

Performing Arts Recordings and Broadcasts: A practical manual on author's and related rights



A study

**PERFORMING ARTS RECORDINGS AND BROADCASTS:
A PRACTICAL MANUAL ON
AUTHOR'S AND RELATED RIGHTS**

—

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FOREWORD

Creating and presenting theatre in the digital space is no longer a futuristic utopia but part of our work. Yet, when we want to distribute filmed or recorded dramatic works online, we still find ourselves on slippery territory as legal regulations are complex, not fully cleared for the digital environment, vary from country to country and often imply a time-consuming and resource-intensive process. The study “Performing arts recordings and broadcasts: a practical manual on author’s and related rights” gathers for the first time a comprehensive overview from a European perspective and provides us with consolidated information to better navigate live and recorded performances in the digital space.

Having the right skills and competences to enable digital theatre is key for digital readiness when talking about now and the future of theatre making and about interacting with audiences. The European Theatre Convention (ETC) is a network for European theatres striving to strengthen European theatre as a dynamic art form that is both innovative and timeless, ensuring our societal relevance as the art and cultural sector remains and advances, considering the disruptive changes, crises and challenges of the 21st century.

With our work we experiment and test new artistic practices at the international level and then reflect on and share our findings with the wider community. Documenting these findings of applied research is crucial to us when

advancing and creating progress. The publication series ETC – A Study generates knowledge transfer within the European theatre community, opens and shapes new scope for action for the creative community and informs policy makers. Commissioned as part of the large-scale international theatre project Prospero – Extended Theatre, the study makes an important contribution to the further development of European theatre and digital formats and we are proud to make available the work of the project as part of the publication ETC – A Study.

Heidi Wiley

Executive Director

European Theatre Convention

The development of online streaming platforms in the last few years, accelerated by the successive lockdowns linked to the COVID-19 pandemic, have brought to the forefront the question of the digital existence of theatre.

This trend has become the subject of many debates and discussions. Can online theatre still be considered theatre? Can theatre exist without its immediate and tangible physical presence?

The questions surrounding the theatre’s existence in the digital sphere are numerous and remain open for the public, directors and theatre companies.

The project Prospero – Extended Theatre, which brings together ten European partners (nine theatres and one media outlet) and is co-financed by the Creative Europe programme of the European Union, tried to provide answers to these essential and compelling questions by developing a streaming platform dedicated to theatre.

The purpose of this platform, named prospero-theatre.tv, is to make accessible, throughout the European Union, theatre-related content such as: play recordings, interviews with artists and short documentaries on the backstage of theatres and plays. Beyond this broadcasting objective, this platform is also a means for the project partners to take their first steps in this fluid and moving space, where performing arts and digital media meet.

While developing this platform, we – partners in the project – became aware of the complexity of the legal issues that surround the online broadcasting of performing arts recordings. To be more precise, we came to realise that there is a lack of knowledge and understanding for these new issues, among both producers and broadcasters as well as among artists and performers. This is why we called upon two lawyers specialised in the field of copyright—Maxime De Brogniez and Antoine Vandebulke—to produce a study, a guide, that has given us a better understanding of the nature of these legal issues, the obligations they entail for producers and broadcasters and the steps we must follow to fulfil these.

This publication is a way for us, partners of Prospero – Extended Theatre, and the ETC to disseminate this knowledge as widely as possible in Europe, which is essential for the digital development of the sector.

Serge Rangoni

*General and artistic director of Théâtre de Liège—
lead partner of Prospero – Extended Theatre*

Abstract

The capture and audiovisual broadcast of live performances (theatre, concerts, opera, etc.) leads to particular requirements as regards author's rights and related rights. Managing these constraints is of primary importance for cultural operators. Indeed, **a lack of authorisation or an inappropriate authorisation** of the specificities of a recording and an online broadcast can purely and simply **block the whole enterprise**.

At first, it is necessary to **identify the holders of author's rights and related rights** who are involved in a performance intended to be captured and broadcast. Each of these rightholders will have to consent to the recording and to the terms of the broadcast. Producers must ensure that they obtain these assignments or licences **in writing**, including certain mandatory elements developed in this study (assigned/authorised **modes of exploitation, territory, duration, and remuneration**).

The **principal author's rights holders** are the author of the text, the director, the composer of the music and, if relevant, the set designer. The lighting designers and costume designers can also be holders of author's rights, providing the conditions for protection are met. The works that are protected are those that are fixed in a material form ('material' being interpreted very broadly) and that are original, that is, those that reflect the personality of their author. A set of lights that would meet the condition of originality is therefore likely to be protected by author's rights. This appreciation is not always obvious; it must be carried out on a case-by-case basis (in the last instance by the competent judge).

In addition, performers (like actors or musicians) benefit from rights similar to those of the authors, which are called '**related rights**' or '**neighbouring rights**' (synonymous expressions), when their performance is fixed. Since the recording of a performance constitutes such a fixation, the producer must take into consideration these neighbouring rights.

The holders of author's rights and related rights enjoy certain **economic prerogatives (economic rights)**: these include authorising

or prohibiting the reproduction, communicating to the public and distributing their work or performance. It is therefore important to ensure that these rights are assigned or licensed for a particular use. In addition, they enjoy **moral prerogatives (moral rights)** that allow them to object to any alteration made to their work or performance. These rights cannot in principle be transferred.

In the particular context of the recording and online broadcasting of a live performance it is important to adapt the transfer/authorisation to the particularities of this mode of diffusion. Indeed, an authorisation or assignment granted for the use of a work in the context of a live theatre performance does not cover the recording and online broadcast of this performance. Also, a performer, who did not enjoy any neighbouring right in the context of a live performance (except for the right to object to the fixation), is vested with new prerogatives once the performance has been filmed.

More generally, it will be necessary to take into account the wider territory that the transfer must cover, to settle the question of neighbouring rights, and to adapt the transfer of author's rights to the context of online distribution (including the related remuneration).

However, some national laws establish a **presumption of rights assignment** to allow audiovisual exploitation, which exempts the producer from obtaining certain authorisations. The application of these presumptions sometimes requires that the recording in itself be an original work, distinct from the initial work (the performance), so that they would de facto not apply to recordings that are not the result of a true artistic production. In addition to the application of these presumptions, if the recording is considered an original work, the director will benefit from author's rights and the producer from a neighbouring right on the recording, which will also allow them to object to its reproduction and broadcasting.

The present study therefore seeks to expose the main theoretical elements of author's rights and related rights applied to the specific problem of the recording and online broadcasting – or, more broadly, audiovisual broadcasting – of live performances. It then proposes a more precise analysis of the contractual relationships among the various stakeholders, from the point of view of

the producer (generally the theatre): relationships with the authors and performers, with the co-producers and with the distribution platform. Finally, the classic structure of a transfer or licence contract is explained and some examples of contractual clauses are provided.

**Performing arts
recordings and
broadcasts:
A practical manual
on author's and
related rights**

by

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and

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Introduction

This publication is the result of a specific request from the Prospero platform, a project that brings together various European theatres that plan to collaborate to produce and make available filmed plays on an online platform. This initiative is linked to the exponential increase in the recording of performances following the COVID-19 pandemic and the governmental measures imposed closing cultural institutions. This massive increase in a practice that already existed has brought to light a number of legal issues that, for the most part, are due to stakeholders not receiving complete information.

First, from the non-legal perspective, the online distribution of a live show is likely to reach a much larger audience over a much broader territory and in this way **draw attention to possible breaches** of author's rights that would otherwise not necessarily be noticed in the context of a performance played in a theatre. Furthermore, the work itself becomes especially exposed to the **risk of piracy** (unauthorised copies, illegal downloads, unauthorised distributions, etc.).

Second, fixing the performance requires taking into account the performers' (and producers') **related rights**, whose importance is minor when a performance is limited to the stage.

More generally, audiovisual exploitation is a **new mode of exploitation** that requires specific authorisations. The **territory** covered is also much larger in the context of an online exploitation, which implies adapting the scope of the assigned or authorised rights.

This study therefore aims to answer the main questions related to the recording and broadcasting of live performances. It is primarily addressed to non-lawyers, in particular theatres and artists, and thus pursues a pedagogical objective. The purpose is to offer a manageable tool for any cultural operator who wants to execute a capture.

The study is divided into two parts. The first part introduces the relevant legal concepts, that is, the general principles of author's rights and related rights as they apply to the audiovisual broadcasting of shows. In the second part, we will take a closer look at the contractual relationships that

intervene in the process of recording and broadcasting a live performance. This part includes examples of contractual clauses. Finally, a glossary and a list of relevant legal texts are included in the appendices.

Note that the study was first written in French¹ and has been translated under the supervision of the authors.

First Part

General presentation of author's rights and related rights in the performing arts and specificities of their audiovisual broadcast

In this first part, we will explain the main principles of author's rights (1.) and related rights (2.), drawing particular attention to the questions that arise in the context of the recording and audiovisual broadcasting of performances.

1. Author's rights

1.1. Definition of author's rights

Author's rights are a set of rules related to legal protection and to the conditions for the use of a **work**, which itself may be defined as the manner in which an original idea is fixed in a material form.

Unlike classic (physical) property, intellectual works comprise information that may freely circulate and that know no boundaries of scarcity. Author's rights thus aim to limit this free circulation with the goal of compensating the creativity of the creator. However, for reasons of general interest, a certain number of limits (time limits and various exceptions) have been imposed on this literary and artistic property, with the goal of allowing certain dissemination of the culture.

1.2. Legal sources of author's rights

The subject matter of author's rights has been strongly harmonised on the international stage through the conclusion of international treaties. Such harmonisation is indeed necessary to ensure the effectiveness of protection.

The European Union addressed the issue by adopting **Directives**, thereby leaving the States to whom they were addressed some room to manoeuvre. The Directives are effectively, unlike Regulations, not in principle directly

.....
1 Also available on the website www.europeantheatre.eu

applicable in national laws. The national legislators have to transpose them into their national orders, and they have more or less room to manoeuvre depending on the Directive in question.

These Treaties and Directives establish a general framework that does not prejudice the freedom of the States to make certain choices. If the matter is thus significantly harmonised internationally and, in particular, at the European Union level, we must nevertheless be aware that important national particularities remain.

This study focuses on international standards. However, where it appears to be relevant, a few incursions into national legal regimes (Belgian and French in particular) will be made.

Before we consider the substance, we will first look at the main legal sources of author's right law.²

The founding international legal instrument on contemporary law on author's rights is the **Berne Convention for the Protection of Literary and Artistic Works** (hereafter: 'the Berne Convention'), adopted in 1886 and amended several times since. It offers creators (authors, musicians, painters, etc.³) the means to control how their works may be used, by whom and under which conditions. This treaty rests on three essential principles: national treatment,⁴ the absence of formalities for protection^{4 5} and the independence of the protections.⁶ At present, there are 179 contracting parties that include European Union countries and the United States of America.

The European Union has adopted several **Directives** in the field of author's rights. As explained above, a Directive is a legal instrument of European law that Member States must transpose, through a law or other suitable

instrument, into their legal order. They thus do not apply as such.⁷ These Directives set a common framework for minimum protection and sometimes leave the Member States some room to manoeuvre (for example, exceptions to author's rights). To know which regime applies to a work, reference should thus always be made to applicable national laws.

1.3. Holders of author's rights

Generally, except as regards cinematographic and audiovisual works, national laws govern issues on ownership of author's rights and its various forms. Here we will thus present only the trends that should be specified according to the law that applies.

The original author's rights holder is **the physical person who created the work.**⁸ It does not matter if the person has physically created the work but rather that they were its designer and, more precisely, that it bears the stamp of their personality.⁹ Thus, the holder of author's rights for a costume is not the costume maker but the costume designer, the holder of author's rights for a set is not the carpenter but the stage designer or scenographer, and so on.

Some ownerships that relate to certain works require some development or clarification:

- Some works are the result of more than one person. These are **collaborative works**. They are the joint property of the authors who must therefore exercise their rights by mutual agreement. It is possible (and recommended) that the way in which the rights are exercised by the co-authors be regulated by contract.
- As regards **cinematographic or audiovisual works**, Directive 2006/116/EC provides that "the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States shall be free to designate other co-authors."¹⁰

2 The principal sources are however listed at the end of the study.

3 Cf. *infra*, First part, 1.3., "Holders of author's rights".

4 The works that are from a Contracting State to the Berne Convention (that is to say, the author of which is a national of that State or which were published for the first time in that State) should benefit from the same protection in every other Contracting State as is offered by that State to its own nationals.

5 Once the conditions required for a work to be protected have been met (cf. *infra*, 1.4., "Conditions necessary for protection"), the author need not fulfil any formalities to enjoy author's rights protection on this work.

6 The protection provided by the Berne Convention applies equally to works that are not protected in their country of origin, providing that the Convention applies to them.

7 Except in some rare cases.

8 International and European law nonetheless do not explicitly take a stand on this issue. However, certain national laws affirm this principle (e.g., art. XI.170 of the Belgian Code of Economic Law or art. L113-1 of the French Intellectual Property Code which implicitly sanctions this principle). Moreover, it seems to us that this solution is essential given the general economy of the texts relevant on the matter.

9 See for example: French Court of Cass., 13 November 1973, *D.*, 1974, p. 533.

10 Art. 2(1) of Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, hereafter "the 2006/116 Directive".

- Finally, there are works whose rightholders are not known. These are called **orphan works**. In principle, it is impossible to use or exploit a protected work without the consent of the rightholders.¹¹

As regards the **specific case of a play**, there are several holders of author's rights. In principle, each contributor holds rights to its creation: the author for the texts, the composer for the music, the director for the staging and, in some cases, the lighting designer for the lighting design, the stage designer for the decor, the costume designer for the costumes, and so on.¹² If the result is the fruit of concerted work that makes it difficult to distinguish between the individual authors (for example, between a stage director and a choreographer or between a stage designer and a scenographer), we are dealing with a collaborative work (which could, if necessary, coexist with the separate works: for example, the production could be qualified as a collaborative work between a stage director and a choreographer, without the decor or the costumes being integrated into it because they are considered accessories). If this performance is the object of a **recording on video**, the resulting recording is also likely to be protected by author's rights, if this work is considered original – this concept is addressed below.¹³ Ownership will be determined using the presumptions related to cinematographic or audiovisual works.

1.4. Conditions necessary for protection

To enjoy protection, the work must be **original** and **fixed in a material form**. Where these conditions are satisfied, the work enjoys the protection with no requirements as to formalities.¹⁴ In other words, once the conditions of form and originality are met, the work is **automatically** protected by author's rights.¹⁵

- 11 Prompted by European law (Directive 2012/28/UE), a specific regime was nonetheless established to allow some use of such orphan works by libraries, educational establishments, museums accessible to the public, as well as archives, depositary institutions of audio or cinematographic heritage and public service broadcasting bodies. Theatres thus do not fall within this particular regime and so may not benefit from it.
- 12 Cf. *infra*, First part, 1.4., "Conditions necessary for protection".
- 13 1.4.2., First part, "Originality".
- 14 The Berne Convention specifies in this respect that "[t]he enjoyment and the exercise of these rights shall not be subject to any formality" (art. 5.2). In French law, art. L111-1 of the Intellectual Property Code states that: "[t]he author of a work of the mind enjoys, for the sole reason of its creation, an exclusive intellectual property right enforceable against all".
- 15 In some States, however, certain administrative procedures are necessary to render the protection effective; such is the case, for example, in the United States, where copyright must be registered at the US copyright office to seek a review before the federal

1.4.1. Material form

Author's rights only confer exclusivity over creations that are **fixed in a material form** ('material' being interpreted very broadly¹⁶). Therefore methods, rules¹⁷ and other concepts are excluded. The various legal texts are left intentionally vague so as, *a priori*, not to exclude certain material media. Thus, the Berne Convention protects productions "whatever may be the mode or form of its expression".¹⁸ A list is provided but it is not exhaustive.¹⁹ Directive 2006/116/EC refers to the Berne Convention to define the protected work.²⁰

The material form requirement does not mean that the work must be either *completed or sufficiently completed*. A draft, a sketch and preparatory notes may be protected for a while regardless of whether they are in a sufficiently material form to meet the originality requirement^{21 22}. The intangible or ephemeral nature of the form's expression (as the execution of a show) does not mean that there is no form to be protected by the author's right.

As regards **performing arts**, the illustrative list in the Berne Convention is more specifically aimed at "dramatic or dramatico-musical works; choreographic works and entertainments in dumb show".²³ It should be noted that there is no doubt that the categories do cover plays, operas and operettas, musical comedies, dances, mimes, circus tricks, illusionist's tricks,

jurisdictions (17 United States Code, section 411). This condition, however, no longer applies to foreign works (to satisfy the requirements of the Berne Convention). Moreover, it could be helpful to register the work (for example through a collecting society) as evidence of the date when the work was created.

- 16 "Fixed in a *tangible* form" is the expressions used for the American copyright.
- 17 See A. Berenboom, *Le Nouveau droit d'auteur et les droits voisins*, 5th ed., Brussels, Larcier, 2022, p. 85.
- 18 Article 2(1).
- 19 "[B]ooks, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." (Art. 2(1)).
- 20 Article 1(1).
- 21 This is clearly stated in French law: "The work is said to be created, independent of any public release, by the mere fact of execution, even unfinished, of the author's design" (Art. L111-2 of the Intellectual Property Code).
- 22 Cf. *infra*, First part, 1.4.2., "Originality".
- 23 Art. 2(1).

magic tricks, acrobatic acts or certain sport shows (like figure skating).^{24 25}

If the status of the **staging** could have been controversial (certain believing that it was “merely” a matter of the interpretation of a text²⁶), today it is accepted that a production may be protected as such²⁷ so that the condition of originality is met.

Finally, it is certain that the designers of **costumes** and **decor** may enjoy author’s right protection for these creations if they are original.²⁸ The quality of co-author of a play or a staging has already been recognised in France (but caselaw appears quite unpredictable).²⁹

1.4.2. Originality

A form may not enjoy the protection afforded by author’s right unless it is **original**. This notion has been established and clarified in caselaw, in particular by the Court of Justice of the European Union, which has

24 M. Vivant and J.-M. Bruguiere, *Droit d’auteur et droits voisins*, 4th ed., Paris, Dalloz, 2019, pp. 238-239.

25 As regards the fields of choreography, circus numbers and pantomimes, French Law includes a requirement that is not in the Berne Convention or other national legislation (Belgium, for example). Art. L121-2 of the French Intellectual Property Code provides: “Within the meaning of work of the human mind as defined in this Code: [...] Choreographic works, circus acts and performances, pantomimes, whose production is set out in writing or otherwise [emphasis added]”. This requirement to set out in writing or otherwise is absent with respect to dramatic or dramatico-musical works. It is essentially a matter of evidentiary requirement that some authors view as being debatable, “since, as a judicial fact, the creation should be proved by any means” (P.-Y. Gautier, *Propriété littéraire et artistique*, 11th ed., Paris, PUF, 2019, p. 95.). That said, the adverb otherwise opens up infinite possibilities of proof (videos, vocal recordings, etc.) that appear to empty this additional requirement of all substance.

26 H. Desbois, *Le Droit d’auteur en France*, 3rd ed., Paris, Dalloz, 1978, no. 184 and 186 bis.

27 See M. Vivant and J.-M. Bruguière, *op. cit.*, p. 239 and caselaw cited: Paris, 27 September 1996, D., 1997, p. 357, note Edelman; *RIDA*, 1997/2, p. 270, note Kéréver; Paris, 9 September 2011, Pl., 2012, no. 42, note Lucas; Paris, 16 October 2013, Pl, 2014, no. 50, p. 54, note Lucas.

28 In assessing whether the designer was a holder of author’s rights, the Paris Court of Appeal tested whether he “had a margin of discretion that allowed him to express his own artistic choices when creating the work”. It held that “he had, through the choices that he made, expressed his own feelings and impressed his personality on his work” (CA Paris, 21 October 2009, Pl, 2010, p. 614, note A. Lucas). The principal issue in this ruling was that the originality of the creation, the material form being evident. To evaluate this element, the Court based its opinion on the margin of discretion the designer had, which is in line with European caselaw (cf. *infra*, First part, 1.4.2., “Originality”).

29 P.-Y. Gautier, *op. cit.*, p. 97 and the caselaw cited: refusing Leger this status, Trib. Civ. Seine, 15 October 1954, *RIDA*, Jan. 1955, p. 146; see also, same jurisdiction, 2 July 1958, JCP, 1960, II, p. 11710, conc. Combaldieu; Fr. Ct of Cass., 5 March 1968, D., 1968, p. 382 dismissing the appeal Paris, 11 May 1965, D., 1967, p. 555, note Françon.

made originality an autonomous notion of European law (this means that European judges are competent to specify the content of this notion).

A work is original when it is “[its author’s] own intellectual creation”.³⁰ This is particularly the case “if the author was able to express their creative abilities in the production of the work by making **free and creative choices**”.³¹ A creation that meets purely technical imperatives or that follows very exacting directions would not, therefore, be deemed original. By contrast, if choices in translating a creative notion have sufficiently been made, the production could be described as original. The notion of originality then becomes essential in determining if certain functions that were more technical at the outset (like lighting, creating sets or costumes) could give rise to author’s rights. In sum, the originality is the true **tipping point** between the technical performance and the work that is protected by the author’s rights.

In view of these two criteria of author’s rights – form and originality – and of their relative plasticity, there is no doubt that the integral nature of the works in operation in the framework of performing arts could potentially be protected by author’s rights, including filmed shows that will only be broadcast on audiovisual media.

Nonetheless, there could remain **some questions** that are connected to the holders of author’s rights. If it is clear that the directors, playwrights, composers, choreographers and, in the specific context of video films or recordings, the possible producer enjoy author’s rights, the question, when assessing the **originality criterion**, should be examined on a case-by-case basis for the more technical functions (for example for the lighting designers, the scenographers, the make-up artists, etc.). It is at any rate certain that author’s rights **do not exclude, in principle, any form of expression**. If the border between technical act and creative act potentially protected by author’s rights may, in some ways, raise a question, it will ultimately be for the courts to decide.

30 CJEU, 16 July 2009, *Infopaq International*, C-5/08, point 35.

31 CJEU, 1 December 2011, *Eva-Maria Painer v. Standard Verlags GmbH et al.*, C-145/10.

1.5. Term of author's right protection

In the European Union, an author's rights over a literary or artistic work within the meaning of article 2 of the Berne Convention lasts **for the life of the author plus seventy years after their death**, regardless of the date the work became legally accessible to the public at large.³²

The Directive of 2006 specifies that, for **collaborative works** that have several authors, the duration of the protection is calculated from the death of the last surviving author.^{33 34}

For **anonymous or pseudonymous works**, the term of protection is seventy years after the work was legally made accessible to the public. However, when the pseudonym adopted by the author leaves no doubt as to their identity or if the author reveals their identity during the period of protection, the term of protection is seventy years after the death of this author.³⁵

These terms are calculated as from January 1 in the year following the event that gives rise to them.

1.6. Prerogatives of author's rights

The author of a protected work is vested with several prerogatives that give them certain control over the use of their work. These include property elements (**economic rights**) and moral aspects (**moral rights**).

Economic rights may be assigned. **Moral rights**, by contrast, are **in principle non-assignable**.³⁶ The author thus reserves the right to rely on it even if they have assigned their economic rights, including as regards the assignee holder of the economic rights.³⁷ The Berne Convention provides that, after the author's death, the moral rights continue to exist at least until the economic rights have expired.^{38 39}

32 Art. 1(1) of the 2006/116 Directive.

33 Art. 1(2) of the 2006/116 Directive.

34 On the notion of collaborative work, cf. *supra*, First part, 1.3., "Holders of author's rights".

35 Art. 1(3) of the 2006/116 Directive.

36 Art. 6bis, section 1 of the Berne Convention.

37 Art. 6bis, section 1 of the Berne Convention.

38 Art. 6bis, section 2 of the Berne Convention.

39 In this regard, the national laws differ. In France, for example, art. L121-1 of the Intellectual Property Code provides that the right to respect for the name, the quality and the work is perpetual. In Belgium, by contrast, failing details, it is generally accepted that moral rights are extinguished with the economic rights. This position is still controversial, however, courts and tribunals never having been required to rule on the issue

1.6.1. Economic rights

The economic rights include the reproduction right, the representation right and the distribution right. We will see that there is also a form of right to remuneration in return for compulsory licences.

Reproduction

Authors have the exclusive right to authorise or prohibit the direct or indirect, temporary⁴⁰ or permanent reproduction of their works, by whatever means and in whatever form, in full or in part.⁴¹ It should be noted that any sound or audiovisual recording is considered a reproduction as defined by the Berne Convention.

Authors have the right to **control the fixing of the work on any material medium** (book, sound or video recording, etc.) and **the duplication of these media** (photocopy, DVD copy, digital copy, publication of books, etc.). It does not matter whether the reproduction is complete or partial, direct or indirect, temporary or permanent: authorisation must be obtained from the author. In addition, the destination of the reproduction and its (non-)lucrative character are not relevant.

If the reproduction can be **material**, it may also have an **intellectual** character. This is sometimes referred to as **right of adaptation**. Thus, many works are inspired by or adapted from pre-existing works. The authors of these **derivative works** are given the same rights on their works as any author. It is nonetheless possible for the rightholders of the original work to object to the use of the derivative work if this infringes on their moral or property prerogatives. In this respect, the limits between reworking an idea or a theme (lawful since ideas as such cannot be protected) and reworking an original material form shall be defined. The caselaw is inconsistent and the courts have significant discretionary power.⁴²

(see B. Vanbrabant, "La Prescription en droit d'auteur", *A&M*, 2010/5-6, pp. 422 et seq.).

40 For example, *streaming* constitutes an act of provisional reproduction of the work in a computer's buffer memory (P.-Y. Gautier, *op. cit.*, p. 278).

41 Art. 2 of the 2001 Directive; Art. 9 of the Berne Convention.

42 According to the Belgian Court of Cassation, it is necessary to consider the similarities (and not of the differences) between the original elements of the two works: "if a work presents significant similarities with a pre-existing work, the trial judge should examine whether these similarities with the older work are accidental or the result of conscious or unconscious loans from this work, in which case a copyright infringement has been committed. If there are sufficient similarities between the original elements of the two works the author the more recent work must reverse the presumption of reproduction by showing that it was plausible that he was unaware of the pre-existing work or that he could not reasonably have been aware of it" (Cass., 3 September 2009, RG C.08.0337.N).

The Berne Convention gives authors (or their rightholders) the exclusive right to make and authorise the translation of their works.⁴³

With respect in particular to the **reproduction and the use of musical works** (or of extracts, even very short, from such works) in an audiovisual work or in the context of a play, practice has opened a **synchronisation right**. It is not a distinct prerogative, but it is a specific application of the right to reproduce. The synchronisation right targets the use of musical works or of fragments of musical works in an audiovisual work and, more generally, in any context other than that for which it was composed. Like for the right to reproduce, it is necessary to obtain authorisation from the rightholders. Some management organisations provide **music production catalogues**. These are a repertoire that provide music for audio, audiovisual or theatrical productions. In this context, it is generally unnecessary to contact the rightholders: the management organisations also have the mandate to authorise the use (unless the rightholders have explicitly stated otherwise, based on their moral rights, for example). Rates are established on the basis of the territory in which the use is permitted, on the medium, and on the term of the license. It is important to note that the right to use a musical work in a defined context does not extend the right to use it in another context. If a synchronisation contract was concluded for the use of a work in the context of a play and it is the intention to film the performance of this play afterwards, the rights necessary for the film or the recording and for the audiovisual use of the film or recording must be obtained.

Assuming filming or recording a show created for the stage, the film or recording is an *act of reproduction* for which an authorisation should be obtained from holders of the author's rights found in the show in question (for example: playwright, director, composer, etc.); which explains the interest in transferring these rights to the producer.

If this film or recording is original, it may in turn be a protected derivative work and, for this reason, confer a monopoly over its digital or material reproduction.

Communication to the public and representation

The 2001 Directive states that "Member States shall provide authors with the exclusive right to authorise or prohibit any communication to

43 Art. 8 of the Berne Convention.

the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."⁴⁴

This right concerns both **direct communications to the public** (or representations), whether it is by the authors themselves or by the performers (actors, musicians, etc.), and communications made using a **technical device**. Note that the fact that a show is free of charge does not exclude the qualification of communication to the public as protected by author's right.

The "public" referred to in Article 3 of the 2001 Directive means an **indeterminate number of potential viewers** and implies, moreover, a **fairly large number of persons**.⁴⁵ There is no communication to the public within the meaning of the Directive if the work is made observable by a public not restricted to specific individuals belonging to a **private group**.⁴⁶ This realisation leads the Court to hold that "The concept of public encompasses a certain *de minimis* threshold, which excludes from the concept groups of persons which are too small, or insignificant".⁴⁷ It will be the role of the judge to review this threshold concretely on a case-by-case basis.

As concerns 'private' presentations or rehearsals reserved for the press, without the courts having explicitly, to our knowledge, ruled on the issue, it can reasonably be argued that, if the people in attendance were invited individually, their number would be small in relation to the capacity of the hall and, if possible, that access would be free of charge, there is no doubt that there was no act of communication to the public within the meaning given by the Court of Justice of the European Union.

Distribution

Authors enjoy the exclusive right to authorise or prohibit all forms of distribution to the public, through sales or otherwise, of the original of their works or of copies of these.⁴⁸ It is therefore a question here of the stage

44 Art. 3(1) of the 2001 Directive.

45 See CJEU, 2 June 2005, C-89/04, point 30; 14 July 2005, C-192/04, point 31; 7 December 2006, C-306/05, points 37 and 38; 15 March 2012, C-135/10, point 84.

46 CJEU, 15 March 2012, C-135/10, point 85.

47 CJEU, 15 March 2012, C-135/10, point 86.

48 Art. 4 of the 2001 Directive.

of the sale (or of the distribution more broadly) and not of reproduction.

To promote free movement within the European Union, a mechanism of **exhaustion of right** of distribution has been provided: in case of first sale or other transfer of ownership of the work or of the copies of the originals within the European Union by the holder of the author's right or with their consent, the holder of the author's right may not object to a new act of distribution (for example, resale).⁴⁹ This is the result of the Court of Justice of the European Union caselaw that the right of distribution and the exhaustion mechanism **concerns only material objects (and not the immaterial 'media')** that incorporate intellectual creation.⁵⁰

In real terms, this signifies that the rightholders control the **distribution** of the work; however, after having authorised the first sale of the material object that incorporates the work (for example, a DVD or Blu-ray of the film or recording), they may not object to the resale of this (application of the principle of **exhaustion**). Nevertheless, this exhaustion does not apply to sale of digital files (downloading the film or recording, for example); since the beneficiary is able to object to the resale.

Furthermore, it should be recalled that the work should be incorporated on a medium, even digital, so that it is affected by the right of distribution, while an online or television broadcast falls under communication to the public.

Characteristics of rights to remuneration

Bearing in mind the impossibility to control every use of a work, on the one hand, and the desire to allow some uses, on the other, an equitable mechanism for remuneration is provided for certain uses. These remunerations are paid by the collective management organisations. These rights to remuneration are in fact the corollary of exceptions to the exclusivity of rights. We also speak of *legal* or *compulsory licences*.

49 This exception does not apply to copies initially put into circulation beyond the European Union (CJEU, 12 September 2006, C-479/04).

50 CJEU, 22 January 2015, C-419/13, point 37; CJEU, 19 December 2019, C-263/18, point 52. One of the reasons put forward to justify the different treatment of the tangible media and the dematerialised work (on internet, in e-book form, etc.) is the absence of wear of the work not incorporated on a medium: any new distribution would be tantamount, in concrete terms, to placing a new object on the market.

Such rights are provided in the framework of exceptions to the reproduction right:

- when it is a matter of reproductions made on paper or on a similar medium using any photographic technique or other process with similar effects (photocopier, scanner, etc.), except sheet music;⁵¹
- when it is an issue of reproductions carried out on any medium by a physical person for private use and for ends that are neither directly nor indirectly commercial (for example, the copy of a CD or its import onto a flash drive).⁵²

1.6.2. Moral rights

Alongside economic rights, the author has moral rights. Unlike economic rights, **moral rights are in principle impossible to transfer**.⁵³ Furthermore, in some countries – including France – moral rights are perpetual, i.e., there are no time limits for the author's rightholders in their exercise of this right.⁵⁴

However, this prohibition in principle calls for certain **nuances** that should be verified on a case-by-case basis according to the applicable law, the issue of moral rights still being based on a **strong national foundation**. Certainly, **the general and anticipated assignment clauses of moral rights would, in any case, automatically be void as would a general waiver to their exercise**.

Nonetheless, an author who agreed to amendments made in the framework of an assignment of the right to adapt could not validly invoke their moral right to revoke this agreement⁵⁵ provided that the change in question fits in the framework of the margin to adapt of which the assignee from economic rights benefits.

Moreover, a **contractual waiver of the exercise of moral rights is, to a certain extent, allowed**⁵⁶ (for example, a clause imposing anonymity or the use of a pseudonym to an author would generally be valid).

51 Art. 5(2)(a) of the 2001 Directive.

52 Art. 5(2)(b) of the 2001 Directive.

53 Art. 6bis of the Berne Convention.

54 Cf. *supra*, First part, 1.5., "Term of author's right protection".

55 M. Markellou, *Le Contrat d'exploitation d'auteur*, Brussels, Larcier, 2012, no. 37.

56 In France, it is necessary that this clause be sufficiently precise as to its purpose and be revocable at any time (*Ibid.*, no. 53 et seq.)

Disclosure

The right to disclose reserves to the author the exclusive right to make their work available to the public in the way and on the conditions that they see appropriate.⁵⁷ This right also implies the ability not to disclose the work and to decide when it is completed and may be disclosed. Thus, third parties have an obligation not to make the work known without the author's formal agreement. For example, an editor may not disclose a manuscript if the author specified that the version was not final. In the context of a live performance, the authors of the play (for example, the stage director) may therefore object to the first representation of the play.⁵⁸ The same applies to a film or recording, if it represents a new work; all the authors of this audiovisual work (the film director, for example, but also the stage director if these are two distinct people) could also object to the disclosure.

Authorship

The author is always entitled to claim authorship of their work, that is, identifying their name in connection with the work.⁵⁹ Conversely, third parties are required to indicate the author's name when they present the work (for example, on a poster, in an event programme, in credits, etc.). The authorship right also includes the possibility for the author to require anonymity or the use of a pseudonym.

Integrity

The author is entitled to object to any distortion, mutilation or other modification of the work and, more generally, to any violation of the work.⁶⁰ The integrity which is at issue is both material (passages of a text may not be deleted nor a table that is too long cut) and intellectual (principally in the context of an adaptation). Where audiovisual broadcasting of live performances is concerned, certain media sometimes require time compression (e.g., reducing the duration of a play to be televised). This may constitute a violation of the author's moral right – authors could accordingly object to such compression.

Concerning the performing arts, the issue of works being adapted by

57 Paris, 6 March 1931, *GAPI*, 2004, no. 8.

58 If the play is from an existing text (for example a novel), the author of the text in question may only assert his right to disclose once the text has, in principle, already been broadcast.

59 Art. 6bis of the Berne Convention.

60 Art. 6bis of the Berne Convention.

directors is raised with particular relevance. The director is, in effect, considered to have significant freedom in interpreting the works. Legally, this freedom has its foundation in the right to **freedom of expression**, enshrined in particular in Article 10 of the European Convention on Human Rights, even, in some countries, established as a specific freedom to create.⁶¹ Nonetheless, the freedom held by the director may conflict with the right to integrity of the work held by the author or their rightholders. There is no hierarchy between the right to freedom of expression and the moral right, although, in the latter case, it is the judge who will ultimately assess whether the adaptation violates the author's moral right. In France, a criterion recently used to assess this appears to be that of the **"misrepresentation of the pre-existing work"**.

This criterion was developed following a court case between director Dmitri Tcherniakov and the rightholders of Bernanos and Poulenc as regards the *Dialogues of the Carmelites*. In this production, the end of the work was changed. However, the dialogues (missing in this part) and the music were not subject to any change. Without examining the parties' arguments in detail, we note that the Versailles Court of Appeal, ruling after cassation⁶², reminds us that the staging **"necessarily involves that a certain freedom be recognised to its author"** and that a **"fair balance** must be struck between the right of the author of the original work to the integrity of his work and the director's freedom". The Court recalls that the misrepresentation of the pre-existing work could be a **violation** of the author's moral right. This violation exists **"when the production changes the meaning of the work and misrepresents its spirit"**.⁶³

Although directors have a certain amount of freedom, they must nevertheless remain attentive to the integrity of the adapted work. It is an issue in which the courts' discretionary power is significant.

1.7. Assignment of author's rights

The assignment of an author's right is an essential question and is at the heart of the issue addressed. In the context of the production of a work for

61 In France, Law no. 2016-925 of 16 July 2016 on the freedom of creation, architecture and property specifically sets out the freedom of artistic creation. In Belgium, artistic freedom may be considered as included in the right to cultural development, as established under Article 23 of the Constitution (C. Romainville, *Le droit à la culture, une réalité juridique*, Brussels, Bruylant, 2014, pp. 391 et seq.).

62 Fr. Cass., 22 June 2017, no. 788.

63 Versailles CA, 30 November 2018, no. 17/08754.

the stage, including audiovisual broadcast on an online platform⁶⁴, the producer has an interest in obtaining all the rights that contributed to creating the work to ensure it is used without undue interference. If we focus on the practical elements in the third part of the study, the initial theoretical elements already deserve to be presented.

To begin, as addressed above, **only economic rights** may be the object of an assignment (i.e. right to represent, reproduce and distribute). Moral rights are not, by contrast, assignable.⁶⁵

The economic prerogatives of the author's right are assignable and inheritable economic rights, in whole or in part. They may therefore be the object of an **assignment** or a **licence** (the term **concession** is used as a synonym in Belgian law). While the assignment is a real **property transfer** (for a limited duration in time, which could nonetheless cover the term of the author's right), the licence is a **right to use** the work. In the context of an assignment, the author relinquishes their prerogative while in the context of a licence, they retain ownership but authorises use of the work.⁶⁶

The assignments and licences touch upon **modes of use** and **strictly-defined territories**. It is absolutely necessary to call attention to the rights held. For example, the authorisation to use music in the framework of a performance does not authorise inclusion of the music in a film or a recording (unless otherwise clearly permitted in the licence contract).

The specific rules that apply to assignment contracts are **in essence national**. For each contract, reference must thus be made to the legislation under which the contract was concluded. Nonetheless, one notes the significant similarities. In fact, if the general principle remains the contractual freedom, the **different national authorities** have taken legal measures to **protect the authors**.

64 For the purposes of this study, we refer to platforms that provide their own content and not to service providers whose content is uploaded by its users (as referred to in Article 17 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [hereafter, "the 2019 Directive"].

65 Cf. *supra*, First part, 1.6.2., "Moral rights".

66 It will be noted that the license may be *simple* or *exclusive*, when the licensor is the only allowed to benefit from the license. In the second case, the license is more like assignment.

In particular, assignments of rights must be implemented in **writing** and are to be **interpreted strictly**. Hence the obligation to identify clearly **the assigned modes of use or exploitation**, the territory and the term. In addition, the contracts are often interpreted in favour of the authors.

In our concrete context, close attention must be paid to **including online audiovisual broadcasting** of the performance. The **territory** covered is also very important, since an online broadcast is likely to reach an international audience.

Since the 2019 Directive⁶⁷, European law requires that the authors and performers who license or assign their exclusive rights to use their works have the right to an **appropriate and proportional remuneration** at the actual or potential value of the rights that are granted under licence or are assigned.⁶⁸ Recital 73 of the Directive then specifies that "[a] lump sum payment can also constitute proportionate remuneration, but it should not be the rule".

The Directive specifies, moreover, that the authors may authorise their works to be used **free of charge**.⁶⁹ It is the opinion of the authors of this paper that there is nothing to exclude assigning the right free of charge, as explicitly provided in some national laws.

Finally, it should be clarified that, in general, a work in the framework of an **employment contract does not *per se* lead to assignment** of the author's right. This is in any case the clear situation in Belgian⁷⁰ and French⁷¹ law.

67 Art. 16 of the 2014 Directive already states that, for a license to be granted by management organisations, "the owners of the rights collect an appropriate fee for the use of their rights. The rates applied for the exclusive rights and the rights for fees are reasonable, considering, amongst other things, the economic value of the use of the negotiated rights, taking into account the nature and the extent of the use of the works and other objects, as well as given the economic value of the service provided by the organisation of the collective management organisation" (Art. 16(2) para. 2, of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, hereafter "the 2014 Directive").

68 Art. 18(1) and Recital (73) of the 2019 Directive.

69 Recital (82) of the 2019 Directive.

70 Belgian law requires the inclusion of an explicit provision for the assignment of economic rights when the author's work or the performer's performance are carried out in the framework of an employment contract (Art. XI.167, section 3, para. 1, of the Belgian Code of Economic Law; art. XI.205, section 4, of the Belgian Code of Economic Law).

71 Art. L111-1, para. 3, of the Intellectual Property Code. The French Court of Cassation has moreover confirmed that the employment contract does not derogate from the enjoyment of intellectual property rights, including for the performers, and that the

In the **audiovisual field**, however, there is a **rebuttable presumption**⁷² **of assignment to the producer of audiovisual exploitation rights** of the work that relates as much to the authors (except authors of musical compositions)⁷³ as it does to the performers.⁷⁴ The reason underpinning this presumption is the aim to guarantee a certain legal security for the producer, given the often very significant investments required to produce a film.⁷⁵ As will be seen when the subject of related rights is considered, this presumption only appears to apply, in Belgian law, at least, if the film or recording is itself a *work* that is protected pursuant to author's rights.⁷⁶

1.8. Collective management of author's rights

It is **difficult to individually manage** rights and, more specifically, **ensure they are respected**, and this difficulty often leads to contacting a company that collectively manages rights. Such organisations will then monitor respect of the rights, collect any fees that result from their exploitation and then distribute these funds to the rightholders. To this end, they grant **licences for the use of certain rights or categories of rights**, the management of which the rightholders have entrusted them. Except in the specific case of compulsory licensing, agreement from the holder (who may have given prior consent) is in principle always required, but the user (the producer in this case) addresses and deals with the management organisation.

It should be noted that **in principle there is no obligation to work** with a management organisation.⁷⁷ Natural or legal persons can very easily decide to manage their own rights.⁷⁸

authorisation of the artist is required each time (Fr. Cass. (civil chamber), 6 March 2001, *D.*, 2001, p. 1868, note B. Edelman).

72 Such a presumption is compatible with European law if it can be rebutted (CJEU, 9 February 2012, *C-277/10*).

73 Art. L132-24 of the French Intellectual Property Code; art. XI.182 of the Belgian Code of Economic Law.

74 Art. L212-4 of the French Intellectual Property Code; art. XI.206, section 1 of the Belgian Code of Economic Law.

75 A. Joachimowicz, "La présomption de cession des droits d'exploitation audiovisuelle", *A&M*, 2015, p. 17.

76 Cf. *infra*, First part, 2.3.1., "Performers".

77 As provided in recital (2) of the 2014 Directive: "It is normally for the rightholder to choose between the individual or collective management of his rights, unless Member States provide otherwise, in compliance with Union law and the international obligations of the Union and its Member States."

78 In some particular cases, however, collective management is obligatory, as for managing compulsory licensing or to manage the cable retransmission of the work.

In practice, when the producer wishes to use an **existing work** (for example, integrate a piece of music), they must most often contact a management organisation empowered to grant the licence for the **modes of use concerned**.

It is always necessary to be particularly careful in the field covered by this authorisation. For example, a licence that allows using a piece of music in the context of a public representation will not generally allow using this same piece in the framework of a recording (it all depends on the terms of the contract).

In the context of an online broadcast, particular attention should moreover be paid to the **territory** on which this licence may be used. This problem is not raised as much in the framework of only live presentations, since the broadcast may be in a smaller geographic area.

The proposed rates should be founded on equitable criteria and not be discriminatory⁷⁹, which nonetheless does not rule out negotiations being used on a case-by-case basis.

1.9. Exceptions to author's rights

The European legislation has provided for the possibility of including certain **exceptions to economic rights** in the various national laws.⁸⁰ Without considering the details of these exceptions, the one most likely to be used in the context of live performances is the use for the purposes of **caricature, parody or pastiche**.⁸¹ This exception thus allows the use of a text or another protected work in a performance for such purposes, without having to obtain authorisation or assignment.

The Court of Justice of the European Union specified that the exception of parody should be given a uniform interpretation throughout the Union. Three conditions emerge: (i) the parody must evoke an existing work, (ii) present the noticeable differences in relation to this and (iii) demonstrate humour or mockery.⁸²

79 Art. 16(2), para. 1, of the 2014 Directive.

80 Art. 5 of the 2001 Directive. European law reserves to the States the possibility of providing for other exceptions as long as this only concerns analogical uses of works and does not affect the free movement of goods and services within the Union (Art. 5.3, o of the 2001 Directive).

81 Art. 5.3, k) of the 2001 Directive.

82 CJEU, 3 September 2014, *C-201/13*.

It should be recalled that the exceptions only concern economic rights and that, consequently, it remains possible for the rightholders of a parodied work to rely on their moral rights to prevent the parody. In order not to empty the exception of its substance, judges will have to balance the interests of the author of the parodic work and the holder of the moral rights of the parodied work.⁸³

2. Related rights

2.1. Definition of related rights

After it became possible to **fix and broadcast sounds and images**, the need was felt to extend protection to persons other than the authors in the strict sense. The related rights give their holders **prerogatives that are often close to those of the authors**. The monopoly is, nevertheless, **broader** and varies according to the holder of this right.

Once their performance is fixed on a medium, the **performers** benefit from rights that permit them to control the use of this medium. They have **economic rights** that allow them to control the use of their performance, but also **moral rights**.

To protect their investments, **phonogram producers, film producers, radio broadcasting organisations** and, recently, **newspaper publishers** have been given certain related rights. These are **by nature exclusively economic rights**.

2.2. Legal sources of related rights

Just as with author's right, related rights are regulated at the international, including European, and national levels.

The **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961** (hereafter, "the Rome Convention") is the main tool at the international level.

83 In Belgium, one of the criteria kept to comply with satisfying the claims of the holders of moral rights appears to be an attack on the author's honour and reputation (See caselaw analysed in B. Mouffe, *Le Droit à l'humour*, Brussels, Larcier, 2011, pp. 276 et seq.). The criteria the different European States have kept are, in this regard, mixed (*Ibid.*, p. 284).

The **WIPO Performances and Phonograms Treaty** (hereafter the "WPPT") has been given the objective of adapting the issue of related rights to technical developments. This treaty does not cover broadcasting organisations.

The European Union legislator dealt with the issue of related rights at the same time as that of author's right, by means of **directives**.⁸⁴

2.3. The holders of related rights

The holders of related rights are the **performers** (2.3.1.) and some **producers** (2.3.2.).

2.3.1. Performers

The Rome Convention provides a definition of performers. These are "actors, singers, musicians, dancers and other persons that represent, sing, recite, declaim, **play or perform any other kind of literary or artistic works**".⁸⁵ The performance is protected independent of the issue of knowing if the work performed is itself protected: The performer of a work that falls in the public domain all the same enjoys related rights on their performance.

Under the Rome Convention the States may extend the protection to the artists who do not perform "literary or artistic" works (it focuses more particularly on variety and circus performers).⁸⁶ Belgian and French laws make use of this ability. French law adds puppet shows.⁸⁷ These same laws moreover **exclude supporting cast** recognised as such by the professional practices.⁸⁸ They are generally stuntmen and extras but also make-up artists, dressers, camera men, care takers, and so on.

Certain national laws provide a significant **presumption of assignment in favour of the producers of audiovisual works**. Belgian law provides that, "unless otherwise stated, the performer assigns to the producer of the audiovisual work the exclusive right of exploitation of their audiovisual performance, including the rights necessary for this exploitation, like the right to add subtitles or to dub the performance [...]".⁸⁹ French law takes up the same idea a little differently: "Signing a contract concluded

84 See the directives listed at the end of the document.

85 Art. 3(a).

86 Art. 9.

87 Art. L212-1 of the French Intellectual Property Code; art. XI.205, section 1, of the Belgian Code of Economic Law.

88 Art. L212-1 of the French Intellectual Property Code; art. XI.205, section 1, para. 5, of the Belgian Code of Economic Law.

89 Art. XI.206, section 1 of the Belgian Code of Economic Law.

between a performer and a producer for the completion of an audiovisual work provides authorisation to set, reproduce and communicate to the public the performer's performance."⁹⁰ The objective of these provisions is to avoid a single performer blocking the use of the work globally.

In the context of recording live shows, the issue of the application of this presumption of assignment necessarily arises. The Court of First Instance then the Court of Appeal of Brussels rendered interesting rulings on the issue.⁹¹ In the absence of a legal definition of the concept of an audiovisual work, the Court notes that it would be appropriate to define this concept as "any series of images, with or without sound that meets the conditions for author's right protection". For there to be an audiovisual work and for the presumption of assignment to potentially apply, the audiovisual work must therefore meet the conditions of material form and of originality. It states in particular:

"An audiovisual recording of a live performance will not constitute an audiovisual work covered by intellectual property unless it has originality. Thus, a video recording of a live performance, without real participation attributable to audiovisual realisation, will not lend itself to author's right protection."

In other words, a filmed or recorded performance without directing-related work (choice of angles and of perspectives, editing, etc.) may not be given the status of audiovisual work and, therefore, may not be allowed to apply the presumption of assignment of rights from the performers to the producer.

In sum, for a recording of a live show to benefit from the presumption of assignment provided for the benefit of the producer of an audiovisual work, it is **necessary that the audiovisual work is an original work distinct from the recorded work**. This includes production work that is elaborate enough where the personality or expression of free and creative choices of the director are reflected. A "faithful audiovisual reproduction of a live

⁹⁰ Art. L212-4 of the Intellectual Property Code.

⁹¹ CFI Brussels, 7 August 2020, roll 20/2738/A and Brussels, 7 May 2021, roll 2020/AR/1222. On this case, see our observations: M. de Brogniez and A. Vandebulke, « La problématique des droits voisins dans le cadre de la captation de spectacles vivants », *A&M*, 2021/4, pp. 496 et seq.

performance"⁹² does not constitute an audiovisual work.

In our opinion, this reasoning could, **by analogy**, also apply to the presumption of **assignment of author's rights** in the same specific context (cf. *supra*, 1.7., "Assignment of author's right").

This interpretation is nonetheless limited to **Belgian law**. It is by no means clear whether such reasoning is likely to be transposed into other legal orders that provide a similar presumption of assignment.

If this presumption of assignment is inapplicable, it is necessary to ensure an effective assignment of the related rights by each of the holders prior to the performance so as not to block the use.

2.3.2. Producers

In addition to performers, the following persons also benefit from related rights: **phonogram producers**⁹³ and **film (or audiovisual work) producers** on the first fixation, broadcasting organisations on the fixation of their broadcasts and, finally, publishers of press publications for the online use of their press publications by information society service providers.

2.4. Possible cumulation with author's rights

A work that has been fixed on a medium, as the recording of a play to broadcast it on an online platform, necessarily raises questions of author's rights and related rights. It is necessary to **obtain all the authorisations** to exploit the recording: authors of the text, of staging, of sets but also all the authorisations of the performers concerned. Besides, it is perfectly possible to be **holder of at once author's rights and a related right**. For example, this is the case of a comedian who recites the text that he wrote or of an author/composer/performer. In these cases, the assignment of author's rights and related rights must be assured so the recording can be used.

2.5. Possible cumulation with right to publicity

Once the issues of author's rights and related rights have been regulated, it is still necessary to check whether other types of rights or other legal rules come into play. In particular, **right to publicity** may allow a performer to object to the recording of their performance.

⁹² Brussels, 7 May 2021, role 2020/AR/1222.

⁹³ That is "any exclusively aural fixation of sounds of a performance or of other sounds" (Art. 3(b) of the Rome Convention).

Once the recording has been completed, the right to publicity is largely integrated with related rights since it can allow the performer to object to broadcasting the image. It is thus necessary to obtain authorisation from the performer prior to the recording. Nonetheless, it is recognised that this authorisation may be tacit, and the assignment of related rights could be considered such an authorisation.

We recommend, nonetheless, to assure the explicit authorisation to use the image: in fact, beyond the interpretation of the work, the performer remains the holder of their rights to their image and could, for example, object to use photos of them in their logo or in rehearsal for promotional purposes.

2.6. Term of related rights

Performers' rights expire fifty years after the date of the performance. Nonetheless, if a fixation of the performance is the subject of a legal publication or of a legal communication to the public within this term, the rights expire fifty years after the date of the first legal publication or communication to the public.⁹⁴

The rights of **producers of phonograms and of films** expire in principle **fifty years after fixation** and the rights of **broadcasting organisations** **fifty years after the first broadcast** of a program.⁹⁵

If the phonogram or film has been lawfully published or communicated to the public within fifty years of fixation, the rights expire fifty years after the date of such first lawful publication or communication to the public.

These terms are calculated from January 1 of the year following the operative event.

2.7. Prerogatives of holders of related rights

The regime of related rights is firmly based on that of author's rights even if the scope of the rights is often narrower. The content of the various prerogatives is generally identical to the corresponding prerogatives of author's rights. Like for authors, there are **economic** rights and **moral** rights. The latter are nonetheless reduced and reserved for performers only.

94 Art. 3(1) of the 2006/116 Directive.

95 Art. 3(4) of the 2006/116 Directive.

2.7.1. Economic rights

Before examining the prerogatives, it should be noted that, in some cases, concerning performers, it is sufficient to obtain the authorisation of a single person to use several performances. Indeed, the Belgian legislator, aware of the practical difficulty of obtaining authorisation from all the performers of a live performance (concert, play, musical performance, etc.) to reproduce it or communicate it to the public, proposed a tempered position to the principle that use of the performance may only take place if all performers agree to its use. Thus, Belgian law provides that, in the event of a live performance, authorisation may be given, as the case may be, by the soloist, the conductor, the manager or the company director.⁹⁶ This prerogative, which allows a single participant to authorise the use, does not dispense with paying all the holders of the related rights. This right of certain people is not a European-wide obligation;⁹⁷ French law, for instance, does not provide such a mechanism. It will therefore be necessary to check specific national regulations.

Fixation and reproduction

Performers enjoy the exclusive right to authorise or prohibit the first **fixation** of their performances.⁹⁸

They also benefit from the exclusive right to authorise or prohibit **reproduction**, whether direct or indirect, temporary or permanent, regardless of the means or form, wholly or in part, of the fixations and their performances.⁹⁹ The producers of phonograms for their phonograms and the producers of the first fixation of a film for the original or of copies of their film enjoy a similar exclusive right to authorise or prohibit reproduction.¹⁰⁰ Reproduction is not limited to the physical medium (copy of a CD or DVD) but also covers dematerialised reproduction as in the reproduction of a file on a computer or on a USB key.

96 Art. XI.207 of the Belgian Code of Economic Law.

97 Based on art. 8 of the Rome Convention according to which "Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance."

98 Art. 7(1) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, hereafter "Directive 2006/115".

99 Article 2 of the 2001 Directive.

100 Art. 2(b) and (c) of the 2001 Directive.

Communication to the public and representation

Performers benefit from the exclusive right to authorise or prohibit making their performances available to the public, by wire or wireless means, such that anyone may have access to it in the place and at the time the individual chooses.¹⁰¹ Phonogram producers for their phonograms or first fixation of a film producers for their film also enjoy the exclusive right to authorise or prohibit any communication to the public.¹⁰²

The Court of Justice of the European Union has held that communication to the public in the context of the related right of the performer has **the same meaning and should be interpreted using the same criteria as provided for author's rights**.¹⁰³ We thus refer to the corresponding section on author's rights.¹⁰⁴

The performers' (and the producers') right to communicate to the public has nonetheless a **major limitation** when it has to do with a work fixed on a phonogram legally reproduced or broadcast on the radio.¹⁰⁵ In these cases, a **compulsory licensing** mechanism is implemented. In this context, the performers cannot object to either the public performance nor its broadcast.¹⁰⁶

Distribution

Performers and producers enjoy the exclusive right to authorise making available to the public recordings of their performances (or copies hereof) either by selling or by any other act of transfer of ownership.¹⁰⁷ The exhaustion of rights mechanism provided in author's right also applies here.¹⁰⁸

Characteristics of rights to remuneration

As discussed above, an important exception to the performers' (and producers') related right of communication to the public is provided by European Law. This exception only applies to phonograms (sound work).

101 Art. 3(2) of the 2001 Directive.

102 Art. 3(2), (b) and (c) of the 2001 Directive.

103 CJEU, 31 May 2016, C-117/15.

104 Cf. *supra*, First part, 1.6.1., "Communication to the public and representation".

105 Art. 8 of the 2006/115 Directive ; art. XI.212 of the Belgian Code of Economic Law.

106 For further developments, cf. *infra*, First part, 2.7.1., "Characteristics of rights to remuneration".

107 Art. 9(1)(a) of the 2006/115 Directive.

108 Cf. *supra*, First part, 1.6.1., "Distribution".

The performers (and their producers) may not forbid radio broadcasts or, generally, communication to the public of their works if these have been lawfully published. States must implement a system that allows for appropriate payment for performers and producers. Collective management organisations are responsible for collecting the notifications of exploitation of author's rights material, invoicing for this exploitation according to the rates established and to distribute the payment to the performers and producers.¹⁰⁹

However, this exception does not generally apply to the use of the work in a live performance.¹¹⁰ In other words, if the interpretation of the performance fixed on a phonogram takes place in the context of a live show or a paying event, the performers and producers retain the right to object to the communication. Concretely, if a recording is used as part of a play, it will always be necessary to obtain the authorisation of both the performer and the producer. It is not enough to pay the collective management organisation.

2.7.2. Moral rights (of performers only)

The performer enjoys moral rights and these have been taken up in the WPPT treaty. They are fewer in number and less extensive than those of the author and **only apply to performers** (only a right to the name and a right to the respect of the performance are provided).

The performer's moral rights are **inalienable**. They remain holder, even after assignment of their economic rights or the application of a presumption of assignment. The WPPT treaty provides that the moral rights of the performer have a term at least as long as that of their economic rights.¹¹¹ As for author's rights, French law provides for these to be imprescriptible and unlimited in time (without, however, using the term 'perpetual').¹¹² Belgian law simply affirms that the right is inalienable.¹¹³

Right to one's name

The performer has the right to **have their name mentioned** in accordance with honest practices in the business as is the right to **prohibit an**

109 Cf. *infra*, First part, 2.9., "Collective management of related rights".

110 In Belgian law : art. XI.212 of the Code of Economic Law; In French law : art. L214-1 of the Intellectual Property Code.

111 Art. L212-2 of the Intellectual Property Code.

112 Art. L212-2 of the Intellectual Property Code.

113 Art. XI.204 of the Code of Economic Law.

inaccurate allocation.¹¹⁴ The reference to “honest practices in the business” is a particularity of Belgian law.¹¹⁵ They also have the right to require the preservation of **anonymity**.

In concrete terms, this entails handing out a programme or a leaflet with the names of the performers in a play, mentioning them on the promotional material, including full credits at the end and/or the beginning of a film or recording, and so on.

Right to the respect of the performance

The performer has the right to respect for their performance. They may object to any mutilation, deformation or other modification of the performance.¹¹⁶ Concretely, it has already been held that distribution of a performance in a hostile or inadequate context was a breach of the moral right.¹¹⁷ Direct changes made to the fixation of the performance constituted a violation of the moral right.

Thus, it has been held that cutting a film into episodes violated the moral right of the actors.¹¹⁸ Such reasoning appears perfectly transferable to an audiovisual film or a recording of a live performance. If one wishes to cut the work into fragments, this must at least be planned from the beginning and the performer must have been duly informed.

2.8. Assignment of related rights

The rules related to assignment of related rights are no different to those raised for author’s rights. Therefore, we refer the reader to the developments above on the matter.¹¹⁹

The fixation of a play on a recording requires taking into consideration these related rights, which are not in principle considered for classic live performances (except the use of existing recordings – like a song or an extract from a film).

114 Arts. 5(1) of the WPPT treaty; XI.204 of the Belgian Code of Economic Law and L-212-2 of the French Intellectual Property Code.

115 Art. XI.204 of the Belgian Code of Economic Law.

116 Arts. 5(1) of the WPPT treaty; XI.204 of the Belgian Code of Economic Law and L-212-2 of the French Intellectual Property Code.

117 For example, Paris, 28 April 2003, CCE, 2003, comm. 83. The caselaw is nonetheless mixed.

118 Paris, 18 December 1989, D., 1990, sum. 353.

119 Cf. *supra*, First part, 1.7., “Assignment of author’s rights”.

2.9. Collective management of related rights

Related rights are, like author’s rights, managed collectively. The different elements mentioned above are also relevant to related right.¹²⁰

2.10. Exceptions to related rights

As with author’s rights, exceptions to related rights are largely left to the discretion of the Member States. Directive 2006/115 refers to the relevant provisions in matters of author’s rights under the 2001 Directive. We thus refer *mutatis mutandis* to the developments raised to the exceptions under matters of author’s rights.¹²¹

We also refer to the developments related to legal licence that apply to performers and to the producers of phonograms that prevent them from prohibiting broadcast or communication to the public of a work legally published and the particularity connected to shows in France and Belgium.¹²²

120 Cf. *supra*, First part, 1.8., “Collective management of author’s rights”.

121 Cf. *supra*, First part, 1.9., “Exceptions to author’s rights”.

122 Cf. *supra*, First part, 2.7.1., “Characteristics of rights to remuneration”.

Second Part

Analysis of Contractual Relationships in the Chain of Transfer of Rights

In this part of the study, we will highlight the main legal points (related more specifically to intellectual property) to which attention must be drawn in the context of the production of a play likely to be broadcast online. We will take the perspective of the producer (delegate), who will generally obtain all the authorisations necessary. After a few key reminders (1.), we will analyse the contractual relationships between the producer and the various stakeholders (authors and performers or other rightholders, management organisations, co-producers, platform or other broadcasting organisation) (2.). Finally, we will describe the classic structure of a contract of assignment or of licence and will offer examples of contractual clauses. (3.).

1. Key notions

Contractually, it is absolutely necessary to have all the authorisations required from the various holders of author's rights or of related rights, for the exploitation modes concerned, for the territories targeted and for a limited term with, as necessary, a number of determined presentations. The term of the assignment may never, in any event, exceed the term of the author's rights or related rights and may, possibly, be limited by national legislation. ¹²³

First, it should be recalled that contract interpretation that gives or authorises the use of certain work is still **strictly interpreted**, such that the only **modes of exploitation that are stated explicitly** in the contract are assigned or authorised.

This means that the authorisation to use a work for a classic theatre show

¹²³ This is the case in particular for assignments or exclusive licenses awarded in the framework of presentation agreements in view of a live show in France and Belgium. For more details, see *infra*, Second part, 3.3.1., "The Term".

does not include the authorisation to broadcast the play online or *via* other media. Each broadcasting medium should therefore be clearly indicated.

This also means that a **payment** to use the work, made to a collective management organisation, **does not necessarily result in an authorisation for all forms of exploitation on all territories**. It is thus important to pay careful attention to the scope of the authorisation granted.

As stated above, the consequences may be dramatic since a **single missing authorisation is likely to block the entire project**. For example, assuming the authorisation to use music in the framework of broadcasting a piece of music online was not granted, the beneficiary may object to the broadcast of the music, which will leave the producer with two options: broadcast the drama without the music or cut the scenes containing this music. In these two situations, however, it is possible that certain beneficiaries may claim their moral right, in particular, the right to the integrity of the work, to object to substantial changes to their work.¹²⁴

Thus, it is worth recalling that the authorisation or the assignment of rights of all the authors (or their rightholders) and of all the holders of related rights should be obtained. These authorisations should relate to both the **performance on stage** and its **audiovisual fixation and broadcast**.

With respect to the stage performance, the authorisations to be obtained should in particular come from the author of the text and, as necessary, from its translator, stage director, choreographer and scenographer. Depending on how original their work is, such authorisations should possibly also be obtained from set designers, lighting designers, even, in some exceptional cases, make-up artists.¹²⁵

Regarding the filming or recording, the fixation of the work gives rise to related rights that benefit the performers. Thus, it is appropriate to obtain the authorisation from each of these performers.¹²⁶ The audiovisual fixation of the performance also gives rise to other rights. Thus, subject to the originality, the film director will also enjoy author's rights to the audiovisual work. It should be recalled, however, that national laws generally

124 See First part, 2.7.2., "Moral rights".

125 See First part, 1.3., "Holders of author's rights".

126 Unless national laws provide that the authorisation of one person (e.g., the orchestra conductor or the troupe leader) is valid for a larger group of artists (see First part, 2.7.1., "Economic Rights").

provide for a presumption of assignment to the producer of the rights to use the audiovisual work¹²⁷, such that, if this presumption applies¹²⁸, the producer is presumed assignee of the rights and thus need not obtain the authorisation from each contributor. It should also be recalled that the producers of the first fixation of films enjoy a related right.¹²⁹

Finally, it should be noted that, *from a legal standpoint*, the existence of author's rights or related rights is **independent** of the contracts concluded between the producers and the presumed authors.¹³⁰ Anyone who meets the legal conditions¹³¹ will be viewed as holding an author's right or a related right. Nonetheless, *from a practical standpoint*, it is clearly advisable that the producers always check whether there are any **company-level** or **establishment agreements** (concluded between the employers and union delegations or employees) that grant specific payments to certain categories of authors.

2. Relationships between the principal producer and the various contributors

In this section, we will analyse the different contractual relationships that the producer (as a rule the theatre) has with the various actors to obtain the rights or authorisations to broadcast the shows produced on an on-line platform.

The producer should first obtain the necessary rights from the authors and the performers or their rightholders or from the management organisations (2.1.). If it is a co-production, the co-producers should ensure that they benefit from all the rights, as necessary by dividing the task; but it may be more prudent for a single producer to take responsibility for collecting all the rights (2.2.). Finally, the producer(s) conclude(s) a distribution contract with a platform, which will broadcast the various shows on-line (2.3.).

127 See First part, 1.7., "Assignment of author's right" and 2.3.1., "Performers".

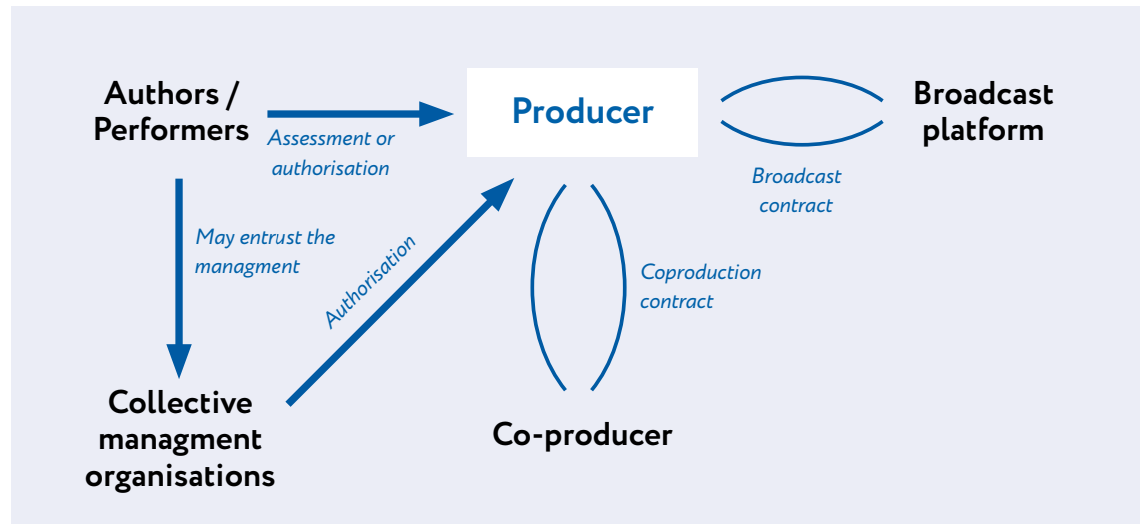
128 Which, as we have seen, is not acquired in the framework of the filming or recording of a live show (see. *Ibid*).

129 On the applicability of the related right of producers of first fixation of films to recordings of live shows, see First part, 2.3.2., "Producers".

130 For example, a contract that grants a payment in the form of a copyright.

131 See First part, 1.4., "Conditions necessary for protection" and 2.3.1., "Performers".

The possible contractual chain is represented in the diagram below:



Below, we discuss these various stages in detail.

2.1. With the authors, the performers and the representative collective management organisations

The producer who ensures the necessary rights and/or authorisations are obtained should address the two categories of actors: in the most common scenario, the **collective management organisations** to whom the authors have entrusted managing their rights; or the **authors and the performers** themselves, even their rightholders (for example, the successors or any [legal] person to whom the authors have assigned the management – e.g., a company incorporated by the author themselves to manage their rights).

If the author or the performer **has not entrusted a management organisation with the management of their rights**, they may then deal with the producer directly and either assign their rights (for a term, a territory, and defined modes of use) or authorise the use of their work (again, for a term, a territory, and the defined modes of use).

If the author or the performer **has entrusted** the management of their rights to a management organisation, the producer must then contact the necessary authorisations from the organisation.

Where the author or the performer has entrusted the **exclusive management** of their rights to the management company, it is **not possible to**

override the latter and to negotiate directly with the author. European law, nonetheless, provides for an exception regarding licences granted for the purpose of non-commercial uses of rights.¹³²

Besides, the mandate which the management company has been given does not necessarily cover all modes of use, so the author(s) or the performer(s) may negotiate directly with the producer for the modes of use not covered by the mandate. The scope of this mandate depends on the contract concluded between the author and the collective management organisation.

How can the producer know who to address?

There is no central directory that lists all the works and their rightholders or the companies that manage their rights. Practically, the only solution thus, depending on the situation, is to deal with the author or the competent management organisations in the artistic fields concerned (authors of texts, composers, related rights, etc.).

What can one do with an orphan work, that is, a work whose author cannot be identified?

Even if it turns out to be impossible to find the rightholder, the principle remains the same: **no use is permitted** without authorisation. Thus, if it is impossible to find or contact the rightholder, then it is necessarily **prohibited to use** the work. A specific regime was implemented in Europe to allow for the use of orphan works in certain cases¹³³, but it does not affect the production of staged or audiovisual works.¹³⁴ Besides looking for the authors, we advise contacting the producer, editors, and management organisations of the sector of the work concerned. If it is still not possible to identify the rightholder and the work is used without authorisation, the beneficiary may appear later and object to the use of the work. The decision to use an orphan work is thus **not without risk** for the producers.

2.2. With the co-producers

In the same way several producers may join to produce a show, it is

132 Art. 5, section 3, of Directive 2014/26/EU on collective management of copyright and related rights.

133 Directive 2012/28/EU of the European Parliament and the Council of 25 October 2012 on certain permitted uses of orphan works.

134 In effect this only concerns libraries, teaching establishments and museums accessible to the public as well as archives, depository institutions for cinema or sound heritage and public broadcasting service organisations; so theatres are not included.

possible to conclude a co-production contract to produce an audiovisual recording of the show. Unlike contracts of assignment and licences of author's rights or related rights, the **freedom of contract** prevails in these circumstances. Thus, we can only provide some guidelines, since the effective content of these contracts will depend first and foremost on the will of the co-producers and their negotiations. The assignment of rights that come to the fore between the co-producers should nonetheless meet the conditions specific to these contracts.

A relatively classic pattern can be found in the association of a theatre producer with an audiovisual producer. It is also possible for several producers together act as co-producers of all aspects. Finally, an association could be formed between an audiovisual producer and theatre co-producers. The combinations remain numerous.

As regards author's rights and related rights, **it is always necessary to ensure that at least one of the co-producers holds all the required rights**. It is therefore more practical that a single producer assumes responsibility for obtaining the necessary authorisations or assignments, but there is nothing to prevent the producers from sharing the role of the assignee or the task of obtaining the required authorisations (for example, depending on the kind of work).

When a play is first produced to be performed live and then another producer comes in for the audiovisual recording, we would advise the first producer to obtain, from the outset, all the authorisations and/or assignments required for the audiovisual use. Moreover, certain national laws ban in principle the transfer of the profits from a presentation contract. Thus, the fourth paragraph in Article L132-19 of the French Intellectual Property Code provides that "the entertainment promoter may not transfer the benefit of his contract without the formal written consent of the author or his representative". Belgian law has an analogous provision.¹³⁵ It will in principle, therefore, not be possible, without the author's explicit and written authorisation, for a producer to assign or concede to another producer the rights that they have been granted in the context of a presentation contract.

Nonetheless, it is imperative to include a **guarantee clause** in the co-production contract that will offer the producer a guarantee that their partner is the true holder of all the rights required to use the work.

.....
135 Art. XI.201, para. 2 of the Belgian Code of Economic Law.

If the use of a work is blocked because of poor centralisation of the rights of a producer who guaranteed effectively to hold all the necessary authorisations, they may be held contractually liable. Where the co-producers together take joint responsibility for all aspects, it will be necessary to carefully **specify each one's role** in the co-production contract. Therefore, if it appears that the authorisations were improperly collected by the co-producer who was responsible for the task, the other co-producers may be held liable for the resulting contractual responsibility.

More conventionally, it is also important to resolve the issue of the **ownership of the master** (the recording that will serve as a basis for broadcast). The co-producers may be co-owners of the master equal to their investment. It is also possible to provide that the delegated producers will own this fixation. It should, however, be noted that the digitisation and the easy reproducibility of the works render the issue of ownership of the master less problematic than it used to be. It is also noted that the owner of the rights to use the work is utterly independent of the issue of the ownership of its physical medium. It may nonetheless be worthwhile to combine the economic rights of the master and ownership of the right to use for the purpose of starting with a very high-resolution medium. The rights to use may be held in co-ownership, although it may be simpler to designate a single owner.

2.3. With the broadcasting platform

The relationship between the producer and the broadcasting platform is, after all, a very traditional contractual relationship. Ultimately, it is a distribution contract, in which the platform will commit to broadcasting the play according to the conditions laid out in the contract. Two points, nonetheless, merit some specific developments.

First, we must ensure, as has already been highlighted, that the producer owns all the rights required for the broadcast. However, it is necessary, at this stage of the procedure, to ensure that the platform **respects the scope of the rights** granted. For example, it may only broadcast the play in the **territories referred to** in the assignment or authorisation. It is also necessary to ensure that the **term** of the assignment or authorisation, even the **number of broadcasts** authorised, is respected by the platform.

Then the issue of **payment of the authors or performers** is addressed. If the authors are paid a fixed amount, this should not give rise to any

difficulties: the author was paid and the contract between the producer and the broadcaster is of little importance. In contrast, if the author or the performer has the right to a **proportional remuneration**, this should not in principle fundamentally change anything legally. However, depending on revenues collected by the producer via the platform, the authors will have a right to a share in these receipts. The complexity and the administrative cost will vary depending on the producers' pay from the platform: the simplest form being the platform granting a fixed rate; the most complex being dependent on the payment of the number of views by the subscribers; the 'intermediary' solution being to pay per show (like the purchase of a ticket) and to pay the producers according to these purchases. We recall, moreover, that certain national laws impose a proportional remuneration.¹³⁶

The essential point to retain at this stage, in terms of author's rights and related rights, is that the platform should implement **technical procedures to guarantee that the scope of the authorisations and the assignments are respected** while broadcasting.

3. Structure of the contracts and examples of clauses

This section describes the classic structure of an authorisation (licence) contract or a contract of transfer of author's rights or related rights. We will supplement the explanation with examples of contract terms. Such a contract is concluded between the **producer** and the **rightholders** (where appropriate, through a collective management company).

It should be recalled that, except for certain **mandatory provisions** (that is, legal provisions from which the parties may not derogate), the contracts are mainly regulated by the principle of **freedom of contract**, allowing for negotiation between the various parties. Moreover, every contract must necessarily take into account the **context**, that is, the concrete factual elements, such that it is not possible to provide a model contract that could be used *the same way in every situation*; it must necessarily be **adapted**.

¹³⁶ This requirement flows from article 18 of the 2019 Directive, except that this article specifies that "a fixed amount may also constitute a proportional payment", even if this "should not be the rule" (Recital 73). This requirement is directed at both the authors and the performers.

Verifying the contracts on a case-by-case basis thus remains necessary. It should also be noted that, when the producer deals with a management company, there is limited room for negotiation.

Certain elements **must be included in the contract**. If they are not, the assignment/concession may be declared invalid by the court.

The assignment/concession must be **in writing**. If it is not, it may not be enforced against the author or the performer.

The following elements must always be included:

- Details on the **modes of exploitation** transferred;
- For each mode of exploitation:
 - the **remuneration**;
 - the **scope** (broadcasting technique, output format, etc.);
 - the **territory**;
 - the **term** of the assignment/concession.

If some references may be made (e.g., to provide that the territory is identical for all the rights under the contract), it is still prudent to provide details of these items by relating them to the mode of exploitation under the contract. This is particularly true regarding the remuneration. Indeed, the absence of remuneration clearly linked to one of the assigned modes of use may result in the invalidity of the assignment for this mode of use.

Below, we will present the classic structure of contracts. The clauses are likely to be applied to either authors or performers, or to both equally. We thus distinguish the situations when it is necessary to separate them.

3.1. Contracting parties

Every contract opens with a description of each of the contracting parties, specifying generally each one's residence, company number, if applicable, the corporate form if it is a legal person, and so forth.

Example: "Between the undersigned parties
Mr/Ms ..., domiciled at ... [full address],
hereafter called the "Author"/the "Performer"¹³⁷,
and

¹³⁷ When a contract term is defined specifically, it will then generally be capitalised (to remind the readers that this term was the subject of a particular definition).

The Theatre ..., [corporate form], whose headquarters are established at ..., registered under number ..., hereafter called the “Producer”.

3.2. Contract object

It is then advised to specify the main object of the contact (i.e.: assignment or licence of rights) for the play in question.

Example: “The author assigns/transfers the rights to ... [specify the work ¹³⁸] (hereafter, the “Work”), as specified in this contract, to produce and exploit the play [specify the play] (hereafter, the “Play”), which will be staged before audiences and will be recorded (hereafter, the “Recording”) to be broadcast online”

For a transfer of a performer’s related rights: “The performer assigns/transfers the rights to their performance, as specified in this contract, for the purpose of using the recording of the play [specify the play] (hereafter, the “Recording”) which will be broadcast online”.

3.2. Scope of assignment or licence

The essential point of an assignment or licence contract is the extent of these, which should be indicated clearly in the contract.

Thus, attention should always be paid to the field of application of the assignment, in particular the **modes of exploitation** intended, the **territories** concerned and the **term** of the authorisation or the grant.

It should be recalled that assignment contracts are to be **interpreted strictly** and that **only the modes of use explicitly mentioned in the contract are assigned or authorised**. Clauses like ‘for every current or future mode of use’ are not legally valid (despite their common use).

Any modes of exploitation that is not considered may thus not be used by the producer, and a new contract should then be concluded. This is the **main issue** in the context of the **filming or recording** and the broadcast of **live shows**: in many cases, the assignment or authorisation related to live presentation before an audience and not the audiovisual exploitation of the play.

¹³⁸ Here it is a matter of a work within the meaning of author’s rights; for example, the text, the musical composition, etc.

In the context of drafting a contract, the **term (a.)**, the **territories covered (b.)** and the **rights that have been transferred or licensed (c.)** should thus be specified while also specifying the various modes of use.

a.) The term

The term is no longer than the duration of the author’s rights or of the related rights, but will often be less. It depends on the contractual negotiation.

More than a period in terms of years, the assignment or licence may relate to a **number of determinate presentations**. This relates in particular to **presentation contracts concluded for the purpose of live performances**. In any event, the alienation or the exclusive licence in the contracts may not validly exceed five years in France and three years in Belgium. Interruption of the presentations for two consecutive years will automatically bring them to an end. ¹³⁹

The duration may differ depending on the mode of use. If this is the case, it is necessary to specify the duration for each mode of use. If this is not the case, it is imperative to specify that the duration of the assignment or the licence *“applies for all the modes of use listed below”*.

b.) Territories covered

For each right assigned or transferred, the territories covered should also be specified by the latter, which **may nonetheless extend to the ‘entire world’**. The territory may, certainly, differ depending on the modes of use.

Here again, the size of the territory will depend on the **negotiation** and will generally be correlatively linked to the price of the assignment or the authorisation.

c.) The rights assigned or licensed

The rights assigned or licensed should then be specified, while specifying all the **modes of exploitation** for which these rights are assigned or licensed.

Here, we will itemise the rights to assign or license by classifying in broad classic categories of prerogatives of author’s rights and related rights:

¹³⁹ Arts XI.201 of the Belgian Code of Economic Law and L132-19 of the French Intellectual Property Code.

rights of **presentation, reproduction and distribution**.¹⁴⁰ One such categorisation is rarely as clear in contract practice, in fact, there is most often a complicated pattern of enumerated rights that are difficult to navigate.

Presentation to the public

Where presentation to the public is concerned, the authorisation or the license should first allow **presenting the work before a live audience**. It will be recalled that, regarding the live presentation of the work before an audience, there are no related rights.

Example: The author authorises the producer to “present the Work or have the Work presented publicly, before any audience, in any theatre hall or outdoors, for paid or unpaid presentations”.

Moreover, the **broadcast of the audiovisual recording or the live broadcast of the play** via streaming or any other technical procedure must be permitted. It will be noted that the recording, so the fixation of the play on a medium, should itself be authorised, but this falls under the rights of reproduction (cf. infra), and not the rights of presentation.

Example: The author/the performer authorises the producer to “exploit the Recording through on-demand media services, that is, make the Recording available to the consumers on their request, by any means of telecommunication, by any broadcast procedure like streaming (linear broadcast) or download, for viewing on any reception equipment (i.e., a computer, a television, a tablet or a mobile telephone) and regardless of the access system for users to the platform (pay per view or per download, subscription formula, free broadcast with or without prior registration, hybrid formula combining certain or all of these modes of use, etc.)”.

The scenario envisaged here is the one of an online broadcasting via a platform, but it can also be interesting to foresee an audiovisual exploitation authorisation.

It may also be useful to clarify that the work or a part of the work may also be used for promotional material.

140 See First part, 1.6, “Prerogatives of author’s rights” and 2.7, “Prerogatives of holders of related rights”.

Example: “The Author/The Performer authorises the Producer to exploit and present all extracts of the Recording, including the soundtrack, as well as any photographs of the Play for purposes of promotion”.

Reproduction

The reproduction right will from now on be used in the context of **the recording**, since it relates to the recording itself. The contract should authorise the producer to record the piece.

Example: the author/the performer authorises the producer “to record the Play/Performance or to have it recorded by whatever technical procedures, on any media, and all formats by using any framing medium”.

It may moreover be more prudent to mention the right to **digitise** the recording.

Example: the author/the performer authorises the producer “to digitise the Recording by compression, compacting or other procedures, to save on the memory on any medium, adjust, compress, decompress, digitise or reproduce the Recording”.

A **synchronisation right**, where some music is added following the recording, may moreover be provided.

Example: the author/the performer authorises the producer “to allow for synchronisation between the recording and any musical composition”. Where the authorisation relates to the use of music, this synchronisation right should exist along with the Recording: “the Author/the Performer authorises the producer to synchronise the musical composition with the Recording”.

Provision should also be made for the possibility of **integrating subtitles**, even dubbing the play:

Example: the author/the performer authorises the producer “to integrate subtitles into the Recording or to dub this recording, in any language”.

Distribution

The distribution right, connected to the reproduction right, relates to the right to distribute to the public, by selling or otherwise, the products

allowing for viewing the show, whether it is DVD/Blu-Ray or to download the show, the derived products, the CD, and so forth.

Example: the author/the performer authorises the producer to “exploit the Recording/the fixation of their performance in the form of videograms (like DVD, Blu-Ray or any other audiovisual or digital medium) intended for sale or lease to the public for private use”.

3.4. Limit of assignment or license

Legally, describing the limits of the assignment is of no interest since all that is not explicitly assigned remains the property of the author, while anything that was not authorised may not be used.

However, this allows clarifying certain points between the Parties and reassuring certain authors or beneficiaries.

Example: “This Assignment/Concession does not include ... [list the modes of use not included]. For these, the producer must conclude a new contract with the rightholders to obtain the assignment/the authorisation”.

3.5. Author’s guarantees

The author or the beneficiary guarantees that they are holder of the rights attached to the work, that he has not granted assignment of exclusive authorisation on this to third parties or that they have themselves respected the author’s rights for the creation of their work.

The author also guarantees that there is no on-going litigation as regards the work assigned or subject of an authorisation.

Example: “The Author explicitly guarantees to the Producer the peaceful exercise of the assigned/licensed rights.

For this purpose, they guarantee being the only holder of all the rights attached to the Work and having full powers and capacities to grant the assigned/licensed rights in this contract.

They moreover guarantee that the Work does not violate any third-party right and is thus not open to possible lawsuits for counterfeiting. They guarantee that there is no litigation on-going or about to be initiated

addressing the Author’s Rights on the Work.

The Author is personally responsible, both as regards third parties and the Producer, in the event of non-compliance with this clause”.

Since a performance is not capable, in itself, of logically breaching another person’s author’s rights, such a clause would seem irrelevant as regards performers.

3.6. Moral rights

It should be recalled that moral rights are non-transferable. Nonetheless, it is possible, to a certain extent, to model the exercise for it. Thus, it appears important to limit, as far as possible, remedies of the authors or performers based on the right to the integrity of the work or of the performance that could be affected by the recording. It will be recalled, however, that the courts retain significant discretionary powers as regards the validity of such clauses that could, as necessary, be excluded. Such a discretion is moreover likely to vary from one legal jurisdiction to another.

Example: “The Producer undertakes to uphold the integrity of the Work/of the Performance or have it upheld.

The Author/the Performer shall not rely on their moral rights to object to the addition of subtitles and/or dubbing of the Recording for the purpose of its audiovisual exploitation.

The Author/the Performer shall not argue a violation of the integrity of the Work/the Performance following the slight alterations of images and/or of its connection to all recording procedures or to compression operations or to other equivalent techniques.

The Author/the Performer shall not argue a violation to the integrity of the Work/the Performance for any interruption of the live presentation before the public (in the form of an intermission) or of the audiovisual broadcast, in particular to diffuse advertising, promotional or other messages”.

With respect to the authors only, we can specify: “The Author shall not, based on their moral right, object to the choice of professional comedians which remains the prerogative of the Producer”.

3.7. Remuneration

Remuneration may be **fixed**, which means that a fixed amount is granted for the assignment or license, or **in proportion to the receipts**.

As mentioned above, account must be taken of national specificities, which **sometimes require** that it be a payment in proportion to the receipts

Some national laws require that the remuneration be determined for each mode of use.¹⁴¹ This may be cumbersome, but it is indispensable. In fact, the courts and tribunals may cancel an assignment clause if there is no clearly distinct payment associated to the assigned right.¹⁴²

If there are no receipts (e.g., in case of the recording being made available on the Platform free of charge), a fixed amount may validly be set.¹⁴³ A payment proportionate to the number of views may also be used.

Example regarding theatrical exploitation: “In consideration of the rights to use assigned/transferred to the Producer under clause [X], within the limits established under this clause, the Author shall receive:

- A fixed fee of [X] EUROS

or

- A fixed fee of [X] EUROS by representation

or

A proportional payment of [X%] of the ticketing receipts calculated on the net amount determined according to the modalities set out in Annex X [providing the detailed calculation based on the percentage]

Example regarding audiovisual exploitation: “In consideration of the rights or use assigned/transferred to the producer under clause [X], within

141 See for example art. XI.167, section 1, para. 4 of the Belgian Code of Economic Law and art. L132-25 of the French Intellectual Property Code.

142 See for e.g. CA Versailles, 24 January 2013, RG: 11/04109.

143 Art. L131-4 of the French Intellectual Property Code authorises, for example, a fixed payment when “it is not practical to determine the basis for calculating the proportional interest.”

the limits established under this clause, the Author/the Performer shall receive:

- A fixed fee of [X] EUROS for the taping and the recording, for payment of the reproduction right as defined under Clause [X]
- A proportional payment of [X%] of the receipts from the audiovisual use calculated on the basis of the net amount determined according to the modalities listed in Annex X [providing the detailed calculation based on the percentage], as part of the payment for the right to communicate to the public defined under clause [X]
- A proportional payment of [X%] of the receipts from the sale of the videograms as defined under clause [X], calculated on the basis of the net amount determined according to the modalities provided under clause [X], as part of the payment for the right to distribute defined under clause [X].”

As mentioned, however, depending on the applicable national law, a fixed fee could be granted for the different modes of exploitation.

3.8. Rendering accounts

In the case of proportional payment, provision must moreover be made for a mechanism of **rendering the accounts**, that is, a periodic regulation of the amounts that are owed by the Producer.

Example: “The account of the fees that are owed to the Author/the Performer under this contract will be fixed on [date] of every calendar year. The statement of account shall be sent by the Producer to the Author/the Performer by the latest [X] days after this date.

The Author/the Performer may, at any time, request justification of the accounts for the use of the Work. The Producer recognises the right of the Author/the Performer to inspect the accounts, the documents and the contracts at their headquarters at any time, during opening days and hours, subject to a notice period of [X] days.

Failing such a request, the accounts and regulations shall be deemed to have been approved [X] [months] after the Producer sent them”.

3.9. Right of revocation

Where rights are assigned or transferred exclusively is not subject to any use after a certain period, it is possible to provide for the termination of the contract at the request of the Author or the end of the exclusivity. Some national laws grant such a right to the authors (regardless of a clause expressly provided in this sense).

Example: “If, [X days/months] after the date provided for the performance of the obligation to use], the Producer has not performed any act of use of the work and unless the Producer can provide a legitimate reason, the Author may serve notice of default by registered or certified mail with notice of receipt. The Producer will have a period of [X days] to demonstrate that he has performed acts of use. If, after this period has expired, the Producer has not provided such proof of use, the Author may unilaterally terminate this contract by sending a registered or certified letter with notice of receipt.”

It is worth recalling that, in Belgian and French law, the validity of exclusive rights granted by a playwright for the purpose of live shows may not exceed three and five years respectively. Interruption of presentations over two consecutive years automatically brings this to an end¹⁴⁴, that is, independent of a judge’s intervention.

3.10. Termination clause

A termination clause allows for terminating the contract without appearing before a judge, if it is provided contractually, for example, if one of the parties does not fulfil their obligations, after notice from the other party.

Example: “In the event of prolonged lack of execution of the obligations by a Party to the Contract, the other Party may put the defaulting party on notice by a registered letter with acknowledgement of receipt. If [X] months from the date of receipt of a registered letter with notice of receipt, the defaulting Party has not executed their obligations, the Contract is automatically terminated, to the sole prejudice and detriment of the defaulting Party, by sending a second registered letter giving notice of such default by the other Party noting this.”

144 Arts L132-19 of the French Intellectual Property Code and XI.201 of the Belgian Code of Economic Law.

3.11. Force majeure

It may also be prudent to include a *force majeure* clause in the contract, such a clause will allow temporary suspension of the parties’ obligations, even to terminate the contract without compensation. A *force majeure* is the occurrence of an unpredictable element, through no fault of the parties, that leads to, for at least one of the parties, the impossibility of performing the obligations in the contact, temporarily or definitively (the Covid-19 pandemic is an excellent example of force majeure).

Example: “If, when an unpredictable event occurs independent of any fault on the part of the contracting Parties, the Producer must stop production or distribution of the Play, the Producer is entitled to suspend the execution of the Contract and, after a period of [X] months of suspension, to terminate the Contract unilaterally.

Any suspension of this Contract for the above-mentioned reasons is for a period equal to that of the event that constitutes the cause of the cessation in the production activity. All deadlines provided in this agreement will be increased by a period equivalent to the suspension.

If this Contract is terminated for any of the above-stated reasons, the Author may not claim sums from the Producer other than those owed before the Contract is terminated nor may he claim compensation for any reason whatsoever or hold the Producer liable for the loss of any payment due on termination of the Contract.”

3.12. Litigation

In this section, the Parties will choose the applicable law and competent courts.¹⁴⁵ For example

Example: “The law that applies to this contract is the law of [select law] and the competent courts are the courts of [State previously chosen; possibility of choosing the language in a multilingual country; e.g., Belgian French-language jurisdictions]”.

145 In principle, the parties are free to choose the law applicable to their contract. There are, however, restrictions to this freedom of choice. See in particular articles 3.3, 4.3, 9.2 and 21 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (so-called “Rome I Regulation”). In short, if there is a manifestly more closely connection with the law of another State than the one chosen by the parties, the former law is likely to apply. Moreover, it is not always possible to bypass certain rules that have been put in place to protect authors.

It is also possible to require an attempt to settle by **out-of-court agreement** or through **mediation** before commencing court proceedings.

3.13. Parties' signatures

Clearly the contract must be **duly signed** by the Parties and done in a number of copies that correspond to the number of Parties. In practice, we recommend to initial each page and to sign the last.

It is moreover necessary to indicate the **date** of the contract.

Relevant legal texts

European Law

Main Directives:

[Directive 2001/29/CE of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society](#). This directive is the main instrument in issues of author's rights at the European level. It governs in particular the issue of economic rights, of certain related rights and the main exceptions.

[Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights \(codified version\)](#). This directive mainly governs the issue of the term of the author's right and related rights.

[Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance](#). This directive organises collective management of copyright and related rights in the European Union.

[Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC](#). This directive recognises in particular new exceptions and related rights for newspaper publishers. It generalises the requirement of proportional remuneration and has some specifications regarding licensing.

Other legislation:

[Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission](#). This directive contains rules on licenses granted for satellite broadcasting services and cable retransmission. It aims at improving the transborder availability of radio and television programmes within the European Union.

[Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property](#). This directive governs issues related to renting and lending protected works. It establishes a mechanism for equitable remuneration.

[Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art](#). This directive establishes a resale right allowing authors of a work of art to collect a percentage on each resale of their work.

[Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works](#). This directive introduces a new exception regarding permitted uses of orphan works by certain institutions. It defines the notion of orphan work and imposes a preliminary procedure for searching for the beneficiaries.

Other international conventions

[Berne Convention for the Protection of Literary and Artistic Works](#). This convention is the main international instrument on author's right.

[International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961](#). This convention is the main international instrument on related rights.

[WIPO Copyright Treaty](#). This treaty governs issues related to author's rights and broaches, in particular, the issue of photographs, computer programs and databases.

[WIPO Performances and Phonograms Treaty \(WPPT\)](#). This treaty governs issues on certain related rights, in particular in the digital environment.

Glossary of legal terms

Anonymous work: The anonymous work is that for which the author does not wish to communicate their identity. Here it has to do with a facet of the moral right of authorship (First part, 1.3., “Holders of author’s rights”).

Assignee: Beneficiary of an assignment of rights.

Assignment: The assignment of author’s rights or related rights is a transfer of their ownership and, consequently, of the possibility of using them. Only economic rights may be assigned. The assignment contract is the subject to particular regulations (First part, 1.7., “Assignment of author’s rights”; First part, 2.8., “Assignment of related rights”; Second part, 3., “Structure of contracts and examples of contract terms”).

Assignor: Person who assigns a right.

Author: The author is the physical person who created a work protected by author’s right. It does not matter whether the author completed the work themselves but that they had intellectually conceived it and that, consequently, it bears the stamp of their personality (First part, 1.3., “Holders of author’s rights”).

Authorisation: Authorisation to use a work for certain purposes. The authorisation only covers the modes of use provided, on a certain territory and for a certain period of time.

Authorship right: The authorship right is a moral right enjoyed by the author of a protected work that allows them to require that they may be identified as the author of the work or, conversely, not to be or even to be identified by a pseudonym (First part, 1.6.2., “Authorship”).

Collaborative work: A collaborative work is the fruit of the shared work of several persons (and not the mere compilation of individual works) from which the rights that flow should be exercised by mutual agreement between the various authors (First part, 1.3., “Holders of author’s rights”).

Collective management organisations: Companies certified to manage collectively author’s and related rights to ensure these are respected. They must respect numerous national provisions, themselves framed by European law (see Directive 2014/26/EU) (First part, 1.8., “Collective management of author’s rights”).

Collective management: Collective management of author’s rights and related rights is management carried out by a group (a **management organisation of author’s rights**) comprising authors, performers and rightholders (management organisation of author’s rights), to ensure their rights are respected. This management is mostly optional, but is compulsory in some specific cases (First part, 1.8., “Collective management of author’s rights”; First part, 2.9., “Collective management of related rights”).

Communication to the public: Communication to the public is a prerogative of author’s rights and related rights. It relates to both the direct communications to the public

and the communications carried out using a technical device. The term public requires a sufficiently large number of potential recipients and excludes, for example, a private group (First part, 1.6.1 and 2.7.1., “Communication to the public and representation”).

Compulsory licensing: Generally considered an exception to the monopoly over use enjoyed by holders of author’s rights or related rights, compulsory license, still known as a **legal license**, is a mechanism that prevents the rightholders from objecting to certain uses of their works. A remuneration is generally provided (in this context known as **right to remuneration**). Such a compulsory license exists for example for private copies or radio broadcast of legally published phonograms. (First part, 1.6.1., “Characteristics of rights to remuneration”; First part, 1.9., “Exceptions to author’s rights”; First part, 2.7.1., “Characteristics of right to remuneration”; First part, 2.10., “Exceptions to related rights”).

Copyright: The term copyright is sometimes used as the English translation for the “droit d’auteur”; the Anglo-Saxon copyright, and American in particular, however, differs in many ways from the author’s right as we understand it. It would thus be more appropriate to speak of the Anglo-Saxon equivalent of the author’s right.

Derivative work: A derivative work is a work inspired by or adapted from a pre-existing work. If it meets the conditions for protection, it is itself protected by author’s rights. (First part, 1.6.1., “Reproduction”).

Directive: Directives are pieces of legislation from the European Union that are in principle not directly applicable in the Member States. They must be transposed into their respective legal systems by a law or any other appropriate instrument. The use of a Directive generally leaves the States some room to manoeuvre. At the European Union level, the matter of author’s rights and related rights is mainly harmonised by Directives (First part, 1.2., “Legal sources of author’s right”; First part, 2.2., “Legal sources of related rights”).

Distribution: Distribution is the act of making the work or copies of it available to the public by various means, like sale or rental. It is one of the prerogatives of author’s rights and related rights (First part, 1.6.1. and 2.7.1., “Distribution”).

Economic rights: Economic rights are the economic prerogatives attached to the author’s right or to related rights that thus differ from moral rights. Economic rights include the right of reproduction, of communication to the public and representation, and of distribution (First part, 1.6.1 and 2.7.1., “Economic rights”).

Exceptions: There are exceptions to author’s rights and related rights that allow, in legally defined contexts (among a catalogue of exceptions provided under European law), to use an author’s right or a related right without obtaining authorisation from its holder (First part, 1.9., “Exceptions to author’s rights”; First part, 2.10., “Exceptions to related rights”).

Fixation: Fixation in the broad sense means any procedure that permits keeping a recording of a performance or interpretation. In the context of related rights on the

fixation of an interpretation, of a phonogram or of a film, caselaw that is still somewhat limited specifies that, to be considered fixed, the work must be useable for its reproduction or its communication to the public. (First part, 2.7.1., “Fixation and reproduction”).

Inalienable: That which can never be transferred or assigned (like moral rights).

Licence: The licence is an authorisation to use certain works, it may be voluntary (based on a licensing contract) or compulsory. In Belgium, the term **concession** is also used.

Material form: The material form is a necessary condition for a work to be protected by author’s right; it thus requires that it be more than a mere idea, rather it has to have been partially formalised, realised, without this form being precisely defined (First part, 1.4.1., “Material form”).

Mode of exploitation: The modes of exploitation of a work are the counterpart to the holders’ economic rights. They encompass the way in which the work can be used (reproduction, communication to the public, etc.). Generally, regarding contracts for transfer or concession, the law requires that these modes of exploitation be set out in detail and that their scope be specified (First part, 1.6.1., “Economic rights”; First part, 1.7., “Assignment of author’s rights”; First part, 2.7.1., “Economic rights”; First part, 2.8., “Assignment of related rights”).

Moral Rights: Moral rights are the rights that protect the authors in their relationship with the work. Unlike economic rights, they are inalienable and perpetual in certain States. Moral rights are the right to disclose, the authorship right and the right to the integrity of the work. Performers also enjoy these rights in a more limited manner (First part, 1.6.2., “Moral rights”; First part, 2.7.2., “Moral rights (of performers only)”).

Originality: The originality is one of the two conditions required for protection of author’s rights. To be protected, a work must be in a material form and original. According to the European Court of Justice, a work is original when it bears the personal stamp of its author (First part, 1.4.2., “Originality”).

Performer: The performer is the person who plays or performs, in any manner whatsoever, a literary or artistic work. The performance is protected independently of the issue of knowing if the performed work is itself protected. The performer enjoys specific related rights (First part, 2.3.1., “Performers”).

Phonogram: Audio recording.

Presumption (rebuttable or irrebutable): A presumption involves shifting the burden of proof. Thus, a fact is held as established as long as it has not been rebutted. In matters of author’s rights, there are presumptions as much on the assignment of certain rights, including in the audiovisual field, and with respect to ownership of rights to a work. A presumption is rebuttable when it can be proven that it does not correspond with the facts. It is considered irrebuttable when the law does not allow

reversing by demonstrating that it does not correspond with reality (First part, 1.3., “Holders of author’s rights”; First part, 1.7., “Assignment of author’s right”; First part, 2.3.1., “Performers”).

Proportional remuneration: Proportional remuneration is a requirement linked to the remuneration of authors who assign or grant a license for one or more modes of exploitation on a work or a performance. The remuneration should be proportionate to the real or potential value of the rights granted. This may be translated into a percentage of the receipts but other modes of calculation are possible (First part, 1.7., “Assignment of author’s rights”; First part, 2.8., “Assignment of related rights”).

Pseudonymous work: The pseudonymous work is that for which the author does not officially identify their name. Here it is a matter of a facet of the moral right of authorship.

Related rights: Related rights are a group of prerogatives that performers hold on the fixations of their performances, phonogram producers on their phonograms and films producers on the first fixations of their films. The rights conferred in this context are similar to those of author’s rights but generally not as extensive (First part, 2., “Related rights to author’s right”).

Representation: Representation or **communication to the public** is a prerogative of author’s rights and related rights. It relates as much to direct communications to the public that the communications made using a technical device. The term public requires a sufficiently significant number of potential recipients and excludes, for example, the case of a private group (First part, 1.6.1. and 2.7.1., “Communication to the public and representation”).

Right of disclosure: The right of disclosure is a moral right enjoyed by the author of a protected work. It reserves to the author the exclusive right to disclose or not to disclose their work to the public, as well as decide on the conditions and on the timing of any disclosure (First part, 1.6.2., “Disclosure”).

Right to one’s name: Equivalent of **author’s authorship** right (cf. supra), the right to one’s name confers on performers the right to require that their names be mentioned correctly or, conversely, the right to maintain anonymity (First part, 2.7.2., “Right to one’s name”).

Right to publicity: The right to publicity, established in national laws, is the right of every person to authorise the fixation, the exhibition, the reproduction or the communication of their image. This right also includes the right to object to these acts or to determine the modes. It is a regulation distinct from the author’s right and related rights, even if, in many cases, the prerogatives of the right to publicity are already covered by related rights. However, publicity rights may also be implemented where related rights may not be, for example in the distribution of photographs of the person (on a poster or other medium) or in filmed interviews (First part, 2.5., “Possible cumulation with right to publicity”).

Right to the integrity of the work: The right to the integrity of the work is a moral right enjoyed by the author of a protected work, which allows them to object to any deformation, mutilation or, more generally, any violation of the work (First part, 1.6.2., "Integrity").

Synchronisation right: The synchronisation right is a special form of the reproduction right, which relates to the integration of musical works or fragments of musical works in an audiovisual work and, more generally in any context other than that for which they were composed (First part, 1.6.1., "Economic rights").

Work: The work is the central element protected by the author's rights. It should be original and in a material form.

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ABOUT PROSPERO – EXTENDED THEATRE

Prospero - Extended Theatre is a project that brings together ten partners from nine European countries. Co-funded by the Creative Europe programme of the European Union, this project runs from December 2020 to November 2024.

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Prospero – Extended Theatre is founded on three axes: the production of nine plays and their tour in Europe; the development of an OTT streaming platform hosting, among others, the recordings of the nine plays produced; and audience development activities.

The OTT streaming platform has been available since the beginning of October 2022 on www.prospero-theatre.tv. Developed with a budget of more than €83,000, its purpose is to enable partner theatres to showcase the artists and shows that they produce and support through high-quality digital content, as well as to increase their own visibility on the European scene. In addition, this platform is an opportunity for the partners to develop their digital practices and to contribute to the appropriation of this medium - rich in potential - by the sector.

More information can be found on: www.prospero-theatre.eu

ABOUT THE STUDY

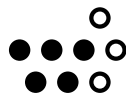
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EUROPEAN THEATRE PROJECT
PROSPERO
EXTENDED THEATRE



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As the **largest network** of public theatres in Europe, the ETC has 59 European Members from over 30 countries, reflecting the diversity of Europe's vibrant cultural sector.

Founded in 1988, the ETC promotes European theatre as a vital platform for dialogue, democracy and interaction that responds to, reflects and engages with today's diverse audiences and changing societies.

ETC fosters an inclusive notion of theatre that brings Europe's social, linguistic and cultural heritage to audiences and communities in Europe and beyond. Powerful and professional ETC governance ensures that the network will thrive and grow, taking into consideration the latest trends and developments.

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The broadcasting of live performances on the internet is a phenomenon that is becoming increasingly common in Europe. This trend, accelerated by the successive lock-downs in recent years, is often the subject of debate and discussion. To make progress on these essential issues, experience, research and trials are indispensable. Unfortunately, practical experimentation is too often limited for budgetary and legal reasons. Indeed, the author's rights issues raised by the broadcasting of live performances on the internet are unprecedented and little known in the cultural sector. This manual is a practical tool, intended for the entire sector in Europe, to better understand these new legal issues and above all to identify the concrete steps to overcome them.

This study was commissioned by Prospero – Extended Theatre, a project co-funded by the Creative Europe programme of the European Union, bringing together ten partners (nine theatres and one media outlet) and structured around the production and distribution of plays—both in theatres and online.



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