

# The Advent of Performing Rights in Europe

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## Introduction

Music copyrights, as well as other Intellectual Property rights/IPRs, have 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 the item is bought nobody else can buy it. Also broadcast and mechanical rights and blank media levies came as 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 which covers goods or situations which are mainly not rivalrous or excludable, namely the performing right. It briefly looks at technological change as cause for the urge for the performing right 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.

The introduction of performing rights is described with international comparisons from France, Germany, Britain and Sweden. Why did the latter three take so long to implement the French legislative innovation? Some national peculiarities are discovered. Ethnic or national animosities are apparent. Differences, at least alleged, in how composers' artistic and general moral norms were viewed by themselves and outsiders seem to play an important role in why some countries saw with lingering scepticism on performing rights for several decades after the first introduction of them in France. The paper, finally, presents some historic facts which shed light on why the piracy movement is especially strong in Sweden.

Performing rights are generally divided into two categories: 1. *grands droits* pertaining to music for the stage (opera, musical, 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 theatre company while small rights are the objects of collective licensing agencies which provide costumers with blanket licences for the use of all the music listed by the agency for an agreed purpose (normally live performances or broadcasts).

## **Grand Droit**

### France

The common use of French for the two different performing rights discloses their place of origin. Both were French inventions. The *grands droits* were introduced in the *réglements* 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*). The *Académie* was made possible through a royal *Lettre Patent* providing a Pierre Perrin with the privilege to perform opera in French within the boundaries of the kingdom. He was also granted a thirty years exclusive right to publish and sell the operas. Perrin managed to stage only two operas, both with music by Robert Cambert, before he was forced, due to mismanagement of funds, to transfer his privilege to the royal music director Jean-Baptiste Lully in May 1672. Only operas composed by Lully himself were staged until his death in 1687. Thus there seem to have been little need for a special consideration as to how composers should be remunerated.

It seems that the *Académie royale de Musique* became increasingly difficult to manage. Through the 18 paragraph *Réglement 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)<sup>1</sup>. The composer remuneration clause was repeated (as § 16) in the even more elaborate, 47 paragraphs, *Réglement sur sujet de l'Opera donné à Marly le 19 Novembre 1714*. It is likely that the *réglement* ratified and clarified a system which was already in place. The clause stipulates 100 *livres* for each of the ten first performances and thereafter 50 *livres* for each of twenty more performances. After these 30 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 functions and their salaries, nor the *réglement* 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 got. (Durey de Noinville, 1757).

For authors providing *La Comédie-Française* with plays the situation was fundamentally different. The actors ran their theatre as a collective enterprise with less royal supervision than the *Opéra* which was managed by a *directeur*. The author right issue had been of little importance for the earlier French playwrights. Molière integrated his function as playwright with those of producer, director and actor. Voltaire adhered to the old tradition that a true gentleman should not earn money from his writing. His early ambition was to invest in the writing of plays in order to elevate into

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<sup>1</sup> 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

high social rank. He successfully managed to become economically independent as member of the *Académie Française* and as royal historiographer. He had little understanding for the efforts of, for instance, Louis-Sébastien Mercier and, later, Pierre Augustin Caron de Beaumarchais to reach a 'literary sociability which sought prestige and financial support from a socially broad public, or "nation"' (Brown, 2006, p. 47).

The struggle by dramatists, led by Beaumarchais, to gain actual possession of their plays has been documented in detail by Boncompain (2001) and Brown (2006). Playwrights had an even more insecure financial situation than opera composers. But when it came to actual ownership of their works circumstances were principally similar. None could expect to maintain long-term property right in their oeuvres. This was not addressed until the *Decret rendu sur la Pétition des Auteurs dramatiques* was passed by the post-revolutionary national assembly on 13 January 1791 (ratified the next week by Louis XVI). The decree was based on a report by the *jacobin* lawyer and orator Jean le Chapelier. Article No 4 reads: 'The works of living authors may not be represented in any public theatre within the extent of France without the formal consent and in writing by the author...'. This was the first legal safe-guarding of the performing right in the hands of the originators. In July 1793 le Chapelier suggested a revision of the earlier law to specify that it 'should apply to all dramatic works, whether or not they had been previously performed or printed' (Brown, 2006, p. 147).

The organisation established by Beaumarchais, the *Société des Auteurs Dramatiques* (SAD), 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 organisation, 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 theatres. These agreements stipulated that one-seventh of net proceeds of all performances should be granted the author (Brown, 2006; p. 144). Remuneration size in this range remains today a common business praxis. The *Bureau* was succeeded by the *Société des auteurs et compositeurs dramatiques* in 1829.

### The United Kingdom

In Britain the joint author-publisher copyright in books was codified in the Statute of Anne of 1710. The copyright in 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. Theatre managers maintained that it was their right to stage published plays freely without neither consent from the author nor reimbursement to 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 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' (Deazly, 2008: p. 3).

Lord Smythe first establishes the 'advantage from the performance' and then the other sources of income: printing and publishing. Thus he, albeit in a backward way, principally established an IPR for the author in the performance of his plays. Other cases dealt with the question whether it was the published play, in which there was copyright, or something non-copyright which was staged when the text was enhanced by acting, set design, lighting, costumes and sometimes music. Only alterations of published plays when staged was 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 theatres, Covent Garden and Drury Lane, tried to uphold their claim for patents on the performance of 'legitimate drama' (i.e. spoken drama) in several cases against minor theatres 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' (Deazly, 2008: pp. 12-13)

Neither in the Select Committee Report (1832) nor in the subsequent Dramatic Literary Property Act (1833) 'music' or its 'composer' are mentioned explicitly. It is, however, generally accepted that composers are included in the author concept of this act as well as its counterparts in

other countries. Composers wrote and published their music. In the extensive Minutes of Evidence attached to the Select Committee Report lots of references are made to music and the use of it in theatres. Captain John Forbes, proprietor of Covent Garden, was interviewed by the committee on 15 June 1832. His reply to a question regarding musical composers' remuneration was:

...they do not receive anything but the copyright [supposedly: royalty from the score purchased by Covent Garden from the publisher]. Musical composers are generally desirous of writing music for the stage. Sometimes it is otherwise; for instance, for the authorship of Oberon we gave 400*l.* to Mr. Planché, who undertook to produce the manuscript, and we gave 500*l.* to [Carl Maria von] Weber for the music. I trust the committee will think there is no want of encouragement to authors' (Select Committee Report, 1832: p. 112).

Von Weber, however, seems to be an exception to a rule. He was one of the leading contemporary composers internationally. His bargaining position was strong. The amounts paid to Planché and von Weber, as mentioned by Forbes, were lump-sum commission fees covering costs for work hours for the production of manuscript and score rather than actual performing right royalties. Oberon was first performed at Covent Garden in April, 1826<sup>2</sup>.

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 (1833: first paragraph). How legal matters should be conducted was specified as well as a fine on infringements of 'not less than Forty Shillings' (1833: second and third paragraphs)<sup>3</sup>. The Act explicitly defines the performing right to include not only the full piece but also 'any Part thereof'.

The Act provided the necessary legal frame-work for what was considered an IPR and how infringements were to be handled. The implementation and the policing was left to the parties

<sup>2</sup> von Weber was extremely exhausted and met an untimely death while still in London two months after the première.

<sup>3</sup> The fourth and last paragraph includes 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'.

involved. The playwrights immediately organised in the Dramatic Authors' Society for the administration of performing rights.

The new, revised Law of Copyright of 1 July 1842 clarifies '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: p. 412). By this the revision opened up for *petit droits* in Britain.

### Sweden

The francophile King Gustav III of Sweden established his Royal Opera in 1773. An early employment contract from 1781 concerns composer Joseph Kraus (1756-1792). His primary duty according to the contract was as assistant chief conductor. In addition: 'of every new opera that I compose the third representation shall be to my benefit' (Kraus, 1781).

King Gustav IV Adolf, the son of Gustav III, was overthrown in the mild coup-d'etat of 1809 due to his miscalculations of the military force of the country which he had engaged in wars against the parvenu emperor Napoléon and his allies. A few months after the coup the *Riksdag* (a four estate Parliament) decided on a new constitution with a division of governmental powers between the king, his council and the *Riksdag*. The following year the Freedom of Information law of 1766 (however made extinct by Gustav III when he declared himself 'the enlightened autocrat' in 1772) was revived, revised and included in the constitution as an ordinance on freedom of the press. It now included a section on the author's rights. As the act was written the copyright was to be a property eternally belonging to the author and his/her heirs. The interests of consumers was identified and addressed in a revision 1841 whereby the duration of the right was limited to the life of the author plus 20 years for his/her heirs.

The British Copyright Act of 1842 is a detailed and extensive piece of legislation also regarding the parts on performing rights. In Sweden the similar act of 20 July 1855 issued by king Oscar I is much more laconic. Nevertheless it is very much to the point and declares that 'Swedish [N.B.!] dramatic works may not be publicly performed unless the author has given permission therefore'. Songs composed by the king were favourably reviewed by Robert Schumann in his *Neue Zeitschrift für Musik*. King Oscar's son, Prince Gustaf, composed the song which has ever since been sung by Swedish pupils when having passed the Baccalaureate exam. So it is not surprising that the king took 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' (Swedish Ordinance Collection, 1855: no. 79).

For the proper implementation of this act the opera directorate, based an arguments for an enhanced furthering of Swedish playwrights, suggested changes in the company regulations in

August 1856. King Oscar returned the petition simply signed 'approved Oscar'. For 'musical plays, regardless if they included words or not' (thus the regulation must pertain to composers as well as librettists), the fees should be paid according to duration (Royal Court Orchestra and Spectacles Directorate, 1856):

First Class; full spectacle for the evening:	1/4 of net income for the first 20 performances and for all thereafter 6 Swedish <i>Specie Riksdaler</i>
Second Class; half a spectacle or more but less than full	1/6 of net income for the first 20 performances and for all thereafter 4 Swedish <i>Specie Riksdaler</i>
Third Class ; less than half a spectacle	1/12 of net income for the first 20 performances and for all thereafter 3 Swedish <i>Specie Riksdaler</i>

The regulation also includes clauses regarding music to translated plays and pantomimes however, in these cases, there was no tariff. The directorate was to apply 'reasonable fees' according to individual agreements.

The author's rights part of the freedom of the press chapter was taken out of the constitution by a second and enacting decision by the *Riksdag* in 1877. The interests of the various stake-holders in the publishing business – authors, publishers, vendors and consumers – were balanced in a way which adhered to international debate and legal standards. The process lasted more than a decade. Per Östman, a spokesman of the peasantry estate anticipating higher costs for literary products and printed music, declared that:

this report regards the prohibition of reproduction of the products of 'the liberal arts', but it seems to me that there is a contradiction in this, and I believe that these latter, in the case the law should be finalised, should change their name and henceforth be referred to as 'the patented arts'. (Fredriksson, 2009a; p. 141)

### ***Petit droits***

Changes in copyright law have generally come as results of technological shifts. When it comes to the introduction of the *petit droit* it is, however, difficult to identify a self-evident technological cause. F.M. Scherer suggests 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 conducted by Frederic Chopin twenty years later. Chopin spent only 12 hours on a train. (Scherer, 2004; pp. 145-147).

The changes in transportation technology were, however, part and parcel of a more general economic growth after the industrial revolution. Railways and canals were introduced when enough capital was at hand and thus the result of previous economic growth. Once they were built they reinforced economic growth.

New socio-economic strata, primarily the bourgeoisie, financed both 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 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 rate in the four studied countries were substantially higher after the industrial revolution than before, table 1. The break of periods at 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 silver price 1990). The percentages display a rise of income in the 80 years period between 1820 and 1899 with approximately 250%. For the much longer earlier period of 121 years the total rise was approximately 125%.

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

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

Music publishing equalled book publishing in size and income in the 19<sup>th</sup> century<sup>4</sup>. Prior to broadcast and gramophone technology music could only be enjoyed live. To be able to play music from scores was a beneficial asset to the sons and, especially, the daughters of the bourgeoisie. This virtue was extended to the community, town or city as a whole:

Beyond question, one of the most powerful civilizers is the piano-forte. Let a house be ever so lonely, sordid, unhappy and a piano will send the evil spirit away and make smiles perform upon its very walls. Let a community be well supplied with pianos, and a visitor requires no further evidence of its high intelligence and social excellence. (The Piano-Forte, 1861)

The development of the piano industry, as an example of the growth of music businesses, showed all the typical signs according to general economic theory. The best entrepreneurs combined craftsmanship with a good sense of the business matters. The early innovations of Parisian piano makers such as Pleyel and Erard were of great importance and made them world leading brands

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4 According to Gunnar Petri, the STIM president, in conversation

until the middle of the nineteenth century when the forces of schumpeterian 'creative destruction' were instead found in Germany and the US. Some piano makers used celebrity musicians to showcase their products. Beethoven hailed the Broadwood grand piano which was sent to him from London in 1818. Liszt helped both Bösendorf of Vienna and Bechstein of Berlin to gain high reputation.

The grand pianos for the rich and for concert halls were supplemented by the smaller and cheaper square pianos and upright pianos for use in homes, schools, churches etc. The productivity was enhanced by those who did not cling to pure artisanship. A higher degree of division of labour was seen in the emergence of companies which supplied several end product makers with, for instance, action systems (Renner in Stuttgart) and keys (Kluge in Wuppertal).

Although trade was still mostly domestic or even local, some more prominent makers became early exporters with the help of faster and cheaper transport facilities. Blüthner of Leipzig, for instance, opened a sales representation in London in 1876. By the turn of the century Blüthner had built over 50 000 pianos - grands, uprights, and squares - which were distributed by a network of dealers throughout Europe, North and South America, and Australia. American piano companies such as Steinway, Mason & Hamlin, Baldwin and Chickering were well known also in Europe (Palmieri, 2003). Pianos became household items at least with the bourgeoisie. Composers produced new music for publishers who supplied all the amateurs with sheet music. To a large extent concerts were produced by publishers to market their music prints.

Thus the music businesses benefited from the continuously improved socio-economic circumstances. The suppliers of music services (concerts) and products (instruments, music prints) contributed to and reinforced economic growth as they successfully met an ever increasing demand. Composers identified the possibility to have a part of the increasing profits that virtuosi could muster in the thriving new concert business.

### France

During the 1830s Parisian creators of art, including music, organised an association with the aim of becoming a cartel based on compulsory membership; only members should be allowed to be published. According to the cartel, composers should be awarded a share of the box office revenues or a general fee for the use of their music in public. In 1847 Parisian composer Ernest Bourget, who was accompanied by fellow song-writers Victor Parizot and Paul Henrion, refused to pay for what he had consumed at a *café-concert* at *Les Ambassadeur* on the ground that the proprietor had not paid him for the use of his music which was played live in the café. The *Tribunale de Commerce de la Seine* verdict of 8 September 1847, based on the Copyright Act of 1791/93, in Bourget's favour opened the ground for public performance also outside the opera as an IPR arena. The *Court*

*d'Apelle de Paris* subsequently granted Bourget a compensation payment in addition. 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; pp: 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 also today.

SACEM had to struggle hard to reduce the transaction costs that prevented an easy transferral of fees from performances to composers, for instance:

- Information collection regarding all pieces of music – big and small - and the owners of performing rights.
- Policing and contracting – identification and listing of all venues, signing of licenses
- Payment transfers – the banking system was in its infant stages

With the increasing international trade also in artistic goods and services came, at least from the French point of view, a need for international harmonisation of domestic legislations and international cross-boarder 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 10 nations on 5 September 1887 ratified the treaty that had been finished 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 Anglo-Saxon 'copyright' which was more focused on economic matters only. The convention had as its main objective to broaden the domestic rights of the participating countries into internationally reciprocal rights. Signatory countries had obliged themselves in a long range of bilateral treaties which were made redundant by the new convention. Many bilateral treaties were maintained with countries which 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 domestic members of SACEM in those countries. The money flow went via Paris. This business procedure was generally not well appreciated abroad.

Not only composers of lighter café-concert music benefited from the performing right 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 right fees (Herlin, 2011).

## Germany

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

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

§. 32. 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, extends the protection not only to 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 22 April 1841 to be implemented in all member nations (of which Prussia and Austria were the 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 which excludes §35 from consideration: 'Regarding non-dramatic (chamber -, concert- and church) music there is, namely, a to the printed issue linked and by everyone well understood permission to perform the printed piece because this performance is the very purpose of publication...' (Vesque von Püttlingen, 1864; p. 61). Vesque von Püttlichen did not recommend composers to work for the French *petit droit* to be enforced in the German Confederation. He argued that it was not in line with their *Künstlerehre* (artistic honour). They stood a risk to be 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 16 May 1871 in the *Deutsche Genossenschaft dramatischer Autoren und Komponisten* (The 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 11 Juni 1870. When it was actually enacted on 1 January 1871 it became applicable to the entire German Empire which was formed 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 possibility of *petit droit* fees provided by the law were not actually implemented by the composers until several decades later. The limited number of opera performances were comprehensible and easier to control than the vast amount of public concerts. The transaction costs for collection of information and policing were high. Publishers generally demanded of composers to transfer performing rights to them as part of the publishing contract. Few made any performance fee claims. 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: p. 30).

Albrecht Dümling claims 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 in the background' (Dümling, 2003, p. 30).

Wolfgang d'Albert, a century before Dümling, however, discussed another 'romantic notion' when it came to why French composers were the first to adapt 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; p. 5)

Both Dümling and d'Albert depict a German preoccupation with *Geist* (spirituality) rather than anything else. D'Albert continues with an appreciation of 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 merchantlike manner' (d'Albert, 1907; p. 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 recognise the financial potentials of the German law were publishers rather than, with some exceptions, composers. When the law later was revised the *Verein der Deutschen Musikalienhändlern* (The Union of German Music Publishers) declared in a note to the *Reichskanzler* (Chancellor) Bismarck that:

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 a strengthening of the *petit droit* and the collective agency to enforce it. It came to several clashes 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 possessions of composer's works. They saw no need for a collective agency. Some composers, e.g. Engelbert Humperdinck, Eugen d'Albert (father of Wolfgang) and Richard Strauss, worked persistently and effectively in favour of a full *petit droit* implementation. Their most important friend among publishers were Hugo Bock in Berlin who already from the 1870s printed '*Aufführungsrecht vorbehalten*' ('performing rights reserved') on all 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 Littéraire et Artistique Internationale*, in Dresden he persisted to speak 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 part-took in the Paris revision of the Berne

Convention and agreed to transfer it in all parts into German legislation. It, however, also 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'. The Union of Publishers' board now declared that their prior opposition was not targeted on the actual founding of an agency but, rather, on the limited knowledge and the disregard in the German music business regarding the French *Société*. They further claimed that the situation only now had become 'ripe enough'. In order to prevent the composers from 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; pp. 17-18).

The *Anstalt für musikalische Aufführungsrechte/AFMA* (The Institute for Music Performing Rights) was finally chartered in 1903. The Viennese publisher Josef Weinberger gave a speech at a conference in Milan in 1906 declaring that: '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; pp. 29-31). Step by step AFMA took control over the situation and managed to muster much of the anticipated gains. AFMA was soon succeeded by the present *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte/GEMA* (The Association for Music Performing and Mechanical Duplication Rights).

### Britain

In Britain the music performing right had been enacted through the Copyright Act of 1842, i.e. five years before the famous court verdict in Paris. But the implementation of that right was not carried out by an agency like SACEM. Obviously the difficulty in retrieving correct information on who actually held the IPRs was a huge obstacle for concert promoters. In the 1 August 1876 edition of the *Musical Times* a J. Clelland reflects 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 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. Mr. Clelland concluded (Clelland, 1876: p. 567-568):

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.

The editor adds 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 posses the copyright'.

In the Musical Times May issue of 1877 an anonymous journal spokesman provides 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 claims that

'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: pp. 214-216).

The editor presents several cases where Mr. 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'.

Harry Wall had a criminal record before entering the new business of performing rights policing. In 1860 he was sentenced to eighteen months imprisonment 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 that 'no living composer cared to employ him' (Alexander, 2010: p. 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 & Weir, 1975: p. 35).

The editor of the May 1877 issue of the *Musical Times*, however, also explores *logos* in his rhetoric by suggesting that the general transaction cost from bad or non-existent information on performing right ownerships 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: pp. 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 & Weir, 1975: p. 35)

A few years later the tide had turned. Although the person Wall 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 in the 30 January 1886 issue, 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 behoves 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: p. 343)

In 1888, ironically, Harry 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 imprisonment.

In the *Musical Times* December 1883 issue C.T. Cobham, the producer of concerts at the local School of Arts in Hertford, complained that he was 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: p. 684)<sup>5</sup>

This was in line with the business practice in Britain at the time. Whereas French publishers

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

saw a possibility to commercialise their music through performing right fees collected by 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 they safe-guarded 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 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. However, in the 1890s 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 & Weir, 1975: pp. 46-48)

The 1842 act was extended and modernised 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

.....

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 detrimental to the interest of composers. Songs and dance music were to be exempt from performing rights. The composers were quick to organise in *Föreningen Svenska Tonsättare*/FST (The Swedish Union of Composers) which was constituted on 29 November 1918. Mr. Kant, an MP, had motioned for an inclusion of at least songs into the new law. The Royal Music

Academy decided on a pronouncement supportive to MP Kant's suggestion. FST followed that example and sent a declaration to the First Provisional Committee of the *Riksdag* (Swedish Parliament) supportive of MP Kant. The general conception was that it would be futile to suggest also the inclusion of music for social dancing in the labour movement's People's Parks and Houses and other ball-rooms. The *Riksdag* eventually accepted the Kant revision in its final decision of 30 May 1919. (Atterberg, 1943; p. 3)

Several leading social democrats had tried to stop the act claiming that it did not enough 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 towards 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'. Gustav Möller, the party secretary for several decades, was the harshest critic: 'I see a certain part of this bill as .... the most serious attack against significant cultural interests that have occurred in this country'. (citations from Fredriksson, 2009b; p. 5). Maybe his negative view was inspired by the fact that Möller was a mighty publisher himself as the editor in chief of the labour movement's publishing house *Tiden* (Time).

The new 1919 Copyright Act was passed with the narrowest possible majority, namely by a pro-act casting vote (Fredriksson, 2009b; p. 5). The *Riksdag* minutes from 1939 cites an MP who recalls that

'it was only with the help of the sealed vote that the law was passed at all, and after it had been opened one of the members of the Stockholm bench rose ... and said that there must have been something wrong with the voting bells forasmuch he had not reached the chamber until the entire Stockholm bench had been called'. (Edström, 1998; p. 17)

The major changes in the new law were two: 1. a *droit moral* clause defending the composer and his/her music from distortive treatment and 2. a *droit économique* clause including also 'fragments' of pieces in the performing rights. The law also declared that there were 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 FST regarded it as pointless to form a collecting society based on

the new law. (Atterberg, 1943; p. 4)

At this point in time SACEM had branch offices in Holland, Belgium, Czechoslovakia and Switzerland. In principle also domestic composers in these countries could become members of SACEM which then collected their fees which were sent to the SACEM HQ in Paris. The collecting agencies in Spain and Italy were under heavy influence from SACEM. Sweden, Norway and Denmark lacked collecting agencies. P.J. Carvil in 1915 had started the Nordic Copyright Bureau/NCB in Copenhagen with the same intentions as Harry Wall before him in Britain. The NCB, however, soon concentrated its efforts on the emerging record industry<sup>6</sup>.

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

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 (earning his income primarily as engineer with the Swedish Patent and Registration Office) studied the fee and payment calculation system of GEMA. Berg received substantial information on the subject from Holland and Belgium. He reports that 'elderly women and, in the mornings, four kids' extracted concert adds from all Dutch papers (Edström, 1998; p. 21). Atterberg (1943; p. 5) puts himself forward as the one who wrote the documents by which *Föreningen Svenska Tonsättares Internationella Musikbyrå*/STIM (The Swedish Composers' International Music Bureau Association) was founded. In his 1943 memoirs and in other later recollections he totally ignores the crucial work once performed by the lawyer and music amateur Seibrant Widegren as secretary of the organising committee. The committee held most of their meetings in his flat or office. Widegren sent the invitations to the Stockholm music publishers who, at a crucial meeting in his office on 19 February 1923, agreed to the founding of a collecting agency. They reluctantly accepted the fee-split of  $\frac{3}{4}$  to composer and lyricist and  $\frac{1}{4}$  to the publisher, i.e. the same shares as those decided by GEMA. The suggestions for the STIM charter, which

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6 NCB is still the Nordic hub of the international mechanical rights network

Widgren put forward at a meeting of FST members on 22 March 1923, were partly disputed by Atterberg but revised by a majority of members only regarding a few paragraphs. Widgren revised accordingly. STIM was thus chartered.

STIM was swiftly put in operation. Agreements were signed with *Musiketablissemangets Förening*/M.E.F. (The Association of Music Establishments) 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 FST and STIM to the legislative committee is very clarifying on a range of issues. A reference is made to the legal situation in the US:

a country which generally has the reputation to tender more for practical and economical than cultural interests, where performing right fees .... are not demanded for concerts with artistic intentions, but only for music at cafes, restaurants, ballrooms and cinemas where the purpose of the performance is to enhance income and not to fulfill a cultural mission. (FST/STIM response, 1925)

MPs Norman and Holmström claimed that STIM operated as monopolist or, alternatively, as a trust and that this was detrimental to its customers and the general public. The FST/STIM joint response however claims that STIM should rather be regarded as a part of an international trade union: 'composers do not own a monopoly with one exception: in Hungary public musical events may not take place without the prior acquisition of a permit from the domestic agency'. Some numbers are presented, as well:

.... that Gustaf Hägg for ten performances of two pieces for piano at an establishment of semi-high standard in Holland has received 10:69 kronor, i.e. 0.54 kronor per performance, and that Wilhem Peterson-Berger and his publisher for one radio performance of his piece "Vaino's songs" received 28:80 gold marks (of which a quarter has been distributed to the publisher who is not member of STIM).....For restaurants and cafes in Stockholm the fee is 10 – 134 kronor/month, based on the number of musicians... for instance, the Operakällaren with 3 musicians pays 25 kronor/month while the Fenixpalatset with 12 musicians pays 83 kronor/month.

The anti-IPR ideas of leading social democrats of the 1910s are today upheld in Sweden by *Piratpartiet* (the Pirate Party) which, however, lacks mandates in Swedish local, regional and

national governments. By force of its substantial share of Swedish votes in the 2009 European Parliament election it currently holds two of its 736 seats. The German Pirate Party has seats in the city councils of Münster and Aachen and since 2011 also in the *Abgeordnetenhaus Berlin* (state parliament).

The Swedish Pirate Party's youth organisation has now created a 'religious' affiliation: *Det Missionerande Kopimistsamfundet* (the Missionary Copy-me-ism Communion). Its creed is manifested on its web-site:

*Kopimistsamfundet* does not believe in gods or supernatural forces. Life as we know it originated with the DNA molecule's ability to duplicate itself.... Copy-me-ism is a creed which tries to answer the existential question: what is the meaning of life? We believe the answer lies in copying, distribution and the remix of information. (Kopimistsamfundet, 2012)

*Kopimistsamfundet* was accepted as a religious organisation by *Kammarkollegiet* (National Judiciary Board) in December 2011. The verdict is only related to strict legal and administrative issues but is promoted by the piracy movement as a governmental acceptance of its creed as such. *Kammarkollegiet*, however, considered it necessary to strongly emphasize and clarify that the activities of a registered religious community has not been sanctioned by the state by this kind of registration. It does not in itself involve any quality assessment of the organisation, its beliefs and its activities. *Kopimistsamfundet* expresses its satisfaction with the verdict on its website: 'Soon we will also apply for the legal right to perform marriages as well as for government support to expand our activities'. Only more common religious communities belonging to Christianity, Islam and Buddhism have so far been granted financial support by *Nämnden för statligt stöd till trossamfund/SST* (the Swedish Commission for Government Support to Faith Communities).

## Conclusions

Performing rights were, unlike copyrights and, later, broadcast rights and blank media levies, not caused by any singular technological innovation. They were rather the results of the general economic growth which occurred in Europe after the industrial revolution. The demand for and the supply of opera performances and concerts 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.

The paragraph concerning the reimbursement to the composer in Louis' XIV *réglements* for the royal opera is nothing more than a contracting and reimbursement formula. The possible arguments for the French edge concerning performing rights are not captured by Dufey de Noinville

in his *Histoire Du Théâtre de L'Opera en France* of 1757. Combined with Enlightenment ideas, Beaumarchais' struggles and the bourgeois revolution they paved the way for the first copyright act from 1791/93 including a section on performing rights. The extremely condensed nature of the act opened up for debates in and out of courts. It seems that both the Louis XIV *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 *Tribunale de Commerce de la Seine* verdict of 8 September 1847 in favour of composer Ernest Bourget's claim for economic compensation from public representation of his music was based on the 1791/93 act.

A plausible reason for the reluctance by other countries to follow the French example to form collective licensing agencies is the work-laden task of taking on transaction cost elimination. But nowhere in my sources does this aspect turn up. The difficulties involved in the acquisition of information on where and when music is performed are recognised. But as SACEM did manage to produce a financial surplus it would have been a sign of indolence to use difficulties in transaction cost reduction as argument against the domestic implementation of the French system.

The composers involved in the upstart of 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 lesser 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 on 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 SACEM.

The idea that IPRs incentivise music production was largely absent in the discussions regarding the implementation of the SACEM system in other countries. Maybe it was implicitly accepted as such. It is rather the opposite view that explicitly was held against the *Société*. Namely that the primary task of composers is something more honourable than making money. Eventually old school composers maintaining such ideas were succeeded by younger composers who probably recognised that the French system did not prevent Gounod, Saint-Saëns, Debussy, Ravel, Fauré and others from making music of high artistic value but rather enriching also them at least somewhat. 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, which 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. The backwardness of small, periferal Sweden was indicated by representatives from other countries with ridicule.

STIM is a success-story in obliging to all international treatise. The Swedish commercial music business was one of the top five exporters until the late 1990s. According to recent studies the Swedish record industry has declined considerably since then. But this has been balanced for artists and IPR owners by a rapid increase of income from performing rights from live concert and broadcasts (Albinsson, 2011). They also benefit from other kinds of income related to live concerts (Johansson, 2009).

It is obvious how in Sweden voices against IPRs at large, including performing rights, were strong from an early point. The view of IPRs as beneficiary for publishers and, later, record companies more than composers, the general public and the consumers seems to have held a strong grip on the Swedish debate from the peasantry MP Östman in the 1860, via leading social democrates in the 1910s and the single issue Pirate Party of today holding two seats in the European Parliament. The latest contribution to the movement is *Det Missionerande Kopimistsamfundet* (the Missionary Copy-me-ism Communion) with the general motto that information is sacred and holding copying as a sacrament.

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