

A Costly Glass of Water

The Bourget v. Morel case in Parisian courts 1847–1849

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1. Introduction ⁽¹⁾

In Paris during the first half of the nineteenth century artistic creators maintained that they had a right to a share of box office revenues. This claim was tested in the Bourget v. Morel case which was heard in the Parisian courts of justice between 1847 and 1849.

Authors, composers and others based their stance partly on the *French Literary and Artistic Property Act* (1793), which explicitly gave composers the same legal protection as authors. Like similar acts already passed in other countries, the Act was directed at printed material. New issues introduced and settled in this Act were 1) a right or duty for 'officers of the peace' to intervene against pirate printers; 2) details of fines and 3) a post-mortem article. The very first article of the Act gave the copyright owner the right to 'transfer that property in full or in part'. In a report issued prior to the Act (1791) Isaac le Chapelier discussed the meaning of 'property' and how it could be transferred. What le Chapelier discussed explicitly was the fact that there was only one dramatic theatre in France: *La Comédie-Française* – which had been established and put in a privileged position by the former monarchy. However, the situation was the same regarding the opera, which had been established and privileged a decade before the dramatic theatre. In the *Règlement concernant l'Opera donné à Versailles le 11 Janvier 1713* and the even more elaborate *Règlement sur sujet de l'Opera donné à Marly le 19 Novembre 1714* King Louis XIV regulated how the opera was to be run, including a performing rights clause with detailed remuneration figures (Durey de Noinville, 1757). As a result of these *règlements*, librettists and composers were granted what was later to be called *grands droits* – performing rights regarding staged productions of pieces with music and words. Also prior to the Act of 1793 it was generally recognised that composers 'wrote' music. In the 1793 Act they were explicitly given the same legal rights over their works as authors. This opened up for the notion not only that the music for

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operas should be granted performing rights but also music to songs and music without words.¹

The general economic growth spurred by the Industrial Revolution and the subsequent rise of the middle-classes led to a widening of the audience for public concerts in the large European cities (Weber, 1975; Johnson, 1996; McVeigh, 2008; Werner et al., 2008). William Weber provides details of concerts for 'the low-status public'. Weber, furthermore,

sees a strange parallel with the explosion of popular music in Europe and the United States – indeed worldwide – between 1955 and 1970. During both periods there appeared dynamic new kinds of performers (virtuosi and rock stars), a larger public (the middle class then and hip-minded young people in more recent years) and modernised commercial frameworks (the new concert world and the enlarged record industry) (Weber, 1975, p.127).

It was this audience segment which, through its increased financial status, was found in the specific kind of 'concert' of interest here: the Parisian *café-concerts* (or '*caf'conç'*'). In these concerts, the music, food and beverages supplemented each other (Caradec & Weill, 1980). The concept of a share of the box office revenues was not applicable to these concerts as the musical entertainment was used to attract audiences who would purchase the food and drink which were the main sources of income for the proprietors. Some proprietors, instead of charging entrance fees, increased the prices of what was served to customers when there was musical entertainment. Émile Mathieu (1844–1932), who later went on to compose more 'serious' music, was very heavily involved in the *cafés-concerts* business at the beginning of his career. In his book *Histoire des Cafés-concerts* from 1863 he explained the nature of the business: 'The *café-concert* is an establishment where for a small fee in the form of an increase in the price of regular café consumption, you can hear music, ballads, ditties, by artists, some of whom are not without merit' (cited by Kimminich, 1991; my translation). Although music had been used to complement drinks earlier in French history (Constantin, 1857 and 1872) the *cafés-concerts* in Paris – the first of which, *Café du Midi*, opened in 1835 – were the first time this form of entertainment became an 'industry'. *Café du Midi* was run by the artists themselves. Soon they were challenged by the *Café Les Ambassadeurs*, which was re-opened after refurbishment in 1841 and run by a café proprietor/concert producer. Constantin (1872, p.100) reports that this outdoor *café-concert*

1 Some authors discuss how and when 'abstract' music was included in the performing right concept. Ulrik Volgsten (2012, pp. 171-172) sees it as a result of the Bern Convention. However, the French Act of 1793 does not exclude music without words. Thus, it seems that this debate concerns the legal implementation of the French Act and similar laws in other countries rather than a progression of what was actually covered in these legal documents.

could accommodate 1,200 spectators. The success of the phenomenon encouraged its spread to many other countries, often in slightly different forms which appealed to local audiences.

What was performed in the *cafés-concerts* was light music of a kind which appealed to a large audience. Like today, more money circulated in this kind of popular music industry than in the more 'serious' high-status concerts. Thus, it is not surprising that the struggle for performing rights to be applied outside of the opera was first focused on the thriving *cafés-concerts*. The progress on performing rights which was brought about by the Bourget v. Morel case was sneered at by composers of more 'serious' music, especially in the Germanic countries. Composer and lawyer Johann Vesque von Püttlingen did not recommend that composers should advocate that the French *petit droit* should be enforced in Germany and Austria. He argued that it was not in line with their *Kunstlerlehre* (artistic honour). If they accepted it they stood the risk of being disqualified as avaricious (Vesque von Püttlingen, 1864, p.61).

The event that spurred the Bourget v. Morel case is described as an anecdote in the writings of two former presidents of collective performing right licensing societies, Jean-Loup Tournier of the French *Société des Auteurs, Compositeurs et Éditeurs de Musique* (SACEM) and Gunnar Petri of the Swedish *Svenska tonsättares internationella musikbyrå* (STIM). The Bourget v. Morel case eventually resulted in the concept of *petits droits* (performing rights outside theatres) on which all performing right licensing agencies depend. Obviously, this, in turn, was dependent on the decision of the French courts to grant composers and lyricists legal protection for performances of their work and not only for their printed items.

In a previous paper (Albinsson, 2012) I suggested that the SACEM, the world's first collective performing rights licensing society, was founded when potential revenues could be anticipated to cover transaction costs, for instance, for 1: the search for information on where and when pieces were played, 2: the bargaining and contracting of both venues and composers and 3: the monitoring, policing and enforcement of rights. The Bourget v. Morel anecdote according to Tournier and Petri merely states that the courts decided to the benefit of the former. The transaction cost assumption needed fairly substantial damages to be awarded to M. Bourget to be relevant. I found this information in the Parisian archives.

This paper provides a thorough reading of the Bourget v. Morel case, based on an examination of contemporary documents. Two are daily papers on French legal affairs: *Le Droit: journal des tribunaux, de la jurisprudence et de la législation* and *La Gazette des Tribunaux*. The descriptions of the verdicts are corroborated by the actual, handwritten verdicts of the *Tribunal de Commerce du département de la Seine* and the *Cour d'Appel de Paris*. The documents describe a case which differs a great deal from the legend.

The contribution of this paper lies in its more accurate description of what actually occurred and its economic implications for the production of music. Together with my previous article on the introduction of *petits droits* (Albinsson, 2012), this article should make a significant contribution to understanding of the history of western music.

2. The incident

The librettist, lyricist and playwright Ernest Bourget (1814 – 1864) may be little known today but among contemporary Parisians he seems to have been highly cherished as the author of, mostly, humorous texts. He supplied the words to Jacques Offenbach's musicals *Bouffonneries: Tromb-al-cazar ou Les criminels dramatiques* and *Les Dragées du baptême*, both first performed in 1856, *Les deux pêcheurs ou le lever du soleil*, 1857, and *La Leçon de chant électro-magnétique*, 1867. Furthermore, Bourget provided lyrics for a multitude of songs by composers such as Victor Parizot (e.g. *Les Dîners parisiens*, 1841, and *La Mère Michel aux Italiens*, 1845), Charles-Francois Plantade (e.g. *L'Accordeur de pianos! Scène de mœurs*, 1855, and *Végétal, animal et minéral*, 1859) and Paul Henrion (e.g. *Le Vigneron*, 1855). However, according to Christian Goubault (2003), his biggest success came with the 1855 first performance of the 'medieval legend' *Le Sire de Franc-Boisy* (also known as *Le Sire de Framboisy*) with music by Laurent de Rillé.

In March 1847 Ernest Bourget, according to Jean-Loup Tournier and Gunnar Petri (neither of whom indicate primary sources), refused to pay for the orgeat syrup he had consumed at a 'café-concert' at *Café 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, a M. Morel according to Tournier and Petri, explained that the price of the beverage was raised from the usual 40 centimes to 50 centimes because he had to pay the musicians (Tournier, 2006, p.28; Petri, 2000, p.104).² 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 Jean-Jacques Lemoine's (1950), Brunschwig et al (1981, p.338) and Aaron Schwabach's (2007) versions, Bourget was accompanied by his composer friends Victor Parizot and Paul Henrion. Jacques Migozzi (2000) and François Caradec and Alain Weill (1980) also referred to this unsubstantiated legend. The latter authors also claimed that the publisher Jules Colombier covered Bourget's trial costs.

² According to Delihu the price was 2 francs and the drink was not an orgeat syrup but an *eau su-crée* (Delihu, 1911, p.59).

Whether this event at the *Café Les Ambassadeurs* actually took place or not has not been possible to establish in this study. According to Henri Delihu (1911, p.58) a Mme Doumerc maintained that SACEM owed its existence to this incident. It seems that she presented a version similar to the one above in a pleading in a *Société des Auteurs et Compositeurs v. SACEM* case. Most likely Delihu refers to the 1898 case where the two societies met in court to settle items of mutual dispute half a century after the alleged event.

The only evidence I have found which supports the story of the *Café Les Ambassadeurs* is that the proprietor of the café, Madame Varin, appeared in the same court as M. Morel, who had been sued by Ernest Bourget on the basis of another event. It was this other event which was reported in the contemporary press.

According to *Le Droit*, M. Bourget was refused the drink he ordered at another establishment: the *Café Morel*. In the evenings the proprietor, M. Morel, served only guests who ordered drinks for which the *garçon* could not 'deceive the corkscrew'. The profit 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, 8 May, he wrote an angry letter to M. Morel, in which he complained bitterly about how he had been received at the *Café Morel*:

Yesterday, Friday 7 May, the staff in your café refused to serve me a glass of *eau sucré*. The counter lady apologized very politely for the refusal of the waiter when a woman came and, literally, sent me away in a tone as brutal as the words themselves ... Here's what I had to let him know: that I would prohibit the representation of my *scènes comiques*, as well as my *chansonnettes*; in short, the representation of all my repertoire for the singers at *Café Morel*. If you do not know the titles of my *scènes comiques* or songs, you'll find a few that I have listed at the bottom of this letter.

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. (*Le Droit* 1847, my translation)

3. The first Tribunal de Commerce de la Seine hearing, 8 September 1847

There was no response to this letter, so Bourget called M. Morel to appear in front of the *Tribunal de Commerce de la Seine*. Mme Varin was summoned, too. Bourget's claim was that the tribunal should either forbid the performance of his lyrics in the cafés or that the proprietors should pay him ten francs for each performance of a *scène* or a *chansonnette*. If he received a positive verdict he would not then complain about past damages. The fee of ten francs was in accordance with the tariff of the *Société des Auteurs Dramatiques* for performances in provincial theatres. The tariff was based on the prior *grand droit* performing rights accruing to songs in staged performances of plays.

M. Morel and Mme Varin protested. They allowed singers and musicians to come each summer evening to sing in front of their cafés, with the aim of targeting the seated customers. The police, in the interest of public order, had permitted this to occur, but only if the singers and musicians appeared on a stage. Furthermore, M. Morel and Mme Varin maintained that they had allowed the singers to choose their songs themselves. They were ignorant of the fact that they had chosen songs by Bourget. Thus, they could not accept responsibility for something that was unknown to them. In any case, they did not retain any proceeds of the songs, and, thus, the law did not apply to them.

As M. Morel and Mme Varin saw it, the damage inflicted on Bourget was purely imaginary and he should instead welcome that, as a result of the performances, his works had become better known; as, they claimed, did the best composers and lyricists who sent their works to the singers of the Champs-Élysées.³ As the above letter of 8 May was addressed to Morel alone, the *tribunal* acquitted Mme Varin. M. Morel, however, was forbidden from using Bourget's songs in his café. He was to be held liable for future violations (Archives de Paris, 1847).

4. The second Tribunal de Commerce de la Seine hearing, 3 August 1848

As a result of the February Revolution of the following year, King Louis-Philippe was forced to abdicate. In May 1848, during the period of turmoil before the Second Republic was established in June, Bourget sued Morel again. Petri (2000, p.104) suggested that this decision was based on the hope that the court would be influenced by revolutionary sentiments and would therefore favour Bourget. In fact censorship was re-established on 29 July, a few days before the verdict (Caradec Et Weill, 1980, p.12). Another reason is more obvious. M. Morel and Mme Varin had opened their open-air cafés for the new 1848 summer season. Bourget claimed that his songs were again performed in their establishments, despite the verdict of the *tribunal* the year before.

According to the *Gazette des tribunaux* (Gazette 1848) 'the majority of such institutions [theatres and salons, including open-air ones] pay M. Bourget the *droit d'auteur* which is due'. Only the proprietors of the *Morel* and *Les Ambassadeurs* cafés refused to do so. The verdict of the *Tribunal de Commerce de la Seine* session of 3 August 1848 mentions witness statements of performances of specified Bourget songs in *Café Les Ambassadeurs* on 7th June and in *Café Morel* on the 12th of the same month (Archives de Paris, 1848). According to the *Gazette des tribunaux* (1849) it had been

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

difficult to establish the crime because it was committed during hours when the bailiff could not issue fines. However, someone had taken notes of what had been performed:

7 June in *Café les Ambassadeurs*:

La Fille de ma portière

Le Grand Dadais

L'A, B, C, D, ou la leçon de lecture

12 June in *Café Morel*:

La Fille de ma portière

Le Grand Dadais

L' A, B, C, D, ou la leçon de lecture

La Mère Michel au Théâtre des Italiens

The tribunal discussed whether the publishers of Bourget's songs, MM. Noël and Paté, should also be financially remunerated, but came to the conclusion that only Bourget himself should be compensated. Moreover, the *tribunal* found that the agents for the roving singers, MM. Piquet and Narcisse, had acted in good faith. Bourget was, however, awarded 300 francs compensation from M. Morel and the same amount from Mme Varin.

According to the verdict and the reports in *Le Droit* and *La Gazette* the *tribunal* was presided by M. Gratien-Milliet on this occasion.

5. The *Cour d'Appel de Paris* hearing, 26 April 1849

Mme Varin accepted and obeyed the second *tribunal* verdict. M. Morel, however, filed an appeal at the *Cour d'Appel de Paris* which granted him a future hearing. Therefore, the offense continued to occur at *Rue de l'Arcade*, where M. Morel had opened his establishment for the winter season (Gazette, 1849). Bourget disputed this in the *Cour d'Appel de Paris* supported by his lawyer M. Paillard de Villeneuve. The court confirmed the sentence of the *tribunal* and, to repair the damage inflicted during the time from when the appeal had been filed, Morel was ordered to pay a further 500 francs indemnity to Bourget (Archives de Paris, 1849).

The signature in the hand-written verdict is not readily decipherable. However, the official list of *Cour d'Appel de Paris* judges in 1849 lists a M. Poultier as the president of the third *chambre* in which the hearing was conducted (Almanach national 1849). This name corresponds perfectly with the verdict signature.

6. Legal aftermath

On 18 March 1850 Ernest Bourget, Victor Parizot and Paul Henrion, aided by the publisher Colombier, started a mutual collecting society: the *Agence Centrale pour la Perception des Droits des Auteurs et Compositeurs de Musique* (Lemoine, 1950, p.16). On 28 February 1851 it was replaced by *La Société des Auteurs, Compositeurs et Éditeurs de Musique* (SACEM) (Tournier, 2006, pp.26–27). Among the 43 charter members of the SACEM were composers Daniel Auber and Adolph Adam, together with librettist Eugène Scribe. The number of members rose rapidly. In 1852 the SACEM counted 350 members; in 1858 the membership had increased to 760 (Lemoine, 1950, p.18).

In the SACEM's first charter, works already protected by *grand droit* and administered by another much older society, *La Société des Auteurs Dramatiques*, 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 Dramatiques*, 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 *grands* and *petits droits* remains globally today.

One important difference between the two societies was that publishers were not members of the *Société Dramatique*, but as soon as they heard of the plans for a new society they asked to be admitted to a share of the profits from the new association. They claimed that they had, previously, left the monitoring of the arenas for *petits droits* aside as it had been practically impossible to know which songs had been sung where. Thus, they had given up this chance to gain from the frequent cases in which publishers had purchased both the right to print and the right to allow public performances. They were admitted to the SACEM as full members (Delihu, 1911, p.59).

Although the article 18 exemption clearly states that the SACEM, often referred to at the time as the new '*Société Lyrique*', should keep away from the markets already covered by the older '*Société Dramatique*', clashes did occur. In 1898 the two societies agreed on a 'peace treaty', which declared that composers of a work in one act or one *tableau*, which was shorter than forty-five minutes and which was performed in *cafés-concerts*, music halls and similar events and venues, were allowed to register that work with either of the societies (Delihu, 1911, p.58).

Another difficult issue that was debated in courts regarding both the SACEM and the *Société Dramatique* was their legal status as representatives of their members (Delihu 1911, pp. 61–65). Courts hesitated for decades before providing the societies with such rights. In 1866 the *Tribunal de Commerce de la Seine* admitted that right to the SACEM. However, this was contested by the plaintiff in the *Cour d'Appel de Paris*, which denied the SACEM that right. The society chose, instead, to act in the name of its board of

directors, which, according to article 15 of the 1851 charter, was granted the necessary rights to litigate in the interest of the members. The *Cour d'Appel de Paris* granted that possibility in a verdict of 9 February 1867. On 11 July 1882 the *Cour d'Appel de Douai* declared that the SACEM could be 'well and validly' represented by any of its members who had been given mandates to litigate in the name of all the members. Judge M. Labbé declared, in a note at the bottom of this judgement, that the board of directors could act only as agents and in all proceedings should include the specific mandates from the authors involved. The legal status issue was further accepted by France's court of last resort, the *Cour de Cassation*, on 2 January 1894. However, M. Labbé's refusal to view the SACEM as a *société civile* or *société commerciale* was debated in 1903 in the *Tribunal Civil de Saint-Sever* and in the *Cour d'Appel mixte d'Alexandrie*. The latter, finally, declared that the SACEM was a single agency with a mandate to negotiate on behalf of each of its members and to pursue recovery of their claims or damages. Lemoine (1950, p.74) lists ten more court verdicts after 1903 that recognised this legal status.

Lemoine (1950, pp.29–54), furthermore, lists 145 other cases in which French courts discussed legal matters of importance to the SACEM before 1950! The most difficult item seems to have been '*la radiophonie*', with 25 verdicts listed.

7. Collection of fees

During the last six months of 1850 the *Agence Centrale pour la Perception des Droits des Auteurs et Compositeurs de Musique* collected 6,002 francs (Lemoine 1950. pp.16–18), the equivalent of, approximately, 15,185 EUR in 2006 (Monange, 2001). During its first full year the SACEM managed to collect a total of 14,408.50 francs (appr. 36,450 EUR in 2006). Ten years later the annual turn-over had risen to 115,000 francs (appr. 228,850 EUR in 2006). The round figure of one million francs was reached in 1885. As a consequence of the progressively established legal status of the SACEM it had by 1910 reached the considerable annual turnover of 4 million francs (Delihu, 1911, p.72) (appr. 10,760,000 EUR in 2006).⁴

8. Discussion

Obviously, the glass of water which *Café Morel* refused Ernest Bourget became extremely costly. Not only for the proprietor Morel, but also for millions of restaurants, radio and TV stations, shops, hair-dressers and many other kinds of licensees. The verdicts established that the transaction costs for a systematic collection of performing right fees

4 In 2012 the SACEM had 145.000 members. The society had 1.1 million titles registered. €02 million EUR were collected, see www.sacem.fr/cms/site/en/lang/en/home/about-sacem/sacem_key_words. (Last accessed 9 December 2014).

could be covered by those fees as they could be claimed at a level which was related to the 300 and 500 francs indemnity decided on by the Parisian courts of justice. The 500 francs' compensation equalled twice the annual salary of a carter and 25% more than the annual income of a herdsman on a farm in Oise in 1851 (Chevallier, 1887, p.36). It covered the total price of appr. 4000 litres of red wine at the time of the verdict (*Annales d'agriculture*, 1841). However, a decade later the salaries of singers and musicians performing in the *cafés-concerts* were substantially higher than rural wages. According to Émile Mathieu (cited by Caradec & Weill, 1980, p.12) singers earned 150 – 700 francs per month, a chief conductor 300 – 400 francs per month and orchestral musicians 70 – 150 francs per month. The *garçons* might make 300 – 400 francs per month. On week-days box office income was typically 500 – 1,000 francs and on a good Sunday the gross income could amount to 2,500 – 3,000 francs. The world's first performing rights society was established by the Parisian composers two years after the *Cour d'appel* verdict: the *Société des Auteurs, Compositeurs et Editeurs de Musique*/SACEM.

According to the *Gazette* report cited above (*Gazette* 1848) 'the majority of such institutions [theatres and salons. including open-air ones] pay M. Bourget the droit d'auteur which is due'. Thus, it might be that Ernest Bourget did not appear at the *Café Morel* accidentally. It is not unlikely that he deliberately wished for a legal confrontation.

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Abstract

The music business of today relies heavily on the performing right element of the Intellectual Property Right/IPR laws. Unlike many other IPRs, the performing right did not come about as a result of technological inventions for the distribution of artistic content. The background is, rather, to be found in the general economic growth in the mid-nineteenth century which, in turn, was a result of the Industrial Revolution. 'Economic

growth' is, however, a complex causal background that eventually needed a particular event which could function as a catalyst for the new IPR to be recognised, accepted (at least as a legal act) and implemented. This event has been identified as the Bourget v. Morel case in Paris 1847-49. It resulted in the legal framework on which the music industry of today, penetrating every aspect of our lives, relies. It is strikingly odd how this event has been narrated as a mere anecdote. This short paper provides more details.

Key words

Performing rights, intellectual property right history, musicology, cultural economics.

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