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Modern sheet music publishers regularly assert copyright claims over their new editions of public domain compositions by long-deceased composers like Mozart and Chopin, yet the legal basis for these claims remains untested. This inquiry argues that most such claims are untenable, and outlines a doctrinal copyright analysis supporting this conclusion in Canadian law and jurisprudence. Following a brief overview of the sheet music publishing industry’s copyright practices and some recent challenges to its preferred status quo, two doctrinal approaches are tested using various editions of Frédéric Chopin’s “Raindrop Prelude”. First, an application of the doctrine of originality, as described in CCH v. Law Society of Upper Canada, reveals that editors’ original expression in most new editions of public domain compositions is difficult to discern. Although some editions meet the required standard, this finding nonetheless jeopardizes many publishers’ copyright claims. Second, the inquiry briefly investigates the nature of musical scores as works, concluding that, contrary to what publishers have sometimes argued, a proper application of the Copyright Act should classify them as musical works instead of artistic works. Finally, the findings of the court in the British case Sawkins v. Hyperion are applied to the Canadian context. The article concludes by discussing some of the policy implications of its findings, contrasting the benefits accruing to musicians with the potentially harmful decisions that some music publishers might make if the Canadian standard were adopted more widely.

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discerner. Bien que certaines éditions se conforment aux normes requises, cette conclusion compromet néanmoins les demandes de droit d’auteur de plusieurs éditeurs. Deuxièmement, cette enquête examine brièvement la nature des partitions musicales en tant qu’œuvres, concluant que, contrairement à ce que certains éditeurs ont parfois soutenu, l’application appropriée de la Loi sur le droit d’auteur doit les classer comme des œuvres musicales et non des œuvres artistiques. Finalement, les conclusions de la Cour dans la décision britannique Sawkins c. Hyperion sont appliquées au contexte canadien. L’article conclut en discutant quelques-unes des incidences qu’apportent ses conclusions, comparant les avantages pour les musiciens et les décisions potentiellement endommageantes que certains éditeurs pourraient prendre si la norme canadienne était adoptée plus largement.

1. INTRODUCTION

The place of music within copyright is an oft-explored subject in intellectual property law. Over the past decade, scholarship on music downloading,¹ digital sampling,² the relationship between musical creativity and copyright,³ and even musical folklore and oral tradition⁴ has proliferated. These are all important areas of research; yet, they all focus on musical composition and performance, that is, the elaboration of works and their sounds. Comparatively little attention has been paid to the process that mediates these two activities, namely, the creation of musical scores, and its relationship with copyright. The above topics also tend towards contemporary musical issues; older music that continues to garner a significant following has been left by the wayside in modern copyright discourse.

One could be forgiven for thinking that old “classical” music — say, that of Beethoven and Mozart — ought to retain little attention in copyright circles. After all, these composers’ works are in the public domain, freed from restrictions; ergo, what does copyright have anything to do with them? But while the works of Mozart might well be in the public domain, it remains an open question whether or not modern editions of Mozart’s music, as represented by a recently-made musical score, are also in the public domain. Separating the work (Mozart’s Piano Sonata K. 330, for example) from the score of the work (the Henle-Verlag edition of Mozart’s Piano Sonata K. 330) is the crucial nuance here. Music publishers argue their new editions of Mozart’s sonatas should be protected by copyright, given the

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¹ For example, see Geoffrey Neri, “Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and Unsettled Social Norms” (2005) 93 Geo. L.J. 733.
⁴ For example, see Jason Toynbee, “Copyright, the Work and Phonographic Orality in Music” (2006) 15 Soc. & Leg. Stud. 77.
“scholarship and research” invested into their production, among other reasons. These publishers’ claims have not been thoroughly tested in copyright law, given the lack of scholarly research in the areas of modern editing and the republication of old musical scores, as well as the paucity of jurisprudence on this topic in any jurisdiction. To be sure, this is a remote backwood of the music and copyright scholarship; among Canada’s leading copyright thinkers, only Vaver mentions musical scores, briefly arguing that musicologists and editors who reconstruct old works or simplify well-known pieces for beginners are “rewarded for their skill and judgment by a copyright in the new version” of the work. As will be seen, though, neither of these examples directly addresses the most common forms of contemporary music editing, so Vaver’s conclusions are regrettably of limited applicability. For their part, neither McKeown nor Handa even mention musical scores in the sections of their copyright treatises dedicated to musical works. Despite this lack of detailed legal attention, scores raise fascinating questions as to where proprietary interests in dots of ink on a page arise from. Indeed, “[c]opyright’s doctrines are simple enough to state, but their practical application is often complex, context-specific, and, therefore, inherently unpredictable,” and especially so in the case of musical scores, where a certain level of musical sophistication is required simply to apply copyright doctrine. In short, the topic is ripe for inquiry by both musicians and legal academics.

I therefore pose and answer two principal questions in carrying out a doctrinal analysis of old works republished as modern scores. First, if it is acknowledged that Mozart (or any other long-dead composer) is the author of a musical work, but a modern editor claims copyright in her edition of that work, on what basis is copyright granted? Second, since musical scores pose unresolved challenges in the application of copyright doctrine, I ask: what does copyright tell us about originality in musical scores, and what do musical scores tell us about originality in copyright? I answer these questions in two broad strokes, anchoring my analysis in Canadian law. First, I contextualize and show the importance of an inquiry such as this one by touching on issues of copyright in scores today as they relate to the music publishing industry, musicians and the public domain. Second, based on the provisions of the Copyright Act and jurisprudential guidance on how to apply its provisions (principally from the landmark case CCH Canadian Ltd. v. Law Society of Upper
Canada11 but also other relevant sources), I undertake a detailed analysis of multiple editions of one public domain work — namely, Frédéric Chopin’s Prelude in D-flat Major — to delineate what forms of expression within those scores will or will not likely attract copyright. I also analyze a recent British decision, Sawkins v. Hyperion Records Ltd.,12 which dealt with the applicability of copyright to modern editions of public domain musical works. I conclude by suggesting some consequences my analysis holds for music publishers and their business methods. I argue ultimately that publishers’ claims of copyright to these editions are not as certain as may widely be believed, though clearly some cases deserve copyright protection.

2. CONTEXTUALIZING COPYRIGHT AND MUSIC PUBLISHING

A music publisher is an entity that “issues musical editions that consist primarily of musical notation, whether for performance or study.”13 Its principal activities include “working with the composer or editor, financing the printing, promoting, advertising, storing and distributing”14 a new work or a revised edition of an old work. While a detailed presentation of publishers’ methods is beyond the scope of this inquiry, one important fact concerns how editors and publishers prepare modern scores of old works. Generally, editors consult special public domain editions of the works that they wish to republish.15 These special editions, termed source scores, usually have a strong historical legacy, either because their publisher was well-connected to the composer, or perhaps because the composer himself supervised their production. From the information gathered from whatever source scores an editor chooses to privilege, she then prepares her own layout of the music, makes her independent editorial decisions, and the process goes ahead as described above.

Although most of their work goes on symbiotically with the musical communities they serve, one area where music publishers encounter criticism is in their collective enforcement of a strict copyright regime in the sheet music business. In a particularly poignant example, a German publisher recently demanded compensation from a kindergarten for photocopying old scores and performing the works in public.16 Publishers also assert copyright in numerous republished public domain

14 Ibid.
15 Ibid.
16 “Kindergartens ordered to pay copyright for songs”, Deutsche Welle (28 December 2010) online: <http://www.dw-world.de/dw/article/0,,14741186,00.html>. Although the publisher is likely fully within its rights to demand so, it remains something of a comment on its copyright priorities when even preschools do not escape unscathed.
scores, perhaps legitimately sometimes, but also sometimes illegitimately, as will be seen shortly. Their interests are also well-represented by various other musical bodies in society. For instance, nearly all music festivals, conservatories and competitions require published copies of the works being performed to be made available for adjudication panels, with photocopies disqualifying entrants from participation, examination or competition. Consider, for example, the following notice issued by the Royal Conservatory of Music of Toronto [RCM] in the syllabi for its music examination candidates:

**Copyright and Photocopying**

Please note that photocopies will not be permitted in the examination room. Candidates who bring photocopies to the examination will not be examined. Composers, artists, editors and publishers rely on the sales revenues to contribute to their livelihood. Photocopying music deprives the creators of due compensation.

This notice is odd for a number of reasons. First, the RCM is mostly in the business of training and examining classical performers; as a matter of copyright, it is entirely plausible that many of the RCM’s prescribed examination test pieces are in the public domain — certainly not all, but definitely many. If so, why impose such a blanket rule in the name of copyright, which does not apply to public domain works? This anomaly exposes a subtler trick in the RCM’s policy: while “copyright” figures prominently in the title of the section of the above excerpt, the actual policy does not concern itself in the slightest with copyright. The policy merely describes how photocopies are never acceptable to the RCM, and skirts entirely the issue of legally photocopied music, such as fair dealing, preferring to deny by omission that such a thing even exists. To the non-expert reader, copyright infringement is associated with photocopying music, without any consideration of whether any copyright actually subsists in a given work. Worse, the policy borrows the term “copyright” to bestow on itself a legalistic air, but then completely fails to integrate that legal concept into its framework. Moreover, in suggesting that

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17 The majority of the editions of a Chopin work consulted in Part 3 of this inquiry featured copyright notices, usually presented as a general “all rights reserved” notice alongside the copyright symbol, laid out such that they implicitly suggest everything in the bound volume is protected by copyright — presumably, that also being the publisher’s preferred conclusion.


19 Indeed, many of these works belong to the public domain, though an exhaustive proof of this notion is not necessary in the service of the point I want to make.

20 It is worth pointing out here the RCM’s strong ties to Frederick Harris Music, a publishing company which regularly produces editions of the RCM’s most popular examination test pieces.

21 Photocopying scores for a music exam could potentially, for example, be recognized as a permissible purpose for education under s. 29 of the *Copyright Act*. 
“[p]hotocopying music deprives the creators of due compensation,”22 the normative implication is that all music creators produce work that is equally cognizable under copyright, and that all such creators are naturally owed compensation for their work because of copyright. But copyright in fact presumes no such thing; indeed, the Supreme Court of Canada has warned that mere labour, even if undertaken in a qualifying medium, is insufficient to attract copyright.23 As this article shows, only some kinds of work qualify for copyright, and then only for limited duration.

These kinds of policies that enforce a “maybe real, maybe fake” copyright interest in every work are unfortunately all too common in the classical music world. While these policies may represent legally prudent positions for conservatories and festivals to adopt, at some point, it is also important for these bodies to acknowledge some legal reality. Fortunately, recent innovations in sheet music distribution are starting to poke holes in publishers’ legal arguments and business methods. For example, in 2000, the Theodore Presser Co. released a CD-ROM of sheet music of classical songs and opera solos that are in the public domain in the United States. The Journal of Singing hailed this “legally printable sheet music” as an important step toward “having easy and legal access to individual arias and songs”24 — as if the public domain magically appeared the moment a CD-ROM with digitized copies of old scores was made available, language that further attests to the copyright stranglehold music publishers enforce as a disciplinary norm in musical communities. More recently, in February 2007, like the better-known Project Gutenberg in relation to literary works, the International Music Score Library Project [IMSLP] began digitizing and cataloguing the world’s largest collection of public domain musical scores, with its servers hosted in Canada.25 It did not take too long for music publishers to notice. By October 2007, the site had been taken down as a precaution against mounting legal challenges from music publishers.26 This occurred even though, according to Michael Geist, there was “little doubt that the site was compliant with Canadian law.”27 The publishers argued that the website hurt sales of sheet music, among other alleged wrongdoing.28 The website eventually came back online in June 2008 after publishers, rather tellingly, dropped their suits once the site’s creator, Edward Guo, enlisted the support of both the Canadian Internet Policy and Public Interest Clinic and the Stanford Fair Use Pro-

22 Royal Conservatory of Music (1998), supra note 18 at 11.
23 CCH, at para. 21.
26 Ibid.
27 Michael Geist, “Music Copyright in the Spotlight”, BBC News (2 November 2007) online: <http://news.bbc.co.uk/2/hi/technology/7074786.stm>. The interjurisdictional complexities of the cases were slightly more complicated than I have described above; onerous still, the website generally operated on a sound legal basis, with the few available infringing editions promptly deleted by site management when flagged.
ject to fight the claims. As of April 2013, the IMSLP held over 234,000 scores, and it continues to grow in popularity among classical musicians as a source for obtaining dependable editions of public domain works.

Although de facto victorious against the music publishers’ claims of illegal activity, the IMSLP today remains careful about the material it chooses to make available, erring on the side of extreme caution. While it denounces practices like “copy-fraud” in the music publishing industry, where a publisher “will reprint public domain editions with no new editing and write ‘copyright 20XX’ even though the work does not qualify for copyright protection,” its own uploading policies steer clear of these copy-fraud editions and favour editions that are unquestionably in the public domain according to their year of edition; indeed, most scores on the website date from before 1910. For a supposedly sensitive challenger of copyrightability in old scores, the website gives a curious example of when it might choose to not make a work available:

Example 1: Henle published a re-engraved edition of Beethoven sonatas in 1985, with an editor who is still living. The work is not public domain because the editor is still living, and the new engraving is copyrighted.

Strictly speaking, there is nothing in the above scenario that guarantees that Henle’s edition attracts copyright. Treating a living editor as a de facto author whose contributions are substantive enough to attract copyright is legally prudent for the IMSLP, but it remains an open question as to whether this is the correct legal conclusion in Canada. Thus, some editions purport to benefit from copyright despite the fact that a more nuanced analysis of copyright law and jurisprudence would suggest otherwise. Publishers are quick to point to “significant changes to the music, such as corrections and editing marks, based on years of scholarship about the composer” as a justification for a renewed copyright interest in recent editions of a given public domain work. However, the test for copyright is not whether one has done research, corrected mistakes or even added new editing marks; it is, simply stated, whether there is some more than trivial or de minimis original expression in a work. Publishers may well be correct in their conclusions, but their reasoning as to why they deserve a copyright is not.

Thus, finding the line where “corrections and editing marks” become a form of original expression is an important goal in the classical music world today, given the interest of websites like the IMSLP in exposing copy-fraud practices in the

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30 The IMSLP home page updates the total number of scores periodically. Online: <http://imslp.org> (accessed July 17, 2013).


33 Ibid. Emphasis in original.

34 Wakin (2011).

35 See CCH, at para. 16; this requirement will be discussed in greater detail in Part 3.

publishing industry and resisting the reclamation of public domain works back into copyright’s territory. In sheet music as elsewhere, such attempts at reclamation upset the “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator” by restricting access to what ought to be a public resource. Thus, that “the dissemination of artistic works is central to developing a robustly cultured and intellectual public domain” remains a key principle here as in much other contemporary copyright scholarship.

3. A DOCTRINAL COPYRIGHT ANALYSIS

As Part 2 has illustrated, the modern editing of public domain works raises numerous questions about the nature and application of copyright to old musical scores. To answer such queries, I propose a two-prong analysis of copyright doctrine in the context of musical scores. First, several editions of a work by Frédéric Chopin are compared and their features interpreted in light of two central tenets of copyright: originality and the nature of the work, emphasizing the former. By considering different scenarios of how expression can emerge on or in a score in the context of these two main tenets, I show how Canadian copyright law sets a fairly high standard of originality before editorial work may benefit from copyright. Some scores indeed deserve copyright protection; many, however, do not. Second, the particulars of Sawkins v. Hyperion Records Ltd. are analyzed. This case, although not exactly answering my questions, nonetheless provides several clues in its adjudication of the copyright status of a modern edition of the music of French baroque composer Michel-Richard de Lalande (1657–1726).

Frédéric François Chopin (1810–1849) composed his Prelude in D-flat Major, op. 28 no. 15, around 1836 as part of a set of 24 preludes for solo piano (collectively known as the Preludes, op. 28, published in 1839). This piece, sometimes known simply as the “Raindrop Prelude”, constitutes an ideal exemplar with which

40 Supra note 12 [“Sawkins”].
to test copyright doctrine in musical scores, for several reasons. First, Chopin having died in 1849, the Prelude is clearly in the public domain. Second, the work is well-known and frequently performed by pianists of all skill levels, increasing the likelihood of reader familiarity. Third, as a consequence of this popularity, several publishers have prepared editions of the work, since popular works attract more sales than unpopular ones. In preparing the analysis below, I consulted no fewer than 15 separate editions of the piece, published between 1873 and 1997.42 The music of Chopin is also a particularly good case study because in his day the composer is known to have sold slightly varied editions of his works to various publishers across Europe.43 There is, therefore, some academic debate among musicologists and music editors as to whether to grant more “authority” to an early French edition compared to, say, a German one from the same era.44 These debates necessarily inform the work of modern editors, who must decide which early publications best represent Chopin’s truest intentions. Consequently, some latitude exists in terms of what expression to communicate in the score and scores thus necessitate editorial choices. Therefore, while all editions present the same work, its form and content vary slightly. But do they vary enough to attract copyright?45

(a) On Originality

The Copyright Act provides that copyright subsist “in every original literary, dramatic, musical and artistic work.”46 Thus, only original works are eligible for protection under copyright. However, the Act does not define what constitutes an original work but the Supreme Court of Canada has spoken on this issue. In CCH

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42 A complete bibliography is available at: <http://www.ualberta.ca/~glaroche/IPJ1_Biblio.pdf>. Obviously, not all of these editions are in copyright. I seek only models in these scores from which to ask interesting questions about copyright and music, and not to determine the copyright status of each score individually.


44 To be clear, scores differ only slightly, and certainly not on the scale that one should question whether one particular version of the work represents a revision. It is mostly small details (slurs, dynamic markings, articulation marks, etc.) that change, not the melodies and harmonies.

45 It is worth noting here that some elements from the score as a whole will usually attract copyright protection, irrespective of the musical work’s underlying status. These include the title page and editor’s foreword or methodological description. Since these elements so clearly fall under the ambit of copyright, they do not retain any further interest here; going forward, the terms “score” or “edition” apply only to those elements of a complete edition which are unquestionably substantially republished, i.e., the music itself.

46 Copyright Act, s. 5(1).
Canadian Ltd. v. Law Society of Upper Canada.\textsuperscript{47} Chief Justice McLachlin held that:

[A]n “original” work under the \textit{Copyright Act} is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author’s exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.\textsuperscript{48}

An “original” work, therefore, originates from an author, is not copied from elsewhere, and must be the product of non-trivial skill and judgment. If new editions of the “Raindrop Prelude” are to qualify for copyright protection, they must pass all steps of this basic test.

In order for one better to understand how markings and, more generally, scores differ from one edition to another, some visual examples will provide context for the analysis that follows. The first page of Chopin’s own handwritten score of the Prelude is included as Appendix 1 for reference.\textsuperscript{49} To begin, compare the following two editions, first a German and then an Austrian one, of the opening few measures of the “Raindrop Prelude”:

\textit{Figure 1}. Measures 1–4 of a German edition of the “Raindrop Prelude”, edited by Hermann Keller.\textsuperscript{50}

\begin{figure}
\centering
\includegraphics[width=0.5\textwidth]{Figure_1.png}
\caption{Figure 1. Measures 1–4 of a German edition of the “Raindrop Prelude”, edited by Hermann Keller.}
\end{figure}


\textsuperscript{48} \textit{Ibid.}, at para. 25.

\textsuperscript{49} This is reproduced from the Paderewski edition of the Chopin Preludes. See Ignacy Paderewski, ed., \textit{Frédéric Chopin, Fryderyc Chopin: œuvres complètes: Préludes} (Warsaw: Fryderyk Chopin Institute, 1956) at an unnumbered page between the foreword and the main body of scores.

\textsuperscript{50} Frédéric Chopin, Prélude op. 28 no. 15, edited by Hermann Keller (Munich: G. Henle Verlag, 1936) at 3.
Figure 2. Measures 1–4 of an Austrian edition of the “Raindrop Prelude”, edited by Raoul Pugno.51

The notes recorded by these two editions are identical, whatever their visual layout may be. The more peculiar details to analyze here are the additions in the Austrian edition of 1) the performance direction “con espressione e semplice” [“with expression and simplicity”] and 2) the dynamic crescendo/decrescendo markings in measures 2 and 3 (or, conversely, their deletion from the German edition; deletion is a thorny problem to which I will return later).52 Incidentally, stem directions in both staves also differ between the two scores, though this will have little if any effect on a performer. What do these choices tell us about the nature of skill and judgment in musical scores? Before this question is answered substantively, it is worth noting that, whatever the conclusion reached, looking for evidence of skill and judgment (or a lack of it) is a highly nuanced exercise in musical scores. The above two scores represent something of the two extremes of the spectrum in terms of layout and editing choices, and yet the differences between them

51 Frédéric Chopin, Preludes, edited by Raoul Pugno (Vienna: Universal Edition, circa 1900) at 23. For the record, this edition is definitely not in copyright given the editor’s death in 1914, but for argument’s sake we will suppose that it is. I also wish to point out two mistakes in the score, which I will recall later: the A-flat ties in the bass part in measure 1, and the absence of a B-flat in the bass at measure 2, beat 3.

52 I wish to clarify some musical terminology for the benefit of lay readers. A crescendo, represented as an elongated hairpin opening right (<), indicates an instruction to gradually play at a louder volume; a decrescendo (sometimes also called diminuendo) requires the opposite in gradually playing softer, and is represented by an elongated hairpin opening left (>). Collectively, changes of volume are known as changes of dynamics.

A measure is a unit of musical time, represented by the space between two vertical lines that completely cross all lines (or, more technically, staves) of a score; a bar is an oft-used synonym for the same concept.

A stem is the vertical line that extends from notes; it may extend upwards or downwards, according to a complex set of rules. For our purposes, stem direction is largely irrelevant in these scores, even though it varies widely. Granting copyrights based on stem direction would be like granting copyrights based solely on the capitalization of certain letters in a novel: there are prescribed rules for capitalization, but failing to observe them should not substantially alter the text in any meaningful way, only perhaps its legibility.
nonetheless appear relatively minor superficially. Yet, this is precisely the kind of detailed editorial work that publishers claim deserves copyright protection. The locus of originality, if it exists, requires a narrowing of a copyright analyst’s perspectives to an incredibly detailed level if music publishers are to have any chance of successfully claiming that they hold copyrights in these scores.

Let us momentarily reverse the two scores’ real chronology and suppose that the more detailed Austrian version was derived from an earlier public domain edition identical to the plainer German copy above, based only on the editor’s own intuitions and conclusions about the piece, absent any other scores to consult; in other words, that all new markings originate from the editor. Does the inclusion of dynamic markings and a common musical directive in Italian constitute evidence of skill and judgment? One could argue in favour of such evidence by turning to the Supreme Court’s definition of the terms “skill” and “judgment,” while recognizing that the tasteful inclusion of the above markings requires, according to the court, a “developed aptitude” and significant “discernment”53 of 19th century musical practices in order to decide which markings to include as part of a published edition. These are not random markings; after all, notice how the crescendo/decrecendo pattern maps onto the rise and fall of the melody in the top staff. On some level, recognizing musical patterns and adding markings into a score to facilitate a performer’s understanding of these same patterns requires skill and judgment, according to the court’s definition.

On the other hand, one could argue that the insertion of such common stock markings and phrases shows little skill and judgment, and is thus too minimal to attract a copyright interest. After all, the Italian phrase translates to “with expression and simplicity,” which does little to add valuable information onto the score about the music. All things being equal, one would hope that music will normally be performed expressively and without undue complexity. To attract copyright in the work by stating such a requirement explicitly sets the level of “knowledge, developed aptitude or practice ability” and the “capacity for discernment”54 required for a finding of originality at an extremely low standard. The same could be said of the dynamic markings; it takes little skill to write in a marking to represent what every marginally competent pianist would naturally do with the music anyway. Notice how Chopin saw no need to include this marking in his handwritten score.55

Such editing, in some sense, is largely akin to rewarding the correct punctuation of a sentence in a text, or even to inserting a remark after each sentence in a children’s book to the effect that a narrator ought pause briefly in order to mark the end of a sentence. Though some specialized knowledge of a field’s practices would be required, wider cultural practices are generally sufficient for those in the field to know how to perform a musical phrase in Chopin’s solo piano works, or how to mark the end of a sentence in narrating a children’s book. Thus, while the expres-

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53 *CCH*, at para. 16. The court defines “skill” as “the use of one’s knowledge, developed aptitude or practiced ability” and “judgment” as “one’s capacity for discernment or ability to form an opinion or evaluation.”


55 See the score included as Appendix 1, excerpted from the Padarewski edition (see *supra* note 49).
sion communicates something, the value of what is communicated is indeed extremely low.

The issue behind both sides of the above argument raises an interesting question: to what extent should disciplinary norms be considered as evidence of “developed aptitude” and “discernment”\textsuperscript{56} for the purposes of evaluating the skill and judgment in expression? In context, then: to what extent should musicians’ habits influence how copyright applies to their work? The question emerges because the expression under consideration is obvious and commonplace to someone acting from within the discipline\textsuperscript{57} but may appear as incredibly specialized knowledge to an outsider. Should a layman’s or specialist’s view be taken in analyzing claims of skill and judgment? In my opinion, with some nuance, the former is correct. Since an “author must contribute something intellectual to the work [...] if it is to be considered original,”\textsuperscript{58} knowledge from within a discipline ought normally qualify under the criteria of skill and judgment, given that the standard of contributing “something intellectual” is set so low. Adding markings coherently still requires a level of intellectual awareness about the topic at hand, even if it is not so refined as to respect the conventions of the discipline. Hence, it also requires a modicum of skill and judgment; that is not to say that this standard results in better editions of Chopin’s music but it might in the right circumstances. A poignant example is a more recent edition of the “Raindrop Prelude” by Dr. Teresa Escandon, who develops her own notation to communicate her vision of this work. It is rather strange to behold, but nonetheless, Escandon’s expression clearly comes across as her own.

\textit{Figure 3. Measures 4–7 of the “Raindrop Prelude”, edited by Teresa Escandon.}\textsuperscript{59}

![Measure 4–7 of the "Raindrop Prelude"

Neither the squiggly line inserted between the staves on the left nor the squiggly diagonal extension of pedal markings (straight lines with an occasional

\textsuperscript{56} \textit{CCH}, at para. 16.

\textsuperscript{57} In this instance, music, but the underlying principle surely applies to many other disciplines, too.

\textsuperscript{58} \textit{CCH}, at para. 19.

\textsuperscript{59} Frédéric Chopin, Preludes and Ballades of Frederic Chopin, edited by Teresa Escandon (Miami: CPP/ Belwin Inc., 1994), at 34. A portion of the score, reproduced by permission of the publisher, is attached as Appendix 2 to allow for a fuller consideration of Escandon’s method.
indent, below the lower staff) are common musical symbols. Yet, simply from looking at the score, given the uncommon markings, one clearly sees that skill and judgment have played important roles here, first in developing a new notation for musical expression, second in applying that expression throughout the Prelude. If these more complex symbols attract copyright (and, in my opinion, they should), common stock symbols similarly applied in an original way should, too. The fact that someone prefers existing forms of notation instead of developing a new system ought not to limit the applicability of copyright, which looks only for signs of original expression, not ingenuity. As long as an editor has applied her own set of markings, and thus her own expression, to an edition of Chopin’s work, there is reason to believe that such expression ought to be protected by copyright.

Of course, authenticity as an objective in and of itself requires that editors ideologically respect Chopin’s views of his Prelude ahead of their own interpretation. In dealing with the originality of sets of musical or other markings, one is faced with two other distinct editorial possibilities. First, an editor might choose to remove markings from a source edition score, based on recent discoveries about, say, a newfound lack of reliability in a deceased editor’s claims about his connections to the composer. Second, in what is the most common scenario today, new editions may be produced by blending together the features of several other scores, selectively taking markings from the beginning of a piece from one source edition, and others from the ending of another edition. How then do originality, skill, and judgment come into play here?

The first scenario is far from abnormal. Modern publishing houses must occasionally correct the excesses of a long-deceased editor of a previously reliable first edition based on, say, a newly discovered personal manuscript kept by the composer. For example, Pugno’s earlier Austrian edition contains some mistakes; yet, correcting these mistakes involves removing symbols from a page, not adding more. Thus, peeling back previously published layers of expression can be part of a music editor’s job. But this prospect raises a most intriguing feature of copyright law: where does one locate evidence of skill and judgment in a new edition that features, on the whole, less material on the page than that seen in the public domain version of the same work? It is a problem fairly unique to musical scores, since few other kinds of works almost routinely need to have material removed in order to arrive at a more “authentic” edition of a text. This situation is difficult to analogize to anything the Supreme Court of Canada has dealt with in copyright. Although CCH discusses copyright in headings and summaries of court decisions, something new and distinct is created in the process of writing those fragments of text; they are not derived by simply paring down a judicial decision until nothing but a few words or sentences are left. Identifying the locus of an editor’s expression when material is removed from a page is inherently difficult but leads to interesting observations about the nature of copyright. I return to this topic shortly.

Let us meanwhile briefly consider the main arguments for and against copyright. An argument in favour of the originality of a less-marked score has some grounding in the definitions that the Supreme Court offers of the terms “skill” and “judgment.” It is entirely plausible that, in doing his work, an editor might use his

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60 See supra note 51.
knowledge, developed aptitude or practiced ability” in deciding to exclude some marking or component as part of the work he edits; doing so might even reflect favourably on his “capacity for discernment.”61 By the Supreme Court’s own metrics, these activities appear to be of the right kind. The problem, of course, is that while there may be skill and judgment (and thus originality) in this decisional process, it is difficult to identify and isolate the original expression that emerges from this process or the resulting product. Indeed, if one is simply not reproducing symbols on a page, whatever the reason, one is in fact only re-copying a public domain work, albeit a materially impoverished version of it. Though the rationale that justifies it may be different, the process itself resembles the “purely mechanical exercise” that the Supreme Court warns against.62 While there is undoubtedly labour expended in creating such a score, it appears that it is not of the right kind. After all, all the Supreme Court notes that the relationship between labour and copyright “should not be interpreted as concluding that labour in and of itself could ground a finding of originality.”63 Editors that only strip away markings from previous scores should beware.

It is worth pausing to consider more fully the implications of this conclusion for the music publishing industry, and what it says about the nature of copyright. By only crediting expression that appears tangibly on a page, copyright mandates that destructive original expressive acts64 are not granted equal protection as creative expressive acts, despite the fact that both may be generated from equal investments of originality, skill and judgment. The requirement to supply something new as opposed to something better to benefit from copyright thus has two principal consequences in music publishing. First, it encourages the continuous addition of markings, editorial notes, etc. into republished sheet music so as to attract maximal copyright protections. On this reasoning, the score shown earlier produced by Dr. Teresa Escandon is likely among the most impervious of Chopin scores to claims of non-copyrightability, because of all the unconventional squiggly lines that inhabit her edition. However, an editor who, two centuries from now, discovers Dr. Escandon’s edition as the sole surviving record of the “Raindrop Prelude” and decides to republish the work without Escandon’s squiggly lines65 based on his skill and judgment would not receive any copyright protection, despite independently applying much of same kinds of skills and judgment as Escandon in deciding what belongs and what does not, and arguably producing a more “authentic” edition of Chopin’s work in doing so. It is worth pondering the extent to which this is what we seek to encourage with our copyright regime.

The second conclusion to be drawn here is, in some sense, a further abstraction of the first, as a feature of copyright not often acknowledged but on prime display here: for all the considerations of “the public interest in promoting the en-

61 CCH, at para. 16.
62 Ibid., at para. 25.
63 Ibid., at para. 21.
64 By which I mean the removal of expression as an expressive act in and of itself.
65 Assuming of course that, perhaps unsurprisingly, he works under a copyright regime which is substantially similar to that of today.
couragement and dissemination of works of art and intellect"66 (in Canada) or the need “to promote the progress of science and useful arts”67 (in the United States) which are invoked to justify the existence of copyright, there is little connection between copyright and the veracity or authenticity of the expression it protects. Copyright concerns itself mostly with protecting originality as a creative act. This situation creates a perverse incentive for those, like many music publishers and other specialized kinds of literary and artistic publishers, in the business of publishing the most “authentic” copies of works. In order to benefit from copyright protection, “authenticity” in a new edition must be rooted in some tangibly visible creative act, as opposed to a destructive one. Music publishers seeking to guarantee copyrights in their scores therefore have an economic incentive to tilt the scale of “authenticity” ever higher toward adding things to a page, lest the photocopying of the fruits of their labour be permitted moments after a new release is placed on the market. Authenticity derived from the removal of markings is much riskier, because of the absence of evidence on the page that some act of original expression occurred. For those not concerned with authenticity, the road to a secured copyright lies in littering a score with as much unquestionably original material as possible. This analysis perhaps explains in part why some editions, such as this comparatively recent one by Désiré N’Kaoua, add ever greater quantities of text and descriptions into their scores:

* Figure 4. Measures 17–20 of the “Raindrop Prelude”, edited by Désiré N’Kaoua (1992).68

66 Théberge, at para. 30.
The written explanations here act like footnotes as evidence of original work by the editor, and situate that evidence prominently on the musical score itself. In older editions, remarks about the historical basis of the proposed fingering were confined to appendices at the back of the book. But a copyright system that rewards evidence of original acts on a page ahead of any other criterion shifts incentives and leads to more text and expression marked on the score itself. This may indeed in part explain why some editions, such as Schirmer’s editions of J.S. Bach’s (1685–1750) “Inventions and Sinfonias”, include many expressive markings contrary to the generally accepted stylistic musical practices: doing this was visibly original, enough to practically guarantee a copyright in the score.

If one, however, returns to the purposes of copyright, it is difficult to see what kind of public interest is served and which arts are advanced when copyright, no doubt unintentionally, does more to reward the work of those who would indiscriminately scribble doodles onto a public domain work, and then republish it with additional protection accorded to their “valuable” original expression, than the work of those who focus on building a better version of Chopin’s, Bach’s, Ibsen’s or Kant’s works. To return to my original point, then, under its current configuration, copyright is a system that always rewards new ahead of better, and it is therefore at best doubtful if copyright always serves the interests it was intended to promote for both the public and authors.

Let us now return to the second scenario described earlier. What should be made of cases where an editor consults numerous source scores, compares their contents, then comes up with her own unique set of markings based on the various options, while never creating any markings that cannot be traced to one source score or another? Should this kind of work qualify as original expression? On the one hand, none of the expression on the page comes from the editor herself. On the other hand, the kind of skill and judgment required to make such expressive decisions is largely akin to that seen earlier with the editor who inserted her own markings: one must decide on the reasonableness of all markings individually based on one’s knowledge, consider the various options available for editing the score, then finally make decisions about which markings are most useful, given available research, documents and the craft of music performance of the day. Done right, it is not a “purely mechanical exercise” involving only the transcription of musical data from one page to another, a process that the Supreme Court warns against. The synthesis of various markings into a new edition in some sense requires the same kind of skill and judgment as that associated with the selection and/or arrangement

70 Michael Birnhack arrives at a similar idea by a different path (though he structures his dichotomy as “more or better” instead of “new or better”), and follows through with several of its economic and democratic consequences. See, generally, Michael Birnhack, “More or Better? Shaping the Public Domain” in L. Guibault & P.B. Hugenholtz, eds., The Future of the Public Domain (Netherlands, Kluwer Law International, 2006) 59.
71 CCH, at para. 25.
of materials in building an original compilation;72 none of the materials themselves is original, but their original presentation in some new format merits copyright protection.

Categorizing such editions as compilations might indeed be the most solid ground on which to certify that a score developed as described above is copyrightable. After all, the editor marks no original expression of her own in such cases, but rather determines which of others’ expressions are most appropriate for inclusion in her edition. There is, however, a possible statutory obstacle to overcome: the Copyright Act specifically defines a compilation as “a work resulting from the selection or arrangement of […] musical or artistic works or parts thereof.”73 The word “works” in the plural underscores the notion that compilations in copyright usually draw from distinct sources in producing a new whole; it is unclear whether different editions of Chopin’s Prelude in D-flat Major constitute separate works or simply multiple versions of the same single work. A “normal” compilation of scores of the “Raindrop Prelude” would result in a dozen or so distinct editions being republished as a set, perhaps titled “Twelve Editions of Chopin’s ‘Raindrop Prelude’”. But is it still a compilation where small details and/or parts of each of those scores (“parts thereof”) are used to create one version of a work? After all, there are usually striking differences of scale between a work and a compilation in which that same work might feature. Albums titled “Chopin’s Greatest Works” or “The Best Classical Music” may include Chopin’s famous Prelude, but the compilation is severable into its constituent works. This is not so, though, where a compilation of editions of Chopin’s “Raindrop Prelude” is presented as one score of the same Prelude. Applying the statute in this way leads to the somewhat awkward position that a musical work protected by copyright may be its own compilation, possibly recycled ad infinitum by a publisher from time to time in order to renew copyright in the work.

It is difficult to judge if this is an acceptable definition of a compilation according to Parliament’s intent, or an abuse of the provisions of the Copyright Act in a way never intended by Parliament. In my opinion, however, copyright in a compilation is granted on the selection and arrangement of individually severable and identifiable works which can be easily isolated from one another so as to determine what exactly the compilation consists of. Because musical scores that compile various markings from other sources do not present their findings in a way that allows for a clear delineation of what has been compiled from where, it is difficult to ascertain a priori their status as compilations. If one can find no clear evidence in the work of such a status, then one should not allow the definition of compilation to apply, even though the process may involve steps similar to that of building a compilation. On the whole, then, if an editor contributes no new expression and only rearranges the expression offered by others into a new format and presents this as

72 As per the Copyright Act, s. 2, a copyright may be granted for compiling a selection of materials, and arranging them in a non-obvious way; this copyright is held only for the compilation itself, and not the materials compiled. See the next paragraph for statutory details.

73 Ibid.
one score, the availability of copyright for compilations should not be invoked to attract copyright to the new work.

(b) Classification of Scores as Works

One underlying issue not yet fully addressed is a basic yet not at all straightforward question: if a musical score is a “work” according to the Copyright Act, then what kind of work is it? The intuitive view suggests it clearly ought to be a musical work, because the information on the page details a musical event. This is so intuitive a view that, when the question of if a score constitutes a musical work was put before the England Court of Appeal, the analysis provided by the Lords Justices Court was: “why not? [. . .] Why is that not music?”

Lay persons could thus be excused for thinking there could be no alternatives. Yet, publishers have sometimes argued otherwise. Specifically, publishers’ use of the term “engraving” to described the physical layout of a score on a page, as well as the process by which scores were up until quite recently physically made (that is, as impressions of an engraving on paper), suggests an appeal to the category of artistic rather than musical work. After all, section 2 of the Copyright Act lists engravings as an acceptable type of artistic work. The advantage in using this kind of language in the industry is that, should a defence of the copyrightability of a score fail on musically expressive grounds, the design of the engraving may act as a fail-safe by presenting the score as a visual work of art. Of course, if this is possible, then there is no reason that a score could not also be seen as a compilation of a musical work (the sound) and an artistic work (the design of the engraving), under the provisions of section 2.1(1) of the Copyright Act; the question then would be to see if the “category making up the most substantial part of the compilation” would be musical or artistic.

What should be made of such an argument? In one sense, this is a question of whether to privilege the form or function of dots of ink of a white page as copyright-protected work. Strictly speaking, by form, I mean that the dots of ink on a musical score become lines, shapes, and all the other basic ingredients of the visual arts, as there is some appeal in their visual presentation and layout. But to look at a musical score this way ignores the reason ink is pressed onto a page in the first

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74 Hyperion Records Ltd. v. Sawkins, [2005] EWCA Civ. 565, aff’g Sawkins, supra note 12, at para. 37: “The next question is whether the performing editions are ‘musical’ works within the meaning of the 1988 Act. A first reaction (and a reasonable one, in my view) is to ask: why not? If the creative work contributed by Dr. Sawkins, as evidenced by his scores of the performing editions, enables musicians to participate in the organised production of combinations of sound, why is that not music?”

75 Although a record company rather than a music publisher, for example, Hyperion made such arguments in Sawkins at first instance and on appeal, arguing that scores do not qualify as musical works.

76 See, generally, Boorman, Selfridge-Field & Krummel [nd], and specifically Paul Hume, “Engravers Still Make Music as J.S. Bach Did” (1962) 48 Music Editors Journal 82, for the history and practice of score engraving.

77 Copyright Act, s. 2, def. “artistic work”.

78 Ibid., s. 2.1(1).
place. People do not purchase scores mainly for the beauty of their visual designs, but rather for the information about the sounds that the ink conveys, i.e., its function as a symbol of music. Whatever technical merits the argument of seeing scores as engravings may hold based on industrial processes, these ought to be rejected on the basis that, at its core, copyright exists to protect expression. What is it that dots of ink on a page arranged into a musical score express? Music, of course. Dots express music and, as such, the work ought to be understood as belonging to the category of musical work for copyright purposes. To pretend otherwise is to bend copyright doctrine in ways contrary to its fundamental goals. Consequently, even though publishers may claim originality and thus copyright in the design of a score independently of a score’s contents, such rationales ought to be rejected doctrinally because they fail to isolate the expressive dimension of what is being protected under copyright. Thus, simply re-engraving a public domain work, perhaps changing the font or size of the notation, should be viewed along the lines of a “purely mechanical reproduction” and discredited from attracting copyright on that basis.

To close my doctrinal analysis of copyright claims in republished public domain musical works, it seems that the Canadian legal standard of copyrightability represents a fairly steep hill for publishers to climb. Given the requirement of a not inconsequential amount of originality in their contributions, editors who tweak only a few details here and there—as seen in the great majority of the scores consulted—would likely fail the test of copyrightability in a musical work, unless markings could be shown to have been independently derived by an editor. Nor is their appeal to the visual arts as a special category of artistic works for copyright purposes likely to receive much sympathy. Only editions that clearly show some evident personal contribution, such as that of Dr. Teresa Escandon, approach the standards set out by the Copyright Act and Supreme Court of Canada in the case of Sawkins v. Hyperion Records Ltd.

Some mention should be made of the conclusions reached in the judgment of Patten J. in Sawkins v. Hyperion Records Ltd. [“Sawkins”]. The central issue to be determined was “whether the production of a new performing edition of an existing score is capable of vesting in the editor copyright in the musical work.” While the case remains merely persuasive in Canadian law because of its British origins, Patten J.’s judgment, upheld by the Court of Appeal, nonetheless remains noteworthy in supporting this inquiry’s conclusions.

In that case, Dr. Lionel Sawkins, a world expert on the music of Michel-Richard de Lalande (1657–1726), prepared new editions of four works by Lalande for a

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79 Some exceptions might be made for select works by composers such as Erik Satie (Three Pieces in the Shape of a Pear) and George Crumb (“The Magic Circle of Infinity” from Makrokosmos), in which the visual aesthetic of the score plays an important expressive role in the music itself. Suffice it to say that these are especially tricky cases for a doctrinal copyright analysis seeking to classify the nature of a work.

80 CCH, at para. 16.

81 Sawkins, at para. 12. The case was appealed by Hyperion in Hyperion Records Ltd. v. Sawkins, supra note 74, where the Court of Appeal affirmed the decision and reasoning of Justice Patten. As such, I use the more detailed trial level decision here in deciphering British copyright law’s requirements.
choir in London, starting in 1999. 82 The choir later recorded these works for a CD release by Hyperion Records Ltd. Dr. Sawkins insisted that his work on the editions ought to grant him more than an editor's fee and claimed that he held an authorial copyright interest in the editions used to produce Hyperion's recordings, thus deserving royalties at Hyperion's authorial rates. For its part, Hyperion insisted that the works of Lalande were in the public domain and that Sawkins was not an author under the Copyright, Designs and Patents Act, 1988 (U.K). 83 Thus, while the case deals with royalty payments, the court had to address the rights of editors as authors. The decision is marked by a careful parsing of the various kinds of editorial activities that Dr. Sawkins undertook in preparing new editions of Lalande’s work. Patten J. considered whether expression includes “items such as the figuring of the bass, ornementation and performance directions or is really limited for copyright purposes to the notes on the score” such that only a “significant rearrangement of, or significant addition to, the melody will create a new copyright in the edition.” 84 The judge began his analysis by approvingly quoting from the late Laddie J., a leading intellectual property judge. Patten J. thus noted that, in dealing with a musical work in copyright law, “what it sounds like matters more than the notes” on the score. 85 Therefore, following Laddie J.’s logic, the relevance of the ornementations and performance directions must be evaluated only insofar as they substantially changed the sound of a musical performance. While certainly an acceptable standard, this approach suggests that copyright in musical works subsists only in the sound itself. This is debatable, given that one can infringe a musical copyright by photocopying a score or by merely downloading a popular song as an MP3, without any requirement that sound be produced as part of the infringement. There is also nothing in section 3(1) of the Copyright, Designs and Patents Act, 1988 that strictly alludes to sound in musical works. 86

Whatever his initial predisposition, though, Patten J. drew the line between copyrightable editorial work and non-copyrightable work on two bases: first, the amount of re-composition in a given piece; second (and somewhat surprisingly), on the amount of bass figuration included. Of the four works contested in the suit, only

82 The fact pattern is summarized from paragraphs 1–12 of Patten J.’s decision, ibid.
84 Sawkins, at para. 54. To clarify the terms here, bass figuration is a system of musical notation by which specific harmonies (that is, a combination of multiple notes) can be indicated to a musician by notating only the lowest note of the harmony alongside a series of numbers; each series of numbers symbolizes a different harmony over this bass note. As such, players can quickly identify a harmony based only on the lowest pitch and the accompanying set of numbers. Thus, an indication of “G 5-3” would lead to a different harmony than the annotation “G 7,” itself different from “G 4-2.” With practice, a musician can learn to harmonize without the figurations (numbers) added in, based on established patterns. Harmonic notation for some instrumental parts in this way was common in Lalande’s day. Ornementation is the decoration of prolonged notes by the use of trills, vibratos and other pitches close to the sustained tone.
86 Copyright, Designs and Patents Act, 1988 (U.K.), c. 48, s. 3(1): “musical work” means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.”
one required re-composition by Dr. Sawkins of some inner orchestral parts which were lost in the original source editions, and “these recreated passages are sufficient in themselves to create a separate copyright in favour of Dr. Sawkins.” This is not a particularly surprising conclusion. Musical composition itself has long been recognized as an original creative act, even in the imitation of someone else’s style; it is why the concept of a musical work exists in the first place. Still, this suggests that, the moment an editor composes or re-composes portions of a work, a new copyright should apply.

More interesting is Patten J.’s analysis of the originality of figured bass notations. His analysis here confirms the basic principles of my earlier discussion on the nature of copyright in edits which reflect knowledge that is commonplace to those in the musical world, while appearing specialized to those outside it. Hyperion argued that figuring a bass was not a protectable expression on a score, on the basis that players in a rehearsal would have no need of such notations, because they could themselves create the same harmonies, and do so without the figurations; essentially, “performers could have, by their own efforts, achieved the same result.” Patten J. dismissed this analysis, saying that Sawkins’ efforts in figuring the bass created a certain kind of sound — harmony, in that instance — which is essential to the “proper realisation” of the baroque music of Lalande. Patten J. rejected the argument “that changes or additions to the figured bass are not capable of adding qualitatively to the musical work,” and on this basis awarded Dr. Sawkins a copyright interest in two additional works. The message seems to be that, if editorial work has the potential to change the sound substantially, whether or not performers would come to the same interpretative conclusion as the editor, such markings may be sufficient to attract copyright. At the same time, it is worth noting that bass figurations affect the harmonies (that is, the notes of a musical work), as opposed to the volume, expressive style, or other non-pitch based musical elements. In this regard, Sawkins’ editing differs substantially from that seen earlier in scores of Chopin’s music.

On that point, Patten J.’s remarks on the last remaining score that Dr. Sawkins submitted for consideration are most illuminating. Patten J. rejected Sawkins’ claim of copyright in that score on the basis that Sawkins’ corrections and edits were all to elements which did not substantially affect the sound of the piece, and were too few in number. In Lalande’s “Sacris Solemnis”, Sawkins corrected only a few pitches, added one correction to the figuring, and inserted a few additional perform-

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87 By “re-composition,” I mean that portions of Lalande’s work needed to be completed by Dr. Sawkins, who composed music in the style of Lalande to fill in gaps.
88 Sawkins, at para. 64.
89 This is useful in cases such as modern completions of Mozart’s Requiem, K.626. Mozart left the work unfinished at his death; through the ages, various musicologists have offered different completions of the work. Patten J. indirectly confirms that their work ought to receive a copyright interest.
90 Sawkins, at para. 65.
91 Ibid., at para. 65.
92 Ibid., at para. 67.
93 Ibid., at para. 66.
ance directions; given this, Patten J. ruled that there was no “taking of a substantial part” of Dr. Sawkins’ work when Hyperion produced a recording of this piece.94 Patten J.’s decision implies that an editorial copyright may arise only where the number of corrections is sufficiently great to constitute a new kind of expression. Admittedly, this is a difficult standard to meet for editors of Chopin’s works, who are (and should be) mostly content to reproduce all the notes exactly as in previous editions, only tweaking various performance directions. Thus, it seems that Patten J. applied an even more rigorous standard than I would in deciding upon the validity of non-pitch based corrections in deserving copyright. Patten J.’s line is fairly clear: if editorial work changes pitches, either melodically or as part of the harmony, the result is copyrightable. Otherwise, the standard of editing is fixed sufficiently high for minor editorial corrections and suggestions not to qualify for copyright protection.

4. CONCLUSIONS

What is one to make of the copyright status of editions of Chopin’s “Raindrop Prelude” and other classical works in Canada? On the whole, while, in some cases, it may be plausible to argue that an editor’s contributions of original expression are substantial enough to clear all statutory hurdles and attract a legitimate copyright interest, Canadian law and jurisprudence currently stack the deck against this possibility. Some truly novel editions, best represented by Dr. Teresa Escandon’s exemplar, qualify for copyright, but those editions that make only marginal contributions are probably — save the title page, editorial remarks and other substantially original materials — not entitled to the benefits of copyright in the main body of scores, contrary to publishers’ claims. This position is more generous than that offered by the leading case dealing with copyright in modern editions of public domain works. On Patten J.’s standard from Sawkins, perhaps not even Dr. Escandon’s edition would secure a copyright, given how few pitch changes she makes.

I am of two minds about this conclusion. On the one hand, showing a detailed legal rationale as a push-back against publishing houses that, without challenge, abuse or manipulate the provisions of copyright for financial gain may signal forthcoming victories for users’ rights and the public domain. Gaining greater accessibility to music’s cultural legacy is unquestionably good.95 The above analysis also helps define the application of copyright to musical scores, while also revealing some of the limits and unintended consequences of copyright as they apply to the medium. This was seen in the earlier discussion of how publishers of “authentic” editions of Chopin or others are less likely to attract copyright due to the nature of the publishers’ work. This is the downside of the analysis: it reveals how the core

94 Ibid.
values of copyright, namely that of originality in expression, are fundamentally misaligned with those of industries predicated on publishing “authentic” editions. One questions if copyright is as ideal a mechanism for promoting these kinds of works as is generally assumed.

There are consequences for everyday musicians in all of this. For example, some music publishers have invited distinguished musicians to edit collections of repertoire in their area of specialization, in order to record their ideas and strategies for other musicians’ benefit. Hence, Ignacy Paderewski, the great pianist renowned for his performances of Chopin, produced an edition of this composer’s complete works.96 But if copyrightable expression in music publishing is limited only to pitch-based dimensions, as Patten J. believes, publishers may produce less of these editions, because performers like Paderewski to offer performance suggestions of how to play Chopin’s works rather than rewrite the score. There is value in preserving great musicians’ ideas on sheet music; but the required standard of revision or expression necessary to secure a copyright may render it financially impractical for music publishers to dedicate resources to this kind of project. After all, without copyright, anyone could photocopy such a new score the moment it hit store shelves, jeopardizing the publisher’s profitability.

My application of copyright doctrine to these works would, however, allow for the cheaper printing and distribution of music across society, as more of what is currently produced would belong in the public domain. A vibrant public domain requires its works to be accessible to the public not just in theory, but also in practice.97 and more sheet music would be more widely available (albeit without its cover or editorial remarks). Although it is difficult to predict exactly what publishers might do in this kind of business climate, it is almost certain that many would need to revise their core business practices. Nonetheless, musicians would clearly benefit from a wider societal recognition of public domain sheet music and its more widespread availability. There are nevertheless solutions elsewhere that aim to balance such competing interests. For example, countries like Germany98 and the United Kingdom99 grant new editions of public domain works 25 years of copyright protection from the date of publication. Such terms encourage publishers periodically to update their catalogues, while not ignoring the need for classical works in the public domain to be readily accessible to the public. Such an approach better incentivizes valuable republished editions while maintaining and recognizing ac-

98 Guo, “Public Domain” (2011): “As per Article 70 of the German Urheberrechtsgesetz (copyright law), scientific editions, which is to say editions which are produced as a result of scientific analysis (i.e. scholarly or critical editions and urtext), have a copyright length of only publication + 25 years.”
99 The *Copyright, Designs and Patents Act 1988* (U.K.), c. 48, s. 15, grants copyright in a “typographical arrangement of published editions” for 25 years.
cess to the public domain as a goal in itself. However, Canada has no comparable provision within its Copyright Act.

To finally answer the questions that began this inquiry: on what basis is copyright to be granted in modern editions of public domain musical works? It seems that substantial, visible originality on the page is the only certain way to achieve this, whether by the introduction of new pitches, symbols or textual remarks into the score so as to provide a written tangible expression of some explanation of a musical detail. Second, what does copyright tell us about originality in musical scores, and what original things do musical scores tell us about copyright? Scores reveal the importance of carefully considering the nature of written expression, what symbols (musical or otherwise) represent to both learned and lay audiences, and how symbols come to project sufficient meaning to qualify as forms of original expression. This mechanism, while generally understood, could still be better defined in Canadian copyright law. After all, most of the conclusions reached in this inquiry rely on more or less abstract extensions of existing jurisprudence; few are confirmed by actual decisions.

Only one thing is certain: musical scores present under-explored yet intriguing questions in copyright law. They deserve more attention in both legal and musical academic circles.
Appendix 1

Chopin’s personal handwritten score of the “Raindrop Prelude”, as reproduced in Frédéric Chopin, Fryderyc Chopin: œuvres complètes: Préludes, edited by Ignacy Paderewski (Warsaw: Fryderyk Chopin Institute, 1956) at an unnumbered page between the foreword and the main body of scores.
Appendix 2

An excerpt of the “Raindrop Prelude” as edited by Dr. Teresa Escandon. Reproduced by permission of the publisher from *Frédéric Chopin, Preludes and Ballades of Frederic Chopin*, edited by Teresa Escandon (Miami: CPP/ Belwin Inc., 1994) at 34-35.

No. XV

Sostenuto

a) Play the grace note on the beat.