

A BPC Litigation Playlist

Ten Songs that Rocked the Court

Antony Zacaroli

(Supervising BPC Judge for the Midland, Western and Wales Circuit)

David Foxton

(Judge in Charge of the Commercial Court)

Introduction

It is our great pleasure to welcome you this evening to this joint Chancery Division-Commercial Court event organised by Bristol Business and Property Courts. In the strangest combination of ancient and modern since Bing Crosby was joined by David Bowie for Little Drummer Boy/Peace on Earth, we have each picked five songs which have occupied the courts for a BPC Litigation Playlist. We had originally intended to call the event “A Litigation Mixed Tape”, until it was pointed out to us that the vast majority of the audience would not know what a mixed tape was. We are going to take the songs alternatively, and Tony is going to begin with what would be a strong opener on any album: Pink Floyd’s “Have a Cigar”.

Have A Cigar (AZ)

The length of the typical pop song, at around 3-4 minutes, is largely dictated by the fact that the original phonogram records – played at 78 rpm – could fit only 3 or 4 minutes of music on each side. The other reason was succinctly captured in the lyrics of *The Entertainer* by Billy Joel:

"It was a beautiful song/But it ran too long/If you're gonna have a hit/You gotta make it fit/So they cut it down to 3:05."

That could well have been a reference to the Righteous Brothers’ *You’ve lost that lovin’ feeling* which, with Phil Spector’s production, came in at just under 4 minutes. It was stamped, however, as being 3 minutes 5 seconds in order to encourage DJs to play it. Record stations need to keep people listening, and the listening public has a short attention span. The ruse worked: as the record became one of the most played songs on radio in the 1960s. Toward the end of that decade, there emerged a wave of bands that were not interested in radio airplay, for whom making music was all about artistic integrity, and who eschewed the single in favour of the LP. With 20-25 minutes per side to play with, the songs expanded: sometimes so that a single track filled a whole side of the album. For many, at the forefront of this wave sits Pink Floyd.

The enormous success of their 1973 break-through album, *Dark Side of the Moon*, brought to the surface conflicts between artistic integrity and what they saw as the materialistic world of record companies, who were wont to “grab that cash with both hands and make a stash”: immortalised on “have a cigar” from their 1975 album, *Wish You Were Here*: “come in here

dear boy, have a cigar ... we heard about the sell-out, you gotta get an album out, you owe it to the people, we're so happy we can hardly count.”

An important part of their attitude towards musical integrity was that they wrote their albums to be listened as a seamless whole. On *Dark Side of the Moon* and *The Wall*, for example, – the listener is guided towards listening to the whole thing in one sitting by there being no break between tracks: one merges into the next, so that – for those of you old enough to remember – it was very difficult to land the needle on the vinyl at the start of any song mid-way through a side, without causing a jump in the music.

Such was the band’s insistence on this that in their 1999 agreement with EMI, they included a number of restrictions, including:

“not [without consent] to couple Records delivered hereunder with other master recordings or to sell in any form other than as the current Albums and to exploit the Albums in exactly the same form as to track listing and timing as are delivered hereunder”.

This was all very well, but within a few years, “Records” and “Albums” were quickly becoming a thing of the past. Digital downloads were, apparently, the future. By 2009 EMI were selling via digital download, and streaming, separate Pink Floyd tracks. Pink Floyd sued EMI to enforce the contract, and the case came before the Chancellor, Sir Andrew Morritt.¹

EMI’s contention was that the contractual restrictions applied only to physical records. Parts of the definitions in the contract appeared to be on their side. “Album” meant “any sound alone record derived from the Master Tapes”; “Records” meant any sound alone devices manufactured by the Licensee...”

The judgment got off to a bad start for Pink Floyd’s artistic integrity: what self-respecting prog-rock band would not be hurt by being labelled “a well known pop group”? But things rapidly improved. Counter-indications were found in the text of the contract: in particular the fact that, although the definition of Records was confined to things “manufactured”, it went on: “in a configuration now known and currently exploited together with formats to be devised...” The definition of “Single” also contained reference to “all other equivalent means of exploitation”.

The key point, though, was the purpose of the clause; it was not disputed that it was to preserve the artistic integrity of the album. That was as relevant to online distribution as to the sale of the physical product. As Lord Neuberger MR put it, on appeal²:

“Of course, it also gave [Pink Floyd] a negotiating position, in other words a platform for extracting more money, if EMI wished to unbundle any Album, but that does not detract from the good sense of the proposition that composers, compilers or performers of musical works can reasonably be expected to want to have a degree of control over any interference with the integrity of the products of their creativity.”

¹ *Pink Floyd Music Limited v EMI Records Limited* [2010] WHC 533 (Ch).

² [2010] EWCA Civ 1429.

Before the Chancellor, and the majority of the Court of Appeal, the purposive construction won out. (In his dissent, Carnwath LJ felt constrained by the fact that the definitions referred to physical items.)

Within a short time, however, the victory was eclipsed by the advent of mass streaming. By 2013 the us and them battle was over, and Pink Floyd were welcomed to the machine, allowing all of their albums to be streamed on Spotify. Now the world could enjoy the delights of *Another Brick in the Wall* without being comfortable numbed by the other hour and a half of music.

A Whiter Shade of Pale (DF)

It's now time to trip the light fandango, and celebrate one of the most bizarre mock-Baroque songs ever to grace the charts. Released by Procul Harum in the Summer of Love, *Whiter Shade* was No 1 in the UK for six weeks in 1967, and reached no 5 in the US Billboard Chart. It has sold more than 10 million copies, and inspired over 1,000 cover versions. That, it goes without saying, has generated a lot of royalties. The song's melody was originally credited to vocalist and keyboardist Gary Brooker. However, in March 2004, a letter before action was sent asserting the right to a co-credit. The letter was not sent, as you might imagine, on behalf of the estate of the late Johan Sebastian Bach, whose Orchestral Suite No 3 BWV 1068 ("Air on the G String") bears something of a resemblance to the song's base line. But by the man who composed the song's organ solo, inspired by Bach's "Wachet Auf", Matthew Fisher. He had joined the group after answering an advertisement in *Melody Maker* a few months before the song was recorded, securing the gig because he had his own Hammond Organ to bring to the party.

*Matthew Fisher v Gary Brooker and Onward Music Ltd*³ was tried before Mr Justice Blackburne in the Chancery Division in November 2006 and turned on three principal issues:

- Who had written the distinctive eight-bar Hammond organ solo on which Fisher's claim to a composition credited rested?
- Was composition of the solo sufficient to justify a co-composition credit for the song as recorded?
- What was the effect of the considerable delay between the composition of the song and Fisher's assertion of a claim to authorship?

That delay gave rise to a threshold issue in the case of whether a fair trial was possible at all some 40 years on, by way of a variation of the well-known saying that if you can remember the 1960s, you weren't really there. The Judge was troubled by the issue, but concluded that there was sufficient evidence to determine what were in fact relatively narrow issues of fact about the solo's origins. Indeed, the judgment records the band's and song's origins in impressive detail, reciting, in a *Spinal Tap* moment, the group's very first line-up which included "a person known only as 'Tubs' as drummer."

Blackburne J rejected the suggestion that in formulating the solo, Fisher was doing no more than "adopting, or at any rate adapting ... Mr Brooker's original Bachisms". The solo was a significant and original contribution to *Whiter Shade*, entitling Fisher to be regarded as a joint composer. The Judge rejected the suggestion that there was any contractual term or

³ *Fisher v Gary Brooker and Onward Music Ltd* [2006] EWHC 3239 (Ch).

convention that limited the contribution made by a musician during the recording of a pre-existing musical work to an arranging credit and also a defence based on laches or estoppel. He did, however, reject Fisher's claim in restitution for his share of royalties paid over the preceding four decades. Fisher had taken no steps to assert his claim notwithstanding his knowledge as to the manner in which royalties were being accounted for, and had thereby granting an implied licence.

The defendants appealed.⁴ Giving the lead judgment for the majority, Mummery LJ treated us the wonderful piece of trivia that the band's name was "inspired by the pedigree of a friend's cat." He held that Fisher's delay should have led the judge to refuse to make a declaration of co-ownership, which brought with it the power to control and share in the future exploitation of the work, with the result that Fisher could not revoke the implied licence for the exploitation of his contribution to *Whiter Shade* granted back in 1967. Mr Justice David Richards dissented.

Now you might think that was enough *Whiter Shade* litigation for anyone. But "the crowd called out for more", and the case reached the House of Lords where Fisher was triumphant.⁵ Their Lordships held that while Fisher's delay might prevent him from obtaining discretionary equitable relief off the back of a declaration of joint ownership, it did not provide a basis for refusing to confirm his undoubted right of property, with its attendant right to a share of the proceeds of the exploitation of that property. Baroness Hale, after whom this magnificent moot court is named, observed that "as one of those people who do remember the sixties, I am glad that the author of that memorable organ part has at last achieved the recognition he deserves."

There is a saying in the music business on the sharing of royalties, "write a word, take a third". What share of the music copyright did Fisher get for the contribution made by that distinctive Hammond Organ part. The answer appears to be:

"Writ a riff. Take two fifths".

"I guess that's why they call it the blues" (AZ)

There is nothing unusual in Rock Stars failing to keep tabs on their vast wealth. You may remember the papers making much of the fact that Sting failed to notice when £6m went missing from his bank accounts. On that occasion, it was straightforward theft for which his former accountant was sentenced to six years.

In the case of Elton John there were many reasons for his rather chaotic financial affairs throughout the 1970s and 1980s. Many of these were revealed in the course of his unsuccessful claim against Price Waterhouse at the turn of the century. The claim arose out of a contract Elton John (and his companies) had entered into with John Reid Enterprises Limited, the company of his former manager, John Reid. The thrust of his claim against PW was that as auditors and advisors they had failed to ensure that certain costs and expenses incurred in connection with Elton John's musical activities were borne by John Reid's company (to which Elton John paid very generous commission) rather than by Elton John or his own companies.

⁴ *Brooker and Onward Music Ltd v Fisher* [2008] EWCA Civ 287.

⁵ *Fisher v Brooker and Onward Music Ltd* [2009] UKHL 41.

These claims comprehensively failed: as explained in a judgment handed down after a 4 month trial by Mr Justice Ferris.⁶

I will focus on just one of the issues; which was taken to appeal.⁷ The question was whether PW were negligent in failing to ensure that the costs of tour agents were borne by John Reid. The Court of Appeal took the unusual step of ordering a preliminary issue on the question of construction of the agreement between EJ and JR. If the contract put those costs on EJ, then the claim must fail.

It all turned on the following Clause 7:

Clause 7.1.3 required that the obligations of JREL under the contract were to be performed personally, or under his direct supervision.

Clause 7.2 provided:

“JREL shall not be entitled to appoint an agent or agents to act on its behalf in the performance and discharge of any of its obligations hereunder without the prior written consent of the person (“the Principal”) in respect of whose activities such agent is appointed save for an agent in respect of bookings for a live performance concert tour.

Any such appointment shall be subject to the following provisions of this clause:-

- 7.2.1 Mr Reid shall at all times exercise supervision and control of the activities of such agent;
- 7.2.2 the fees and expenses of such agent shall be paid by JREL out of the Commission and administration fees paid to it hereunder unless otherwise agreed in writing by the Principal.”

The question was whether tour agents fell within the opening words of clause 7.2, so that John Reid was responsible for their payments, or fell outside clause 7.2 altogether. In the Court of Appeal, Walker LJ ultimately concluded that the “booking agent exception” was decisive. The answer all turned on the meaning of the words “any such agent...” Did it mean any appointment which required consent, or did it mean both an appointment which required consent AND one where the requirement of consent was dispensed with (such as a booking agent)? He concluded it was the former, so that any agent for whom no consent was required, e.g. booking agents, were not “such agents” and therefore not subject to the provisions in clause 7 as to payment.

No-one suggested this was a case of model drafting: the most powerful argument against was – what was the point in referring to booking agents at all, if the clause had no application to them at all?

Walker LJ began his consideration of the construction of the agreement with a “melancholy truth”: “The fact that very large sums of money are to change hands under a commercial

⁶ [2001] 4 WLUK 283.

⁷ [2002] EWCA Civ 899.

agreement, and the further fact that it has been negotiated and prepared over a long period by well-remunerated professionals, provide no guarantee of competent drafting”. He was troubled by the argument that it was unlikely that tour agents were outside the scope of the clause altogether, because then what was the point of the these complicated provisions, but countered with another truism: “the length of a clause in a commercial agreement may not be proportionate to its importance.”

He noted that this was not the first time Elton John had been embroiled in long and tortuous litigation: he had earlier sued (unsuccessfully) his first manager – Dick James – over the rights to his earlier material. That case ended in 1985, a year before the contract with John Reid’s companies was entered into. Some of the elaboration in these clauses might be explained by his solicitors’ (in the end thwarted) wish to avoid being caught up in such litigation again.

The Court was also wary of submissions that the contract should be construed by reference to what was common in the industry at the time. On any view, this was an exceptionally generous agreement to John Reid. By its final iteration, Reid was entitled to 20% of the gross revenues. But as the Court of Appeal noted, this was no ordinary relationship. Elton John and John Reid were in a personal relationship from 1970 for five years, and remained close for another 12 years. In addition to the fact that he spent most of the time touring or recording, much of the next two decades – as both men candidly accepted at trial – was lost in a haze of drink and drugs. Even without these complications, Elton John freely admitted that his business acumen was sadly lacking: “if I were a banker, the bank would be broke in about five days”. His spending on flowers alone during this time was close to £300,000 a year.

These factors supported two conclusions: first, clause 7 was of narrow application - it was all about reinforcing the personal nature of Reid’s obligations, and providing limited scope for him to delegate *his functions* to others. Second, whereas in other cases, the sheer size of the commission might suggest that the manager would be expected to cover bigger ticket items from his cut, that was not the case here. You need not look beyond Elton John’s enormous generosity to explain the size of the commission.

Sogno Nostalgico / Girl in the Dark / This Man Alone (DF)

It is now time to slow matters down, with an instrumental piece: *Sogno Nostalgico*. Aka *Girl in the Dark*. Aka *This Man Alone*. The tune has more aliases than a secret agent, which makes it appropriate that the tune, or something like it, first penetrated the British consciousness when a *Girl in the Dark* was used as the theme tune for the British TV spy drama, *Callan*. *Callan* first aired between 1967 and 1972 and starred Edward Woodward – famous not only for playing Callan, but in 1980s school playgrounds as the answer to the question “What do you call a man with three heads?” The TV programme had sourced the theme from a stock record of incidental music composed by a Dutch composer, Jan Stoeckart, copyright in which was owned at the relevant time by De Wolfe Music. Woodward recorded the tune with a lyric, as *This Man Alone*, making it the title track of his 1970 LP.

However, the production music library company Mood Music thought that *Girl in the Dark* bore a striking resemblance to a song on their books, *Sogno Nostalgico*, written in 1963 by an Italian composer called Armando Sciascia. Mood Music’s complaint was rebuffed by De

Wolfe, who said that any resemblance between the tunes was coincidental. The case first came on for trial in 1973, but was adjourned after De Wolfe raised a late assertion that *Girl in the Dark* had been written first. To bolster their case, Mood Music had placed a “trap order” with De Wolfe. They took a tune from their own catalogue, *Fixed Idea*, wrote on the disk that it had been recorded directly from a US TV broadcast, and approached De Wolfe via an intermediary asking them to produce a new record based on that recording. De Wolfe duly obliged, returning a version of the entrapment piece, now entitled *Vision*. Mood Music informed De Wolfe of its intention to adduce this in evidence. During the resumed trial, Mood Music became aware of two other examples of alleged conscious copying by De Wolfe, from compositions by Elgar and Sibelius which were still in copyright. De Wolfe objected to this being adduced at trial, but Fox J admitted it. That decision was challenged on appeal, and the trial adjourned pending the decision.

The various recordings were played before the Court of Appeal, Lord Denning noting “there is indeed a very close resemblance so that one may well think that De Wolfes may well have copied them from the copyright work.”⁸ Lord Denning held that similar fact evidence was admissible in civil cases where “logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it”. All of those requirements had been met, and the Court dismissed the appeal. That judgment was delivered on 28 October 1975, an impressive three days after the hearing. On 15 November 1975,⁹ newspapers reported that the case had settled, without admission of liability, with copyright in *Girl in the Dark* being assigned to Mood Music, who also received payment of some past royalties (half of those collected for *Girl in the Dark* and a quarter for *A Man Alone*) and all future royalties. A coincidence? Like the alleged resemblance between *Sogno Nostalgico* and *Girl in the Dark*, we will never know.

Freedom (AZ)

In 1984, when he was still one half of Wham!, on the hit single *Freedom* George Michael sang: “I don’t want your freedom/I don’t want to play around/I don’t want nobody, baby/Part-time-love just brings me down”.

Wham were hugely successful, but very much a pop band. After six years, George Michael had had enough of this. Now he wanted his freedom to move on, musically. *Listen without Prejudice*, his second solo album was a much more reflective, introspective and musically mature affair.

This change unsurprisingly caused tensions in his relationship with his record company. In 1982, Wham had entered into a classic unknown band’s first contract. The global success that came soon after revealed the cracks in that agreement, and two years later, a restraint of trade claim was settled in Wham’s favour. A new agreement was entered into with CBS, requiring Wham to produce 8 albums. When Wham split up in 1986, the obligations under the agreement followed George Michael. His first solo album – *Faith* – released in 1987 established him as a major artist. The CBS agreement was renegotiated in 1988: improving the terms for him, but now obliging him to deliver seven albums.

⁸ *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119.

⁹ *Billboard* 15 November 1975.

CBS was taken over by Sony. It paid George Michael \$11m by way of advances and royalties under the 1988 agreement. In 1990 a further renegotiation took place – putting George Michael on a “American superstar” basis.

In 1990 he released *Listen Without Prejudice*. The price of musical maturity was a significantly smaller audience: so this was not as successful as *Faith*. This was all part of George Michael’s plan: he changed his image, and he ensured that his picture did not appear on the covers of the new album. As he said at the subsequent trial: “my objective was to narrow my audience to some degree”.

The change was reflected on the updated version of *Freedom*, on the new album: *Freedom 90*. Now, he sang:

“Heaven knows I was just a young boy/Didn't know what I wanted to be/I was every little hungry schoolgirl's pride and joy/And I guess it was enough for me/ To win the race? A prettier face/Brand new clothes and a big fat place on your rock and roll TV/ But today the way I play the game is not the same, No way.”

Nevertheless, he still wanted at least some audience, and he complained at what he saw as Sony’s lack of promotion – and mis-use- of the album in US. One example relates to the song *Mother’s Pride* – a son grows up, goes to war, and dies. The lyrics were firmly anti-war: “And all the husbands, all the sons, all the lovers gone, they make no difference in the end...” So George Michael was perhaps understandably upset when he found the song being used as the soundtrack to messages of public support from mothers to sons fighting in the gulf war. He blamed Sony.

He was also somewhat upset with Sony execs when he believed they had flown to one of his concerts only to leave half way through. Whether he was right or wrong about that, it drew little sympathy from the judge – Jonathan Parker J – who described him as having “a degree of touchiness” – in the case he brought against Sony to release him from what he ill-advisedly termed “professional slavery”.¹⁰ Sony was, he complained, thwarting his efforts to move from heart-throb to serious artist.

He noted the two types of relief against restraint of trade: equitable, which is all about the relief from unconscionable bargains, where equity is concerned to protect the weak and vulnerable; or common law. The latter is about the particular public policy consideration of free trade. The test to be applied, where the contract is one which attracts the doctrine of restraint of trade, is a test of reasonableness: the court does not have to be satisfied that the defendant has behaved in a morally reprehensible way”

After a 74 day hearing, the claim was dismissed. It was not open to Michael to challenge the agreement on grounds of restraint of trade, for three reasons.

First, the agreement had compromised an earlier dispute. There is a public interest, he held, in enforcing agreements reached by way of compromise of disputes. Second, It would be unjust to Sony if the 1988 Agreement were now treated as unenforceable or void, given that George Michael at all material times had access to expert legal advice; Sony had agreed to bring forward the dates of payment of various sums due to become payable to George

¹⁰ *Panayiotou v Sony Music Entertainment (UK) Limited* [1994] EMLR 229.

Michael under the Agreement; the agreement had been varied in 1990. Third, George Michael had requested payment of the advance due in respect of his third album at a time he knew it was open to him to sue for restraint of trade. This amounted to affirmation of the contract.

In any event, the judge found the agreement satisfied the restraint of trade test (*Nordenfelt v Maxim Nordenfelt*¹¹): it was reasonable between the parties, and reasonable in the public interest.

He accepted that Sony's legitimate interest included the need to recoup investment costs *and* to finance the failed development of other hopeful artists. And he found that the various re-negotiations of the agreement had paralleled George Michael's increasing fame and success, and each resulted in a substantial improvement in financial terms in exchange for additional product.

Unfortunately for George Michael, the lines from the last chorus of *Freedom 90*, "I don't belong to you and you don't belong to me", were only half-true. It turned out he did belong to Sony. Luckily for music lovers, he quickly forgot the promise he made during the trial, that if he lost he would never record again.

Love Grows (Where My Rosemary Goes) (DF)

Love Grows Where My Rosemary Goes, a No 1 for Edison Lighthouse in 1970, was one of number of hits written by Tony Macaulay, a talented British pop song writer of the 1960s and 1970s. Others Macaulay-penned hits included *Baby Now That I've Found You*, *Build Me Up Buttercup* and David "Hutch" Soul's No 1s, *Don't Give Up on Us* and *Silver Lady*. In 1966, a 21-year old Macaulay signed a standard form song writing contract with A Schroeder Music Publishing Co Ltd which had a 5-year term. The publishers were entitled to copyright in a number of Macaulay's current compositions and any written during its term, and if the royalties earned exceeded £5,000, the agreement was automatically extended for a further 5 years. The publishers could terminate the agreement on one month's notice at any time. Macaulay was entitled to rolling £50 payments on account of his 50% share of royalties received, but the publishers were under no obligation to promote his work.

In 1970, Macaulay brought proceedings for a declaration that the contract was in unreasonable restraint of trade and void, the company counterclaiming for specific performance. He succeeded before Plowman J at first instance, who also found that the publishers had repudiated the agreement by its treatment of the income derived from publishing abroad. Macaulay was entitled to 50% of the foreign publisher's take, but he had only been paid 50% of the net amount received by Schroeder after the foreign publisher had taken its cut – a phenomenon sometimes referred to as "double dipping". Plowman J was not persuaded that there had been a deliberate decision to pay Macaulay less than his due, but found the short payments to be repudiatory nonetheless.

The Court of Appeal¹² upheld the decision on restraint of trade, pointing to the complete imbalance in the parties' obligations: there was no obligation on the defendant's part to exploit anything composed by the Macaulay, in which case its only liability under the

¹¹ [1894] AC 535.

¹² *Instone v A Schroeder Music Publishing Co Ltd* [1974] 1 All ER 171.

agreement would have been to pay the first £50 advance. In contrast, Macaulay was obliged to commit his entire production of compositions for five years with no right, even at the end, to recover the copyright of a composition not used by the defendants. However, the Court held that, in the absence of any finding that the excessive deductions had been a deliberate attempt to short-change Macauley, there had been no repudiatory breach.

Schroeder's committed Macauley to another year of litigation, taking the case to the House of Lords.¹³ However the appeal failed, for reasons set out in important and characteristically impressive judgments of Lord Reid and Lord Diplock. Lord Diplock noted the unbalanced nature of the agreement, and responded to Schroeder's argument that it would not enforce the agreement to its fullest advantage because of the adverse effect of doing so on its reputation by pointing to the publisher's unrestricted right of assignment. Lord Diplock described the task for the court as assessing "the relative bargaining power of the publisher and the song writer at the time the contract was made and to decide whether the publisher had used his superior bargaining power to exact from the song writer promises that were unfairly onerous to him." Referring to the suggestion that the standard-form nature of the contract somehow justified its terms, he offered one of the most compelling judicial critiques of boilerplate:

"Standard forms of contracts are of two kinds. The first, of very ancient origin, are those which set out the terms upon which mercantile transactions of common occurrence are to be carried out. Examples are bills of lading, charterparties, policies of insurance, contracts of sale in the commodity markets. The standard clauses in these contracts have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade. Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable. The same presumption, however, does not apply to the other kind of standard form of contract. This is of comparatively modern origin. It is the result of the concentration of particular kinds of business in relatively few hands The terms of this kind of standard form of contract have not been the subject of negotiation between the parties to it, or approved by any organisation representing the interests of the weaker party. They have been dictated by that party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: 'If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it.'"

The litigation rather cooled Macaulay's enthusiasm for Tin Pan Alley, and he turned his attention to writing musicals and film scores. He also published two thrillers, teaching a course on how to write thrillers at Brighton University which CJ Sansom, author of the Shardlake mysteries, attended. Whether Macaulay ever suggested a plot in which a young penniless composer murders an avaricious music publisher is unknown.

¹³ *A. Schroeder Music Publishing Co. Ltd. v Macaulay (Formerly Instone)* [1974] 1 WLR 1308.

Chariots of Fire (AZ)

The famous theme tune from *Chariots of Fire* has troubled the UK courts on two occasions. First, in what must be one of the least successful attempts to avoid deliberate copying, the makers of a 1983 advert for clarkes shoes commissioned a “new” piece of music to accompany shots of children running along a beach. This was an obvious and deliberate reference to a famous scene from the 1981 film, *Chariots of Fire*. Not a problem so far, but it was going to put the accompanying music - which attempted to emulate but not copy, the original - under serious scrutiny. The composer’s attempt to do so wholly failed. Warner Brothers sought an injunction. Their musicologist referred to it as a rarely seen clear cut case of plagiarism, and doubted that any reputable music expert would disagree. Vinelott J certainly didn’t, describing the score as “a mere orchestral arrangement without significant variation”.¹⁴

A couple of years later, the boot – or shoe – was on the other foot. Mr Vangelis and Warner Brothers found themselves on the end of a copyright claim, by the composer of the theme tune to a 1975 Greek television show called *The City of Violets*.

There were undoubted similarities between one phrase in each of the two pieces of music. Both involved a low sustained or repeated tonic note, over which was a “turn” played on the piano – around the fifth, played as a slow triplet. This is probably the element (the hook) that people find most memorable about the theme tune from *Chariots of Fire*.

The case came before Whitford J.¹⁵ Having noted that, in considering similarity, the judge must rely as much on the ear as on the eye, he agreed with the claimant that there was an undoubted similarity in the turn. But, as had been well established by then, the existence of resemblance is not proof of copying. Indeed, even complete identity is not such proof. With only seven notes in the scale (12 including chromatics) it is surprisingly difficult to create something new, particularly using only a few of them in a short phrase such as the turn used in these cases.

The first question was whether Vangelis had deliberately copied the earlier tune. This was based on the evidence of the composer of the first piece, Mr Logarides. He said, and his girlfriend corroborated this, that Vangelis had expressed an interest in *City of Violets* in 1976 and asked for tapes of it.

The judge was clearly not much impressed with either Logarides or his girlfriend: refusing to rely on the evidence of each of them, unless corroborated by someone other than the other of them. He was also struck by the fact that *Chariots of Fire*, when Logarides first heard it, did not bring *City of Violets* to mind. Even if Vangelis had been played it 4 years earlier, the judge thought it most unlikely he would have remembered it so as to have deliberately copied it. Vangelis was not infrequently visited by Greek musicians hoping for some assistance, and why would this piece have stuck in his conscious mind?

The second question was subconscious copying. Vangelis’ composition process was to watch the film on video screen with no sound, and simply play whatever came into his head on his keyboards. The most important factor here was that the “turn” was commonplace in music.

¹⁴ *Warner Brothers v de Wilde* (1983) 3 Tr L 101.

¹⁵ *EMI Publishing Limited v Papathanasiou* [1993] EMLR 306.

Musicologists gave evidence of other pieces that had used it. Vangelis had used it himself, before *City of Violets* was written.

There was a second allegation of copying of another section of the piece. This failed, however, because (1) any similarity was difficult if not impossible to discern to the ear, but could only be made out, if at all, on looking at the written music; and (2) Vangelis himself did not read music; so the idea that he copied it was fanciful.

All this led the judge to the conclusion that the resemblance in the turn was the result of coincidence not copying, thus maintaining the shine on Vangelis's Oscar for the soundtrack to *Chariots of Fire*.

Sugar Baby Love (DF)

The Rubettes are best, and for some perhaps only, known for their 1974 No. 1, *Sugar Baby Love*, a glam rock classic complete with doo-wap backing vocals and a spoken verse. It was recorded by a group of session musicians in 1973, and The Rubettes put together to promote the record on its release. The vocalist in that manufactured group was Alan Williams. The band had a number of further hits in the UK and in mainland Europe with Williams on lead vocals, before they split in 1980. A reformed version, featuring original members Williams and Bill Hurd, toured between 1982 and 1999, before the band split into two factions, one headed by Williams and the other by Hurd.

In 2000, the group's management company, Alan Williams Entertainment Ltd ("AWEL"), issued proceedings to injunct Hurd and other former Rubettes from using that name. Those proceedings were compromised by a Tomlin order, which provided for *two* Rubettes bands to tour: "The Rubettes featuring Alan Williams" and "The Rubettes featuring Bill Hurd". There was an agreement neither would trade as The Rubettes.

In 2004, AWEL commenced proceedings against the Hurd Rubettes alleging breach of the agreement. That provoked a counterclaim making similar allegations against AWEL. The trial judge, David Richards J, had to determine two issues of construction of the settlement agreement: what did it mean to "trade as" the Rubettes; and did the agreement oblige the signatories to use their best endeavours to ensure that third parties such as concert promoters used the correct appellation? The judge held¹⁶ that "trade as" extended "to any promotion of the band as 'The Rubettes'". The agreement was intended to allow both bands to trade off the reputation of the original Rubettes, but without "suggesting that they are the original Rubettes." He also held that the obligation not to "trade as" The Rubettes necessarily involved an obligation to use reasonable endeavours to ensure that third parties with whom they dealt did not describe or promote their bands as The Rubettes. On that basis, he considered a series of alleged breaches which reveal much of the glamour of a pop band touring after its heyday. These included an appearance at "Oldie Night" in Essen, Germany, "the Yesterday Once More" event at Pontins, Brean Sands and the Barking and Dagenham Town Show on July 17, 2005. Some of those allegations were made out, others failed, and this was also true of the various breaches alleged in the counterclaim. However, the judge found the defendants' breaches to be more serious, and awarded Williams 75% of the costs at

¹⁶ *Alan Williams Entertainment Ltd v Hurd* [2006] EWHC 81 (Ch).

the end of the liability trial. An attempt to challenge the judge’s construction of the contract and the costs order failed on appeal.¹⁷

If you thought that was the last of The Rubettes in the Chancery Division, then “[do] think twice”. Two of the other original Rubettes, bass guitarist Mick Clarke and drummer John Richardson had performed as part of the Williams line-up, as, from a later period, had vocalist Steve Etherington. In 2018, there had been a disagreement between the performers about money, and later Williams informed his band members that he was moving to live in Australia. Shortly afterwards, Clarke applied to register “The Rubettes” as a trademark under the Trade Marks Act 1994 and Clarke, Richardson and Etherington formed a band using the ‘The Rubettes’ name. AWEL then brought a claim asserting entitlement to all goodwill in the name “The Rubettes”, seeking damages for the tort of passing off and cancellation of the trade mark.

The claim came before Intellectual Property Enterprise Court in 2022,¹⁸ where the judge, Ms Pat Treacy, had to investigate the challenging issue of who owns the goodwill in a music band which has operated with a changing line-up over time. She held that, the goodwill associated with The Rubettes attached to the corporate entities through which the band had traded, and that the pre-1983 goodwill had passed to the Crown on the 1976 company’s dissolution. From 1983, the goodwill had attached to AWEL, and the 2002 settlement with the Hurd-Rubettes had not abandoned that goodwill. On that basis, the Judge upheld the passing off claim, and set the trade mark aside, holding that Clarke had applied for the trademark to interfere with the claimant’s business rather than for a bona fide purpose. At a subsequent hearing,¹⁹ the judge granted an injunction prohibiting the defendants from passing off their goods and services as those of the claimants.

It would take a braver person than I am to predict whether that will bring an end to Rubettes’ litigation. However, the finding that pre-1983 goodwill has passed to the Crown raises the intriguing prospect of a government-sanctioned Rubettes touring to pay down the national debt. If they need a government-salaried keyboard player, I can offer them a recommendation.

Sacris Solemniis (AZ)

It is time to take a rare walk among the classics. It is not a coincidence that there are few cases of copyright infringement in the world of classical music. Classical composers are perhaps more accepting of the adage that we all stand on the shoulders of those who came before. More prosaically, the size of the financial “hit” from a classical piece is rarely worth the “writ”. The example I have chosen relates to a work that was many centuries out of copyright, but it raises interesting questions as to the meaning of music and originality.

Dr Sawkins was a world-renowned expert on French baroque music. Particularly on the music of Michele Richard de Lalande – the principal composer to the court of Louis XV and Louis XVI. Lalande wrote a number of *Grand Motets* for choir and small orchestra, among which was *Sacris Solemniis*. He re-wrote and re-edited these many times. Not much

¹⁷ *Alan Williams Entertainment Ltd v Hurd* [2006] EWCA 1637.

¹⁸ *Alan Williams Entertainment Limited v Clarke, Richardson and Innes Etherington* [2022] EWHC 1798 (IPEC),

¹⁹ *Alan Williams Entertainment Limited, Alan Williams v Mick Clarke, John Richardson, Steve Innes Etherington* [2022] EWHC 2861 (Ch).

survived, however, apart from disparate versions in often incomplete or unfinished manuscripts spread throughout the libraries of Europe.

For the works to be performed today, a lot of work needed to be done. That is what Dr Sawkins did. He travelled to all those libraries and spent something like 300 hours on each of four pieces to produce performable versions. He claimed copyright in the versions he created. Both he and the conductor of Ex Cathedra, the Birmingham based choir that was going to record them were very keen to get on with the recording, but the record label – Hyperion – refused to acknowledge that Dr Sawkins could claim copyright. The recording went ahead without the dispute being resolved, and then Dr Sawkins sued to establish his claim.

Mr Justice Patten heard the case.²⁰ The question was whether the work produced by Dr Sawkins was an original musical work. A musical work is helpfully defined by s.1(1) of the Copyright, Designs and Patent Act 1988: as “a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music”. What had Dr Sawkins done? Hyperion said he had just copied from the old manuscripts: expertly and skilfully, yes, but it did not amount to more.

What he had in fact done varied across the four works. In some he had gone so far as to add instrumental parts where they were apparently absent (e.g. writing in a viola part, in a way which he concluded, from his extensive research, the composer would have done if he had completed the work). In others, he added inner harmonies where all there was a bass line and a melody. That slimmed down form of writing was common at the time. The players would improvise the notes to play within the chord that was implied by the bass and melody. In others, he added editorial and performance markings.

The key to whether all of these constituted “music” was to be found in the principle I have already noted in the *Chariots of Fire* case: the most important aspect of music is how it impacts on the ear. As Laddie, Prescott and Vitoria, *The Modern Law of Copyright*²¹ puts it: “scholarly analysis may be useful, but the impact on the ear is ultimately more important; what it sounds like matters more than the notes which are written down”. The impact on the ear of the written notes can be very different as a result of performance markings: variations in tempo; adding in ornamentations and relative volume among parts.

The judge concluded, therefore, that the addition of editorial performance directions could – provided they were substantial enough, constitute a musical work.

But what about originality? Patten J turned to a case about examination papers: *University of London Press Ltd v University Tutorial Press Ltd*:²²

“Copyright Acts are not concerned with the originality of ideas, but with the expression of thought ... The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—**that it should originate from the author.**”

²⁰ *Sawkins v Hyperion Records Ltd* [2005] RPC 4.

²¹ 5th ed., LexisNexis.

²² [1916] 2 Ch 601.

That was satisfied in this case: Dr Sawkins' scholarly interpretation of *what Lalande would have done to complete the score* and to direct players how to play it originated from him, and was not merely copying.

Hyperion argued that (much like jazz musicians work from the barest outline – often just chord progressions) experienced players are able to fill in the middle parts of a baroque work, intuitively knowing what harmonies flow from the outer lines. Patten J said:

“If (as in this case) Dr Sawkins has constructed a figured bass designed to ensure that the correct harmonies are played, it is no answer that the performers could have, by their own efforts, achieved the same result. Dr Sawkins has spared them that effort by the use of his own skill and labour, and in so doing has produced an edition containing the harmonies which, in keeping with baroque music, are essential to its proper realisation and, in the form in which they appear, are not mere reproductions of an earlier version.”

Along Again (Naturally) (DF)

We finish with *Alone Again (Naturally)*, one of a number of 1970s hits composed and performed by Irish-born singer-songwriter Gilbert O'Sullivan, and a US No 1. In 1969, O'Sullivan was signed up by Gordon Mills, legendary manager of Tom Jones and Engelbert Humperdinck, to his company Management Agency and Music Limited (“MAM Ltd”). A run of worldwide hits came to an end in 1975. In the late 1970s, O'Sullivan began to look a little more closely at the contracts he had signed with Mills and his companies, and he commenced proceedings against Mills, MAM Ltd and various associated companies, seeking declarations that the various agreements were unenforceable as an unreasonable restraint of trade, or voidable on grounds of undue influence.

O'Sullivan achieved a stunning success following a long-trial before Mars-Jones J. In his first judgment setting out his conclusions,²³ the Judge traced O'Sullivan's background, including his move to Swindon where he “became involved in what is known as the ‘pop music scene’”. He was impressed by O'Sullivan, who he described as “a patently honest and sincere young man”, but less so by Mills and the group Chief Executive, Smith. He found that O'Sullivan had placed himself entirely in Mills' hands, O'Sullivan receiving only £500,000 from the £14.5m in royalties his recordings had earned. Mills and the management company had persuaded O'Sullivan to enter into deeply disadvantageous contracts, oblivious of the conflict of interests they faced. He declared that the agreements O'Sullivan had signed were “void on the ground of oppression and inequality of bargaining power and is unenforceable on the ground that it is in unreasonable restraint of trade.” He also rescinded the management, recording and music publishing agreements, ordering delivery up of tapes, master recordings and copyright, and ordered an account of profits. Further fact findings, and the Judge's conclusions on the issues of law, were set out in a subsequent judgment.²⁴ He held that Mills and his companies were in a fiduciary relationship with O'Sullivan at the time of contracting, and it was that finding which provided the foundation for the conclusion that O'Sullivan had

²³ *O'Sullivan (Professionally known as Gilbert O'Sullivan) & Another v Management Agency & Music Ltd & Others* [1982] Lexis Citation 948.

²⁴ *O'Sullivan (Professionally known as Gilbert O'Sullivan) & Another v Management Agency & Music Ltd & Others* [1982] Lexis Citation 1268.

been subjected to undue influence at the time of contracting. It also formed the basis of the Judge's order that the defendants pay compound interest on the amounts found due.

An appeal followed,²⁵ in which the defendants accepted that Mills was in a fiduciary relationship with O'Sullivan, but denied that his companies were. Dunn LJ had no difficulty in rejecting that submission. The appeal otherwise focussed on the relief ordered. The Court held that the effect of the agreements having been entered into under undue influence was to make them voidable, not void, and the effect of the unlawful restraint of trade was that the agreements could not be enforced, not that performance already rendered fell to be reversed. However, the Court rejected Mills' argument that the agreements should not be set aside because *restitution in integrum* was impossible, Dunn LJ finding that the principles of *restitutio* was not applied with their full rigour where transactions were entered into in breach of fiduciary duty, provided "the court can achieve practical justice between the parties by obliging the wrongdoer to give up his profits and advantages, while at the same time compensating him for any work that he has actually performed pursuant to the transaction." The court granted the defendants an allowance for their work in promoting O'Sullivan. This was to include a small profit element, albeit less than would have been obtained under an arms-length agreement. The award of compound interest was also set aside, because the profits had been used in part for O'Sullivan's own benefit as part of Mills' business.

So O'Sullivan and Mills parted company, O'Sullivan now alone again (naturally). This was not O'Sullivan's last brush with the law. In 1991 he was involved in New York proceedings against the rapper Biz Markie for the unauthorised sampling of *Alone Again (Naturally)*. Judge Thomas Duffy began his judgment by quoting the Biblical commandment "Thou Shalt Not Steal" and went on to award the copyright holder 100% of the royalties.²⁶ There are some judgments where the first line is all you need to read.

Conclusion

That brings us to the end of our BPC Litigation Playlist. We hope you can have some fun putting together rival litigation playlists of your own, inspired by the adage "where there's a hit, there's a writ".

²⁵ *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428.

²⁶ *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.* 780 F Supp182 (S.D.N.Y. 1991),