

# This is the piece that everyone here has come to experience<sup>1</sup> : the challenges to copyright of John Cage's 4'33''

David M. Seymour  
Lancaster University

*Framed within the broader context of law's engagement with modernism, this paper offers an argument in defence of copyright protection of John Cage's 4'33'' as a 'musical work' under the Copyright, Designs and Patents Act 1988. This argument approaches the issues involved analytically and contextually. In doing so, it draws on both legal and non-legal sources. Throughout the paper, the underlying question remains as to whether Cage's 4'33'' really is – or is not – a challenge to law (and to music).*

David M. Seymour, City Law School, City University London, Northampton Square, London EC1V 0HB, UK. Email: David.Seymour.1@city.ac.uk

## INTRODUCTION

Several years ago, I was visiting a friend when, having scraped a chair across the floor, she smiled and said, 'Ah, Cage's fourth.' In reply to my question as to the meaning of that comment, she introduced me to the music and world of John Cage – an interest that, as this paper testifies, continues to this day. Sixty years on, John Cage's 4'33'' – his so-called 'Silent Piece' – continues to fascinate, intrigue, annoy, irritate and divide.

This paper is part of a broader consideration of law's engagement with modernism. Despite the popular belief that law is antagonistic to modernist and/or avant-garde artworks, the actual history of such engagement is far more nuanced. Throughout the twentieth century, the law far from being an opponent of iconoclastic works, has been, if not a staunch defender of modernism, then at least not as openly hostile as may be thought. This 'openness' to the avant-garde (sometimes through an overt, and sometimes through an apparent disregard of consideration of aesthetic values and judgments) can be seen in a string of cases both in the UK and USA. These cases include, for example, judgments defending the artistic integrity of Brancusi's *Bird in Space*, James Joyce's *Ulysses*; DH Lawrence's *Lady Chatterley's Lover* and obiter recognising the art inherent in Carl Andre's *Equivalent VIII* (often disparagingly referred to as 'a pile of bricks').<sup>2</sup> It is in the spirit of these progressive outcomes that the following argument in defence of copyright protection of John Cage's 4'33'' as a musical work is made. More specifically, this paper is a contribution to the debate about whether what is, despite all the disagreements, recognised as one of the twentieth-century's most iconic pieces of music, can or cannot be protected by the current rules of copyright.

1. Tom Sergeant, in his introduction to the BBC's broadcast of the BBC Symphony Orchestra, at the Royal Festival Hall, London on 16 January 2004.
2. Per Jacob LJ, *Lucasfilm Ltd v Ainsworth* [2010] Ch 503 para 54.

In the argument that follows, I will approach this question analytically and contextually. I will first discuss 4'33" in light of UK copyright law. In so doing, I will draw upon some of the criticisms made of the existing law to argue for the protection of copyright to extend to this work. Then I will address more contextual arguments about the nature of what is amenable to such protection and how Cage's work fits clearly within it. Throughout the paper, the underlying question remains as to whether Cage's work really is – or is not – a challenge to law (and to music)?

### 1. 4'33"

After at least a four-year gestation period,<sup>3</sup> and as part of a programme dedicated to avant-garde compositions and organised on behalf of the Benefit Artists Welfare Fund,<sup>4</sup> John Cage's 4'33" premiered on 29 August 1952. It was performed by David Tudor, who was a longtime friend of Cage and was recognised as one of the most accomplished modernist musicians. Confusion was present from its birth. Reading the original programme implies that its title is '4 pieces' and lists the four as '4'33", 30", 2'23" and 1'40". However, it was not '4 pieces', but one piece entitled 4:33 with three movements entitled 30", 2'23" and 1'40", adding up to 4'33". The beginning of each movement was marked by Tudor closing the lid of the piano keyboard, and their end by its opening (although contemporary performances commence and end in the opposite manner). The audience's reception was, to say the least, mixed, ranging from bemusement to anger. As Cage said later of the evening,

'People began whispering to one another, and some people began to walk out. They didn't laugh – they were just irritated when they realised nothing was going to happen, and they haven't forgotten it 30 years later: they're still angry.'<sup>5</sup>

As it did over the first performance, so, too does confusion reign over the score, or, rather, scores that are (and are not) in existence. There are, according to Solomon, 'at least six different versions (two different manuscripts and four different editions), although only two of these are different in performance'.<sup>6</sup> Of these six scores, none is the original.<sup>7</sup> Those that are extant comprise both Tudor's reconstructions of the original as well as Cage's own re-scoring. Some are written on 'traditional' music paper, some adopt 'graphical notation', while others represent the three distinct movements by roman numerals alongside which is handwritten or typed the word 'Tacet'. Some contain performing instructions and some do not. As Cheng Saw notes, the most popular score, in the sense of performance, would appear to be the 'Tacet'

3. Indeed, Gann suggests that it may well have been in Cage's mind since his youth as indicated by his comments about a 'great pause'. K Gann *No Such Thing as Silence* (New Haven, CT: Yale University Press, 2010) pp 161–162 and 39–40. See also C Shultis ' "Silencing the sounded self": John Cage and the intentionality of nonintention' (1995) 79 *Musical Quarterly* 312.

4. The programme included other works by Cage as well as those of Christian Wolff, Morton Feldman, Earle Brown, Pierre Boulez and Henry Cowell. (Since Cowell's work was listed to follow 4'33" there is some doubt whether, in the wake of the audience's reception of the latter piece, if it was actually performed that night.) Gann, above n 3, pp 4–8.

5. Quoted in LJ Solomon 'The sounds of silence: John Cage and 4'33"' (1998/2002), available at <http://solomonsmusic.net/4min33se.htm>

6. Ibid.

7. The original score was lost some point after Tudor's first performance. Ibid.

editions, even though one of the two editions of this particular score (published by Peters and carrying the same catalogue number as the other) is out of print.<sup>8</sup> The relevance of these confusions, as well as the differences between the scores, will be discussed below.

## 2. 4'33" AND THE RULES OF COPYRIGHT

Saw offers three arguments to deny 4'33" copyright protection. These arguments are as follows:

1. It is not a work of individual expression and, hence, not an original work.
2. What is fixed by writing or publication is not protectable expression.
3. The subject matter over which copyright protection is sought is too uncertain.<sup>9</sup>

Each of these points will be discussed and questioned in turn.

### (a) Originality

In general terms following *Sawkins v Hyperion Records*,<sup>10</sup> for UK copyright law, 'originality' is defined as a work originating from the author's 'intellectual exertions of the human mind' (per Mummery LJ). For a work to meet this criterion, the author must show that he or she has exercised 'skill, labour and time' (per Mummery LJ) or 'skill labour and judgment' (per Jacobs LJ) in its production. As Saw notes, these criteria provide a low, some would say, very low, threshold for copyright protection. Perhaps the clearest example of these points is the case of *Kenrick v Lawrence*<sup>11</sup> in which a simple drawing of a hand, a pencil and a ballot box was given the status of copyright protection.

In claiming that 4'33" fails even at these levels, Saw advances two arguments. First, he says that there is no exercise of skill, labour and time and/or judgment in composing silence; and, secondly, and even more fundamentally, that in this particular instance, there is no author at all. Regarding the first point, the absence of any 'skill, labour and time/judgment', Saw argues that:

'It is . . . also arguable that Cage had expended effort, skill, labour and judgement in composing 4'33". Paying much attention to detail, Cage explained that he had employed a complicated technique involving "chance" to mark out the formal structure of the work. *However, on closer analysis, the converse is the more likely.*'<sup>12</sup>

His questioning of Cage's account of the composition of 4'33" turns on his belief that, regardless of the 'amount of effort and time' (and, here, it is noteworthy that Saw omits the criterion of *judgment*):

8. CL Saw 'Protecting the sound of silence in 4'33": a timely revisit of basic principles in copyright law' (2005) 12 EIPR 467. For a detailed account of the history and nature of the scores, see Gann (above n 3) and Solomon (above n 5).

9. Saw, above n 8.

10. *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281.

11. *Kenrick & Co v Lawrence & Co* [1890] 9 QBD 25.

12. Saw, above n 8, at 473 (emphasis added).

'The work is simply a *stark reminder* of a natural phenomenon that already exists freely in nature. It may, in fact, be argued that even though Cage had not, in writing 4'33", copied from any earlier work, the "contents" of 4'33" (at least sub-consciously) – wholly and without further embellishment on his part – from a common stock of pre-existing material.'<sup>13</sup>

Several points concerning the composition and content of 4'33" are relevant here. First, the composition of 4'33" itself did in fact meet the requirements of both 'skill labour and time', and also, of *judgment*. According to the accepted narrative of its composition, 4'33" was the endpoint of at least a four-year period of gestation, if not longer.<sup>14</sup> Moreover, when he finally committed himself to writing the piece, it was, by Cage's own account, one of the most complicated works he had written.<sup>15</sup> His account of the composition of the piece, as well as its finished form, belies the idea that it was a simple, unmediated, capturing of nothing more than a natural phenomenon.

However, even bearing these points in mind, Saw's reliance on a definition of originality that emphasises the trinity of 'skill, labour and time/judgment' looks to be neutralised by a recent string of cases heard before the European Court of Justice. In these cases, the meaning of 'originality' for the purposes of copyright has now been rationalised to that of evidence of the 'author's intellectual creative intention'. The meaning of this term is articulated most clearly in *Painer*,<sup>16</sup> where it was held that,

'an intellectual creation is an author's own if it reflects the author's personality. That is . . . if the author was able to express his creative abilities in the production of the work by making free and creative choices. . . . By making those various choices, the author of a portrait photograph can stamp the work created with his "personal touch".'<sup>17</sup>

Regardless of whether the UK or European test of originality is used, is the question of the distance that exists between the piece (ie its silence) and the apparent silence of nature.<sup>18</sup> Leaving aside for the moment Cage's point that there is no such thing as silence in nature, the distance between the piece acting as a 'stark reminder' of nature and the state of nature itself, is itself mediated by the composer himself. Yet, even if it were such a seemingly unmediated 'reminder' of pre-existing nature, that would not be fatal for the purposes of copyright law. Consider the Court's discussion of the nature of 'portrait photography' in *Painer*. There the question was raised as to

13. Ibid.

14. See Gann, above n 3.

15. Ibid, p 16.

16. *Painer v Standard Verlags GmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG* [2012] ECDR 6.

17. See *ibid*, paras 88, 89 and 92. That the notions the 'author's intellectual creative intention' and 'personal touch' can be applied to the subject matter of music is hardly in doubt considering that they emerged first in the somewhat more complex cases of databases and applied in *Painer* to that of photographs. In the later case of *Football Dataco*, the same court eschewed the presence of 'labour and skill' (and one can imply also 'time' and/or 'judgment' as 'justify[ing] the protection of copyright . . . if the labour and skill did not express any originality in the selection or arrangement of that data'). *Football Dataco Ltd and others v Yahoo! UK Ltd and others* [2012] 2 CMLR 24, para 42.

18. On this point, it is important to recall that one of the points Cage was attempting to communicate in 4'33" was that there was *no such thing as silence*, whether in nature or anywhere else.

whether a photographic portrait contained too minor ‘a degree of formative freedom’ – that is, whether it was nothing more than the production of a ‘realistic image’. The Court held that even a realist portrait is original in expressing the author’s ‘personal touch’ since ‘the photographer can make free and creative choices in several ways and at several points in its production’:

‘In the preparation phase, the photographer can choose the background, the subject’s pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. . . . By making those various choices, the author of a portrait photograph can stamp the work created with his “personal touch”.’<sup>19</sup>

These points and their relevance for the question of ‘originality’ lead almost seamlessly to Saw’s second critique of its claim to copyright: the absence of an author.<sup>20</sup> Saw treats this absence as arising precisely from the adoption of the ‘chance’ method of composition that Cage adopted at around this time. As noted above, the element of originality requires that the work in question should, at the very least, bear a mark of the author’s own personality and taste – some indicia of the author’s personal style or manner of expression.

‘Therein lies the problem with 4’33” and with aleatory and indeterminate works in general. In works such as these, there appears to be a *conscious suppression* of the author’s *personal will* – that the author will distance himself from the composition – to such an extent as to trump his or her own claim to authorship.’<sup>21</sup>

There is little doubt that in choosing aleatory (chance) procedures in composition, Cage did seek to bypass his own conscious will or subjectivity:

‘Observing the effects of the ego on my earlier works, I tried to remove it, by the use of chance techniques, in my latest works. We discipline the ego because it alone stands between us and experience. I wanted to let the environment – or experience – into my music.’<sup>22</sup>

However, at the heart of this belief of an authorial absence (uncritically accepted by Saw) we see contradictions in Saw’s use of the term ‘conscious suppression’. First, and most obviously, Cage, like any author, must first *decide* to suppress their consciousness. Thus, even at this early stage, the presumed ‘suppression’ of will and of subjectivity is itself a conscious (ie an *authorial*) decision. Secondly, the following through of this initial decision does not quiet or evade the subjective will, but rather presupposes it.

19. *Painer*, above n 16, paras 91 and 92.

20. This point takes on an increasing significance in the wake of both the *Infopaq (Infopaq International A/S v Danske Dagblades Forening)* (C-5/08) [2010] FSR 20) and *Meltwater (Newspaper Licensing Agency Ltd v Meltwater Holding BV)* [2012] RPC 1) cases in which the place of the ‘author’s creative intention’ in recognising the nature of an LDMA work moves centre stage.

21. Saw, above n 8, at 473 (emphasis added).

22. Quoted in S Davies ‘John Cage’s 4’33”: Is it Music?’ (1997) 75 *Australasian Journal of Philosophy* 448 at 450.

This point is born out in noting the character of what some have seen as the pivotal inspiration for 4'33". In explaining his intention behind 4'33" – that there is no such thing as silence – Cage recounts the following story:

'It was after I got to Boston that I went into the anechoic chamber at Harvard University. Anybody who knows me knows this story. I am constantly telling it.<sup>23</sup> Anyway, in that silent room, I heard two sounds, one high and one low. Afterward I asked the engineer in charge why, if the room was so silent, I had heard two sounds. He said, "Describe them." I did. He said, "The high one was your nervous system in operation. The low one was your blood in circulation."<sup>24</sup>

In the context of Saw's claim of 'conscious suppression' it is interesting to note Douglas Kahn's comments on this tale:

'[The anechoic chamber] absorbed sounds and isolated two of Cage's usually inaudible bodily sounds, but in the process *there was a third internal sound isolated*, the one saying, "HmMMM, wonder what the low-pitched sound is? What's that high-pitch sound?'"<sup>25</sup>

Kahn's point is that just as the 'I' remains a necessity in cognising the (hitherto inaudible) sounds of the body, so it remains necessary to carry out the act of absencing itself in the name of disavowing the authorial voice. It is this dialectic of presence and absence that is referred to by Nietzsche in his astute observation that in man's 'will to nothing', 'man prefers to will nothingness than not will'.<sup>26</sup> In other words, the desire to efface one's own subjectivity involves not only a *conscious* decision of the will, but is perhaps the most extreme and continuous expenditure of the same will. As I state elsewhere in a different context, '*the denial of subjectivity can only itself be a product of subjectivity*'.<sup>27</sup> As this discussion of 'conscious suppression' indicates, far from being a work *without* an author, 4'33" is, perhaps, the most overt example of Cage's compositional subjectivity and authorial voice.

### (b) Idea and expression

Saw's second point in his argument against 4'33" 's amenability to copyright protection, that the work is devoid of 'protectable expression', turns on the question of the idea/expression dichotomy – that is, the 'rule' that: 'Copyright only protects the form in which the idea or concept has been expressed by the author and not the underlying idea or concept itself.'<sup>28</sup> Having raised this issue, Saw recognises the equivocalities

23. Cage may well be best known for his 'silent piece', but as with many others of the avant-garde, that quietude did not extend to his comments on it, nor music in general. He also frequently lectured and published on virtually all aspects of his work and on music in general. On this point, see P Gay *Modernism: A Lure to Heresy from Baudelaire to Beckett and beyond* (London: William Heinemann, 1997).

24. Cited in D Kahn 'John Cage: silence and silencing' (1997) 81 *Musical Quarterly* 556 at 558.

25. *Ibid.*, at 581.

26. FW Nietzsche *On the Genealogy of Morals* (Cambridge: Cambridge University Press, 2002) p 128.

27. DM Seymour *Law, Antisemitism and the Holocaust* (London: Glasshouse-Routledge) p 99 (emphasis in original).

28. Saw, above n 8, at 470.

with which this (non-statutory) criterion has been treated by the British courts. Sensibly, therefore, he reframes the problematic of the idea/expression dichotomy in the context of ‘the issue of copyright subsistence’.<sup>29</sup> The question then becomes one of whether the work (or ‘form’) itself contains an expressive content over and above the underlying idea – or, to put the matter in other terms, the extent to which the expressive content of the work mediates and particularises in its details (its specificity) the underlying general idea or concept. If, therefore, the content expresses nothing more than the idea itself the claim for copyright fails. If, on the other hand, the expressive content can be seen as something over and above the idea, then the opposite result should follow. In the context of this discussion Saw draws on the US doctrine of *merger*; a doctrine he sees present in UK law in spirit if not in name. This doctrine states that:

‘[W]here there is essentially only one (logical) way to express a particular idea (where, in other words, the expression is dictated solely/largely by its underlying idea), the idea and its expression will merge, *leaving behind no protectable expression in copyright*.’<sup>30</sup>

Placing 4’33” squarely within the rubric of the merger doctrine, Saw argues that since the expressive content of the piece (silence) offers nothing over and above the idea (nature as silence) then the claim to copyright protection is ultimately made for an idea and not the specificity of its expression.

Unfortunately, however, underpinning Saw’s points on this issue are certain assumptions about the nature and content of 4’33” that are far more questionable than they appear at first sight. For example, in the context of the application of the *merger* doctrine to 4’33”:

‘It is probably fair to argue that where there is essentially only one way of expressing a given idea (as in the case of 4’33” – *how else can silence be portrayed but for the performer, in the course of a performance, to remain silent for a period of time?*), then that particular mode of expression cannot be the subject of copyright.’<sup>31</sup>

What Saw overlooks in this assumption is that it is not quite the case that the *only* (musical) representation of silence is (literal) musical silence. It is rather the case that Cage’s ‘silence’ is, in fact, only one of a diverse range of musical representations of silence, none of which express it in the same way as Cage. Charles Ives provides an illustration. Discussing two of the American composer’s pieces from the early twentieth century – *Central Park after Dark* and *The Unanswered Question* (both of which were later linked with the titles *A Contemplation of a Serious Matter* and *A Contemplation of Nothing Serious*, respectively) – William Brooks’ comments:

‘In these works, then, for Ives like Cage, silence is a continuity onto which sounds are placed, a canvas on which musical “stuff” appears. But Ives creates his “silence” by means of *sounds*; this really *is* a “heard” silence. The strings can function as silence – can *be* silent – only because of the implied relations between the “silent” and the “heard”: it is the sounded difference that allows silence to be *felt*. . . . When silence is a *presence*, as for Ives, it is itself a composed, sounded

29. Ibid.

30. Ibid (emphasis added).

31. Ibid, at 471 (emphasis added).

continuity. *Silence is there, but only because it is, in effect, not silent*; rather it is constituted from a music that differs crucially from the music that constitutes the “sounds” (the questions and answers, the snatches of city life). It offers an alternative to “sound”; and because it is itself composed and sounded, its meanings are manifold and varied, like that of any music.<sup>32</sup>

The point here, of course, is that for Ives (as for others), ‘silence’ is capable of representation in ways not only different from, but also diametrically opposed to, Cage’s representation of it. In other words, *4'33"* appears not only *not* to exhaust the (musical) repertoire and representation of silence, but rather contains an expressive content that is ‘over and above’ its underlying idea. Understood in this context, therefore, the seemingly certain application of the *merger* doctrine (and its British equivalents) appears to be cast into doubt.

It is with these points in mind that Saw’s other prohibitory arguments can be opened to criticism. As noted in the previous section, Saw perceives *4'33"* as an unmediated expression of a pre-existing nature. This argument re-appears in the present discussion in two related ways. The first is, that:

‘*4'33"* is the product of his own self-realisation or discovery of the true meaning of silence – a mere discovery of a pre-existing fact/idea. The (fortuitous) discovery of a pre-existing fact/idea, without more, remains just that – an uncopy-rightable idea.’<sup>33</sup>

Secondly, and following the comment of the piece being a ‘stark reminder of the true meaning of silence’, Saw continues:

‘It is ludicrous to suggest that a person like Cage may carve out from the commons an idea as fundamental and prosaic as silence and then be able to assert an intangible property right over it *per se*. Elements which are universal and freely available in the public domain or in nature (e.g. silence or environmental sound, however one looks at the matter) must remain in the community-resource pool for the general benefit of society. [Citing *Exxon* in which copyright was held not to subsist in a single word or few words, he continues:] It cannot be denied that silence (or environmental sound) constitutes the “common property of the world” and should, therefore, remain, in the words of Burger C.J., “free to all men and reserved exclusively for none”. In the author’s view, there is simply no protectable expression in *4'33"*.’<sup>34</sup>

However, this point – that ‘silence’ is an appropriation of a ‘common property’ of nature – is dependent upon the prior notion of *4'33"* as nothing more than an unmediated appropriation of a naturally recurring phenomenon. As I have illustrated above, this assumption is problematic. To say that *4'33"* cannot be granted copyright on these grounds is akin to saying that since naturalist art aims at the exact reproduction of natural phenomenon (ie mountains, landscapes, horses, cows, etc. as well as musical works such as Beethoven’s *Sixth Symphony – the Pastoral*, Debussy’s *Le Mer*, etc.), then, they too should be denied copyright on the grounds that their expressive content offers nothing ‘over and above’ the ‘underlying idea of ‘nature’.

32. W Brooks ‘Pragmatics of silence’ in N Losseff and J Doctor (eds) *Silence, Music, Silent Music* (Aldershot: Ashgate, 2007) pp 102 and 105.

33. Saw, above n 8, at 471.

34. *Ibid.*, at 471–472.

Moreover, Saw's argument has, at least to some extent, been superseded by Mann J's decision in *Lucasfilm v Ainsworth*, in which he implies that what amounts to 'ready-made' or 'found objects' (ie, pre-existing 'elements' – be they natural or artifice) can, in certain circumstances, attract copyright protection.

### (c) Uncertainty of subject matter

The third element of Saw's argument against providing copyright protection to 4'33" turns on the related issues of *fixation* and *certainty* and his belief that the piece lacks both of these relevant criteria. Regarding fixation, or, rather, its presumed absence, Saw returns to the concept of the *idea/expression* dichotomy. He argues that, since 'silence' is nothing more than a 'general, philosophical idea/concept' then its 'reduction to writing (and subsequent publication) of a mere idea (which is what 4'33" is in essence) does not convert the idea into protectable expression'.<sup>35</sup> In the light of Saw's critique of this reading of Cage's piece, this argument is not beyond question. More pertinent, however, is Saw's argument about *certainty*.

Saw argues that 4'33" is uncertain for various reasons. First, he states that the length of the piece, although limited to three movements is, in effect, indeterminate. Secondly, he states that the choice of instruments to be used is equally open. Finally, he observes that since each performance of 4'33" will contain in its hearing a host of sounds external to the piece, then no two performances will be, indeed, can be the same. Saw, therefore, concludes that 4'33" is 'a work of *indefinable composition* and of *indefinite duration* . . . [which] dashes all hope of it attracting copyright protection'.<sup>36</sup> However, as convincing as these points appear at first sight, they too are open to question.

The issue of duration is, to a certain extent, always an open question in musical composition. Indeed, it is rather *uncommon* for two performances of music played from the same score (classical, contemporary or popular) to last an equal amount of time. This is the case even where the composer has left explicit instructions as to tempo and duration, as Cage did in at least one of the four extant editions of the score of 4'33". Thus, to take but one example, the performance of Beethoven's *String Quartet No. 14* when played by the Quarter Italiane, lasts 42'22" while the same piece by the Takacs Quartet lasts 38'52". Similarly, Bob Marley's studio version of *No Woman, No Cry* lasts 4'11" and its 'live' version lasts 7'07". Perhaps the most extreme example is the years it will take to complete the playing of Cage's own organ piece, *AsSLowASPossible*. The point here is that the notion of 'infinite duration' is inherent in more or less all pieces of music, if only by degree.<sup>37</sup>

Secondly, Saw cites in his claim to uncertainty Cage's insistence that the piece can be played on any instrument or combination of instruments. Again, however, this element is not unique to 4'33". As early as the nineteenth century, composers and performers were adept at adapting works from one musical medium to another. More

35. Ibid, at 475.

36. Ibid, at 476 (emphasis in original).

37. The duration of *The Sinking of the Titanic* by Gavin Bryers can be anywhere between 12 minutes and over an hour. John Cage's organ piece, *Organ<sup>2</sup>/ASLSP (As SLOW as Possible)*, originally composed for performance between 20 to 70 minutes, is now the subject of a 639-year performance. See <http://www.john-cage.halberstadt.de/new/index.php?seite=dasprojekt&l=e> and <http://news.bbc.co.uk/1/hi/2728595.stm%20for%20details>.

than one composer has, for example, transcribed orchestral pieces for performance on piano.<sup>38</sup> Likewise, one need only note the success of the chamber orchestra adaptation of Mahler's *Fourth Symphony*. Indeed, the catalyst for the recent interest, by lawyers at least, in 4'33" arose in the context of Mike Batt's *The Planet's* adoption of 'classical pieces' for more contemporary instruments (the electric guitar). Other examples include 'rock versions' of Bach as well as 'classical' adaptations of Beatle songs. On this point, reference to the Ukulele Orchestra of Great Britain may well speak for itself!

Taken together, these comments indicate that *uncertainty* is, to a lesser or greater degree, *inherent* within the very medium of music. However, we must recall that copyright protection extends not to the performance, but to the score. It is in this context that a distinction can be made between 4'33" and those works that have been held to be too uncertain to attract copyright protection. The case of *Komesaroff*<sup>39</sup> is relevant on this point. First, in withholding copyright protection for 'moving sand pictures', in which each new image was created anew through inverting the frame and allowing the sand, air and oil contained within it<sup>40</sup> to fall where it will, the Court held that, since, '[the sand pictures] vary from occasion to occasion, [t]hey are not directly produced by the operation of forces acting in the confines of the product to bring about unpredictable results'. Yet, unlike the 'moving sand pictures', the very content (its silence) of 4'33" is the most constant element in its numerous and diverse settings. 4'33" is, in other words, musically speaking, one of the most 'certain' scores of all; even while like all scores, it is not devoid of interpretation or variation.

It is at this point in the discussion that we come to what is possibly the crux of the matter: the question of under what category of subject matter John Cage's 4'33" can be subsumed.

#### (d) Musical and other works

Many of the commentators who discuss Cage's 4'33" acknowledge its potential for copyright protection but none do so under the heading of 'musical work'. Saw, for instance, concedes that the score may be protectable as a 'literary work'<sup>41</sup> (this is particularly the case as one of the extant editions, the 'Tacet' edition, comprises roman numerals 'i-iii' and the word '*Tacet*' following each number). Others have put the case for its inclusion under the head of 'performing arts'<sup>42</sup> while others have suggested that the 'graphic notation' score could be protected as an 'art work' work<sup>43</sup> (and, indeed, many of Cage's scores have been the subject of at least one art exhibition). However, none claim that 4'33" fits into the category of a 'musical work'.<sup>44</sup> Indeed, Copinger and Skone Jane state, although with some hesitation, that:

'A passage of silence set within musical sounds and intended to be appreciated as part of these sounds is clearly part of the musical work as a whole. *It is*

38. On this point, see eg C Rosen 'The super power of Franz Liszt' NYRB, 23 February 2012.

39. *Komesaroff v Mickle* [1986] Supreme Court (Victoria), 24 November.

40. It is to be noted also, that each 'frame' contained various and varying degrees of a mixture of these components.

41. Saw, above n 8, at 469-470.

42. Davis, above n 22.

43. Gann makes this inference in the similarities between the 'graphic notation' score and Robert Rauschenberg's 'White Paintings'. Gann, above n 3, pp 181-182.

44. Section 3(1) Copyright, Designs and Patents Act 1988.

*doubtful that a passage of silence by itself is capable of being a musical work, even if claimed by the author or critics to be such.*<sup>45</sup>

The central stumbling block to categorising *4'33"* as a musical work is the definition of 'music', absent in the statute, but utilised by the courts, most significantly in the recent case of *Sawkins v Hyperion Records*:

'In the absence of a special statutory definition of music, ordinary usage assists; as indicated in the dictionaries, *the essence of music is the combining of sounds for listening to*. Music is not the same as mere noise. The sound of music is intended to produce effects on the listener's emotions and intellect.'<sup>46</sup>

Likewise, the Australian case of *Schott Musik v Colossal Records* defined musical works as consisting 'of a combination of sounds and noises organized in different ways as to such elements as pitch, volume, quality, duration and rhythm'.<sup>47</sup> This definition of 'music' adopted by the courts, therefore, comprises two elements. First, 'the combination of sounds and noises organized in different ways' and, secondly, its intention to produce effects on the intellect and emotions of the listeners. As the reception of the work and the sheer amount of commentary suggests, there is little doubt that *4'33"* satisfies the second requirement. It is the first that requires the greater consideration.

Turning to the statutory definition of 'musical work' it becomes clear, in the words of Jacob LJ, that

'the definition of music is not a definition at all – its obvious purpose is to separate out lyrics or choreographical directions and the like. They go into a different "box" for copyright purposes, for instance lyrics into "literary works" and choreographical works into "dramatic works".'<sup>48</sup>

Thus, according to the wording of s 3, 'musical work' means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music', which is both a negative definition (ie what music is *not*) and a tautology (a musical work is music); hence, the courts' recourse to 'popular' and 'dictionary' accounts of what music 'is' (ie 'the combination of sounds and noises organized in different ways').

*4'33"* raises two issues in this context. The first is whether it can be considered a 'combination of sounds and noises organized in different ways as to such elements as pitch, volume, quality, duration and rhythm', and the second is the place of sound as the definitive meaning of music itself. Turning to the first point, one of the most consistent criticisms of *4'33"* is that the sounds that Cage wished the audience to hear were that of the environment. Part of the meaning Cage ascribed to the piece was his view that since there was no such thing as silence, the audience should be free to concentrate on the sounds extraneous to the score. Many commentators, therefore, argue, correctly in my view, that the sounds the audience are to concentrate upon are beyond the control of the composer and the performers. Consequently, Cage as

45. *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 16th edn, 2010) para 3–48 (emphasis added).

46. *Sawkins*, above n 10, para 53 (emphasis added).

47. *Schott Musik v Colossal Records* [1997] 38 IPR 1 (FFCA), quoting S Ricketson *The Law of Intellectual Property* (Melbourne: Law Book Co, 1984) para [5.71], cited in J Pila 'Copyright and its categories of original works' (2010) 30 OJLS 229 at 235.

48. *Sawkins*, above n 10, para 74.

composer cannot be said to have 'organised' the sound he treated as fundamental to the hearing of the piece. It is also the case that such sounds are no more than 'mere noise' that, as we have seen, appears unamenable to copyright protection – at least as a 'musical work'.

This criticism relies on the basic assumption that the piece is devoid of the organisation of sound *in itself*. However, this assumption is open to question. Indeed, it is possible to argue that, far from lacking 'the combination of sounds and noises organized in different ways as to such elements as pitch, volume, quality, duration and rhythm', 4'33" entails such combination and organisation at their most extreme. Indeed, it is worth noting in this connection that one of 4'33"'s most careful critics, Douglas Kahn, notes its almost *totalitarian* nature; that the act of 'silencing' (both the performer and the audience) implies the most radical organisation of sound hitherto composed:

'When [Cage] speaks of silence, he also speaks of silencing. . . . Cage's dominion of *all sound* and the corresponding *panaurality* is reminiscent of the totalizing reach of the Romantic utterance, resonating in voice or music throughout eternity and entirety, or of the nineteenth-century synaesthetes who also used their utterances to insinuate themselves through the cosmos.'<sup>49</sup>

Put in other terms, the demand on the musicians to be silent involves the most acute organisation of the (musical) sounds a composer has at his or her command. Indeed, perhaps unlike any other piece of music to date, 4'33" entails the most rigorous organisation of sounds possible. The demands of the piece are such that the organisation of sound is both total and inflexible. After all, restricting the freedom of sound, just as in restricting the freedom of legal subjects cannot, almost by definition, be put into practice without 'organising freedom' for the purpose of 'unfreedom'. To argue in this context that 4'33" does not comprise the organisation of sound(s) is like saying that the (legal) restriction of (personal) freedom depends on nothing more than an *absence* of (legal) organisation. For something to be *made* absent depends upon a whole organisation of *presence*; likewise, for a musical piece to be 'silent' depends upon a strict, if not the strictest 'organisation of sounds' imaginable. However, even if we put aside the dialectic of absence and presence of sounds in the context of its content, we are still left with the more fundamental question of the necessity of sound *per se* in a definition of music.

The Copyright Act 1956 included the repeal of the Musical (Summary Proceedings) Copyright Act 1902. Although dealing with the problems of what would now be termed 'piracy', the 1902 Act is notable for including a definition of a 'musical work' as 'any combination of melody and harmony'. As Copinger and Skone James acknowledge,<sup>50</sup> such a definition is 'too restricted' for contemporary notions of what is and is not a 'musical work'. Indeed, this definition could not but exclude from copyright protection much, if not all, of what has been termed the 'new music' of the twentieth century. What the *New Encyclopedia Britannica* (cited in *Lucasfilm*) says about the 'art of sculpture' is applicable also to the 'art of music':

'Sculpture is not a fixed term that applies to a permanently circumscribed category of objects or sets of activities. It is, rather, the name of an art that grows and changes and is continually extending the range of its activities and evolving

49. Kahn, above n 24 (emphasis in original).

50. Copinger and Skone James, above n 45, para 3-48.

new kinds of objects. The scope of the term is much wider in the second half of the 20th century than it was only two or three decades ago, and in the present fluid state of the visual arts, nobody can predict what its future extensions may be. Certain features, which in previous centuries were considered essential to the art of sculpture, are not present in a great deal of modern sculpture and can no longer form part of its definition.<sup>51</sup>

Although the concept of ‘new music’ brings together a vast array of musical styles and emphasis, it is fair to say that much of it emerged as a direct challenge to the orthodoxy that preceded it,<sup>52</sup> which assumed precisely the necessity of ‘melody and harmony’ for a work to qualify as ‘music’. This challenge manifested itself in dissecting music into its component parts – with pitch, volume, quality, duration and rhythm (the very components recognised in *Schott Musik v Colossal Records*) – and composing according to a single one of these elements. One need here think only of the works of Boulez, Feldman and Stockhausen – works that are now easily recognised as copyrightable under present legislation.

Importantly, it is this dissectionary approach that characterises Cage’s compositions at the time of both *Music of Changes* (1951–1952) and *4’33”*:

‘When I wrote *4’33”* I was in the process of writing the *Music of Changes*. That was done in an elaborate way. There are many tables for pitches, for duration, for amplitudes; for all the work was done with chance operations. In the case of *4’33”*, I actually used the same method of working and I built up the silence of each movement and the three movements add up to *4’33”*. I built up the silence of each movement by means of short silences. “Put together” seems idiotic, but that’s what I did. I did not have to bother with the pitch tables or the amplitude tables. All I had to do was work with durations.’<sup>53</sup>

In response to an audience member on this point who assumed that *4’33”* was a ‘spontaneous creation’, Cage replied:

‘I don’t think that in this kind of work that “spontaneous” is the word. I didn’t know I was writing *4’33”*. I built it up very gradually and it came out to be *4’33”*, I just might have made a mistake in addition.’<sup>54</sup>

And, in a further recollection, Cage explains further that:

‘I wrote it note by note, just like the *Music of Changes*. That’s how I knew how long it was when I added the notes up. It was done like a piece of music, except there were no sounds – but there were durations. It was dealing these [tarot cards] – shuffling them, on which there were durations, and then dealing them – and using the Tarot to know how to use them. The card-spread was a complicated one, something big.’<sup>55</sup>

In many ways then, and despite very real musical differences with his contemporaries, Cage’s own work at the time of *4’33”* is locatable within the pervasive iconoclastic atmosphere of the time. Moreover, it was the case that for Cage of all the

51. Per Jacob LJ, *Lucasfilm*, above n 2, para 47.

52. For a discussion of this point, see Gay, above n 23, pp 231–269.

53. Gann, above n 3, pp 172–173.

54. Cited in Gann, above n 3, pp 174–175 (punctuation added).

55. *Ibid.*

diverse components that both jointly and severally comprise 'music', time (duration) is not only the most significant, but also the most fundamental. This point is in evidence in his earlier fascination with percussion-based compositions and the place of silence that was so deeply entwined within them – compositions that led Cage to view his works as dissolving the barrier between the categories of 'music' and 'silence'. Indeed, for Cage, without time and duration, there would be no basis for the later exercise of the combination of sounds which has formed the basis of the courts' popular definition of 'music'. Without time, there could be no music. It is in this context that 4'33" should be located. In short, 4'33" is a prime example of Cage's understanding of what music *is*.

At this point in the discussion, we must return to the 'dialectic of absence and presence'. A significant theme of the criticisms and critiques (even sympathetic) of 4'33" is an understanding of 'silence' as an absence – in this instance, silence as an 'absence of sound or sounds'. Silence, at least in its musical context, is often understood as a lack. From this perspective, silence is perceived as a 'nothing' merely waiting for a 'something' to come along and fill it. From another perspective, however, silence may be 'something' in its own right. Although analysis of this philosophical perspective is far beyond the scope of the current paper, it is nonetheless important in the present context. More specifically, for Cage, silence is not the absence of sound, but is rather, the presence of time or duration and is thus the very essence of music itself.

That time and duration play such a key role for Cage is evident by reference to the title of 4'33".<sup>56</sup> It refers directly to duration and the passing of time. It is for this reason, if for no other, that 4'33" cannot be reduced to what Copinger and Skone James refer to as simply a 'passage of silence' but is rather an illustration of time and duration structured as music. If this emphasis on time speaks to the *content* of 4'33" as a 'musical work', so too does its *form*. Interestingly, and in keeping with Cage's eliding of musical forms, the form of 4'33" can be located firmly within the 'Western' musical tradition.

4'33" takes a *classical* form. Rather than a single (random) period of silence, it is divided into three movements, each strictly defined by reference to duration. Despite the discrepancies present in the extant surviving scores, each movement is allocated a period of duration that, taken together, total four minutes, thirty three seconds. So exacting are these instructions that the use of a stopwatch is virtually a necessity (see the recent performance of the BBC Symphony Orchestra<sup>57</sup>). Indeed, the exactitude of time is in many ways akin to the exactitude of notes present in more traditional scores. In these ways, 4'33" can be read not only as emphasising the importance of time and duration to Cage's concept of music, but also as the stripping of the classical form to its barest (musical) content.

Finally and following from the previous point, the question of 4'33" 's appropriateness of recognition as a 'musical work' under s 3(1) of the Copyright, Designs and Patents Act 1988 has been given added significance by the recent decisions in *Infopaq* and *Meltwater*,<sup>58</sup> *Lucasfilm*<sup>59</sup> as well as Justine Pila's reflections on categorisation of

**56.** This importance of time is evidenced both by Tudor's description of how he first performed the piece (using the time scales inherent in the musical score) and of the use of a stopwatch in the BBCSO's performance. See above n 1.

**57.** See above n 1.

**58.** See above n 25.

**59.** See above n 2.

subject matter.<sup>60</sup> Pila argues, convincingly in my opinion, that alongside the author's creative intention in determining the specific subject matter of a literary, dramatic or musical work, cognisance should also be given to the broader context of the authorial traditions in which the work is located. Her argument is supported by Mann J's comments in *Lucasfilm* that it is less the technical means of creation than the purpose the artist had in mind for which the 'art' (in that case: sculpture) was created, regardless of what other uses (or purposes) the work may or may not contain. Mann J offers an example relevant by analogy for the present discussion:

'The purpose is that of the creator. . . . It is the underlying purpose that is important. . . . I support this analysis with an example. A pile of bricks, temporarily on display at the Tate Modern for two weeks, is plainly capable of being a sculpture. The identical pile of bricks dumped at the end of my driveway for two weeks preparatory to a building project is equally plainly not. One asks why there is that difference, and the answer lies, in my view, in having regard to its purpose. One is created by the hand of the artist, for artistic purposes, and the other is created by a builder for building purposes.'<sup>61</sup>

In summing up her own argument, Pila offers four criteria for this determination of what is meant by 'art' (including music) for the purposes of copyright law.<sup>62</sup> I have argued these have been met in the case of John Cage's *4'33"*.

- (i) The presence in the work of a relatively large number of features standard with respect to the relevant category. [For example, the presence of a musician, the presence of (musical) time and duration; its relative sameness expected across performances.]
- (ii) The fact that the work is better or more interesting when perceived in the relevant category than when perceived in alternative ways. [For example, words used as performance indicators are better perceived as a musical rather than a literary work – a point accepted by the Court of Appeal in *Hyperion v Sawkins*.]
- (iii) The fact that the work is recognised by the society in which it was created as falling within the relevant category. [For example, *4'33"*'s inclusion within musical concerts at recognised musical concert venues; its seemingly endless commentary by music theorists, musicologists and music critics.]
- (iv) The fact that the author of the work intended or expected it to be perceived within the relevant category. [For example, the presentation of *4'33"* is more likely to be a musical piece if intended by its presenter to be perceived as such.]

### (e) Infringement and levels of protection

The final issue is the oft-repeated problem that if *4'33"* were to gain copyright protection as a 'musical work', its ambit would be too wide. As a consequence, all works that contain a significant 'passage of silence' would fall foul of *4'33"*'s protection. To this problem, three responses are available, each of which refers to resources available currently within the law. The first response is to question the initial

60. Pila, above n 47, and J Pila 'An intentional view of the copyright work' (2008) 71 MLR 535.

61. Per *Lucasfilm*, above n 2, para 54.

62. Pila, above n 47. Pila's work concentrates mainly on 'artistic works'; here, I apply her argument to 'musical work' in general and *4'33"* in particular.

premise that granting copyright protection to 4'33" would, so to speak, silence the production of musical silence. As Mummery LJ noted in *Sawkins v Hyperion Records* when confronted with the argument that protecting Sawkins' performing editions of Lalande's seventeenth-century Baroque composition would lead to its remaining unheard:

'[I]f the claim of the claimant to copyright in the performing editions were upheld, that would not prevent other musicologists, composers, performers or record companies from copying Lalande's music directly or indirectly or from making fresh performing editions of their own. All that the claimant can prevent them doing, without his consent, is taking the short cut of copying his performing editions in order to save themselves the trouble that he went to in order to produce them.'<sup>63</sup>

To this point can be added the rider that the accepted rules of copyright that allow for 'coincidental creation' of copyright work and/or 'the absence of a direct or indirect causal link between the copyright work and the alleged copy'<sup>64</sup> remain in place.<sup>65</sup>

Secondly, and as is well known, infringement arises when the whole or substantial part of a copyright work is reproduced (both itself or in the context of another work) without permission. More fundamentally, the question of infringement turns on the question of whether what has been appropriated constitutes an 'original' expression of the protected work.<sup>66</sup>

It is something of an irony that just as *Infopaq* and other recent related cases have blurred the meaningful distinction between 'whole' and '(substantial) part' so too does Cage's 4'33" blur that distinction. While it is true that each moment (or part) of silence of the piece cannot but be an expression of the author's originality and intellectual creativity, that creativity can only be understood as dissolving those moments into a whole. In other words, the originality of a 'moment' (or part) of silence is, in the context of 4'33", dependent upon the silence of the work as a whole. Understood in this way, therefore, work in which a moment or moments of silence appear within a work that contains sounded music fails to infringe the originality of 4'33".

The second resource arises again in the context of both the *Infopaq* and *Meltwater* case-law and Pila's considerations highlighting authorial creative intention and the tradition in which the author locates their work. If, on these criteria, the law recognises 4'33" as a 'musical work', it follows that the production of 'silence' outside or beyond this parameter would not be an infringing act. For example, the ritual of a 'two minute silence' in remembrance of the dead could not be found to have infringed 4'33" on the grounds that the author's creative intention was not to create a 'musical work' and that the 'tradition' to which such silence belongs is clearly distinct from any music-making tradition. The somewhat paradoxical conclusion of this point, therefore, is that by widening (albeit in strictly policed parameters) the protection of 4'33" as a 'musical work', it correspondingly restricts its ability to silence non-musical instances of its alleged reproduction.

63. *Sawkins*, above n 10, Mummery LJ, para 29.

64. *Ibid.*

65. Here it is important to note that in the recent dispute between Mike Batt and the John Cage estate, the issue stemmed from less from the track 'one minute silence' itself, but rather, the inclusion, without permission, of Cage as co-composer alongside that of Batt.

66. This discussion is without prejudice to the accepted rules of copyright that allow for 'coincidental creation' of copyright work and/or 'the absence of a direct or indirect causal link between the copyright work and the alleged copy'. *Sawkins*, above n 10, Mummery LJ, para 29.

These points become pertinent when one considers as a specific illustration Yves Klein's *Monotone Symphony* (1960).<sup>67</sup> This symphony comprises two movements, both of which last 20 minutes. As implied in the title, the first movement comprises a single note played continuously, with the second movement comprising of 'silence'. Could this work, therefore, be seen as infringing *4'33"* – that is, can the second movement be said to have illegitimately appropriated the whole or part of an original expression of Cage's work? It would appear that, all other things being equal, an infringement has occurred. After all, the presence of silence (especially in an extended form, bounded within its own movement) could well be said to have appropriated a part or even the whole of *4'33"*. Yet, it is also arguable that the fact that it appears within the work alongside sounded music (the first movement) means that the originality of *4'33"* cannot be said to have been infringed. *4'33"*'s originality subsists in the totality of silence as its characterising expression. The very nature of *4'33"* that separates it from a mere 'passage of silence' – its totality of unsounded music, and on which rests its claim to originality – is in this sense, the very cause of its limited application to other works.<sup>68</sup>

Less clear-cut, but not irresolvable, are those instances where silence comprises the whole of the musical piece.<sup>69</sup> On the one hand, as we saw above, it would appear that such works could be deemed an infringement of *4'33"*. However, on the other hand, the potential of such an ambit of infringement could, again, be limited.

As discussed above, *4'33"* can be seen as part of a broader movement that sought, either consciously or not, to challenge the apparent orthodoxies of 'serious' music. The challenge of Cage's piece can be seen not only in its *content* but also its 'classical' *form* (ie its presentation in three discrete movements). It is both of these aspects that, when taken together, it has been argued, constitute the 'originality' of the piece. This point has two consequences for the current question of infringement. First, since in the case of *4'33"* form is as important as content, any work that departs from its formal constraints cannot, therefore, be said to have appropriated the originality of Cage's piece. Secondly, the nature of the work as well as the authorial creative intention and tradition in which Cage situated his work points to a rather narrow arena of application – that is; the world of 'serious' music and its specific conventions and practices.

## CONCLUSION

In the introduction to this paper, I noted the equivocation of law's engagement with the artistic creations of modernism. This equivocation is apparent in the argument I have made advocating copyright protection for John Cage's *4'33"* in the sense that it is a work explicitly written to challenge the nature of the 'Western tradition' of music. Paradoxically, this challenge can be subsumed within the operating categories of both the law of copyright and music. It is this paradox, I believe, that applies not only to John Cage's *4'33"*, but to modernism itself.

**67.** It is interesting to note that, as far as I am aware, no one has claimed that this particular work is to be denied copyright protection on the grounds that it would rob the world of the use of the note adopted by Klein.

**68.** For present purposes, the question of the test for 'originality' (ie the 'author's intellectual creation' or 'skill, labour and judgement') is not specifically relevant.

**69.** An (incomplete) list of such pieces can be found at [http://en.wikipedia.org/wiki/List\\_of\\_silent\\_musical\\_compositions](http://en.wikipedia.org/wiki/List_of_silent_musical_compositions)