The Advent of Performing Rights in Europe

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Music copyright, as well as other intellectual property rights (IPRs), has always been closely linked to technological shifts. The introduction of the printing press in the mid-fifteenth century started the process toward copyright in tangible items like books, music scores, CDs, posters, and T-shirts. These products are all private goods in that they are rivalrous and excludable. Once an item has been bought, nobody else can buy it. Broadcast rights, mechanical rights, and blank media levies also appeared as the results of new technologies. The digital revolution and the Internet call for new amendments to the current IPR legislation.

This paper tells the story of another IPR that covers goods or situations that in some aspects are non-rivalrous or non-excludable, namely the performing right. It briefly looks at technological change as a cause for the urge for performing rights but concludes that it was rather the general economic growth in Europe after the Industrial Revolution and the growth of the public concert scene that paved the way for the new legislative amendment. Although at least the initial transaction costs were high, the potential gains from the introduction of the institution of property rights in the inputs for music-making in public performances could now be beneficial for the growth of supply both qualitatively and quantitatively. Composers could devote themselves more to their trade as freelance professionals. The collective licensing agencies became second-step institutions in attempts to lower transaction costs. Thus, this paper discusses the fundamentals of institutional economics. I will describe the introduction of performing rights by means of international comparisons from France, Germany, Britain, and Sweden. Why did the latter three take so long to implement the French legislative innovation? Ethnic or national animosities will be discussed. Ostensible differences in the way composers and outsiders viewed both artistic and general moral norms seem to play an important role in determining why some countries viewed performing rights with lingering skepticism for several decades after their first introduction in France. This point is related to Polányi's theory of labor as a "fictitious commodity" and his observation of the "double movement" of liberating and restricting forces on the labor market.

Performing rights are generally divided into two categories: 1. *grands droits* pertaining to music for the stage (opera, musicals, ballet); and 2. *petits droits* pertaining to the diffusion of other forms of music productions. The grand rights are negotiated directly between the composer (often represented by a publisher) and the theater company while the small rights are the objects of collective licensing agencies, which provide customers with blanket licenses for the use of all the music listed by the agency for an agreed purpose (normally live performances or broadcasts).

Infant Performing Rights: *grands droits*

The common use of French to denote the two different kinds of performing rights discloses their place of origin. Both were French inventions. The *grands droits* were introduced in the *règlements* issued by King Louis XIV after the establishment of l'Académie Royale de Musique in 1669 (the predecessor of the current Opéra National de Paris). It seems that the Académie Royale de Musique became

increasingly difficult to manage. Through the eighteen-paragraph *Règlement concernant l'Opera donné à Versailles le 11 Janvier 1713*, King Louis XIV tried to regulate how the opera should be run, including the first *grand droit* clause (§15).¹ The composer remuneration clause was repeated (as §16) in the even more elaborate forty-seven-paragraph *Règlement sur sujet de l'Opera donné à Marly le 19 Novembre 1714*. It is likely that the *règlement* ratified and clarified a system that was already in place. The clause stipulated 100 *livres* for each of the first ten performances and thereafter 50 *livres* for each of twenty more performances. After these thirty performances, the piece belonged to the opera company, which could stage it again without further royalties. Thus the composer could be given a maximum of 2000 *livres* if the opera was sufficiently popular with the audience. Given that neither the *état* of 1713, explicitly listing all personnel by their functions and salaries, nor the *règlement* mention copyists, it is likely that the composer had to cover such costs himself. The lead singers were paid 1500 *livres*. With a successful opera the composer could thus earn more or less what the main actors received (Durey de Noinville 1757).

The struggle by dramatists, led by Beaumarchais, to gain legal possession of their plays has been documented in detail by Boncompain (2001) and Brown (2006). The financial situation of playwrights was even more insecure than that of opera composers. However, when it came to the actual ownership of their works, the circumstances were principally similar. None could expect to maintain long-term property rights in their works. This issue was not addressed until the *Decret rendu sur la Pétition des Auteurs dramatiques* was passed by the post-revolutionary National Assembly on January 13, 1791 (ratified the following week by Louis XVI). The decree was based on a report by the *Jacobin* lawyer and orator Jean le Chapelier. Article No. 4 read: "The works of living authors may not be represented in any public theater within the extent of France without formal consent in writing by the author . . ." This was the first legal safeguarding of the performing right in the hands of the originators. In July 1793 a revision was made in accordance with a suggestion by le Chapelier to specify that it "should apply to all dramatic works, whether or not they had been previously performed or printed" (Brown 2006, 147).

The organization established by Beaumarchais, the Société des Auteurs Dramatiques, to work for the recognition of the right for playwrights to be sufficiently remunerated (primarily) by la Comédie-Française, succeeded in its pursuit through the new law. A new, more operative organization, the Bureau Central de Perception des Droits d'Auteur, was created by composer and librettist Nicolas-Étienne Framéry to implement the new legislation. It soon reached agreements with la Comédie-Italienne and four other commercial theaters. These agreements stipulated that one seventh of the net proceeds of all performances should be granted to the author (Brown 2006, 144). A remuneration size in this range remains a common business praxis today. The Bureau was succeeded by the Société des Auteurs et Compositeurs Dramatiques in 1829.

In Britain the joint author-publisher copyright for books was codified in the Statute of Anne of 1710. The copyright for books and music prints was well established when playwrights started to claim both economic and moral rights from theatres at the end of the eighteenth century. Theater managers maintained that it was their right to stage published plays freely without either obtaining consent from the author or reimbursing him. In the 1770 Macklin v. Richardson case, playwright Macklin sued Richardson, editor of the *Court Miscellany, or Gentleman and Lady's Magazine*, for having stolen his unpublished play *Love a la Mode* to print the first act in his publication. Richardson had simply employed

1 The king also found it suitable, among other important restrictions, to prohibit male actors from entering the dressing rooms of female actors and vice versa.

someone to attend performances of the play and transcribe it. According to Richardson, the performance “gave a right to any of the audience to carry away what they could, and make any use of it.” Lord Commissioner Smythe, however, ruled that:

it has been argued to be a publication, by being acted; and therefore the printing is no injury to the plaintiff: but that is a mistake; for besides the advantage from the performance, the author has another means of profit, from the printing and publishing; and there is as much reason that he should be protected in that right as any other author. (Deazley 2008, 3)

Lord Smythe first established the “advantage from the performance” and then the other sources of income: printing and publishing. Thus he principally established, albeit in a backward way, an IPR for the author in the performance of his plays. Other cases dealt with the question of whether it was the published play, in which there was copyright, or something non-copyright that was staged when the text was enhanced by acting, set design, lighting, costumes, and sometimes music. Only alterations of published plays when staged were at first considered as copyright infringements. In 1830 playwright James Robinson Planché suggested a bill to alter and extend the provisions of the Copyright Act of 1814 “with respect to Dramatic Writings.” At first the Planché initiative was overlooked, but when the two major metropolitan theaters, Covent Garden and Drury Lane, tried to uphold their claims for patents on the performance of “legitimate drama” (i.e., spoken drama) in several cases against minor theaters, the House of Commons appointed a Select Committee chaired by novelist Edward Bulwer-Lytton. This came as a result of his assessment that:

The commonest invention in a calico – a new pattern in the most trumpery article of dress—a new bit to our bridles—a new wheel to our carriages—might make the fortune of the inventor; but the intellectual invention of the finest drama in the world, might not relieve by a groat the poverty of the inventor. If Shakespeare himself were now living— If Shakespeare himself were to publish a volume of plays, they might be acted every night all over the kingdom—they might bring thousands to actors, and ten thousands to managers—and Shakespeare himself, the producer of all, might be starving in a garret. (Deazley 2008, 12–13)

The Dramatic Literary Property Act (1833, first paragraph) ruled that:

... the Author of any Tragedy, Comedy, Play, Opera, Farce, or any other Dramatic Piece or Entertainment, composed, and not printed or published by the Author thereof or his Assignee ... shall have as his own Property the sole Liberty of representing, or causing to be represented, at any Place or Places of Dramatic Entertainment whatsoever, in any part of the United Kingdom of Great Britain ... or in any Part of the British Dominions ...

This performing right was also given to published works and it was to last for the author’s or his surviving widow’s life (Dramatic Literary Property Act 1833, first paragraph). How legal matters should be conducted was specified as well as a fine for infringements of “not less than Forty Shillings” (Dramatic Literary Property Act 1833, second and third paragraphs).² The Act explicitly defined the performing right to include not only the full piece but also “any Part thereof.”

2 The fourth and last paragraph included a remarkable clarification for its time: “. . . whenever Authors, Persons and Offenders or others are spoken of . . . in the Masculine Gender, the same shall extend . . . to either Sex.”

The Act provided the necessary legal framework for what was considered an IPR and how infringements were to be handled. The implementation and the policing were left to the parties involved. The playwrights immediately organized the Dramatic Authors' Society for the administration of performing rights.

The new, revised Law of Copyright of July 1, 1842, clarified "that the Provisions of the said Act [i.e., the Dramatic Literary Property Act of 1833] . . . and this Act, shall apply to Musical Compositions . . ." (Copyright Act 1842, 412). With this, the revision paved the way for *petit droits* in Britain.

The Francophile King Gustav III of Sweden established his Royal Opera in 1773. An early employment contract from 1781 concerns composer Joseph Kraus (1756–92). His primary duty according to the contract was to act as assistant chief conductor. In addition, "of every new opera that I compose the third representation shall be to my benefit" (Kraus 1781).

The British Copyright Act of 1842 was also a detailed and extensive piece of legislation regarding the parts on performing rights. In Sweden the similar act of July 20, 1855, issued by King Oscar I was much more laconic. Nevertheless, it was very much to the point and declared that "Swedish [N.B.!] dramatic works may not be publicly performed unless the author has given permission therefore." Songs composed by the king were favorably reviewed by Robert Schumann in his *Neue Zeitschrift für Musik*. King Oscar's son, Prince Gustaf, composed the song that has been sung ever since by Swedish pupils, having passed the Baccalaureate exam. Accordingly, it is not surprising that the king took a personal interest in the matters resulting in the 1855 Act "Regarding the Prohibition of Public Performance Without Permission of Swedish Dramatic, or for the Scene composed, Musical Works" (SFS/Swedish Ordinance Collection 1855, no. 79).

The Growth of Music Businesses in the 1800s

Changes in copyright law have generally resulted from technological shifts. When it comes to the introduction of the *petits droits*, however, it is difficult to identify a self-evident technological cause. F.M. Scherer has suggested that technological changes in the modes of transportation made the growth of the international virtuoso phenomenon possible. The transportation cost-efficiency was improved, for instance, between Felix Mendelssohn's mail coach journey from London to Edinburgh in 1829, which took three days, and the same journey by train undertaken by Frederic Chopin twenty years later. Chopin spent only twelve hours on a train (Scherer 2004, 145–47).

The changes in transportation technology were, however, part and parcel of more general economic growth after the Industrial Revolution. Railways and canals were introduced when enough capital was at hand and were thus the result of previous economic growth. Once they had been built, they reinforced economic growth. New socio-economic strata, primarily the bourgeoisie, financed both the new means of transportation and the growth of the public concert business. Therefore, in the case of performing rights, I suggest that they came about not due to a single radical technological shift but rather as a consequence of all the technological shifts that had made the Industrial Revolution possible and that were fostered by it.

According to Angus Maddison's estimations, the annual GDP/capita growth rates in the four studied countries were substantially higher after the Industrial Revolution than before it (see table 1). The break of periods in 1820 is due to the numbers Maddison provides, but it is also a plausible point in

time at which the Industrial Revolution started to make a substantial impact (Maddison 2007; all numbers according to the price of silver in 1990).

Period	France	Britain	Germany	Sweden
1700-1820	0.19	0.26	0.14	0.17
1820-1899	1.20	1.25	1.26	0.93

Table 1. Annual GDP/capita growth rates (%)

Music businesses grew simultaneously with many other businesses. Of particular importance for music businesses was the growth of the transport, newspaper, and banking sectors. Big and small venues were built to host both their own artists and guest performers. The state of Iowa alone had 1,200 “opera houses” a century ago (Glenn and Poole 1993, 5). Although the word “opera” in this context was used instead of the allegedly immoral “theater” these venues nevertheless hosted a wide variety of musical performances. The same goes for the *Folkets Hus* (People’s House), which the labor movement in Scandinavia built in towns and villages. The Scandinavian sobriety movement built its own similar venues. The peasant movement, likewise, created rural community centers.

Composers as Entrepreneurs: Polányi's “Fictitious Commodification”

F.M. Scherer described the fashion among courts of both higher and lower magnitude between the Westphalian Peace of 1648 and shortly before the revolutionary late eighteenth century for creating orchestras as part of “a cultural arms race.” The orchestra added to the nobles’ prestige. In the latter part of the seventeenth century there were some 300 more or less independent states in the very loosely integrated Holy German Empire, so many orchestras were established. Much music had to be composed and many composers benefited from this in their musical and financial careers (Scherer 2004, 40).

Almost all of these orchestras were disbanded in the last decades of the eighteenth century. According to Tia deNora (1995, 43), most scholars advocate the hypothesis of an impoverished aristocracy. This forced composers and musicians to search for job opportunities elsewhere. What they probably observed was that the reduction of wealth among the nobility was not only nominal but also relative to other groups in society. By the end of the eighteenth century, mercantilism had been succeeded by market-oriented laissez-faire economics indicating a shift to a more commercialized concert production for broader and, to some extent at least, anonymous audiences. This was more or less inevitable; economic theory now advocated free competition among concert promoters. Musicians and their music have always been drawn to where money can be found, and now they turned to a more “general” public.

The most obvious example of a composer who transformed himself from an aristocratic employee into the most famous freelance composer of his time is Joseph Haydn. After three decades in permanent employment by Count Anton Eszterházy his position became unsalaried from 1790, after the death of Count Anton, and finally reduced to an annual ceremonial service. Haydn returned to Vienna to search for other income opportunities. Not least, his association with the growing commercial concert business

in England made him the pioneer freelance composer at the turn of the century (Baumol and Baumol 1994, 175; Scherer 2004, 89).

In this way, music became a good that was not only placed on the market for copyrighted printed items but that was also an input factor for the concert business. Thus musical goods became subject to the law of supply and demand described by neoclassical economics. Joseph Townsend, in his critique of the British Poor Laws, quoted Tacitus:

To promote industry and economy, it is necessary that the relief which is given to the poor should be limited and precarious. *Otherwise industry will languish and idleness be encouraged, if a man has nothing to fear, nothing to hope from himself, and every one, in utter recklessness, will expect relief from others, thus becoming useless to himself and a burden to me . . .* No man will be an economist of water, if he can go to the well or to the brook as often as he please; nor will he watch with solicitous attention to keep the balance even between his income and expenditure, if he is sure to be relieved in the time of need. The labouring poor at present are greatly defective, both in respect to industry and economy. Considering the numbers to be maintained, they work too little, they spend too much, and what they spend is seldom laid out to the best advantage. (Townsend 1786, sect. XIV, citation of Tacitus [ad 109, sect. 38] in italics; Townsend used the original Latin)

This is a harsh representation of the neoclassical view of labor as an input commodity that should be subject to competitive conditions with full mobility of factors. In this way the labor market would be self-regulating. Labor could be allocated according to the forces of supply and demand with a resulting equilibrium with no unused resources, no unemployment, and no need for the poor relief laws.

Another approach is to mirror the performing rights in the “fictitious commodification” concept according to Karl Polányi. He does not reject the neoclassical labor theory as such. In fact Polányi accepted the logics of the self-regulating mechanism of the labor market. According to Polányi, labor became commodified as a consequence of both the diversification and the growth of the labor market. However, he recognized crucial counter-movements in the interest of society that appeared parallel with the commodification of labor—hence a “double movement” system:

Social history in the nineteenth century was thus the result of a double movement: the extension of the market organization in respect to genuine commodities was accompanied by its restriction in respect to fictitious ones. While on the one hand markets spread all over the face of the globe and the amount of goods involved grew to unbelievable proportions, on the other hand a network of measures and policies was integrated into powerful institutions designed to check the action of the market relative to labour, land, and money. (Polányi 1944, chap. 6, sect. 20)

One such institutional restriction apparent in the advent of performing rights is presented below: the unification of the labor force (collective licensing agencies). It is directly targeted to be a counterforce against non-salaried exploitation of composers’ labor. It can, furthermore, be argued that the Romantic notion of the *Künstlerehre* (artistic honor) also worked as a cultural institutional restriction. At least this restriction was favored by some art music composers in their struggle against the unification in collective IPR societies. It seems that they preferred to be without monetary remuneration and in that

clung to the Aristotelian morals based on his idea of economy, which handles limited resources, and trade, which has as its incentive sheer collection of money:

We have now considered that art of money-getting which is not necessary, and have seen in what manner we became in want of it; and also that which is necessary, which is different from it; for that economy which is natural, and whose object is to provide food, is not like this unlimited in its extent, but has its bounds. (Aristotle 350 bce, book I, chap. IX, last section)

Transaction Costs and the Unification of Composers

Thráinn Eggertsson (1990, 22) claims that in basic neoclassical economic models “there is no logical rationale for contractual arrangements such as various types of firms or even money.” Institutional economics objects to the neoclassical economics assumption of zero transaction costs. According to institutional economics, the “cost of transacting makes the assignment of ownership rights paramount, introduces the question of economic organization, and makes the structure of political institutions a key to the understanding of economic growth” (Eggertsson 1990, 14). The basic transaction costs in most sectors are connected to:

- The search for information
 - e.g., the costs for listing all pieces of music—big and small—and the owners of their performing rights
- Bargaining and contracting
 - e.g., the costs related to the contracting of all venues and all pieces of music, licensing, payment transfers
- Monitoring, policing and enforcement
 - the cost for supervising the vast number of venues and litigating illicit usage of music

The objects for the *grands droits* were easily identified. Operas were performed in a limited number of venues, which could be easily monitored. The numbers of productions and composers commissioned for new operas were limited as well. For the *petits droits* to be worth exploiting, the transaction costs had to be reduced by some institutions. Alternatively, the quantity of concerts and the prospective fees from them had to be increased to cover the transaction costs.

In fact, both happened. The growth of the concert business boosted the potential for *petits droits* income. New interpretations of prior legislation and, in some cases, new legislation targeting non-operatic performances made it worthwhile to take on policing and enforcement costs. The increased number of newspapers and their advertisements decreased the costs related to collecting information on venues. The unification of composers in collective licensing agencies reduced the search and information costs both for the performing right owners and for the users.

The bargaining and contracting costs for the collective licensing agencies had two sides. There were transaction costs not only related to the collection of fees from venues but also related to the distribution of the money collected to the various property owners, i.e., composers.

France

During the 1830s Parisian creators of art, including music, organized an association with the aim of becoming a cartel based on compulsory membership; only members were allowed to be published. According to the cartel, composers were to be awarded a share of the box office revenues or a general fee for the use of their music in public. In March 1847, according to Jean-Loup Tournier and Gunnar Petri (neither of whom indicate primary sources), the Parisian composer of songs and light music Ernest Bourget refused to pay for the orgeat syrup he had consumed at such a *café-concert* at Les Ambassadeurs on the ground that the proprietor had not paid him for the use of his music, which was performed in the café. The proprietor, M. Morel, explained that the price of the beverage was raised from the usual forty centimes to fifty centimes because he had to pay the musicians (Tournier 2006, 28; Petri 2000, 104). Bourget, according to Tournier and Petri, asked: “And composers and authors of the songs played, are they not also entitled to their remuneration?” Morel replied: “The authors? They are not of my concern. I would like to know what requirements they may have on their little songs that belong to all of us once they have been published” and “if we had to pay the authors as well, where would that end?” “In court,” Bourget obviously thought, as the case was soon heard in the Tribunal de commerce du département de la Seine. The verdict of September 8, 1847, based on the Copyright Act of 1791/93, was in Bourget’s favor, declaring that Morel had to supervise the performers so that they did not sing songs by Bourget (Archives de Paris 1).

The report from the trial in *Le Droit* tells a story somewhat different from the Tournier and Petri legend (*Le Droit* 1847). According to the journal, Bourget had been refused the drink he ordered at the café. In the evenings Morel served only guests who ordered things for which the *garçon* could not “deceive the corkscrew.” The gain from a modest *eau sucré* was “too small a thing for the proprietor to be able to present music and seats through a whole evening.” Bourget was annoyed. The next day, May 8, he wrote an angry letter to Morel in which he denied him the right to let singers perform his songs in the Café Morel. Bourget ends his letter thus: “If you believe, monsieur, that you do not have to act according to this decision, I warn you that at the first offense I will ask for the bailiff.” Morel did not respond either in letter or in action. Bourget sued both Morel and the proprietor of the Café Les Ambassadeurs, Mme Varin, in order for the Tribunal de commerce to grant him the same compensation for the outdoor performances in their cafés as he got from provincial theaters, namely, ten francs per song performed on stage. This was the tariff of the Société des auteurs dramatiques based on *grand droit* principles.

Through the February Revolution the following year, King Louis-Philippe was forced to abdicate. In the turmoil before the Second Republic was created in June, Bourget sued Morel again, in May 1848. Maybe he thought that the Tribunal de commerce would be influenced by the new revolutionary atmosphere. The case was heard on August 3. Morel and Varin had not prevented their singers from performing songs by Bourget in the 1848 open-air *café-concert* season, and the bailiff saw, heard, and recorded the prohibited performances (*Le Droit*, 1848). Bourget was granted a compensation of 300

francs from Morel and Varin, respectively. Varin, thereafter, agreed to Bourget's demands (Archives de Paris 2).

Morel was not satisfied with the second verdict of the tribunal. He was granted the right to have his case heard in the Cour d'appel de Paris on April 26, 1849. Its brief decision refers to the more extended verdict of the Tribunal on August 3, 1848. The appellate court granted Bourget an indemnity payment of 500 francs (Archives de Paris 3³; Gazette, 1849).

The first music copyright licensing agency, La Société des Auteurs, Compositeurs et Éditeurs de Musique (SACEM), was established in Paris in 1851 to reap the fruits of the verdicts (Tournier 2006, 26–27). In its first charter, works already protected by *grand droit* were exempt from handling by the SACEM. The new society, explicitly, wanted to “in no way affect the powers or rights of the Société des auteurs dramatique, as they remain today” (SACEM's Act of Constitution 1851, article 18). This exemption has been included in most, if not all, other national charters for collective licensing agencies. Thus the separation of *grand* and *petit droits* remains globally today.

The increasing international trade in artistic goods and services was also accompanied, at least from the French point of view, by a need for international harmonization of domestic legislation and international cross-border regulations. The Association Littéraire et Artistique Internationale, founded in Paris 1878 on Victor Hugo's initiative, had the objective of creating an international convention for the protection of writers' and artists' rights. Hugo's efforts were successful in that on September 5, 1887, ten nations ratified the treaty, which had been completed a year earlier in Berne. As the initiative was French, the Berne Convention was heavily influenced by the French *droit d'auteur* with its inclusion of *droit moral* rather than by the Anglo-Saxon “copyright,” which focused on economic matters only. The convention's main objective was to broaden the domestic rights of the participating countries into internationally reciprocal rights. The signatory countries had obliged themselves in a long range of bilateral treaties that were made redundant by the new convention. Many bilateral treaties were maintained with countries that did not sign the convention.

One important effect of the Berne Convention was the opening of SACEM offices in other European countries. They monitored the economic interests not only of French composers abroad but also of the domestic members of the SACEM in those countries. The money flowed via Paris. This business procedure was generally not well appreciated abroad.

Not only composers of lighter *café-concert* music benefited from the performing rights system in France. Claude Debussy, for instance, collected his income from three main sources: 50% from publishing royalties, 25% from concert fees, and 25% from performing rights fees (Herlin, 2011).

Germany

Among the many early members of the SACEM German composers like Robert Schumann, Richard Wagner, and Johannes Brahms also appeared. The *Société* did collect fees for performances of their music as well but refused to forward the money to the German members until similar laws were implemented in their countries from which French members of the SACEM could benefit.

Prussia was the first Germanic state to issue a copyright law, Gesetz zum Schutz des Eigentums an Werken der Wissenschaft und Kunst (Law for the Protection of Property in Scientific and Artistic

³ I am indebted to Professor Anne Elisabeth Andréassian, University of Paris 1 Panthéon-Sorbonne, for the deciphering of the hand-written verdict.

Works), issued on June 11, 1837 (Prussian Copyright Act 1837). It included a section on performances (§§32–34):

The public performance of a dramatic or musical work, be it wholly or with insignificant abridgements, may only take place with the permission of the author, his heirs or legal successors, as long as the work has not been published by means of printing. The exclusive right to grant this permission is vested in the author for life, and in his heirs or legal successors for a period of ten years after his death.

Paragraph 35, however, extended the protection to cover not only unpublished works: “The present statute shall also be applied in favour of all already printed . . . musical compositions . . .” The Parliament of the German Confederation accepted this Prussian law on April 22, 1841, for implementation in all the member nations (of which Prussia and Austria were dominant). It seems that the implementation of the law suffered from the general weakness of the Confederation. Composer and lawyer Johann Vesque von Püttlingen in Vienna had a contemporary view on the matter that excluded §35 from consideration: “Regarding non-dramatic (chamber, concert, and church) music there is, namely, a permission that is linked to the printed issue, and well understood by everyone, to perform the piece because this performance is the very purpose of publication . . .” (Vesque von Püttlingen 1864, 61). Püttlingen did not recommend that composers try to have the French *petit droit* enforced in the German Confederation. He argued that it was not in line with their *Künstlerehre* (artistic honor). They stood the risk of being disqualified as avaricious. It would also be counterproductive to the spreading of their works.

After the Franco-Prussian war of 1871 Otto von Bismarck and King Wilhelm I finally formed the unified German Empire. German composers and authors of dramatic works united on May 16, 1871, in the Deutsche Genossenschaft dramatischer Autoren und Komponisten (German Cooperative of Authors and Composers of Drama). This came as an effect of the new Gesetz, betreffend das Urheberrecht an Schriftwerken, Abbildungen, musikalischen Kompositionen und dramatischen Werken (Law Regarding Originator Rights in Literature, Figures, Musical Compositions and Works of Drama) decided by the North German Confederation on June 11, 1870. When it was actually enacted on January 1, 1871, it became applicable to the entire German Empire, which was formed on the same day. The provisions regarding performance rights were somewhat extended: “. . . Musical works which have been published by means of printing may be publicly performed without the author’s consent, unless the author has, on the title-page or at the head of the first sheet of his work reserved for himself the right of public performance . . .” (Copyright Act for the German Empire 1870, §50).

The possible *petit droit* fees provided by the law were not actually implemented by the composers until several decades later. The limited number of opera performances was comprehensible and easier to control than the vast amount of public concerts. The transaction costs for collecting information and policing were high. Publishers generally demanded that composers transfer performing rights to them as part of the publishing contract. Few made any claims on performance fees. The Imperial Copyright Commission noted a few months after the law was enacted that “only a minority of the composers will be in a position to tie a financial condition to the permission for a public performance . . . most of them will thank the concert promoters for making their names known to the audience” (Dümling 2003, 30).

Albrecht Dümling claimed that German composers lacked interest in the question of performance rights due to their “romantic notions of the unrealism of music as well as aesthetic discussions like the

strife between *Neudeutschen* (New Germans) and conservatives, between Wagnerians and Brahmsians, which pushed the once strong sense of justice to the background” (Dümling 2003, 30).

Wolfgang d’Albert, a century before Dümling, however, discussed another “romantic notion” when it came to the reason that French composers were the first to adopt the idea of performing rights:

The deeper psychological base for this can probably be found already in the French national character which, proud of its ancient culture, rather overestimates than underestimates every creation born out of its spirituality and transfers this appreciation to the author. (d’Albert 1907, 5)

Both Dümling and d’Albert depicted a German preoccupation with *Geist* (spirituality) rather than anything else. D’Albert continued with an appreciation for why French composers of “better entertainment music” and “light music” rather than those of “serious music” were the ones who claimed performing rights for their music:

... but since this class of composers is very eager to strike material gain from their art, their profit superseding their art, they are particularly concerned about the fullest exploitation of their performing rights. From this also the main fault of the French Société is derived: the exclusive emphasis on the purely commercial, financial part of the performing rights and the exploitation of that right in a purely merchant-like manner. (d’Albert 1907, 6–7)

With this kind of explicit esteem, according to the ideals of Romanticism, of the composer of serious music as being solely interested in his art and not his material circumstances and in that pursuit preferably suffering from hunger rather than abundance, it is only natural that the first to recognize the financial potential of the German law were publishers rather than, with some exceptions, composers. When the law was later revised the Verein der Deutschen Musikalien-Händlern (Union of German Music Publishers) declared in a note to Chancellor Bismarck:

After the boom which has occurred in the last decade of German concert life, §50 of the Act, regarding the right concerning dramatic-musical performances including also, by name, purely musical works, provides the authors and their successors quite insufficient protection.”

At first the Verein thus strongly advocated a more explicit *petit droit*. Later on it revised its stance and worked against both the strengthening of the *petit droit* and the collective agency to enforce it. Several clashes occurred between and among publisher cliques and composer coteries. Would a stronger enforcement be productive or counterproductive to either or both publishers and composers? Many publishers clung to their contracted possession of composers’ works. They saw no need for a collective agency. Some composers, such as Engelbert Humperdinck, Eugen d’Albert (father of Wolfgang), and Richard Strauss, worked persistently and effectively in favor of full *petit droit* implementation. Their most important friend among the publishers was Hugo Bock in Berlin, who since the 1870s had already been printing “Aufführungsrecht vorbehalten [performing rights reserved]” on all his scores.

Oskar von Hase, the owner of one of the biggest and most influential publishing houses, Breitkopf & Härtel in Leipzig, was a primary spokesman of the anti-agency movement among publishers. At the 1895 conference held by the primarily French Association Litteraire et Artistique Internationale in Dresden, he persisted in speaking against copying the French system in Germany.

Eventually it was neither publishers nor composers who broke the stalemate. It was a legislative thrust from the government. In 1896 it partook of the Paris revision of the Berne Convention and agreed to transfer it in all parts into German legislation. It also, however, publicly declared “that an extension of the musical performing rights could only be of practical importance if the protection also could be economically exploited by the founding of a German agency.” This statement from the government had a surprising result: “it suddenly changed the fiercest enemies of the agency into its warmest advocates” (d’Albert 1907, 17–18). The board members of the Union of Publishers now declared that their prior opposition was not targeted at the actual founding of an agency but, rather, at the limited knowledge and the disregard in the German music business for the French Société. They further claimed that the situation had only now become “ripe enough.” In order to prevent the composers from exerting a major influence on how the agency should be construed, the board suddenly, “despite the considerable opposition both from the composers’ side and that of publishers” and “in a super-hasty manner,” started the process to establish a collective licensing agency (d’Albert 1907, 17–18).

The Anstalt für musikalische Aufführungsrechte (Institute for Music Performing Rights), or AMFA, was finally chartered in 1903. The Viennese publisher Josef Weinberger gave a speech at a conference in Milan in 1906 declaring, “There is probably in no other business area an example of such an undoubtedly good law, the substantive significance of which is not yet appreciated. Idle in a series of states for decades, left behind and creating losses of millions . . .” (Dümling 2003, 29–31). Step by step, the AFMA took control of the situation and managed to muster much of the anticipated gains. The AFMA was succeeded after the Second World War by the present Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (Association for Music Performing and Mechanical Duplication Rights), or GEMA.

Britain

In Britain music performing rights had been enacted through the Copyright Act of 1842, five years before the famous court verdict in Paris. The implementation of that right, however, was not carried out by an agency like the SACEM. Obviously, the difficulty in retrieving correct information on who actually held the IPRs was a huge obstacle and thus represented a high transaction cost for concert promoters. In the August 1, 1876, edition of the *Musical Times*, J. Clelland reflected on the confusing advertisements in two previous issues of the paper regarding songs from the popular opera *The Bohemian Girl* with music by Michael William Balfe and a libretto by Alfred Bunn. The publisher, Boosey and Co., had stated in an advertisement “that they make no claims for the right of performance of the various English songs, duets &c., published by their firm.” In a later advertisement, “Madame Balfe, as the widow and executrix of the late M.W. Balfe, has resolved henceforth . . . to charge no fees for the execution of single songs . . . when given in concerts, and not performed on the stage.” A Mr. Frank Bodda, acting on behalf of the late librettist Bunn, nevertheless sued the Clerkenwell Benevolent Society for the penalty of 40 shillings for having used a song, or more precisely its lyrics, from *The Bohemian Girl* in a concert. Clelland concluded:

1. That Messrs. Boosey are only the publishers, and can give no permission to sing in public either the music or the words of the song

2. That Madame Balfe can only give permission to sing the music, and cannot give the permission to sing the words
3. That Mr. Bodda can only give permission to sing the words and cannot give permission to sing the music. (Clelland 1876, 567–68)

The editor added that Boosey and Co. did not own the publishing right for *The Bohemian Girl*: “They merely publish an octavo [pocket] edition of the opera by arrangement of Messrs. Chapell and Co., who possess the copyright.”

In the May 1877 issue of the *Musical Times*, an anonymous journal spokesman provided an extensive editorial on the matter. A Mr. Harry Wall, secretary of the “Authors, Composers, and Artists’ Copyright and Performing Right Protection Society” of his own construction, is considered not to be “as one might suppose, simply and solely a nuisance.” Rather, the editor claimed,

Mr. Wall—a contemporary styles him “the man Wall” but on consideration we will drop the qualifying substantive— . . . has no scruples . . . The mode in which he conducts the not very honourable, though it may be perfectly legal, business on which, in the absence of anything better or the capacity for anything better, he has embarked. . . . in order to snatch forty-shilling penalties or obtain ten-guinea subscriptions for the “Society” he has literally stuck at nothing. (*Musical Times* 1877, 214–16)

The editor presented several cases in which Wall excelled in this pursuit, for instance: “At a concert given in the village of Milton an amateur sang ‘Who’s that tapping at the garden gate?’ and soon found out that it was Mr. Wall with his stereotyped demand for penalties.” Wall had a criminal record before entering the new business of performing rights policing. In 1860 he was sentenced to eighteen months in prison for having obtained property under false pretence. His character was thus easily questioned by the established agents of the British music scene. Several publishers complained. Thomas Chappell “did not like the character of the man or the character of the proceedings.” John Boosey said, “no living composer cared to employ him” (Alexander 2010, 339). According to Peacock and Weir, exploitation of the right to perform in public had been “given a bad name by unscrupulous persons who purchased the legal right for the sole purpose of enforcing penalties against unauthorised use by unwitting performers” (Peacock and Weir 1975, 35).

The editor of the May 1877 issue of the *Musical Times*, however, also explored logic in his rhetoric by suggesting that the general transaction cost from bad or non-existent information on performing right ownership would be reduced “if it be enacted that every musical composition shall bear on its title-page not only the name and address of the holder of the copyright . . . but also the name and the address of the holder of the performing right” (*Musical Times* 1877, 214–216). The Royal Copyright Commission discussed this matter in 1878 and recommended exactly that. In 1882 Parliament enacted a bill to this end. However, publishers more often printed a notice on the sheet cover that the music “may be sung in public without a fee or licence” (Peacock and Weir 1975, 35).

A few years later the tide had turned. Although Wall himself was still despised, his line of business had become more accepted. People came to consider managers and concert producers as naïve. A letter to *The Era*, published January 30, 1886, noted that Wall had:

Opened the eyes of song writers to the fact that they are as much entitled to the protection of the law as any other of Her Majesty's liege subjects, and it therefore behooves proprietors, if only as a matter of business, to be on their guard against those unprincipled persons who would rather steal a song than pay for it, and who, knowing they are not themselves worth proceeding against, are careless of the consequences to their employers. (Alexander 2010, 343)

Ironically, in 1888 Wall, after having had his business ideas so accepted, was found to have contravened the Solicitors Act as a non-qualified legal agent. He was sentenced to three months in prison.

In the December 1883 *Musical Times*, C.T. Cobham, the producer of concerts at the local School of Arts in Hertford, complained that he had been charged £14 by the copyright owner's representative for using the song "The moon has raised her moon above" by Benedict at two concerts:

Thus, it will be seen that men are fined heavily for damaging a person whom they have really benefited. The performance of a song advertises it and directs attention to its merits in the most effective manner; therefore the act promotes the sale of that song and does good for the owner of the copyright. (Cobham 1883, 684)⁴

This opinion was in line with the business practice in Britain at the time. Whereas French publishers saw a possibility of commercializing their music through performing right fees collected by the SACEM, British publishers used the 1844 act much more defensively. Publishers were themselves the main concert promoters. They sometimes prohibited the use of their music by other promoters and thus safeguarded the collection of both the entrance fees and the revenues from increased sales of sheet music. For the composer this was detrimental, as he could only benefit from the latter kind of income, which might have been increased if publishers did not prevent the use of their music by other concert promoters. After the signing by both the UK and France of the Berne Convention in 1886, the SACEM employed an agent in Britain to collect the royalties for public performances of French music. This anomaly did not at first influence the British publishers and composers. In the 1890s, however, concerts promoted by publishers lost a great deal of attendance, and by the 1900s the potential threat from sales of gramophone records was identified. Both composers and publishers found it necessary to rally for a proper performing right regulation and a collecting agency to implement it (Peacock and Weir 1975, 46–48). The 1842 Act was extended and modernized as the new Copyright Act of 1911, with a new paragraph on performing rights:

For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform . . . the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof, and shall include the sole right,

- a) to produce, reproduce, perform, or publish any translation of the work
- . . .

4 Today we hear the opposite argument from the piracy movement: recorded songs, when downloaded or broadcast, act as advertisements for live performances.

d) in the case of a literary, dramatic, or musical work, to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered (Copyright Act 1911, paragraph 1, section 2)

In March 1914, more than six decades after the French model was set in place, composers and publishers in Britain created their own version: the Performing Right Society (PRS).

Sweden

In 1914 a royal committee presented a proposal for a new copyright act, which would include some basic performing right clauses. The bill was debated at length. In 1918 the government planned to revise the bill in a way that was detrimental to the interest of composers. Songs and dance music were to be exempt from performing rights. The composers were quick to organize the Föreningen Svenska Tonsättare (Swedish Union of Composers), or FST, which was constituted on November 29, 1918. Mr. Kant, a Member of Parliament, had motioned for the inclusion at least of songs in the new law. The Royal Music Academy decided on a pronouncement supporting Kant's suggestion. The FST followed that example and sent a declaration to the First Provisional Committee of the Riksdag (Swedish Parliament) in support of Kant. The general conception was that it would be futile also to suggest the inclusion of music for social dancing in the labor movement's People's Parks and Houses and other ballrooms. The Riksdag eventually accepted the Kant revision in its final decision of May 30, 1919 (Atterberg 1943, 3). It was a close call decided only through the single casting vote.

Several leading Social Democrats had tried to stop the act, claiming that it did not sufficiently guard the rights of the general public. MPs Carl Lindhagen, Per-Albin Hansson and Wilhelm Björck concentrated their criticism on the weak positions that authors and composers had in relation to powerful publishers. Hjalmar Branting, who was Prime Minister until one month before the Copyright Act was passed and again the following year, stressed the importance of a social perspective. Copyright legislation should not only be regarded in relation to trade and property matters: "it can be put in question if the time is right to bring forward such a purely private financial and legal approach as this . . . instead of looking at the social consequences if this approach is applied" (Fredriksson 2009, 5).

There were two major changes in the new law: (1.) a *droit moral* clause defending the composer and his or her music from distortive treatment; and (2.) a *droit économique* clause also including "fragments" of pieces in the performing rights. The law also declared that there was no longer a need for the phrase "the piece may not be performed in public without the consent of the rights holder" to be printed on scores. This had become common practice only a few years before the new act. As clause 8 of the new §32 declared that music published before 1920 and lacking such a proviso could be performed freely, the FST regarded it as pointless to form a collecting society based on the new law (Atterberg 1943, 4).

At this point in time the SACEM had branch offices in Holland, Belgium, Czechoslovakia, and Switzerland. In principle, domestic composers in these countries could also become members of the SACEM, which then collected their fees and sent them to the SACEM headquarters in Paris. The collecting agencies in Spain and Italy were heavily influenced by the SACEM. Sweden, Norway, and Denmark lacked collecting agencies. P.J. Carvil had started the Nordic Copyright Bureau (NCB) in

Copenhagen in 1915 with the same intentions as Harry Wall before him in Britain. The NCB, however, soon concentrated its efforts on the emerging record industry.

The FST chairman, Natanael Berg (who earned his income primarily as a military veterinarian), was sent to a conference of Europe's collecting agencies in Berlin 1922 to discuss copyright matters with fellow composers. He noticed sharp criticism of the SACEM from the countries where it operated outside France. It was generally believed that the SACEM strongly favored French members when it came to payoffs and other kinds of financial support. When Berg returned from Berlin, he brought with him some scarcely comforting information:

the information regarding the situation in Sweden was received with amazement mixed with ridicule. From several parties it was clearly stated that unless we in our country take action in order to guard composers' financial interest in performances, the foreigners would soon enough be forced to watch over their rights in Sweden through their own agents. (FST Annual Report 1923)

Composer Kurt Atterberg (who earned his income primarily as an engineer with the Swedish Patent and Registration Office) studied the fee and payment calculation system of the AFMA. Berg received substantial information on the subject from Holland and Belgium. He reported that "elderly women and, in the mornings, four kids" extracted concert adds from all the Dutch papers (Edström 1998, 21). Atterberg (1943, 5) put himself forward as the one who wrote the documents by which the Föreningen Svenska Tonsättares Internationella Musikbyrå (Swedish Composers' International Music Bureau Association), or STIM, was founded. In his 1943 memoirs and in other later recollections he totally ignored the crucial work once performed by the lawyer and music amateur Seibrant Widegren as the secretary of the organizing committee. The committee held most of its meetings in his flat or office. Widegren sent the invitations to the Stockholm music publishers who, at a crucial meeting in his office on February 19, 1923, agreed to the founding of a collecting agency. They reluctantly accepted the fee-split of three quarters to the composer and lyricist and one quarter to the publisher, the same shares as those decided by the AFMA. The suggestions for the STIM charter, which Widegren put forward at a meeting of FST members on March 22, 1923, were partly disputed by Atterberg but only a few paragraphs were revised by the majority of members. Widegren revised accordingly, and the STIM was thus chartered.

The STIM was swiftly put into operation. Agreements were signed with the Musikestabilissemangens Förening (Association of Music Establishments, or MEF) and various regional associations of restaurateurs. Contracts were signed with counterparts in other countries. The new structure and its fees were, of course, not well liked by all. In the Riksdag two members, Norman and Holmström, motioned for "certain changes of the law concerning rights to literary and musical works" (Parliamentary Motion 177, 1925). Their idea was to let restaurants and cafés, those without entrance fees, play music freely. The response from the FST and STIM to the legislative committee clarified a range of issues.

Conclusion

Performing rights were, unlike copyrights and, later, broadcast and mechanical (gramophone) rights and blank media levies, not caused by any singular technological innovation. They were rather the results of the general economic growth that occurred in Europe after the Industrial Revolution. The demand for and the supply of opera performances and concerts increased when economies grew. Virtuoso celebrities became household names. As the music business grew, so did the incomes of many artists and publishers. Composers gradually came to demand their fair share of the revenues. Their services became subject to “fictitious commodification,” according to Polányi's definition, as their music became market goods not only as printed scores but also as input factors in the concert business. Music was also used as a supporting additive in the value creation of restaurants and cafés. Performing rights eventually accrued to most occasions when music was played in public.

The paragraph concerning the reimbursement to the composer in Louis XIV's *réglements* for the royal opera is mostly a contracting and reimbursement guideline. The possible arguments for the French edge concerning performing rights were not captured by Dufey de Noinville in his *Histoire Du Théâtre de L'Opera en France* of 1757. Combined with Enlightenment ideas, Beaumarchais's struggles and the bourgeois revolution paved the way for the first copyright act, that of 1791/93, which included a section on more general performing rights. The extremely condensed nature of the act paved the way for debates in and out of legal courts. It seems that both Louis XIV's *réglements* and the 1791/93 Copyright Act came as an implicit recognition of the necessity of reimbursements to composers in order to make them produce the goods that were desired. The famous verdict of the *Tribunale de Commerce de la Seine* of September 8, 1847, in favor of composer Ernest Bourget's claim for economic compensation from public representation of his music was based on the 1791/93 Act. The SACEM, the French collective licensing agency, took care of the business opportunities that the verdict made possible.

A plausible reason for the reluctance of other countries to follow the French example to form agencies is the work-laden task of taking on transaction cost elimination. However, nowhere in my sources does evidence of this reason appear. The difficulties involved in the acquisition of information on where and when music is performed are recognized, but as the SACEM did manage to produce a financial surplus, it would have been a sign of indolence to use difficulties in transaction cost reduction as an argument against the domestic implementation of the French system. France, Britain, and Germany were big countries with substantial music scenes. It is likely that the potential revenues from the implementation of the SACEM system in Britain and Germany could have been profitable in the same way as it was in France. There would have been a net profit from performing right fees and licenses after the deduction of transaction costs. Other factors delayed the processes. Sweden was not only a peripheral country with a comparatively small and scattered population. It also had its Industrial Revolution later than the other countries considered here. Music was, of course, both composed and played, but Sweden lacked the requisites for commercial concert venues in numbers comparable to those of Britain and the larger countries of continental Europe.

Germany did not become a unified state until 1871. Legislation in the many independent states of the German Confederation prior to that was diverse, but the music market was generally common. This put the same heavy hand on the possibility of policing and enforcing performing rights as it had with

regard to copyright in music publishing. The publishers themselves took the initiative of monitoring music copyright in the 1830s.

A special feature of the British music scene was its heavy reliance on publishers to produce concerts. They used public performances as advertising vehicles for their printed music. They had as little interest in handing over a share of the box office revenues to composers as other concert promoters. Another such feature was the cunning actions of individual “agents,” who saw business opportunities in policing and enforcing the performing right, which was, at least implicitly, formulated in copyright acts. The fear of high transaction costs obviously did not discourage them.

The composers involved in the establishment of the SACEM produced music of a lighter kind intended for entertainment. This was definitely held against the licensing system by the composers of more serious music in other countries. The view that the French composers were of a lower standard and mostly interested in the financial aspects of composing was explicitly held against the SACEM system in Sweden and Germany. In Britain the people who actually took it upon themselves to implement the possibilities of performing right fees as a business strategy were looked upon with even more condescension than the café-music composers who established the SACEM.

The argument that IPRs incentivize music production was largely absent from discussions regarding the implementation of the SACEM system in other countries, perhaps because they implicitly accepted that this was true. This idea is almost the opposite criticism that was used explicitly against the Société, namely that the primary task of composers is something more honorable than making money. Eventually the old-school composers who maintained such ideas were succeeded by younger composers who probably recognized that the French system did not prevent Gounod, Saint-Saëns, Debussy, Ravel, Fauré and others from making music of high artistic value but also rather enriched them, at least to some extent. Richard Strauss in Germany and Kurt Atterberg in Sweden belonged to this generation.

In Germany it was the government, identifying the business possibilities that the SACEM system fostered, that finally pressured the composers and publishers to form a SACEM counterpart. In Britain the collective agency was not started until the threat from the gramophone industry made it necessary.

In Sweden it was the embarrassment of the ill-informed negligence vis-à-vis the developments on the European mainland that finally made it necessary to implement the performing right system with its collecting agency. Representatives from other countries viewed the Swedish parochial backwardness on this issue with ridicule.

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