*, and the accompaniments were the composition of Mr. [*sic*] Mara. Madam Mara gave this Song in this state to Mazzinghi, who altered some of the harp accompaniments; and the question was, Whether the alterations so made by Mazzinghi were such as to make this a piece of new music, and to entitle the plaintiffs to maintain an action against the defendants for publishing it? On hearing the whole of the case the Court and Jury were of [*sic*] opinion, that the plaintiffs could not recover in this action.”⁵⁸

We can fortunately unravel these aspects of authorship, originality and contract law in the more extensive second report.

Law Report 2: 10 and 13 February 1794

The reporting from February 1794 fleshes out the case with direct and indirect quotations of court proceedings and gives more detail to the legal arguments and considerations. It begins with an elaborate account of the rhetoric brought forward by the plaintiffs’ counsel Mr. Erskine: he opens by considering the concept of music as property, because “the Gentlemen of the Jury might be apt to imagine they were assembled there to decide on what may be thought a fugitive property.”⁵⁹ He motivates the relevance of the aria in question for being a “song of Madam Mara’s” and emphasizes the function of notation as a form of permanent, commercially relevant manifestation: “the written score; which, after the sound, that was transitory, was lost, being recorded, the eye of the musician could communicate it to another [...]”. A reference to *Bach v. Longman* (1777) solidifies that music is ‘writing’ under the *Statute of Anne*.

This shows that the idea of an aria as an object of property was still quite a novel concept at the time. Due to lack of case law, the reference to *Bach v. Longman* will remain the only mention of a music related case in this report. From this general address, he transitions to the circumstances of the case by stating that O’Reilly “knew the value of musical composition” and thus engaged Mazzinghi and Mara with generous salaries.

57 IBID.

58 IBID.

59 “Law Report”, in: *The Times*, 10 February 1794, p. 4.

In return he “secured to himself all the property in any musical composition that should arise in consequence of that engagement.” The point being that the contract that Mara has consented to financially compensates her for surrendering the copyright of new music to the manager, so that after having received that “large sum of money [...] she was to recommend by her voice that musical composition which became Mr. O’Reilly’s property by virtue of his engagement with her.”⁶⁰

Originality

Being certain of the validity of the contract, Mr. Erskine goes on to argue for the composition’s newness, which apparently has to be given for the piece to qualify as the manager’s property. He does so by making the point that nothing is ever truly original, thereby anticipating objections of the defendants:

“by the same rule it might be said that neither Pope, Swift, nor Milton, were originals, since they talked about the sun, moon, and stars, all of which were to be found in Homer. [...] it was impossible at this day for any man to produce a work that could be called perfectly original. [...] This song was not Signior Pazziello’s [*sic*], in as much as the accompaniments were perfectly new. He should be glad to see a song in which there was nor a crotched or a quaver which was to be found in some other song.”⁶¹

While clearing up the first basic facts of the case, Lord Kenyon obviously accepts the presuppositions of the plaintiff’s case. It becomes abundantly clear in multiple statements that the court takes the theater’s contracts very seriously, so we may discard the view that such contract had been completely ‘illegal’ in the aftermath of *Storace v. Longman*. The issue of originality does, however, present some challenge to the court. The concluding part of the law report starts with the Lord of the Rolls contemplating the concept of originality in music:

“Lord Kenyon – The question here is, Whether this is fairly an original work? The eight notes in music, which constitute the gamut are as much the property of every man as the alphabet is, as much as the mechanic powers, or the nine digits and cypher in arithmetic. Human genius must be exerted in producing various combinations and arrangements of these simple elements before any thing can arise that is useful or entertaining to mankind, and of course, before there can be any thing like exclusive property. [...]”⁶²

60 IBID.

61 IBID.

62 “Law Report”, in: *The Times*, 13 February 1794, p. 4. As all quotes from here on unless noted otherwise.

This demonstrates that Kenyon was assuming a Lockean view of intellectual property, wherein the basic elements of music are understood to be a common property out of which an exclusive property may be formed through mental labor. This, however, needs to be qualified by the degree to which considerable effort, or “genius” has been exerted. The term “genius” in this context is to be understood in relation to labor as it was used in contemporary pamphlets, such as William Enfield’s *Observations on Literary Property* (London 1774), as “not the natural organic genius that would later be celebrated by Romantic theory, but the mechanical skill of putting together a new sequence of ideas gleaned from ‘the continued exertion of mental abilities’”⁶³ Originality enters as a qualification for property: the question is not *who* authored and thus owns the property, but if the arrangement is sufficiently different from Paisiello’s original to become someone’s property in the first place. The case now revolves around the concept of “New Music”, which of course links back to the contracts.

Taken broadly, “New Music” may include any piece of music that gets added to a production. Then, all *arie di baule* would automatically become property of the house by virtue of being new in relation to the music already part of the work. But this was what has been claimed in *Storace v. Longman* and was denied by the court. We must therefore follow a narrower interpretation that takes the problem of authorship into account, namely, that the contractual clause, which is cited as “any new musical composition that should arise in consequence of that engagement”,⁶⁴ implies only original compositions created by employees for the theater. The choice of the word “arise” implies a novel creation⁶⁵ and the “in consequence of that engagement” a direct relationship to the labor arrangement. This interpretation appears to be the most consistent with the evidence.

Authorship

In the report, we can clearly observe that the judge and the plaintiffs’ counsel treat Mazzinghi and Mara identically, because they have the same contractual relationship to the house.

“Mr. Erskine – ‘We will show that Madam Mara is the original author of the harp accompaniments.’

Lord Kenyon – ‘That is another thing. You have a right to take her and Mr. Mazzinghi together, as they both agreed with the manager to let him have all the new music that should be produced.’”

63 BARRON, 2006, p. 111.

64 In the “Law Reports” of *The Times*, 18 December 1793 and 10 February 1794, the same wording is used.

65 Kenyon also uses the phrase “new music that should be produced”, see “Law Report”, in: *The Times*, 13 February 1794.

If the plaintiffs can also “claim through her [Mara]”, authorship cannot be the central issue. It seems to be erroneous to assume that the plaintiffs argue for Mazzinghi’s authorship while the defendants would claim Mara’s, implying that whoever purchased the composition from the actual author is the true proprietor of the aria. Instead, if the plaintiffs can show that any combination of Mara’s and Mazzinghi’s labor has produced the accompaniment in question and that it is original enough to constitute a new composition, they would win. If this is correct, Mara, contrary to what Price believes to have found in other sources,⁶⁶ would be well advised to ‘not’ call attention to her own authorship if she wants to help the party that she has sold the aria to. Because her status as author would, instead of securing ownership, lead to her automatically losing her status as owner over the composition due to her contract.

This only seemingly paradoxical situation is consistent with the logic of the statute itself: the author is defined as the first owner of the copyright, allowing him or her to freely sell it to another. If she was not the author, she would never have had the copyright in the first place, and thus could not have relinquished it to the theater. In any case, there would be no scenario in which claiming authorship would help Mara. Thus, at least in the “Law Report”, she does not make that effort, and instead claims in her final testimony that the harp accompaniment was created by her husband, and only slightly altered by Mazzinghi.

The defendants’ lawyer’s few reported statements also follow the strategy of proving that someone outside of the theater is the main author of the aria: Mr. Mingay speculates that Mazzinghi may have copied from another composer, and attempts to claim “Paesello’s music, which the defendants have sold for many years”, taking the side that the arrangement does not constitute a new composition. In fact, it seems to have been one of the major advantages of the defendants that Mara’s authorship did not seem to have significantly entered the discussion. The plaintiffs were proposing to prove it, but the accompaniment only gets described as something that has been ‘delivered’ by Madam Mara. This leads Kenyon to doubt their case:

“One of my [Lord Kenyon] difficulties with regard to the plaintiff’s case is, that they claim the whole accompaniments for the harp, whereas Mr. Mazzinghi has said, that there was a harp accompaniment to the score delivered to him by Madam Mara, and that he only altered a part of that accompaniment. In patents, if they go beyond the part invented, they are absolutely void. No man shall be permitted to hold a terror over the heads of others not to do what they have a right to do.”⁶⁷

66 His allegations of Mara’s plagiarism appear to be overstated, according to MILHOUS et al., 2001, p. 492: “Amidst the claims and counterclaims, nobody – not even Mara herself – disputed that Paisiello’s duet had formed the basis for the aria, though Mara had certainly omitted to tell either Mazzinghi or any of the other musicians about the original setting during those early rehearsals.”

67 “Law Report”, in: *The Times*, 13 February 1794, p. 4.

Accompaniments and Mazzinghi's contribution

This aspect put the plaintiffs in a difficult position: now they had to argue that Mazzinghi's alterations were by themselves enough to be qualified as an original composition. And the court was already quite skeptical about new accompaniments being sufficient in general, disagreeing with the opinion brought forward by a "Professor of Music":

"[John Calcott] perceived, that if he were to take the air of "God save the King," and to publish it with new accompaniments; that would be his property.

Lord Kenyon – 'I am not at all of that opinion. The alteration would not be sufficient to entitle it to be called a new piece of music. Every composer of music wishes to give a right of property as extensive as he can.'⁶⁸

The case features some interesting discussion about the nature of accompaniments as having elements of both craft and creativity, or, as Mara had put it: "At the same time Accompaniments in general were the effect of a mechanical operation, and had more or less merit according to the mind and genius of the person who wrote them."⁶⁹ The implication seems to be that if accompaniments were derived from melodies by the application of a basic mechanical process, it would not be fair for them to constitute exclusive property of a single individual. The labor applied would need to qualify as being at least partly 'creative' in nature. This mirrors Rose's analysis of the literary discourse of authorship: "Both in the literary-property debates and in Young's *Conjectures* the task was to differentiate true authorship from mechanical invention and to mystify and valorize the former."⁷⁰ The plaintiff's main argument was based on the analogy between accompaniments to a preexisting melody and annotations written to a classic text. The latter was accepted by Kenyon as a type of textual relationship that relates to a pre-text while still being original, so the annotator "will certainly have a right to his notes." But Mara's testimony relegated the house composer's changes to be mere application of craft.

Because the judge believed the testimony brought forward by Mara, he ruled in favor of the defendants. An interesting procedural side note is his appeal to a Mr. Bearcroft: "will you please relieve me from difficulties and adjust this business between the parties? You are the only one in the court who can do it." Adding, after Bearcroft raised procedural concerns, "I feel my incompetency in the strongest degree."⁷¹ Bearcroft likely had a musical background.⁷² The reported judgement ends with reference to him:

68 IBID.

69 IBID.

70 ROSE, 1993, p. 119.

71 "Law Report", in: *The Times*, 13 February 1794, p. 4.

72 Mr. Bearcroft is Edward Bearcroft, King's Counsel. As son of Philip Bearcroft, Preacher, he may have had some musical training. His name can also be found on the subscription

“Lord Kenyon – I confess the very strong bent of my mind is, that this cannot be called an original composition. According to the evidence of Madame Mara, there have been only some small alterations made in the original accompaniments. And I have a whisper from my friend (Mr. Bearcroft) which is of more use to me than all the knowledge I should ever acquire on the subject. Plaintiffs nonsuited.”

This little twist at the end speaks to how difficult it was for the court to decide on musical matters of this sort. Since the plaintiffs were ruled nonsuited in their claim of exclusive property, both editions had to continue to coexist on the market.

5. Conclusions

The freely available sources examined here tell a drastically different story from what has been previously drawn from this case: Mara was not awarded authorial copyright for having adapted the aria. It was decided that the whole “cannot be called an original composition”⁷³ and Mara instead successfully convinced the court that neither she nor Mazzinghi had claim to authorial rights over the adaptation. If Mara had authored the aria herself, her contract would have caused her to automatically surrender her ownership over the composition to her contractor and ultimately entitled the plaintiffs. In future research, this new perspective on *Skillern v. Longman* should of course be tested and improved against all evidence to be found in the Public Records Office. Unless the *Times*’ reporting was completely faulty, it would not be surprising if many previously confusing elements would appear to make more sense in light of the precepts here proposed. We are also invited to reconsider the case as an interesting source for the treatment of derivative works, revising the following conclusion:

“However tenuous the basis of this judgement may seem to a modern reader, the lawsuit illustrates an important aspect of contemporary thinking on musical composition in general and opera in particular. Adapting existing works did not depreciate their value and was in fact considered a genuine creative act.”⁷⁴

In fact, the considerations given by the legal agents in the report do not show any signs of a culture that assigns work status and protection to any minor adaptation. Instead, they appear to be rather mindful while trying to qualify the conditions “before there can be any thing like exclusive property.”⁷⁵

list for CHARLES BURNEY’S *A General History of Music* (p. xii) as “Edward Bearcroft, Esq. Lincoln’s Inn.”, indicating at least a casual interest for music.

73 “Law Report”, in: *The Times*, 13 February 1794, p. 4.

74 MILHOUS et al., 2001, p. 460.

75 See n. 62.

This reading was supposed to address the conditions of legal ownership. There is no claim made here regarding the factual authorship of the arrangement: it is possible that Mazinghi did make a more significant contribution. It might also be the case that the court too uncritically trusted Mara's and her husband's perhaps coordinated testimonies.⁷⁶ Another question that this paper has to leave open is to what extent these legal factors have influenced operatic practice.

How do we answer the question of who legally owned insertion arias at the King's Theatre? From *Storace v. Longman* we see that for much of the century, the management successfully laid claim to all music circulating within the theater as their property and enabled the copyist to sell copies as a lucrative side-business. This absolute claim was denied by the court in that case. Now, arias would in theory have had to be treated separately depending on the circumstances of authorship: through contract, the theater could still make exclusive property claims to new compositions by their own employees,⁷⁷ but they could not claim pieces from outside of the theater. This is the end-result of *Skillern v. Longman*: Since the adaptations made from within the theater were judged insufficient to constitute a new piece of music, the aria had the same status as the old aria of Paisiello. It is correct that the case is a confirmation of *Storace v. Longman*, but in a different way from what was previously thought. The author who is functionally equivalent to Storace is not Mara, but Paisiello. The same principle as developed in *Storace* applied: the opera house could not claim to an aria by an external composer as exclusive property without the author's consent.

The legal status of insertion arias from external composers is fittingly described as "borrowed", in the sense that they get used and circulate among different agents without any transfer of exclusive property taking place.

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76 MILHOUS et al., 2001, pp. 492f.

77 We may have to reconsider the notion that these legal cases have contributed to freeing composers from the theater's contractual 'stranglehold', as argued by PRICE, 1989, p. 95 and MILHOUS et al., 2001, p. 460.

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