

Unraveling Prokofiev

Moderated by Alastair McKean, Head of Library – Sydney Symphony Orchestra

Corey Field, Founder – Corey Field Law Group, P.C.

Carl Simpson, Officer – Project Petrucci LLC; Founder – Serenissima Music, Inc.

Robert Thompson, President – G. Schirmer/AMP (part of Wise Music Group)



Sunday, May 26, 2024

2:00-3:30pm

Ballroom – Salons D&E

G. Schirmer/Wise Music has recently made some assertions about the copyright status of Prokofiev's ballets Romeo and Juliet and Cinderella. It is obviously important that there be clarity and certainty around performances of these very popular works. To discuss these questions, MOLA President Alastair McKean will chair a panel consisting of G. Schirmer/Wise Music President, Robert Thompson, IP lawyer Corey Field, and copyright expert and editor Carl Simpson.

Alastair McKean welcomed delegates and asked panelists to introduce themselves.

- Carl Simpson has a long background in the publishing field, and works on copyright at IMSLP;
- Robert Thompson is president of Wise Music/G. Schirmer; and
- Corey Field is a composer, classical music publisher, and lawyer, appearing on behalf of Wise Music/G. Schirmer.

Alastair McKean opened the session by noting that the question at issue arose in late 2023, with an email from Wise Music/G. Schirmer asserting certain things about the copyright of Prokofiev's ballets *Romeo and Juliet* and *Cinderella*. He invited Robert Thompson to give a sense of the background to the email, as it had come somewhat out of the blue and made some claims which all librarians present found a bit startling.

Robert Thompson began by lamenting that there was not at present a critical edition of Prokofiev. When the Prokofiev archives moved from London to Columbia University in New York, he had met with Janis Susskind (Boosey & Hawkes), Axel Sikorski (Sikorski), and the Prokofiev family, to discuss a critical edited performance edition. These discussions did not progress.

About a year and a half ago, G. Schirmer was contacted by a representative of the heirs of what Mr Thompson described as the "co-authors", or co-librettists, of the ballet *Romeo and Juliet*. Mr Thompson said that the VAAP publishers (including Boosey, Sikorski, Universal Editions, Zen-On, Chant du Monde, and Schirmer) had all come to an agreement with the heirs. He had in the last few days had a meeting in Paris with the representative of the heirs, and also with Gabriel and Serge Prokofiev and their representative.

Mr Thompson then gave the delegates some information which had been the background to this agreement. He noted that the information he would present would be a very small part of hundreds of pages of documents.

Firstly, he outlined the circumstances of the 1946 performances of *Romeo and Juliet* at the Bolshoi. As far as he can ascertain, this mirrored the 1940 performances at the Kirov, which were in effect the

première of the ballet in its final form. Work had started in 1934 or 1935, and involved four people, whom he stressed had worked collaboratively on the project:

- Prokofiev;
- Sergei Radlov, the director (and head of the Kirov); and
- Adrian Piotrovsky, a Hellenistic scholar and theater theorist; and
- Leonid Lavrovsky, the choreographer (and artistic director of the Kirov ballet).

Mr Thompson then referred to G. Schirmer's new edition, alluded to in the email circulated in late 2023. He displayed, side by side, the first page of the first violin part in the original VAAP materials and in the "new edition". He noted that the new edition was not yet finalized, and that he expected it to be finished in the next four to six months.

Mr Thompson showed delegates a photograph of Radlov, and a photograph of Lavrovsky. These came from the program book for a performance at the Bolshoi in April this year, which itself was a reconstruction of the 1946 performance. This program book is 180 pages long and gives a comprehensive account of the genesis of the ballet. Mr Thompson quoted from an essay in the program written by a Russian scholar from St Petersburg, Evgeny Novikov (who was also in Paris this week, and who is working with the heirs of Radlov *et al.*). Mr Thompson specifically singled out a quote from Prokofiev himself:

At the end of December (of 1934) I returned to Leningrad specifically for the negotiations with the Kirov Theatre. I expressed my wish to find a lyrical scenario for a ballet... We started recalling the scenarios: Piotrovsky named *Pelléas and Mélisande*, *Tristan and Isolde*, *Romeo and Juliet*. I immediately clung onto the latter – it would be impossible to find a better one! It was arranged that Piotrovsky, Radlov and I would be making a libretto. Lavrovsky during the staging of the ballet in Leningrad, added quite a lot to what had been composed before him. Later I decided to include him in the co-authors of the libretto.

Mr Thompson showed on the screen some more excerpts from the program:

- an extract from a 1939 letter from Prokofiev to Lavrovsky, a few months before the 1940 performance of the ballet, discussing changes to the music as a result of Lavrovsky's choreography;
- a note involving Lavrovsky giving part of his royalties to Radlov;
- a letter from Prokofiev to the copyright office in Russia about the co-authorship and the distribution of royalties; and
- an article by Evgeny Novikov on the complete history of the ballet and how it was "co-authored".

These letters had not yet been professionally translated from Russian into English, but Mr Thompson was reasonably confident that his understanding was correct.

Mr Thompson then showed on the screen an unverified translation of the opening pages of the complete libretto of *Romeo and Juliet*, published in the theatrical booklet for the premiere at the Kirov on 11 January 1940. He noted that for many of us it was a new concept that ballets would have libretti. He noted that Piotrovsky in particular was very cinematically oriented, and speculated that a reader who didn't know what the document was, might think it was a treatment for a spec script for a movie.

He made the point that the involvement of the four people (Prokofiev, Piotrovsky, Radlov, Lavrovsky) has never been in dispute; it is recorded in history books. It also appears in copyright registrations. He put on the screen a registration card from, he thought, 1968, from the SACD (the French authority for grand rights and dramatic rights). This card registered the "Ballet" as the work of Prokofiev, Piotrovsky, Radlov, Lavrovsky, and the "Musique" as the work of Prokofiev.

Mr Thompson then put up on the screen a timeline compiled by Evgeny Novikov, which in great detail goes through the various meetings and rehearsals. He noted that this period covered great political change in the U.S.S.R., during which Piotrovsky was murdered and Radlov imprisoned. He concluded his remarks by noting that publishers have a responsibility to their composers and their heirs. He clarified that the decision to define the work as “co-authored” was from the heirs and that was why G. Schirmer had sent the email that they did. He reiterated that G. Schirmer’s intent was to ensure that the most authentic, most accurate performance materials are made available.

Alastair McKean asked Mr Thompson about inseparability, given that—apart from historical reproductions—the music of *Romeo and Juliet* is never danced to the original choreography. Mr Thompson wondered if this were true in every case, citing ballets by the choreographer Christopher Wheeldon to music by Joby Talbot, which are always performed to Wheeldon’s choreography. Mr McKean agreed that the same would be true of *Appalachian Spring* and Martha Graham’s choreography, but pointed out that the culture in ballet is that choreography is always new—and if choreography is revived, the choreography is discretely hired from its choreographer (for instance, a performance of Balanchine’s *Nutcracker* would be rented from the Balanchine estate). He observed that a joint work is one where the contributions of the authors cannot be separated, whereas in ballet the contributions of composer and choreographer are almost invariably treated separately.

Mr Thompson invited Corey Field to speak on inseparability, as he understood it to relate to the U.S. Copyright Act of 1976, as well as in other territories. Mr Field began by observed that the discussion reminded him of cases where families have discovered their forebears’ art had been looted during World War II, as Piotrovsky had been killed by the Soviet state and his heirs claimed they had evidence of co-authorship of the work. With the disclaimer that he himself is not a specialist in European law, Mr Field said he understood European countries have the same standard as the US, inasmuch as co-authors co-own the work. He said he understood that credits were an additional factor in European law, and hence that he thought the letter from Prokofiev to the copyright office, describing the four men as co-authors, would be very significant. He noted that the “co-authors” acknowledged they worked together very significantly on the original production, with Prokofiev saying the music was different thanks to the others’ input. He expanded further on the analogy of looted art, suggesting that it was akin to one’s neighbor learning that their grandparents had suffered in Stalinist atrocities, had learned that assets had been stolen, and had decided to put a fence up between the houses.

Mr McKean suggested that what the audience experienced in 1946 was, like any theatrical work, the work of many people (the choreographer, the dramaturg, the set designer, the lighting designer, the composer); but that this did not necessarily make it a joint work. He suggested that, metaphorically, G. Schirmer was thinking of the audience’s experience as a Ming vase, where the porcelain cannot be separated from the pattern, whereas in fact it was more like a Lego model, with different bricks by the composer, the choreographer, etc. He noted that it was standard for ballet companies to refer to “a ballet by [choreographer] with music by [composer]”.

Mr Field restated his understanding that the law and the facts indicated that co-authors co-own a co-written work. Mr McKean observed that it is a fact that the ballets have been performed with different choreography, and asked how the work was affected if a production did not follow the very detailed directions in the Radlov *et al.* libretto (for instance, the Matthew Bourne production set in a lunatic asylum). Mr Field said that he believed Prokofiev’s statement, that the music was different because of his collaborators, was the key statement that rendered the music a co-authored work. Mr McKean asked if this applied despite Radlov *et al.* having not written a single note of music. Mr Thompson asked if a collaborative and joint work really required everyone to write a note of music. Mr McKean said that collaboration, in the theater, was a different question.

Mr Thompson cited the song *Telephone*, performed by Lady Gaga, which is credited to about eight different writers, and asked who determined whether this counted as a joint work. Mr Field said that current American copyright law was based on the intent of the authors to create a joint work, rather than on whether the authors have made a copyrightable contribution to the work. He noted that in the popular music industry it is very common for powerful individuals to be given publishing and writing credit as a *quid pro quo*, even if they have done nothing toward writing the song. He reiterated that he considered Prokofiev's letter to the copyright office to be decisive in American law, if it were found that the intent of the four artists was to create a joint work.

Changing the topic, Mr McKean asked Carl Simpson for his thoughts on U.S. orchestras' use of older sets of parts, purchased from Kalmus and other reprint houses when they were not covered by copyright protection.

Mr Simpson said that the U.S. legal principle of first-sale doctrine establishes that if you have purchased something legitimately, someone cannot force you to throw it away and buy something new. He noted that the works in question were in the public domain in the U.S. when they were sold; this is because the U.S. and U.S.S.R. did not have copyright relations until a limited form was established in 1973. These particular works, however, were only affected by the passage of the GATT amendments (the Uruguay Round Agreements Act) in 1996, which in effect retroactively declared previously public domain works to be under copyright.

Mr Field said he had been researching both the first-sale doctrine and the restoration of copyright under the Uruguay Round. He agreed that reprint houses were legally permitted to sell the Soviet publications until GATT took effect. At this point, in effect, the sale of these editions was banned (with a grace period of 12 months), and all copyrights were restored to G. Schirmer. Begging to differ with his esteemed friend, Mr Simpson, Mr Field noted that the first-sale doctrine only allowed continued use of materials legally made under U.S. copyright law. Whether they were legally purchased was not relevant. He added there have been a couple of Supreme Cases on this topic, and that this was also the opinion of Nimmer, the 11-volume treatise on copyright law.

Mr Field then asserted that a public domain reprint was never made lawfully under American copyright law. This is, he said, because G. Schirmer had become the owners of the copyright on 1 January 1996, and it was considered a fresh reset on their copyright of the work. The reprints had never been authorized by G. Schirmer and therefore were not bound by the first-sale doctrine.

Mr Field said further that his reading of U.S. Copyright Office publications indicated that after the grace period expired (on December 27, 1997), all uses must stop unless licensed. This meant that once G. Schirmer became the copyright owner, they had always had the right to ask for a license fee for the use of these editions. He said that G. Schirmer had not enforced this consistently, as they wanted to be cooperative and they believe that orchestras are important.

Mr Field also added that the first-sale section of the Copyright Act had been changed when GATT restoration was passed, to say that restored works under GATT cannot be used after the 12-month grace period had expired.

Mr Simpson, in response, noted that the reprint houses had lawfully printed the copies of these works prior to GATT, because there was no copyright owner; the work was public domain. He observed that G. Schirmer seemed to be taking the position that it was the lawful copyright owners of the works, all the way back to their creations. This was not correct. Notwithstanding the lack of copyright relations between the U.S. and the U.S.S.R. prior to 1973, the agent representing the U.S.S.R. state music publisher in 1940 (and later) was not even Schirmer. Mr Simpson emphasized that the copies printed

prior to 1996 were lawfully made, because there was no authority required from a copyright owner, because there was no copyright owner at the time.

Mr Field said again that the Supreme Court had looked at this twice; expressed his desire not to get into a debate with his esteemed colleague and friend, Mr Simpson; and suggested that we move on from the topic.

Mr McKean asked how all this affected what had been authorized arrangements, citing a MOLA member which had an arrangement made—legally, at the time—of some of the music from *Romeo and Juliet*. Mr Field said that this was a derivative work and that the law says that you need to come to a licensing agreement with the restored copyright owner, on reasonable terms. In other words, although it was legal at the time, it must be re-legalized.

Mr McKean asked Mr Thompson what was driving the whole thing: was it coming from the Prokofiev heirs, and/or the heirs of Radlov *et al.*? He noted that it was known that Radlov *et al.* had had a role in creating the original production of the ballet—for instance, as Mr Thompson had pointed out, it was mentioned in books by the Prokofiev authority Simon Morrison. He noted further that it was a remarkable coincidence that the “joint authorship” had come to light just before the works had come into public domain in life plus 70 jurisdictions.

Mr Thompson said he could not fully answer the question, but he had asked the same of the representative of Radlov *et al.* Mr Thompson said that for his part, his motivation was putting forward the best possible critical edition. To the best of his knowledge, though, he thought it had little to do with the Prokofiev copyright expiration. As best as he could tell, it was driven by the desire of the heirs of Radlov *et al.* to have their names rightfully restored. He noted that G. Schirmer had entered into a partnership with the Exilarte Center in Vienna to restore hundreds of works banned by the Nazis. He observed that although Hitler and Goebbels were very effective in suppressing so-called *Entarte Musik*, he believed they must have learned something from the absolute brutality of Stalin. He noted that Piotrovsky was shot, and that that Radlov and his wife—and Lina Prokofiev—spent years in the Gulag. He reiterated that he believed that restoring the names of the “co-authors” was what was most important to the heirs of Radlov *et al.*

Mr McKean pointed out that—without meaning to be disrespectful about the hideous history of the time—this nevertheless potentially meant the heirs of Radlov *et al.* would continue to earn substantial amounts for some time. He asked if this were relevant to the heirs’ motivation. Mr Thompson said he was unable to speak for the heirs, and was willing to concede he may be wrong, but that his intuition was that their motivation was not about the money.

Mr Simpson, observing that Radlov was rehabilitated in 1958, and that the choreography for *Romeo and Juliet* had never been purged, agreed with Mr Thompson that all people involved in the creation of the original ballet should be credited, and said that they would be listed on IMSLP. He noted that the copyright dispute did not affect IMSLP directly as it was governed under Canadian law.

Mr Field returned to Mr McKean’s question about the potential financial benefit to the heirs of Radlov *et al.* Mr McKean, apologizing for his cynicism, indicated that he felt it may be a factor. Mr Field noted that in *Golan v. Holder* (the Supreme Court case that upheld GATT copyright restoration), the late Ruth Bader Ginsburg had mentioned Prokofiev in her opinion. He quoted Justice Ginsburg’s observation that Prokofiev’s *Peter and the Wolf* could once be performed free of charge, but that after GATT “the right to perform it must be obtained in the marketplace.”

Mr McKean invited questions from the floor.

D. Wilson Ochoa (Boston Symphony Orchestra) introduced himself and noted that his brother is a copyright law professor. Mr Field confirmed he knew Mr Ochoa's brother. Mr Ochoa observed that nobody was disputing the legality of GATT. He asked if Prokofiev was the only composer registered with the U.S. Copyright Office when *Romeo and Juliet* went back into copyright, or whether Radlov *et al.* were listed as well. He asked whether the French copyright office registration was something that applied in the U.S.

Mr Field said it was registered as Prokofiev's work, and indicated that this would be "corrected". He said he did not know how this dovetailed with European law. Mr McKean asked how such a listing was "corrected". Mr Field said that a form was filed with the Copyright Office. He clarified, after questioning from Mr McKean, that the Copyright Office had the responsibility to decide whether the claim was legitimate, and that the claim was therefore still an open question, although he did not believe it was.

Mr Ochoa noted that although Mr Thompson had expressed a desire to collaborate with the orchestras, some orchestras had recently been given fairly peremptory instructions about which movements of *Romeo and Juliet* they could perform, and in what order. He believed that this exhibited a dictatorial spirit rather than a collaborative one on G. Schirmer's part. He observed that despite Mr Thompson's stated wish to provide the best materials possible, he had not always felt, in dealing with G. Schirmer, that this was always uppermost in their mind.

Mr Thompson said he felt it disingenuous to say that G. Schirmer did not want to produce the best material they could, and that he felt it an unfair comment. He recognized that he was ultimately accountable and that G. Schirmer was not always perfect. But he strongly disagreed that the firm was willfully not trying to do its best. Mr McKean suggested that specific issues with G. Schirmer more broadly might be better dealt with separately.

Mr Thompson noted that nobody would arbitrarily pick movements out and rearrange a work of any copyright-protected composer. He furthermore commented that the Prokofiev family is very receptive to ideas for interesting presentations of Prokofiev's music. It is problematic when producers do not inform the family about questionable adaptations; he cited a production of *Romeo and Juliet* [by Matthew Bourne] which included a rape scene in the first act. The family was unaware of this and he thought that was unacceptable. [The production is still touring.] He reiterated that he was happy to help with any conductor/artistic director/orchestra who wanted to do some new presentation, but he was responsible for doing so in a way that protected the composer, Sergei Prokofiev. (Mr McKean checked that Mr Thompson had meant also to mention the names of the "co-authors", Lavrovsky, Piotrovsky, and Radlov. Mr Thompson indicated that he did.)

Mr Field noted that G. Schirmer wanted to make the best possible edition of *Romeo and Juliet* and invited members to send errata, as this would be very much appreciated. Mr Thompson added that he understood that some conductors are used to using a certain set of materials, and said that G. Schirmer would be happy to cooperate to the extent possible; he wasn't demanding that the Boston Symphony Orchestra turn over its Kalmus sets.

Justin Vibbard (Chicago Symphony Orchestra) commented that he too had had difficulty working with a recent new edition (of another work) by G. Schirmer, and offered some constructive criticism. He then noted that the discussion of inseparability had not yet touched on the three suites, which were indisputably assembled solely by Prokofiev. He asked what role the choreographer had in the creation of *Montagues and Capulets*, for instance, which does not exist in that form in the ballet, and likewise a number of movements in the third suite. He asked if inseparability was still an issue if orchestras played concert, non-dramatic performances of the suites.

Mr Simpson pointed out that Suites No.1 and No.2 were created and performed before the ballet was finished, and hence any arguments about inseparability start to fall apart, especially when discussing excerpts that the composer himself made for concert performance.

Mr Field reiterated his opinion that the work was “co-authored”, and said that if Prokofiev created different versions of it, they still came under that umbrella. He observed that we shall see how it plays out, suggested that he didn’t think there would be a winner on the debate today, and thanked Justin and Carl for their erudition and deep knowledge.

Christopher Blackmon (Royal Concertgebouw Orchestra, Amsterdam) asked about the new edition, referred to in the 2023 email and which Mr Thompson had displayed earlier in the session. He noted that it appeared identical to the Chant du Monde edition which has been in use in francophone countries for about ten years, and he commented that it felt a little disingenuous for the “new edition” to be so described.

Mr Thompson said that Wise Music had acquired Chant du Monde [in 2016] and, along with it, the Sibelius files for their edition. He said that Wise Music had started to update and correct the Sibelius files, and had updated the copyright, and expressed his hope that the resulting version would, with further proofing, become the most accurate critical performance edition. Mr Blackmon commented he had just received old Sikorski materials for summer tour performances. Mr Thompson noted that a situation where conductor and orchestra were using different materials was not ideal, and expressed his hope that unified editions of Shostakovich and Prokofiev would become a reality. He noted that he was in discussions with Boosey & Hawkes, Sikorski, and Universal Edition, with the aim to share resources and create editions of the highest quality.

Nicole Jordan (Philadelphia Orchestra) noted that it would be good if credit were given to the librarians whose work on errata goes into helping create these new editions. She asked whether G. Schirmer, when it used the term “co-authors”, was labeling the librettists as people who had contributed to writing the musical materials, noting that they were getting composer credit.

Mr Field disclosed that the Philadelphia Orchestra was one of his clients and they could therefore not ask him about Prokofiev because that would be a conflict. Mr McKean asked the same question on behalf of the Sydney Symphony Orchestra. Mr Field expressed gratitude that he was not being recorded discussing a conflict.

Mr Field proceeded to say that if European law was like American law, which he thought it was, it was the intent of the authors to be co-authors that was the important part. Ms Jordan said that she wanted clarification for the suites, because they are literally just music; the libretto is not being referenced at all, and she believed the music—especially without any grand rights element—should be public domain. Mr Field said that the suites were not in public domain in the U.S. owing to the rule being publication plus 95 years.

Mr Thompson noted that while editors from orchestras had occasionally worked with G. Schirmer, he wasn’t expecting MOLA members to do editorial work. He clarified that G. Schirmer was not putting out a critical edition, with an editorial board, but what he termed a “critically edited performance edition”.

Emma Luty (Atlanta Symphony Orchestra) said that she was fortunate enough to have worked on the Gershwin Critical Edition at the University of Michigan, and pointed out that this edition corrected many fallacious readings in the Frank Campbell-Watson edition. She noted that (as Mr Simpson had observed earlier in the afternoon) the Kalmus reprint of the Prokofiev suites was a critical edition,

produced in the U.S.S.R. She asked what the heirs thought this older edition contained that was musically inappropriate, and that was rectified in the new ex-Chant du Monde edition.

Mr Thompson referred to the 12-month grace period when GATT took effect, and said he felt G. Schirmer had extended that for a period of time. He reiterated that if an orchestra were used to its own materials, it was G. Schirmer's intent to be cooperative, not disruptive.

Ms Luty asked what the current debate meant for other works (such as Khachaturian) that had come into copyright restoration after GATT. She noted that G. Schirmer's claims had put her in a position where she was unable to say whether it was possible to use a set of music—not just Prokofiev—which her orchestra actually owned, and she could not even work out a consistent musicological reason why this might be the case.

Mr Thompson said he was unaware of any other instance where this issue has come to the forefront.

Ms Luty asked whether G. Schirmer/AMP/Wise Music planned to employ the same kind of legal methodology to change the way that orchestras perform other Soviet or restored copyright works.

Mr Thompson said they did not. He said the only reason this had arisen was because of the “co-authorship” and the restoration of the names of the “co-authors”.

Mr Simpson addressed the contributions of the “co-authors” with respect to U.S. law. He pointed out that he felt it unlikely that the librettos would pass the threshold of originality established under *Feist v. Rural*; they do not differ in content from Shakespeare's and Perrault's originals except for the fact that—as is necessary for a ballet—they were abridged. He noted that while all countries have different standards of originality, the U.S. threshold is very high. Outside the U.S., he felt the “co-authors” would be eligible for whatever the performing rights agency says, whereas in the U.S. this could be challenged.

Mr Simpson also pointed out that the Prokofiev edition, started not long before the composer's death, continued to be published in the Soviet Union until about 1970. The problems with this edition lie mostly in the performance materials rather than the scores, which were pretty good given the level of respect in which Prokofiev was held. He noted that Shostakovich was one of the editors. He made the point that there was also a complete Soviet Shostakovich critical edition, in 42 volumes, before DSCH.

Mr Thompson pointed out that Prokofiev was so well respected in the U.S.S.R. that his colleagues and friends were either imprisoned or shot and his first wife was sent to the Gulag.

Mr Field asserted that *Feist* stands for the proposition that a creative spark, no matter how crude, is copyrightable. He also asserted that the originality test does not apply when the authors jointly agree to be co-authors; the copyrightable contribution/originality test is used when there's a dispute between the authors.

Mr McKean apologised to the remaining questioners as the session had run out of time, observed that the expiration of time was unfortunate but unsurprising, thanked Mr Simpson, Mr Thompson, and Mr Field, and noted that there is vast amounts of disagreement and that it will be very interesting to see how it ends up.

The session concluded at approximately 3:40pm.