

ASSESSING EVIDENCE: JUDGES AND MUSICAL PERFORMERS AS FACT-FINDERS

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Abstract: There is a deep relationship between law and music, above all because both disciplines are related to a specific society. This society gave origin to their historical forms, and these in turn reflect that society's thoughts and values.

Law and music might seem very different, because law requires a scientific and logical approach, which rationally screens reality, differentiating and separating it through mutually exclusive categories: permitted/forbidden, lawful/unlawful, and so on. On the contrary, music, as an art, has an artistic, symbolic, and integrating approach, which aims to overcome the division of the Self, and the separation of the individual from society.

However, both judges and musicians perform their tasks while referring to specific rules, which require making Boolean choices (true/false, lawful/unlawful, convincing/unconvincing, and so on) and applying them to particular cases.

This article considers judges and musical performers as co-creators and fact-finders. Focusing mainly on the latter point, it tries to verify if judges and musical performers may follow the provisions of the same rules, investigating in particular the Federal Rules of Evidence and the California Evidence Code.

Keywords: law, art, music, performance, fact-finder, evidence, Federal Rules of Evidence, California Evidence Code, real evidence, documentary evidence, testimonial evidence, hearsay, expert witness, weight of evidence.

Summary: 1. Introduction. 2. Judges and Performers as Co-Creators and Fact-Finders. 3. Assessing Evidence in the Legal and Musical Field. 4. Real evidence. 5. Documentary evidence. 6. Testimonial evidence. 7. Basic requirements of the admissibility of evidence. 8. The rule against hearsay. 9. Calling witnesses and appointing experts. 10. Expert qualification. 11. Weighing of Evidence. 12. Conclusions.

1. Introduction

There is a deep relationship between law and art. Above all, both disciplines are related to a specific society, which gave origin to their historical forms. In turn, these forms reflect that society's thoughts and values.

Moreover, law and music share their need for performance and specific rites. In fact both music and law are based on texts, to which shall be given performance, and both in

law and music peculiar rites are to be performed according to specific procedures.

Indeed, in order to fulfill their tasks, both the judge in a bench trial and the performer who is preparing to interpret a music score, assume the role of fact-finders, being responsible for determining what, in a specific case, should be recognized as the truth.

With this aim, a judge examines in a trial all the available evidence: material objects, documents and witnesses' testimonies. Similarly, after choosing a piece in order to interpret it, a musical performer examines the principal evidence (the score of the specific piece), other documents (such as other versions of the same piece, other pieces by the same author, letters, and diaries), and witnesses' testimonies (above all those given by experts, such as famous interpreters, music critics, professors of performance practice, and supervisors of performance editions).

This paper analyzes the roles of fact-finders in law and music, and the rules which govern the weighing of evidence in these two fields, emphasizing their analogies and differences.

2. Judges and Performers as Co-Creators and Fact-Finders

Judges play various roles at the same time: first of all, they interpret the law, and can thus be considered as co-creators of law.

Other fundamental roles of the judge are assessing the evidence presented, and controlling how hearings and trials develop in their courtrooms. In almost all civil cases, and in many criminal cases, a judge sits without a jury, and is therefore the trier of fact who determines facts, deciding what evidence is credible, and which witnesses are telling the truth. Finally, the judge provides an independent assessment of the facts and gives his or her interpretation of the law applying to those facts.

In the musical field, the trier of fact is the musical performer: he or she assesses the evidence, deciding which evidence is credible, and which witnesses are telling the truth. Finally, the musical interpreter provides an independent assessment of the facts and gives his or her interpretation.

3. Assessing Evidence in the Legal and Musical Field

In order to get a comparative view about principles and methods in assessing evidence in both the legal and the musical field, it is interesting to analyze the Federal Rules of Evidence (FRE) and the California Evidence Code, to verify if they can govern the admission of facts in a trial or in a musical performance.

The Federal Rules of Evidence were promulgated in 1975, after protracted examination by judicial committees and Congress¹. Adoption of the FRE is not mandatory, but a substantial majority of states have adopted rules which are in whole or in part based on the FRE².

¹ Federal Rules of Evidence, *available at* <http://federalevidence.com/rules-of-evidence> (retrieved 02.20.2011).

² JACK B. WEINSTEIN AND MARGARET A. BERGER (1997) *Weinstein's Federal evidence commentary on rules of evidence for the United States courts*, 2nd ed., gen. ed. Joseph M. McLaughlin, New York, M.

In California, the Legislature enacted the California Evidence Code in 1965, and made it operative in 1967³. This Code, governs only civil proceedings; criminal proceedings are subject to a different version of the Code, in which major changes have been made in the rules of evidence.

FRE Rule 102 states that the FRE shall be construed in order to ascertain the truth and determine just proceedings. This task may include attributing a particular behavior to a specific subject, determining to what extent this behavior corresponded to the subject's intent, and what value shall be given to specific acts and/or omissions.

In the musical field, the performer ascertains the truth about the piece he or she intends to perform: this task may include verifying its attribution to a specific composer, determining to what extent the text corresponds to the composer's thought, how particular performative signs shall be interpreted and executed, what is the proper execution when important performative signs are missing. Therefore, performers must first of all evaluate the score they have at their disposal, in order to establish if it can be considered "the right text" of the piece.

Indeed, in the musical field, performers rarely have autographs at their disposal. Autographs are manuscripts in which the piece was entirely handwritten by its author. On the contrary, performers almost always use printed scores, which publication could have been (but was not) approved by the composer, after thoroughly revising his or her manuscript.

For these reasons, musical performers as fact-finders could search for different sources of evidence, in addition to the music score they actually have at their disposal: the autograph or autographs, its early copies, its early and recent prints, writings and documents of the composer about the piece, testimonies of listeners who have heard the composer himself performing the piece, of famous performers who have interpreted the piece, of music critics who have attended specific public performances, of performance professors who have taught the piece, and of theorists who have developed their research on specific issues.

4. Real evidence

There are four traditional types of evidence: real, documentary, testimonial, and demonstrative. While the latter applies only to the legal area, the other three apply to both the legal and the musical field.

Real evidence is usually a material object which was directly involved in some event in the case. For example, the written contract upon which an action is based is real evidence to prove its terms.

In the musical field, the autograph of a piece, that is a manuscript containing the composer's handwriting, is real evidence to prove the attribution of the piece and its content.

Bender.

³ California Evidence Code, available at <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=evid&codebody=&hits=20> (retrieved 02.20.2011).

However, even an autograph may contain errors. This may happen when the composer writes his autograph while pressed by proximate deadlines: writing hastily, he might make some slips of the pen, or omit some details. Examples thereof can be found in some Beethoven's *Piano Sonatas* autographs, where staccatos, slurs, and dynamic signs are often inconsistent⁴, and many indispensable flats and sharps are missing⁵.

In these cases the performer has the task of detecting the questionable points, and distinguishing between plain errors and musical innovations.

Plain errors may be corrected, in their respective fields, either by the judge⁶ or by the performer. In doing so, the former will reverse a previous decision of a lower court, where a misunderstanding or mistake had a substantial impact on the development of the trial, revealing itself to be prejudicial to a party; the latter will correct plain errors made by the composer in order to perform the piece following the composer's true intent.

However, although in most instances what should be considered an original will be self-evident, in the musical field the point is quite complex. Indeed the search for the right text has been the central concern of musical scholarship for generations. In fact, in music, there are often two (or even more) competing variants of the same text.

This may occur when the composer felt that some elements of his composition could be written in a different way. Probably he conceived a new idea in reviewing his score, and wrote new versions for some bars of the piece. For instance, in the *Petite Messe solennelle*, Gioachino Rossini made innumerable changes throughout his compositional labor. In many cases he scratched out the previous version and wrote the new one directly on top of the cancelled material. Yet in other cases Rossini added a new page on which he wrote the new music without cancelling the older version⁷. When this occurs, both versions are considered originals.

5. Documentary evidence

Documentary evidence can be a kind of real evidence: this occurs, for instance, when a contract is offered to prove its terms.

“Document” is often a synonym of “writing conveying information”⁸: according to FRE writings can consist of letters, numbers or their equivalent, set down by handwriting, or other form of data compilation⁹. Also a music score can be made by letters¹⁰, numbers¹¹,

⁴ WILLIAM S. NEWMAN, (1986) *The pianist's problems: a modern approach to efficient practice and musicianly performance*, Cambridge, Da Capo Press, p. 29.

⁵ EVA BADURA-SKODA, ASPECTS OF PERFORMANCE PRACTICE, IN ROBERT LEWIS MARSHALL (ed.) (2003), *Eighteenth-Century Keyboard Music*, New York, Routledge, p. 34.

⁶ Federal Rules of Evidence p. 103.

⁷ Philip Gossett, Rossini's *Petite Messe Solennelle* and its Several Versions, *available at* <http://humanities.uchicago.edu/orgs/ciao/Introductory/Essays%20from%20CIAO/Petite%20Messe%20versions.htm> (retrieved 02.04.2011)

⁸ Merriam-Webster's *Collegiate Dictionary*, <http://www.merriam-webster.com> (retrieved 02.16.2011).

⁹ Federal Rules of Evidence 1001 (1).

or their equivalent¹², set down by handwriting or other form of data compilation.



Miguel de Fuellana, vihuela tablature (1554)

In fact, a performer who wishes to interpret a piece composed by another musician, may refer to a music score, a sheet where specific signs indicate which notes shall be played, in which tempo and rhythm, with which articulation and dynamics, and so on.

The language used in FRE 1001 applies perfectly to music scores: the Rule defines what shall be considered an original of a writing, and states that a person can “execute” the original or any counterpart intended to have the same effect¹³.

However, as documents contain human language, they may present specific problems not presented by other forms of real evidence: among them, hearsay¹⁴.

The best evidence rule provided that, where a writing is offered in evidence, it should be presented in the original¹⁵.

However, this rule dates back to the time in which a copy was usually made by a clerk or even by a party to the lawsuit. For this reason, the courts generally assumed that, if the original was not produced, there was a good chance of error or fraud. Nowadays, “copy” usually means photocopy, and, in the musical field, also microfilm and facsimile editions, which are photographic reproductions of the autograph. An example thereof is the facsimile edition of Domenico Scarlatti’s *Essercizi per gravicembalo*, published in

¹⁰ Some music notation systems represent different pitches by means of different letters: among them the German and the English ones. Moreover, often composers add specific language in the score, in order to lead the interpreter to perform the piece with appropriate character and expression.

¹¹ Between the fourteenth and the sixteenth century, tablatures were very common: in them numbers indicating fingerings take the place of signs indicating musical pitches. In seventeenth and eighteenth century music theory, a figured bass was a bass part in which notes were marked with numbers which indicated the chords to be played.

¹² In nineteenth century music scores, the principal characteristics of a piece (among them, pitch and duration of sounds) were shown by placing specific symbols (chiefly notes and rests) on the staff. In twentieth and twenty-first century music scores, symbols have been varied, often looking like graphs.

¹³ Federal Rules of Evidence 1001 (3).

¹⁴ The hearsay rule will be discussed as a separate topic below.

¹⁵ Evidence Code section 1500; Federal Rules of Evidence 1002.

Florence in 1985¹⁶.



Domenico Scarlatti, *Essercizi per gravicembalo* (1739)

When a copy is made with these means, at worst it is illegible, while the chance that it could be in error is very slight.

Moreover, as in the legal field, courts are reluctant to spend needless effort and create delays where there is no dispute about the fairness and adequacy of a photocopy¹⁷; also in the musical field photocopy, microfilm and facsimile are currently used, unless the performer faces a genuine question about the accuracy of these means.

Similarly, in the legal field, some rules¹⁸ and decisions¹⁹ state that, in order to prove the content of a writing, the original is required unless it has been destroyed, is lost or not obtainable because in the possession of a third person. In these cases a duplicate is admissible.

Furthermore, the FRE state that "writings" may also be set down by printing²⁰. In the musical field this kind of evidence may include also authorized editions of specific pieces. Authorized editions are printed during the author's lifetime, after he has revised the autograph, and authorized the draft.

If the printed version and the autograph coincide, the fact-finder does not need to make a decision, choosing one version and discarding the other. Yet sometimes there are some

¹⁶ DOMENICO SCARLATTI, (1985) *Essercizi per gravicembalo*, (Firenze, SPES).

¹⁷ Federal Rules of Evidence 1003.

¹⁸ Among them, Federal Rules of Evidence 1002, 1003 and 1004.

¹⁹ Among them, *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964), *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963), *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963).

²⁰ Federal Rules of Evidence 1001 (1).

differences between the autograph and the authorized printed version. An example thereof is the Ricordi edition of Bellini's *Norma*, in which the cavatina *Casta diva* is printed in F major²¹, whereas in the autograph it is written in G major²². The change was made by the composer himself, after the composition of the opera, but before its first performance: he lowered the cavatina so as to make the performance easier for the prima donna Giuditta Pasta, whose vocal texture was not very high pitched.

In similar cases, it is the interpreter's task to evaluate the evidence and determine which version is preferable to be performed in a specific circumstance. Setting down the same principle, the FRE place on the judge the responsibility for the evaluation of evidence²³.

The FRE specify that a "duplicate" is a counterpart produced by techniques which accurately reproduce the original²⁴. According to the FRE accurate reproductions may be photographs, videotapes and motion pictures²⁵; moreover, judicial decisions have declared the admissibility of photostatic copies²⁶, and tape recordings²⁷.

In the musical field movies, videotapes, and sound recordings can be very useful for the fact-finder in order to establish what value shall be given to particular details of the music score. For example, the recording of a concert in which the composer himself performed his piece can show what performing style the author considered correct for this composition, and which value he attributed to the specific performative signs he wrote in the music score. An example can be the videotape of Rachmaninoff's performance of his own *Piano Concerto Nr. 2*²⁸, which makes clear what phrasing, agogic and dynamics the composer deemed appropriate for this piece.

Specific elements of the fact in issue can be proved by comparison with suitable documents. A musical example thereof can be the illustrative ornament table which Johann Sebastian Bach set in his work, *Clavierbüchlein vor Wilhelm Friedemann Bach* (1720).

²¹ VINCENZO BELLINI, (1831) *Norma* Milano, Ricordi.

²² VINCENZO BELLINI, (1935) *Norma*. Facsimile della partitura autografa. Roma, Reale Accademia d'Italia, 2 vols.

²³ Federal Rules of Evidence, 104 (a). Kenneth S. Broun, George E. Dix, Edward J. Imwinkelried, David H. Kaye, Robert P. Mosteller, E.F. Roberts, John W. Strong, Eleanor Swift, *McCormick on Evidence* (St. Paul, West Publishing, 2006) § 53; Edmund Morris Morgan, *Basic Problems of Evidence*. Sept. 1962 (Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, Philadelphia, 1963), 45-50.

²⁴ Federal Rules of Evidence, 1001 (4).

²⁵ Federal Rules of Evidence, 1001 (2).

²⁶ *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963).

²⁷ *Sauger v. Johnston*, 315 F.2d 816 (9th Cir. 1963).

²⁸ Sergei Rachmaninoff, *Piano Concerto Nr. 2*, available at <http://www.youtube.com/watch?v=x8137utZxMQ> (retrieved 02.04.2011).



Johann Sebastian Bach, ornament table (1720)

This table explains the performance practice of the embellishments included in the *Clavierbüchlein*, but may also be considered indicative of the correct performance of ornaments included in other pieces written by the in the same period: among them the *Two-Part Invention* in D major BWV 774²⁹.

6. Testimonial evidence

Testimonial evidence is the most basic form of evidence and the only kind that usually does not require another form of evidence as a prerequisite for its admissibility³⁰. It consists of what is said in the court at the proceeding in question by a competent witness.

In the legal and in the musical field, witnesses are deemed competent if they meet three fundamental requirements: 1) they must have personal knowledge about the subject of their testimony, having perceived with their senses something that is relevant to the case³¹; 2) they must remember what they perceived; 3) they must be able to communicate what they perceived³².

Moreover, in the legal field, witnesses are deemed competent if they have taken, with understanding, the oath or a substitute³³.

As regards the musical field, before the invention of cinema and other media, the only records about performance practice were written testimonies which described the performance of specific pieces briefly or in detail. In this connection, the comparison between autographs and printed editions which were not revised and approved by the composer may reveal important details.

Indeed, sometimes publishers did not acquire rights legally, but set down on music

²⁹ JOHANN SEBASTIAN BACH, *Inventions*, available at http://imslp.info/files/imglnks/usimg/d/dc/IMSLP62840-PMLP03267-Bach_Inventions_Manuscript_1745-55.pdf(retrieved 02.10.2011).

³⁰ Evidence Code section 702(b); Federal Rules of Evidence 602.

³¹ Evidence Code section 702 (a); Federal Rules of Evidence 602.

³² Evidence Code section 701(a)(1).

³³ Evidence Code section 710; Federal Rules of Evidence 603.

paper what they, or their spies, retained after several hearings of a specific work. For instance, after setting down the arias of an opera by a famous composer, they could reduce them for piano and voices, and sell these reductions without recognizing any intellectual property rights. This occurred in 1823, as publisher Giulio Ricordi sold unauthorized reductions for piano and voices of Rossini's *Semiramide*, after listening to the opera in Venice's Teatro La Fenice³⁴. As the Ricordi version must be the product of oral transmission, it might document variations introduced by the singers in public performances, providing evidence of how the opera may actually have been sung in Venice³⁵. The Ricordi version of Rossini's *Semiramide* might therefore be considered a testimony of early performance practice of this opera. Indeed, some changes included in the unauthorized version are still performed, because they allow singers to show their excellence in performing very high notes.

The image displays two musical staves side-by-side, comparing two versions of a vocal line. The top staff is labeled 'Ricordi:' and shows a melody in G major with lyrics 'ri - tor - na a re - spi - - - rar'. The bottom staff is labeled 'Rossini:' and shows a more complex, ornamented version of the same melody with lyrics 're - - - - - spi - - - - - rar.' The Rossini version features many trills and grace notes, particularly in the first few measures.

Gioachino Rossini's *Semiramide* (1823), two versions

Sometimes, witnesses' testimonies depict how the composer himself performed one of his pieces. An example can be the testimony included in a letter, written by Wolfgang Amadeus Mozart to his family: the Austrian composer related that he listened to performances by the Italian pianist Muzio Clementi. In these occasions Clementi performed his own *Sonatas* choosing a slower tempo than the one he had written on the scores³⁶.

7. Basic requirements of the admissibility of evidence

The basic requirements of admissibility, which apply to all kinds of evidence, are relevance, materiality, and competency. Moreover, in order to be admitted, evidence must be not barred by an exclusionary rule³⁷.

³⁴ REMO GIAZOTTO (1968) 'Alcune ignote vicende riguardanti la stampa e la diffusione della *Semiramide*', *Nuova rivista musicale italiana*, II, pp. 961-970.

³⁵ PHILIP GOSSETT, (2003) Piracy in Venice: The Selling of *Semiramide*, in DAVID ROSEN AND CLAIRE BROOK (eds.) *Words on Music: Essays in Honor of Andrew Porter on the Occasion of His 75th Birthday* Hillsdale, N.Y., Pendragon Press.

³⁶ EMILY ANDERSON (ed.) (1989), *The Letters of Mozart and his Family* (London, Palgrave Macmillan, p.850.

³⁷ Evidence Code section 351; Federal Rules of Evidence 402.

Evidence is *relevant* when it has some tendency to increase the likelihood of the fact for which it is offered³⁸. Evidence is *material* if it is offered to prove a fact that is in issue in the case. Evidence is *competent* if the proof that is being offered meets specific requirements of reliability.

The preliminary showing that evidence meets these and any other prerequisites of admissibility, is called “foundational evidence”³⁹.

After being admitted, evidence will be weighed by the finder of fact. Indeed, the present trend in the law is to diminish the importance of the rules of competence by turning them into considerations of weight⁴⁰.

However, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence⁴¹. Indeed, it is necessary for the judge to balance the probative value of and need for the evidence, against the harm likely to result from its admission⁴².

In the musical field, a performer may wish to consult a great number of important treatises⁴³ in order to choose the right interpretation for an ancient musical piece. However, as regards specific ambiguous points in the score, some of these methods and treatises will present the same evidence as others. Therefore, the performer could consider that the search for all relevant methods and treatises and their consultation in order to resolve performative doubts might cause an undue delay in dealing with the performance practice, and ultimately in wasting of time.

8. The rule against hearsay

In the legal field, a witness is someone who has seen or heard an event firsthand, and can therefore communicate important information about it. When a witness, testifying on an event, condition, or material object of which he or she had no direct experience, relates a statement made by another person, this statement is called “hearsay evidence”. A statement may be in words or in a substitute for words⁴⁴.

Hearsay evidence is generally not admitted⁴⁵, but it may be admissible under one of the

³⁸ Evidence Code section 210; Federal Rules of Evidence 401.

³⁹ Evidence Code § 402, 403.

⁴⁰ Evidence Code section 700; Federal Rules of Evidence 601.

⁴¹ Evidence Code section 352; Federal Rules of Evidence 403.

⁴² M.C. SLOUGH, (1956) ‘Relevancy Unraveled’, 5 *Kan. L. Rev.* 1, 12-15; HERMAN L. TRAUTMAN, (1952); ‘Logical or Legal Relevancy - A Conflict in Theory’, 5 *Van. L. Rev.* 385, 392; Broun, Dix, Imwinkelried, Kaye, Mosteller, Roberts, Strong, and Swift, *McCormick* § 152.

⁴³ DAVID DAMSCHRODER AND DAVID RUSSELL WILLIAMS (1990), *Music Theory from Zarlino to Schenker* Hillsdale, Pendragon Press.

⁴⁴ Evidence Code section 225; Federal Rules of Evidence 801 (a).

⁴⁵ Evidence Code section 1200 (b); Federal Rules of Evidence 802.

many exceptions to the hearsay rule. The federal rules contain a considerable number of explicit exceptions, some of which apply only when the declarant is unavailable, while the remaining ones are always applicable⁴⁶.

One of the federal exceptions states that evidence of a hearsay statement may be admitted if the declarant is unavailable, for instance because the proponent of a statement has been unable to procure the declarant's attendance⁴⁷. Another federal exception concerns learned treatises used to question expert witnesses⁴⁸. California law does not have so broad exceptions, but it has other exceptions which are not explicitly mentioned in the federal rules⁴⁹.

In the musical field a hearsay statement can be likened to a copy of an autograph; like a witness who recounts a statement made by another person, which he has perceived with his senses; the copyist relates a musical text, which she has perceived with her senses reading the autograph, or another copy of it.

Also in the musical field copies may be admitted if the autograph is lost. If the archetype is lost, the musician⁵⁰ should reconstruct the text which is closest to the author's original, using the instrument called *stemma*. The musician compares the extant texts highlighting their analogies and differences. This first step allows him or her to outline the relationships between the texts and their common ancestor, making a genealogical tree. A stemma is precisely a family tree of manuscripts, which shows which manuscript is the earliest copy, and which are the subsequent ones⁵¹.

Therefore, also in the musical field, the musician has the task of weighing specific testimonies, comparing their content with that of other testimonies and with the demonstrative evidence brought to his or her attention, in order to ascertain the truth.

Indeed, so in trials as in the musical field, in some cases the witness's account of what happened could be inaccurate for various reasons, for example misremembering⁵² or deliberately lying⁵³.

⁴⁶ Federal Rules of Evidence 803, 804.

⁴⁷ Federal Rules of Evidence 804 a.

⁴⁸ Federal Rules of Evidence 803 (18).

⁴⁹ Among them, Evidence Code sections 1226, 1227, 1235, 1241, 1261, 1302, 1311, 1323, 1350.

⁵⁰ This task is generally fulfilled by the editor of a critical edition.

⁵¹ CAROL BINGHAM KIRBY, (1995) *Editing Spanish Golden Age Dramatic Texts: Past, Present, and Future Models*, in Society for Textual Scholarship, *Text: Transactions of the Society for Textual Scholarship*, D.C. GREETHAM AND W. SPEED HILL (eds.), University of Michigan, 8th vol., 177.

⁵² This could happen quite often in early music, where the written text did not necessarily precede the performance of the piece, but was frequently the precipitate of an oral tradition. Leo Treitler, 'Oral, Written, and Literate Process in the Transmission of Medieval Music', *Speculum* 56, (1981), 471-491.

⁵³ ALDERT VRIJ, (2006) *Detecting Deception in Legal Contexts*, in ANTHONY HEATON-ARMSTRONG, ERIC SHEPHERD, GISLI H. GUDJONSSON, DAVID WOLCHOVER (eds.), *Witness testimony. Psychological, Investigative and Evidential Perspectives*, New York, Oxford University Press, p. 23.

Therefore the musician may wish to examine all sort of evidence (scores, treatises, critical reports, letters, diaries, and so on) with the aim of ascertaining the true text of the chosen piece, and to infer its true interpretation, in order to perform the piece defending its compositional integrity and refraining from performative license.

A fundamental challenge for the performer is the decision between two (or more) competing variants of the same text. Like a judge who listens to testimonies which present the same event or behavior in conflicting ways, the performer who faces competing variants of the same text will compare them, also considering other kinds of evidence, in order to give a correct evaluation of the facts in question.

In both the legal and the musical field, the content of a testimony can be confirmed or proved wrong by other testimonies, and/or by material evidence, such as objects, records, and so on. In particular, in the musical field the correctness of a detail in a variant can be proved by findings of similar details in the same piece or in other pieces by the same composer.

An example thereof can be found in Mozart's *String Quintet* in D major, K 593: the autograph presents in the finale a chromatic figure, but some editors changed this passagework in printed editions, going on corrections made in some points of the autograph. However, these corrections are not in Mozart's handwriting, and there are other chromatic figures which appear later in the same movement. Therefore a performer may assume that a copyist read the changes in a later source, and copied them back in the autograph, considering them to be authentic⁵⁴.

Weighing all the evidence, a performer may judge that there is not sufficient evidence to support that the witness (in this case, the copyist which made the corrections) had personal knowledge of the matter in issue⁵⁵, and therefore choose the first version, discarding the modified one.

9. Calling witnesses and appointing experts

The FRE state that the court has the authority to call and interrogate witnesses⁵⁶. In particular, the court may appoint specific experts⁵⁷, whose scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue⁵⁸.

In the musical field experts may include famous performers, music critics, professors of

⁵⁴ THOMAS A. IRVINE, *Echoes of Expression: Text, Performance, and History in Mozart's Viennese Instrumental Music*, available at <http://hdl.handle.net/1813/221> (retrieved 03.13.2011), 200.

⁵⁵ Federal Rules of Evidence 602.

⁵⁶ Federal Rules of Evidence 614, Broun, Dix, Imwinkelried, Kaye, Mosteller, Roberts, Strong, and Swift, *McCormick* § 8; EDMUND M. MORGAN, J.M. MAGUIRE, AND JACK B. WEINSTEIN, (1965) *Cases and Materials on Evidence*, (5th ed.), pp. 303-304; JOHN HENRY WIGMORE, (1940) *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed. Boston, Little, Brown, § 2484.

⁵⁷ Federal Rules of Evidence 706. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964); John M. Sink, 'The Unused Power of a Federal Judge to Call His Own Expert Witnesses', 29 *S.Cal.L.Rev.* (1956), 195.

⁵⁸ Federal Rules of Evidence 702.

performance practice, supervisors of performance editions. They all offer interpretive suggestions, providing an independent assessment of the evidence, and then give his or her interpretation.

The FRE also include interpreters among the experts, applying to them the provisions relating to expert witnesses' qualification⁵⁹.

An interpreter is someone who mediates between speakers of different languages. Similarly, in the musical field, an interpreter (in this narrow sense) could be an expert who "translates" a piece written in tablature, transcribing it into modern staff notation.

1. *Ricercar senza Canto (Sol)*

Marco dall' Aquila (c.1480-after 1538), *Ricercar senza Canto (Sol)*, tablature

1. *Ricercar senza Canto (Sol)*

Marco dall' Aquila, *Ricercar senza Canto (Sol)*, modern staff notation by A. J. Ness

10. Expert qualification

The FRE states that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion if 1) the testimony is based upon sufficient facts or data; 2) the testimony is the product of reliable principles and

⁵⁹ Federal Rules of Evidence 604.

methods; 3) the witness has applied the principles and methods reliably to the facts of the case⁶⁰.

Similarly, in the musical field, the opinion of the expert (famous performer, music critic, professor of performance practice, supervisor of performance editions) should 1) be based on a thorough examination of the specific piece and of other works by the same composer, at least those written in the same period and for the same or similar instrumentation; 2) originate from reliable principles and methods; and 3) apply these principles and methods reliably to the piece in issue.

For instance, professors of performance practice who teach their students how to play Mozart's *String Quartet* in G major, K. 387, have most probably previously compared this work with many other similar works, in order to determine the correct performance of all details of this piece. Among these works there could be of course other string quartets written by Mozart himself⁶¹ or by other coeval composers, such as Luigi Boccherini⁶² and Paul Wranitzky⁶³. Moreover they have very probably read important treatises⁶⁴ and essays on this kind of music⁶⁵, attended lessons and conferences by famous professors, and listened to concerts of skilled performers.

11. Weighing of Evidence

The term "weight of evidence" is used to characterize a process or method in which all evidence that is relevant to a hypothesis is taken into account, in order to assess its reliability.

Indeed sometimes different modalities of evidence do not converge on a single hypothesis. The judge's role is therefore to weigh the quality and credibility of various testimonies, refraining from deeming a single evidence to be conclusive.

⁶⁰ Federal Rules of Evidence 702.

⁶¹ Among them, other *Divertimenti*, the "*Mailänder*" *Quartets*, the "*Wiener*" ones, the "*Haydn*" *Quartets*, the "*Hoffmeister*", and the "*Preussische*".

⁶² For example the *String Quartet* in E flat, G. 201. CHRISTIAN SPECK, (1987) *Boccherini's Streichquartette: Studien zur Kompositionsweise und zur gattungsgeschichtlichen Stellung*, München, Wilhelm Fink Verlag.

⁶³ For instance the *String Quartet* in G major, op. 4/op. 10.

⁶⁴ See DAVID DAMSCHRODER AND DAVID RUSSELL WILLIAMS, (1990) *Music Theory from Zarlino to Schenker* (Hillsdale, Pendragon Press).

⁶⁵ For instance, among many others, BELLAMY HOSLER, (1982) *Changing Aesthetic Views of Instrumental Music in 18-Century Germany*, (Ann Arbor, UMI Research Press; PETER LE HURAY AND JAMES DAY (eds.), (1981) *Music and Aesthetics in the Eighteenth and Early-Nineteenth Centuries*, Cambridge, Cambridge University Press; CARL DAHLHAUS, (1985) "Das 18. Jahrhundert als musikgeschichtliche Epoche" in *Die Musik des 18. Jahrhunderts*, Carl Dahlhaus (ed.), Laaber, Laaber-Verlag, pp 1-69; LAURENZ LÜTTEKEN, (1995) *Das Monologische als Denkform in der Musik zwischen 1760 and 1785 (=Wolfenbüttler Studien zur Aufklärung 24)*, Tübingen, Niemayer; ULRICH KONRAD, (1992) *Mozarts Schaffensweise: Studien zu den Werkautographen, Skizzen und Entwürfen (= Abhandlungen der Akademie der Wissenschaften in Göttingen, philologisch-historische Klasse, Dritte Folge, Nr. 201)* Göttingen, Vandenhoeck & Ruprecht.

In this field there is a sensible difference between judges' and musical performers' behavior: after *Daubert* judges often adopt a corpuscular approach to expert testimony, applying the *Daubert* standard to each study on which the expert relies, and in general to the expert's opinion. In doing so, judges frequently go so far as to disqualify the evidence as unreliable on its own weight, excluding all expert testimony.

On the contrary, in the musical field performers often rely almost blindly on the opinion of a specific expert, above all if he or she is a renowned concert performer and they were raised in his or her school.

On the other hand, as experts have a particular expertise which the fact-finder lacks, the latter may improve his or her knowledge not only taking into account the experts' conclusions, but also taking up the methodological principles on which these conclusions are based. In the same way, a performance given by a famous artist may be illuminating not only as a model, but also because it furnishes clues on how the artist reached these conclusions: which methodology he or she utilized, what evidence he or she collected, and which witnesses he or she questioned.

12. Conclusions

This paper makes a comparison between the legal and musical fields, highlighting that law and music are both related to a specific society, and reflect this society's thoughts and values.

Furthermore, as legal and musical principles and theories are parts of the culture, this comparative view underlines the links between this culture's rational and artistic achievements.

The findings suggest that strong bridges may connect experts in one area to those in the other area, allowing them to learn from each other, and accomplish a shared understanding of their roles and duties in the society they live in.

Moreover, as decisions in the musical or legal field affect all those who are involved in a specific performance or case, the enhancement of an approach to reality which combines rational screening and symbolic integration may promote this unifying behavior also in the people as a whole, fostering integration and well-being.

The current findings add to a growing body of literature on law and humanities. This initial outline may chart, I hope, future directions for scholars of this field, serving as a basis for further development.

