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The Audiovisual Broadcast of Performing Arts: From the Stage to the Screen—Legal Issues

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Abstract

This contribution focuses on legal issues raised by the audiovisual broadcasting of performing arts, which has significantly increased due to the SARS-CoV-2 pandemic. First, we contextualize this practice and briefly present the emergence and evolution of the practice of "filmed theater", as well as any other form of performances (e.g., concert, ballet, opera) originally conceived for the stage but subsequently diffused through other channels. Secondly, we address the current legal issues that have arisen because of the increase of such practice due to the containment measures taken by government. Two axes are of particular attention: the matter of copyrights and related rights, on the one hand, and the question of public financing, on the other. Concerning intellectual property, audiovisual broadcasting leads to several legal consequences and issues: effectiveness of related rights, emergence of new modes of exploitation and new authors, recognition of the recording as an original work, etc. This new practice is, moreover, likely to disrupt the categories established by public funding legal mechanisms, which are often poorly adapted to hybrid artistic objects. The objective of this part is therefore to analyze the new legal issues raised by the audiovisual distribution of performances. Finally, we go beyond exclusively legal issues to examine the very specificities of performing arts and, more specifically, the possible loss that would result from a fixation of a production on a reproducible medium, making its diffusion possible beyond the stage.

Keywords Audiovisual broadcasting · Copyright · Related rights · Public funding · Tax shelter · Performing arts

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1 Introduction

The *performing arts* can be defined as representations of an artistic performance (theatrical, musical or other) by artists (generally located on a stage, but not necessarily) in front of an audience. The audiovisual broadcasting of performances blurs this traditional definition, since a new audience also views the play without being physically present at the place of the performance (e.g., in a theater) and without necessarily watching it live[1]—what, therefore, leads to a geographical and a temporal dissociation.[2] Thus, the broadcast work becomes conceptually close to a cinematographic work.

Since the technology makes it possible [1: 10], theater and concerts have been diffused by audiovisual means, first on television then online. The recent SARS-CoV-2 pandemic—also referred to as the Covid pandemic—and the government measures taken to face it involved a considerable increase of this practice. The audiovisual broadcast sometimes became the sole diffusion to the public. This increase has revealed legal issues—which already existed but did not draw attention until then—that we will examine in this contribution.

To mention a few examples, the *Opéra National de Paris* has offered access to recordings with, among others, *Manon* (Massenet) or *Les Indes galantes* (Rameau) and, in the field of ballet, with *Giselle* (Adam and Coralli) or *Swan Lake* (Tchaikovsky). The *Berliner Philharmoniker* has made access to its "digital concert hall" free of charge, thus making more than 600 concert recordings available, while, in the field of theatre, the *Comédie française* has set up a vast digital offer, ranging from live performances to podcasts, with, among many titles, *Juste la fin du monde* (Lagarce), *Les Fausses confidences* (Marivaux), *L'École des femmes* or *Le Tartuffe* (Molière). According to a recent report by the Ministry of Culture, in France, no less than 742 h of programmes were supported by the CNC (Centre National du Cinéma) in 2021, which is equivalent to 400 captured works.. In economic terms, this corresponds to an annual cost of 100.3 million euros in 2021 [2: 7]. Socially, the cultural content captured is made accessible, sometimes free of charge, throughout the world, thus enabling new audiences to have access to it.[3]

Before addressing the current legal issues, we will analyze, in a historical perspective, the first relations between theater and cinema and the legal conflicts that emerged from it. As we will see, when cinema was invented, it borrowed the main codes of theater and was criticized for engaging into unfair competition with the performing arts sector, what raised first frictions and legal issues (Sect. 2).

Then, we will focus on the current legal issues that have arisen because of the growth of audiovisual broadcasting of performances due to the containment measures taken by government (Sect. 3). Two axes will be of particular attention: the

[1] The show is not always broadcast live: it may have been recorded and broadcast afterwards (which is in fact often the case).

[2] While there is a unity of time and location in the performing arts.

[3] According to the available data, the revenue generated by these recordings is generally lower than the revenue from ticket sales for live events, which makes it particularly relevant to consider the public funding of such recordings in relation to their social usefulness (see, for the United States [3]).

matter of copyrights[4] and related rights, on the one hand (Sect. 3.1), and the question of public funding, on the other (Sect. 3.2). The first issue is of major importance for theatres wishing to capture and broadcast shows. Licences and assignments for live performances do not, in principle, allow for the capture and broadcasting of such performances, it is therefore essential to adapt the contracts and authorizations. Otherwise, broadcasting may be impossible. The second issue is equally important for producers who wish to benefit from public funding for such projects. Indeed, the set of rules governing public funding are organized by sectors: those intended for the theatre differ from those meant for the audiovisual—in particular cinematographic—sector. The current legal framework is therefore unsuitable for hybrid formulas, such as the recording of a play performed in a theatre and then broadcast on the internet or on television.

Although the issues addressed have a cross-border relevance, we will base most of our reasoning on Belgian law.[5] As well as the analysis of these difficulties, we will explore the possibilities to overcome them.

Finally, we will discuss, from an aesthetic philosophy perspective, whether the act of broadcasting an audiovisual performance does not undermine the very specificity of the performing arts. We will look in particular at the notion of *aura* developed by Walter Benjamin and we will see that the recording of a performance, although it does not reflect the reality of a live performance, nevertheless opens up many possibilities. It is therefore incumbent upon the public authorities to assess the value they give to these images, which are both a loss and a gain, by developing a more or less adapted regime, particularly in terms of public funding. (Sect. 4).

Brief conclusions will then synthesize the lessons learned from this contribution (Sect. 5).

2 Theater Facing the Camera—the First Connections between Theater and Cinema

From the earliest days of cinema to contemporary audiovisual broadcasts of theater productions, the act of filming the stage seems to have been a constant practice, which has raised many aesthetic, political and legal questions. Indeed, "from the origins of cinema, placing a camera in front of a stage performance seems to be both the most elementary gesture of cinematographic staging and its most difficult, perhaps even the most controversial, act"[6] [1: 7]. In some cases, the controversy crystallized into legal dispute.

Traditionally, the birth of cinema is associated with the first public screening by the Lumière brothers on December 28th, 1895, in Paris. Their cinematograph

[4] In this contribution, we use the term "copyright" as a synonym for "author's right". From a linguistic point of view, we thus do not distinguish between the *Anglo-Saxon* copyright, on one side, and the *continental* author's right, on the other side.

[5] Which is, of course, strongly influenced by European law in the field of copyright. We will also mobilize certain illustrations from French law, in particular in Sect. 2.

[6] Translation by the authors.

made it possible to record moving images and then to project them onto a screen. Although the staging of the first views was rudimentary, the relationship between cinema and the performing arts was close from the outset.

The cinematograph emerged at a time when live performances were considered to be the entertainment *par excellence*. On the contrary, the cinematograph was initially confined to fairground shows and café-concerts where it was part of a varied program. It however gradually became a show in its own right [4: 27 *et seq.*].

In order to attract an audience that was already familiar with theatrical representations, the early cinema largely mobilized elements of the performing arts (e.g., the scenarios, the actors, etc.). Thus, "the first films recorded a wide range of performing arts: mime, circus acts, contortionists or acrobats" [1: 9].

This abundant use of theatrical language soon gave rise to tensions, which were immediately expressed in legal terms. In *Pour une histoire culturelle du cinéma*, Édouard Arnoldy reports the words of a member of the *Société des Auteurs* who expressed himself in the *Photo-Ciné-Gazette* in 1907:

> "The authors' commission wants to prevent unscrupulous merchants from borrowing not only the main scenes but also the title from successful plays, without, however, hindering the interesting cinematograph industry. It is therefore determined to *prosecute counterfeiters ruthlessly* [emphasis added]. Because if the cinematographers provide images, these images are often accompanied by lyrics taken from our successful plays.
>
> [...] On the other hand, we understand that the *Société des Auteurs et Compositeurs de musique* would join its efforts with the *Société des Auteurs Dramatiques* to prevent this competition from becoming more and more harmful to the common interests of authors and musicians"[7] [5: 32-33 quoted in 4: 30].

The same publication relates that the newspaper *L'Intransigeant* published an article entitled "War is declared—Competition and fraud—Inevitable trial",[8] while we could read in *La Patrie* that "the Authors' Society has just declared war on the cinematograph, and that it is studying the means to counter this dangerous enemy, which plays operas, fairy tales, melodramas, and even comedies at very low cost" [4: 30].

In this context, where the live performance sector accused the cinema of unfair competition and where, at the same time, the young film industry was struggling to structure itself and to protect its interests, two lawyers wrote the first book considering the cinematograph from a legal point of view. In *Le Cinématographe devant le droit* ("The Cinematograph facing the Law") [6], published in 1908, Émile Maugras

[7] Translation by the authors, original citation: "La commission des auteurs veut, sans enrayer toutefois l'intéressante industrie du cinématographe, empêcher que certains commerçants peu scrupuleux empruntent aux pièces à succès non seulement les principales scènes, mais aussi le titre. Aussi est-elle décidée à poursuivre impitoyablement les contrefacteurs. Car si les cinématographes donnent des vues, souvent ces vues sont accompagnées de paroles tirées de nos pièces à succès.

[…] D'autre part, nous croyons savoir que la Société des Auteurs et Compositeurs de musique joindrait ses efforts à la Société des Auteurs Dramatiques pour éviter que cette concurrence ne prenne une extension de plus en plus néfaste aux intérêts communs des auteurs et des musiciens».

[8] Translation by the authors; original title: "La guerre est déclarée—Concurrence et fraude—Inévitable procès".

and Maurice Guégan (both lawyers and managers of movie theaters of the French company *Pathé*) set out the tools that would enable the film industry to fight against counterfeiting, mainly by explaining the reasons why, according to them, film production falls within the scope of the French decree-law of July 19th and 24th, 1793, then in force[9] and of the articles 425, 426 and 427 of the Penal Code on the offence of counterfeiting.[10] Besides these legal arguments, the authors aim more generally to valorize the cinematograph as an independent form of art,[11] and even as an art of a superior nature—which is probably not unrelated to their economic interests in this emerging industry. In particular, the art of filmmaking was presented as morally superior to theatre. From the beginning, theatre and film were placed in a position of symbolic competition:

> "Not to mention the low price, which many people appreciate, the cinematograph is the easy theatre. There are no complicated or laborious situations. Drama, vaudeville, comedy take place in a few minutes. The plot exists, but it is sketched out. The characters have just enough time, at the stroke of a pen, to establish their character, and it is immediately a cheerful, sentimental, often happy, always moral conclusion, which satisfies the spectator, whatever his or her disposition.
> [...]

[9] Articles 1, 6 and 7 in particular are relevant. Article 1 grants painters and draughtsmen, among others, the right to sell and distribute their works. Article 6 requires "any citizen who brings to light a work, either of literature or of engraving, in any style whatsoever", to deposit two copies in the National Library or in the Print Room of the Republic. This is a condition for the admissibility of the counterfeiting action. Finally, Article 7 requires that the work shall belong to the *fine arts* for the heirs to have exclusive ownership for ten years. In order to fall within the scope of these articles, it is therefore necessary to admit that a cinematographic work constitutes a drawing, an engraving of any kind, or a production of the mind that belongs to the fine arts. Maugras and Guégan consider that, since the cinematograph is nothing other than the representation of landscapes or characters by a mechanical and chemical process, it may be considered as a drawing and Article 1 should apply [6: 3]. Concerning the engraving referred to in Article 6, the authors note that "engraving is the art of producing figures on a flat surface, either by means of incisions, usually not very deep, or by means of mordants, or finally by chiselling and sculpting processes. […]. [However,] the cinematograph also reproduces images on flat surfaces (films) with the help of mordants (developing baths) because […] the film printed by light virtually contains the image; the developing bath is only the corrosive which, by destroying certain salts, makes the drawing appear" (original citation: "La gravure est l'art de produire des figures sur une surface plane, soit au moyen d'incisions, ordinairement peu profondes, *soit à l'aide de mordants*, soit enfin par des procédés de ciselure et de sculpture. […]. [Or,] le cinématographe reproduit aussi des images sur des surfaces planes (pellicules) à l'aide de mordants (bains révélateurs) car […] la pellicule impressionnée par la lumière contient virtuellement l'image; le bain révélateur n'est que le corrosif qui, en détruisant certains sels, fait apparaître le dessin" [6: 4]. The cinematograph could therefore also be considered as a special kind of engraving. As regards the productions of the mind which belong to the fine arts envisaged by Article 7, they finally consider that, since the cinematographic work is a drawing and an engraving, it belongs to the fine arts. Furthermore, it can be qualified as a production of the mind given that the activity of the person filming is not reduced to a mere mechanical undertaking but necessarily involves certain formal choices [6: 6].

[10] These articles allow for the prosecution of counterfeiters and therefore ensure the effectiveness of the 1793 decree-law to which they refer.

[11] Indeed, if the cinematograph should be legally protected, it is also important that it is socially considered.

> Let us add that cinematography has been, up to that point, one of the most moral, that we never find in it any scabrous scenes or equivocal situations. It seems that this art form, in the midst of the ambient and ever-growing immorality of the theatre, wanted to free itself from the depraved tastes and dangerous ideas of modern literature. This is really the essential cause of its success"[12] [6: 17-18].

Despite a certain inclination to distinguish these two forms of art, cinema and theater had been assimilated in the field of copyright. This was notably reflected in the case opposing Alexandre Dumas' son (also named Alexandre) to the publisher Calmann-Lévy. When Alexandre Dumas Sr. died, he left almost nothing but debts. The only assets of the estate were his copyrights and 14,000 French francs of furniture. These copyrights were divided into two lots: literary property and theatrical exploitation. The literary property was awarded to Michel Lévy frères, publisher, which became "Calmann-Lévy frères" at the time of the lawsuit. The theatrical exploitation rights (or dramatic property), on the other hand, went to Alexandre Dumas Jr.[13] The litigation between Alexandre Dumas Jr. and the publisher Calmann-Lévy arose when the first transferred the rights of cinematographic exploitation on the works "*La Tour de Nesle*", "*Les Trois mousquetaires*" and "*La Dame de Monsoreau*" to the limited company *Le Film d'art*. While Alexandre Dumas Jr. argued that the film adaptation was a form of theatrical adaptation *because it is with the theatre that the cinematographic representation competes,*[14] the publishers Calmann-Lévy claimed that

[12] Translation by the authors; original citation: "Sans parler du prix modique, ce que beaucoup de gens apprécient, le cinématographe est le *théâtre facile*. Là, point de situations compliquées ni laborieuses. Le drame, le vaudeville, la comédie s'y déroulent en quelques minutes. L'intrigue existe, mais elle est esquissée. Les personnages ont jute le temps, en une pointe sèche rapide, de fixer leur caractère, et c'est tout de suite une conclusion gaie, sentimentale, souvent *heureuse*, toujours morale, qui satisfait le spectateur, quelle que soit sa disposition d'esprit.

[…].

Ajouterons-nous que la cinématographie a été jusqu'alors des plus morales, que jamais on y trouve de scènes scabreuses, de situations équivoques. Il semble que cet art, au milieu de l'immoralité ambiante et toujours grandissante du théâtre, ait voulu s'affranchir des goûts dépravés et des idées dangereuses de la littérature moderne. C'est vraiment là que réside la cause essentielle de son succès".

[13] In a more recent decision, the Court of Cassation of France ruled on the scope of the assignment of all economic rights relating to literary works in 1907. It deduced from the terms of the decree-law of July 19th and 24th 1793—also applicable at the time of the distribution of Alexandre Dumas Sr. copyrights—that, in the absence of any limitation in the act of transfer, the transfer to the editor included all modes of exploitation, even if unknown at the time. This assignment therefore included audiovisual and photographic exploitation rights. In the case concerning the copyright of Alexandre Dumas Sr., the question of the ownership of the cinematographic exploitation rights only arose because an agreement had divided the literary property and the theatrical exploitation between two different parties (Court of Cassation of France, civil chamber 1, 25 May 2005, 02–17.305).

[14] Mr. Maillard, the defendant's lawyer, explains this competition by the historical development of the cinematograph: "Originally, it was enough to collect and project views of nature on film. We then began to reproduce cavalry charges, train arrivals; after that, we reproduced artificially created scenes, most often comic scenes. It was, for example, the gardener who drags his hose, notices that the water is not flowing, looks for the cause of the obstruction, looks at the mouth of the hose and receives the jet in his face, the boy who had put his foot on the hose having suddenly withdrawn. Or it was the maid breaking the dishes, the children throwing pillows at each other. Then, as these interludes were no longer suf-

the film adaptation was an illustrated edition of the works in question. In a decision of December 18th, 1911, the 3rd Chamber of the Civil Tribunal of the Seine followed Alexandre Dumas Jr.'s argumentation by investigating to whom the cinematographic adaptation was detrimental. In particular, it noted that "whereas the illustrated edition of a dramatic work is addressed to an individual, the projection of the cinematographic film is addressed to a crowd". Moreover, "while the projection of a cinematographic film uses photographs as illustrations, it borrows from theatrical interpretation its ideas, its scenario, its staging, the mimicry of the actors".[15] In addition, the tribunal noted that the impressions provided by the cinematograph are close to those produced by the theatre "and not related to those provided by an illustrated book, which can only be seriously enjoyed, at least in private". He concludes from these observations "that cinematographic projections of a dramatic

Footnote 14 (continued)

ficient, people wanted to increase the interest of the cinematographic scenes, and more complicated scenarios were created. The imagination was running out of steam. We had the idea of taking subjects either from novels or from famous plays. How did we proceed? We had theatrical performances without words, i.e., pantomimes, performed according to the scenario extracted either from novels or from plays, because it is not the plays themselves that can be used, in any case they have to be reduced for the needs of cinematography, a scenario has to be drawn up, the pantomime has to be performed on the basis of the scenario, and it is the pantomime that is cinematographed and then projected. This is what we do today. When you do this, when you have made a pantomime, for example, based on *La Tour de Nesle*, and you have had this pantomime performed by well-known actors, and then you go and show it in theatres and concerts, in any location, from town to town, throughout France, you are undeniably competing with the full performance of the work itself" (translation by the authors; original citation: "À l'origine, on se contentait de recueillir sur le film cinématographique et de projeter des vues de la nature. On a commencé par reproduire des charges de cavalerie, des arrivées de train; après cela, on a reproduit des scènes artificiellement créées, le plus souvent des scènes comiques. C'était, par exemple, le jardinier qui traîne son tuyau d'arrosage, s'aperçoit que l'eau ne coule pas, cherche la cause de l'obstruction, regarde à l'embouchure de la lance et reçoit le jet en pleine figure, le gamin qui avait mis le pied sur le tuyau d'arrosage, s'étant brusquement retiré. Ou c'était la bonne qui casse la vaisselle, les enfants qui se jettent des oreillers à la figure. Puis, ces intermèdes ne suffisant plus, on a voulu augmenter l'intérêt des scènes cinématographiques, on a constitué des scénarios plus compliqués. L'imagination s'essoufflait. On a eu l'idée de prendre des sujets soit dans les romans, soit dans les pièces de théâtre célèbres. Comment a-t-on procédé ? On a fait exécuter des représentations théâtrales sans paroles, c'est-à-dire des pantomimes, d'après le scénario qu'on extrayait soit des romans, soit des pièces, car ce ne sont pas les pièces elles-mêmes qu'on peut utiliser, il faut en tout cas les réduire pour les besoins de la cinématographie, il faut en faire un scénario, sur le scénario exécuter la pantomime et c'est la pantomime qui est cinématographiée, puis projetée. Voilà ce qu'on fait aujourd'hui. Lorsqu'on agit de la sorte, lorsqu'on a réalisé une pantomime, par exemple, d'après la Tour de Nesle, qu'on a fait jouer cette pantomime par des acteurs réputés et qu'ensuite on va la projeter dans des théâtres et des concerts, dans un local quelconque, de ville en ville, à travers la France entière, on cause une indéniable concurrence à la représentation intégrale de l'œuvre elle-même", Civil Tribunal, Seine, 18 December 1911, *La Revue judiciaire*, 25 April 1912, p. 124).

[15] Translation by the authors; original citation: "Alors que l'édition illustrée d'une œuvre dramatique s'adresse à l'individu, la projection du film cinématographique s'adresse à la foule. [En outre,] si la projection du film cinématographique utilise, comme illustration, des photographies, elle emprunte à l'interprétation proprement théâtrale, ses idées, son scénario, sa mise en scène, le jeu mimique des acteurs", Trib. civ. Seine, 18 December 1911, *La Revue judiciaire*, 25 May 1912, p. 159.

work must therefore be deemed to compete exclusively with theatrical performances of that work".[16] Thus, by applying the allocation agreements for the different modes of exploitation of Alexandre Dumas Sr's copyrights, the holder of theatrical exploitation rights was able to authorize the cinematographic adaptation of these works.

While developing a different reasoning, the 4th Chamber of the Court of Appeal of Paris confirmed the judgement by a decision of May 17th, 1912. Without investigating who was prejudiced by the cinematographic exploitation, the Court considered that this mode of exploitation was already included in Alexandre Dumas Jr's monopoly of dramatic exploitation. Indeed, in terms of copyright, the Court assimilates cinema to theatre:

> Considering, furthermore, that the cinematographic reproduction of a script taken from a literary or dramatic work is intended to be projected onto a screen; that this projection gives the illusion of life, of movement and of the actors' performance; that although the latter is always identical and no modification can be made to the interpretation which, once captured, always remains the same, this projection nevertheless constitutes *a theatrical performance* [emphasis added]; that the cinematographic representation has in fact at its origin a scenario created by an author, even by actors in front of a machine, and its main, if not only, purpose is to be performed in front of a more or less numerous audience; that it must therefore be considered as part of the theatrical exploitation and cannot be assimilated to an edition [...].[17]

As the few cases sketched in this introduction show, the question of putting live performance elements on screen has been posed in legal terms since the origins of the cinematograph. It is also interesting to notice the initial proximity between theater and cinema in the first part of the twentieth century. From a legal perspective, the cinematographic exploitation was moreover assimilated to the theatrical exploitation by the French jurisprudence, which is no longer the case today.

Indeed, the current conceptual and legal distinction between theater and cinema seems clearly defined. There is a net separation between these two sectors. Regarding the transfer of copyrights for example, the cinematographic exploitation has to be distinguished from the theatrical exploitation and the assignment of one does not

[16] Translation by the authors; original citation: "[Les impressions procurées par le cinématographe sont] sans rapport avec celles fournies par un livre illustré, qui ne peut être sérieusement goûté, que dans l'intimité, tout au moins". [Le tribunal conclut] "qu'ainsi les projections cinématographiques d'une œuvre dramatique, doivent être réputées concurrencer exclusivement les représentations théâtrales de cette œuvre", Trib. civ. Seine, 18 December 1911, *La Revue judiciaire*, 25 May 1912, p. 159.

[17] Translation by the authors; original citation: "Considérant en outre que la reproduction cinématographique d'un scénario tiré d'une œuvre littéraire ou dramatique, est destinée à être projetée sur un écran; que cette projection donne l'illusion de la vie, du mouvement, du jeu des acteurs; que bien que celui-ci y soit toujours identique et qu'aucune modification ne puisse être apportée à l'interprétation qui une fois saisie reste toujours la même, *cette projection n'en constitue pas moins une représentation théâtrale* [nous soulignons]; que la représentation cinématographique a en effet à son origine un scénario créé par un auteur même par des acteurs devant un appareil, et pour destination principale sinon unique, d'être donné en spectacle devant un public plus ou moins nombreux; qu'elle doit donc être considérée comme rentrant dans l'exploitation théâtrale et ne peut être assimilée à une édition […]" (Paris, 17 May 1912, *La Revue judiciaire*, 25 June 1912, p. 182).

imply the assignment of the other.[18] Concerning public funding,[19] separate schemes have been designed for each of these two sectors.[20]

However, the Covid pandemic has revitalized the hybridization between theater and cinema, since a significant number of performances have been filmed and solely broadcast by audiovisual means. This raised again some legal issues that we will discuss in the next section.

3 The Covid Pandemic: the Boom of a Practice and the Emergence of Legal Issues

As we know, Governments have adopted a series of measures to control the pandemic,[21] including closing or drastically limiting the audience of theaters. The online and television broadcast of shows has consequently increased at an unprecedented rate. The boom of this practice has brought legal concerns to the forefront; in particular in the matter of intellectual property rights (Sect. 3.1) and of public funding (Sect. 3.2). Most of these issues were not new, but they have been unveiled by the sharp increase of filming and broadcasting performances initially designed for the stage. We will identify and analyze them, and then try to provide hints to solve them. Note that we will mainly focus on Belgian law in this section—although these considerations have a strong resonance in many legal systems –, as well as on European and international law.

3.1 Intellectual Property Issues

As we have seen, copyright has always been the subject of discussions in the performing arts sector (and in any cultural sector). The intellectual property aims indeed to protect artists and constitutes therefore a negotiating lever towards producers, whose budget is inevitably limited. The online or televised broadcasting of live performances led to new bargaining and increased tensions between the artists and the producers. More generally, audiovisual broadcasting raises a series of legal concerns.

[18] Belgian and French law now clearly provides that the assignment of audiovisual exploitation rights must be the subject of a separate contract (see art. XI.184 of the Belgian Code of Economic Law and art. L131-3 of the French Code of Intellectual Property).

[19] Most artistic sectors benefit from public funding (see below).

[20] For example, public grants are subject to different legal regimes depending on whether they are allocated to the performing arts sector or to the audiovisual sector. Tax subsidies also differ: e.g., Belgian legislator has established a "tax shelter" for the movie industry (article 194*ter* of the Belgian Income Tax Code) and another one (despite very similar) for the performing arts sector (article 194*ter*/1 and 194*ter*/2 of the Belgian Income Tax Code) (see below).

[21] In Belgian law, see Ministerial Decree of 23 March 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *M.B.,* 23 March 2020; Ministerial Decree of 30 June 2020 on emergency measures to limit the spread of the COVID-19 coronavirus, *M.B.*, 30 June 2020; Royal Decree of 28 October 2021 establishing the administrative police measures necessary to prevent or limit the consequences for public health of the epidemic emergency declared concerning the COVID-19 coronavirus pandemic, *M.B.*, 29 October 2021; and their many modifications.

First, the online distribution of a live show is likely to reach a much larger audience over a much broader territory and, therefore, to draw attention to possible breaches on author's rights that would not necessarily be noticed in the context of a performance played in a theatre. From a legal point of view, the infringement exists in both situations, but it is more likely to be sanctioned when the performance is broadcast on other channels, such as television or online. A cease-and-desist order may therefore be filed to stop the infringement and possible damages may be claimed.

Then, the recording of a "captation" requires taking into consideration the neighbouring rights. When actors perform on stage or musicians interpret a score, they don't benefit from intellectual property rights (unless they are also authors of the text or composers of the score, for example), except for the right to object to the recording of their performance.[22] However, as soon as the performance is recorded, the artist can assert their so-called *neighbouring rights* or *related rights* to copyright (both are considered as synonyms) on their performance.

The performers then benefit from very similar prerogatives—although slightly less extensive—to those enjoyed by the authors, which allow them, for example, to prevent the diffusion or the reproduction[23] of their performance. Every online broadcast requires the authorization of the holders of related rights. An actor who agrees to perform on stage can therefore object that the play—which has been recorded—is afterwards diffused online. In addition to obtaining the authorizations from the copyright holders, the producer must also obtain the necessary authorizations from the holders of related rights.[24]

Who are these performers potentially benefiting from related rights? The Rome convention defines them as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works".[25] Some related rights have also been granted to film producers, phonograms

[22] See art. 7 of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 16th, 1961 (hereafter "Rome Convention") and art. XI.205, § 1, of the Belgian Code of Economic Law. In addition, it should be noted that performers enjoy a moral right including the right to respect for their performance and the right to have their name associated with their performance, whether or not the performance has been fixed (art. XI.204 of the Belgian Code of Economic Law).

[23] See art. 7 of the Rome Convention; art. 3 (2), a) and art. 2, b) of the 2001/29/CE Directive; art. XI.205, § 1, of the Belgian Code of Economic Law.

[24] Note that article XI.207 of the Belgian Code of Economic Law states that, in the case of a performance by a group (by an "*ensemble*"), the authorization is given, depending on the circumstances, by the soloists, the orchestra conductor, the stage director or the director of the troupe. The preparatory work provided, however, that in case of diverging opinions between the artists concerned, there is no agreement (Bill on author's rights and related rights, report made on behalf of the Justice Committee by M. Erdman, *Legislative documents*, Senate, 1991-1992, n° 145-12, p. 40; *contra*: [7: 486]. Also note that once a performance has been fixed on a *phonogram* and has been lawfully reproduced or broadcast on the radio, the performer may not object anymore to its public execution (if not included in a performance) or its radio broadcast (these uses give nevertheless a right to remuneration)—articles XI.212 and XI.213 of the Belgian Code of Economic Law.

[25] Art. 3, (a), of the Rome Convention. Note that Belgian and French Law exclude "complementary artists", such as stuntmen or walk-on actors (art. XI.205, § 1, sub. 5, of the Belgian Code of Economic Law; art. L212-1 of the French Code of Intellectual Property).

producer and broadcasting organizations in order to protect their investments.[26] They, however, do not have moral right on the work, contrary to the performers.[27]

Many States—as it is the case in Belgian law—have established a presumption of assignment of related rights in favor of producers of audiovisual works. Belgian law provides that, "unless otherwise agreed, the performer assigns to the producer of the audiovisual work the exclusive right of audiovisual exploitation of his performance, including the rights that are necessary for such an exploitation, like the right to add subtitles or to double the performance […]".[28] A similar presumption has been established for author's rights (except those concerning musical compositions). 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 [8: 17]. This prevents a single performer from blocking the exploitation of the audiovisual work as a whole.

Such a presumption has been judged compatible with European Law by the Court of Justice since the latter can be rebutted.[29] The Court has indeed confirmed that "European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise".[30]

In a recent decision,[31] however, the Brussels Court of Appeal considered that, in order to benefit from this presumption, the audiovisual capture must be considered as an original work, protected by copyright law, in itself and that the simple recording of a performance without any real directing activity (e.g., editing, choice of angles and shots) does not allow to apply the presumption of transfer. A "filmed play" could therefore hardly benefit from the presumption, unless the presence of a directing work that would reflect the free and creative choices[32] of the director can be proved (these criteria remain nevertheless complex to identify). An express agreement from the performers should therefore be required.

The third issue raised by the audiovisual broadcasting of performing arts concerns the assessment of—or the license for—the different modes of exploitation. Licenses

[26] See article 2 of the Directive 2001/29/EC 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, *O.J.E.U.*, L. 167, 22 June 2001, p. 10 *et seq.*

[27] In Belgian law, see art. XI.209 *et seq.* of the Code of Economic Law.

[28] Article XI.206, § 1st, of the Belgian Code of Economic Law. Translation by the authors; original text: "sauf convention contraire, l'artiste-interprète ou exécutant cède au producteur de l'œuvre audiovisuelle le droit exclusif de l'exploitation audiovisuelle de sa prestation, y compris les droits nécessaires à cette exploitation tels que le droit d'ajouter des sous-titres ou de doubler la prestation […]".

[29] CJEU, 9 February 2012, *Martin Luksan v. Petrus van der Let*, case C-277/10, ECLI:EU:C:2012:65.

[30] Paragraph 87 of the above-mentioned decision.

[31] Brussels, May 7th, 2021. 2022. *Auteurs & Média* 2: 500 *et seq*., note [9].

[32] CJEU, December 1st, 2011, *Eva-Maria Painer v. Standard VerlagsGmbH* et al., case C-145/10, ECLI:EU:C:2013:138, point 89.

or assignments of copyright and related rights must be made in written form and are of strict interpretation, which means that only the exploitation modes explicitly covered by the authorization or assignment are included.[33] For example, the authorization to use a piece of music in a performance does not imply per se the authorization to incorporate the same music in a recording (unless the contract expressly authorizes it). This has caused confusion in the theater sector,[34] especially for plays that were not originally intended to be broadcast online or on television—which, due to the pandemic, became the only way to stay connected to the audience.

Yet, the consequences can be very significant since a single missing authorization can block the entire project. For example, assuming that the authorization to use music in the framework of broadcasting a piece of music online was not granted, the rightful owner may oppose the broadcast of this music, which will leave the producer with two options: to distribute the scene without the music or to cut the scenes containing this music. Nevertheless, in these two cases, it is possible that some rights holders (e.g., the stage director) claim their moral right, in particular the right to the integrity of the work in order to object to substantial changes to their work.

It should also be noted that the duration and territory of the assignment or license must be clearly identified. The issue of territory is becoming increasingly crucial in the case of online broadcast since the performance is no longer limited by physical borders. The Belgian law (as many other legislations) requires moreover that remuneration be determined for each mode of exploitation[35] (which does not, however, prevent an authorization or a transfer granted for free, but it must be specified in the contract). Since the 2019 Directive,[36] European law requires, furthermore, 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 license or are assigned[37].[38] 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, however, that the authors may authorise their works to be used for free.[39]

[33] See art. XI.167 (copyright) and art. XI.205, § 3 (related rights), of the Belgian Code of Economic Law.

[34] Due to a lack of knowledge of the legislation, many operators mistakenly believe that a single payment for the use of a work to a rights management society leads to authorization for all modes of exploitation.

[35] Article XI.167, par. 1st, sub. 4, of the Belgian Code of Economic Law.

[36] 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, O.J.E.U., L.130/29, 17 May 2019 (hereafter "Directive 2019/790").

[37] Art. 18(1) and Recital (73) of Directive 2019/790.

[38] These types of provisions could already be found in national laws. For example, French law imposes an obligation of a remuneration that is *proportional* to the receipts from the use of the work in the case of assignment of such a right (Art. L. 131–4(1) of the French Code of Intellectual Property)—the assignment may nonetheless be free of charge (Art. L122-7 of the same code). Following the transposition of the Directive 2019/790, Belgian Law now contains similar provisions (see art. XI.167/1 and XI.205/1 of the Belgian Code of Economic Law).

[39] Recital (82) of Directive 2019/790. We think that there is nothing to exclude *assigning* the right free of charge, as it is explicitly provided in some national laws.

Although these arrangements aim to protect the artists—who are considered as the weaker party of the contract[40] –, they also create certain administrative difficulties. Moreover, it increases difficulties of negotiations between the theaters (producers) and the artists, who are most often represented by rights management companies. On the one hand, theaters have limited financial resources and the profits generated by the online broadcasting of shows are rarely high; on the other hand, artists fear to be deprived, as they sometimes wrongly compare the audiovisual broadcasting of shows with the (often more profitable) film industry. Note that the Belgian legislator now provides the option to settle these matters by collective agreements.[41] Yet, since the scope of those conventions seems to be extended to self-employed artists (i.e., without an employment contract),[42] they shall comply with European competition law, in particular Article 101 of the TFEU that prohibits in principle agreement between undertakings that distort competition.[43]

Those difficulties are mainly due to a misknowledge and a misunderstanding of the legal rules by the sector. More than a modification of the legislation, it is rather a better knowledge of it that would help to solve the problems. This *corpus* of rules is certainly complex, but a simplification would risk decreasing the protection granted to the artists,[44] considered as the weaker party in contractual negotiations. More generally, most policy changes should also be considered at the European level, or even at a broader international level.

The establishment of a public information desk could however be considered. Such a service could both answer individual questions from artists or cultural institutions and publish a series of general communications periodically. It could also provide a guide of *best practices*, elaborated in consultation with the artists and institutions from the sector. Among these, it should be recommended that theaters anticipate those legal problems, rather than getting locked into a negotiation afterwards because of rights that would not have been cleared. The negotiation of collective agreement—mentioned above—could also be a solution.

[40] The State then contributes to the establishment of a *public social order of protection* [10: 132].

[41] See articles XI.167/5 and 205/5 of the Belgian Code of Economic Law (enacted by the law of 19 June 2022 transposing 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).

[42] We indeed can read, in the preparatory works, that the collective agreements referred to in the text are "not collective labor agreements that must meet certain formal and procedural requirements to be valid and binding" (Chamber of Representatives of Belgium, 55th legislature, doc. n° 2608/001, 5 April 2022, p. 42).

[43] Recital (73) of the Directive 2019/790 of 17 April 2019 states that "Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, *which could include collective bargaining and other mechanisms* [emphasis added], provided that such mechanisms are in conformity with applicable Union law. Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law".

[44] E.g., the principle strict interpretation that governs the assignment, from which results the requirement to list the different modes of exploitation, complicates the drafting and the understanding of copyright or related rights contracts, but it confines the scope of the transfer for the benefit of the artists.

Nevertheless, legislative amendments could be adopted at national level to extend (or to implement if there is no such mechanism) the presumption of transfer of audiovisual exploitation rights to the recordings of performing arts.[45] It should be noted, however, that such a presumption does not exempt the producers from compensating the rights holders, so that it is always better to settle these different questions beforehand.

In summary, the audiovisual broadcasting of performing arts brings to light three issues related to authors' rights. First, the wider exposure of infringements leads to a higher risk of prosecution and, as a result, of not being able to broadcast the play nor to perform it on stage and, ultimately, of being ordered to pay compensation for damages. Second, performers are effectively entitled to assert intellectual property rights through their neighboring rights. Third, audiovisual exploitation is an independent mode of exploitation that differs from stage exploitation and that must be the subject of a distinct assignment or authorization—unless a legal presumption of assignment applies. These difficulties could mainly be overcome through a better knowledge of the rules in force by the organizations of the sector.

3.2 Public Finance Issues

Already prior to the pandemic, the performing arts were facing economic difficulties—as well as many forms of arts. Most operators struggle to adjust to the traditional market mechanisms, based on the interaction of supply and demand. Indeed, the revenues generated by the production of spectacles are generally not sufficient to cover the costs generated by this activity. In other terms, the invisible hand alone is unable to fund sufficiently most cultural institutions. A large number of organizations depend therefore mainly on external financial support, whether public or private (through philanthropy).[46]

One of the most noticed theoretical explanations of this statement has been proposed by the economists William Baumol and William Bowen at the end of the nineteen-sixties [15]. According to them, the performing arts sector suffers from a "cost disease" due to its lack of productivity gains. To quote a widely cited passage from their book: « [w]hereas the amount of labor necessary to produce a typical manufactured product has constantly declined since the beginning of the Industrial Revolution, it requires about as many minutes for Richard II to tell his "sad stories of the death of kings" as it did on the stage of the Globe Theatre. Human ingenuity has devised ways to reduce the labor necessary to produce an automobile, but no one has yet succeeded in decreasing the human effort expended at a live performance of 45 min Schubert quartet much below of a total of three man-hours» [15: 164]. Although this theory has been criticized (see for example: [16]), it nonetheless highlights the economic difficulties faced by the companies in the sector.

[45] See above.

[46] See for example: [11–14].

However, the sole acknowledgement of economic difficulties is not a sufficient reason to mobilize public funds.[47] Many economic activities are not profitable and simply disappear, in political indifference. This is, indeed, one of the objectives attributed to the market: to operate, through the choices of consumers, a selection of the proposed offers. It is thus necessary that, to be financed, the activity also has, in the view of the public authority, a dimension of *general interest*.

Many arguments have been advanced in this sense. For example, the guarantee of a better access to culture or of a greater population participation in artistic creation have been used as justifications (corresponding respectively, in France and in Belgium, to the movements of *cultural democratization* and *cultural democracy*). Others have also put forward the need to preserve cultural diversity[48] threatened by the homogenizing forces of the market.[49] Then, some authors have also attempted to demonstrate the benefits of the arts, from an economic point of view. For example, the arts should be supported because of the *positive externalities*[50] they generate, or because they can be defined as a *semi-public good* or *mixed public good*, since some of their characteristics would benefit the whole population (or, at least, a much broader part than the direct consumers).[51]

Due to the economic difficulties met by operators in the performing arts sector and to the political will to support such an activity, which is considered to be of public interest, several financing mechanisms have been established in most Western legal systems. The public authorities intervene both *directly* (mostly by granting subsidies, but also, e.g., in France and Belgium, by setting up a social regime in favor of performing arts workers) and *indirectly* (through tax expenditures, in order to stimulate private investment and patronage, to encourage consumption and to lower the costs borne by cultural actors).[52] In this second category, there is,

[47] Baumol and Bowen share this observation: «[i]nsolvency per se does not constitute adequate grounds for public assistance» [15: 377]. As writes G. Fullerton: «if this argument explains why costs increase and output falls, it does not justify government subsidies. Government should not subsidize every good that becomes expensive or obsolete, so another argument must identify something special about art» [17: 69].

[48] A concept that has been seized by the law (see the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005).

[49] This assumption is also subject to criticism. For example, the American economist Tyler Cowen considers that the market economy contributes to cultural diversity. The globalization certainly reduces diversity *between* societies, but it increases it *within* the same society. Moreover, market mechanisms would not lead to a standardization of mainstream products, but, on the contrary, would also respond to the demands of niches, so that the cultural offer generated would be rich and diversified [18].

[50] "Externalities" are the positive or negative consequences of a company's activity, which has not received its benefits or borne its costs [19: 122].

[51] A public good is a good that meets two conditions: *non-rivalry*, which means that the consumption of a good does not affect the consumption of the same good by another person; and *non-excludability*, which means that it is not possible to restrict access to the consumption of the good in question [19: 184]. The performing arts, however, do not satisfy this definition since it is easy to restrict access to a performance (exclusive goods) and the purchase of a ticket reduces the number of seats available (rival goods). Some authors, nevertheless, argue that these are mixed public goods, in the sense that the art benefits to everyone, and not just to those who consume it directly and pay for it—the good is thus both private and public (this is the position held by Baumol and Bowen: [15: 382]).

[52] On this subject, see our doctoral thesis: [20].

in principle, no transfer from the public authority to the beneficiary; the authority renounces voluntary certain revenues—this is called, in the legal-economic jargon, a *tax expenditure*.[53]

The Covid pandemic obviously increased the economic difficulties, as theaters could no longer play and were therefore not earning box office revenues. This led to the need for additional public funding. Furthermore, the suspension of the activity created difficulties with regard to the conditions required by the public funding schemes. The public authorities have therefore reacted in two ways: on the one hand, they have provided exceptional financial support (by setting up emergency funds) and, on the other hand, they have adapted the existing legal provisions, most often on a temporary basis. No structural change in the financing of the performing arts has however been noticed. Yet, significant questions arise about the public funding of hybrid products, crossing between the stage and the digital world.

Indeed, the audiovisual broadcast of performances raises important questions in terms of public funding. As mentioned,[54] the public finance schemes have been thought in a sectorial *rationale*. E.g., there is usually a grant scheme for the performing arts sector (and sometimes different ones for different performing arts: theater, concerts, opera,[55] ballet) and a grant scheme for the audiovisual works (in particular for cinematographic works). Hence, the development of hybrid works, between the stage and the screen, undermine the traditional arrangements.

Let's first consider the example of the Belgian "tax shelter".[56] This scheme provides a significant tax advantage for companies that invest in stage *or* in audiovisual productions. The investors don't acquire any rights on the play (or on the film), but the tax benefit is so important that the investment becomes profitable.[57] The State requires, in return, that a certain amount of spending be incurred on the Belgian territory: it therefore hopes to recover the forgone tax revenues through a "derived" taxation on the activities newly generated. The government thus renounce to a part of its revenues in order to stimulate spending that will be taxed afterwards.[58]

In response to the difficulties caused by the Covid, the mechanism was temporarily adjusted.[59] For example, some delays were extended, such as the time limits to realize the expenditures on the Belgian territory. The maximum investment thresholds (which aim to limit the tax expenditure) were temporarily raised to allow

[53] A concept mainly theorized by Stanley S. Surley: [21].

[54] See above.

[55] Which is already a hybrid work: between theater and music.

[56] Articles 194*ter* and following of the Belgian Income Tax Code. For a complete description, see: [22]; [23: 707 *et seq*.]; [24]; [25: 38-40] (concerning its extension to the peforming arts sector).

[57] The producer may also offer a financial return that is strictly framed by the law.

[58] From a budgetary point of view, the mechanism is supposed to be neutral, or even profitable. However, to our knowledge, there is no economic study on the economic impact of the mechanism in its current form.

[59] By the Law of 29 May 2020 on diverse urgent tax measures due to the COVID-19 pandemic and by the Law of 15 July 2020 on diverse urgent tax measures due to the COVID-19 pandemic (CORONA III). Some measures were also adopted in a circular from the tax authorities (Circular 2020/C/72 of 25 May 2020 on the impact of the COVID-19 crisis on the tax shelter schemes for audiovisual and stage production).

companies that could afford it to increase the amounts invested. However, these measures were only intended to deal with an exceptional situation. Moreover, they were not designed to promote the emergence of hybrid projects, at the crossroad of audiovisual and performing arts.

Yet, several legal changes could be considered to facilitate the financing of such hybrid projects. For example, the legal definition of an "original stage production"[60] should be adapted to cover such works. It would also be necessary to ensure that the expenditures related to the audiovisual dimension of the work are qualified as *eligible expenses* in accordance with the law.[61] The legislator could also authorize that the "first performance"[62] be a live audiovisual broadcast. Of course, the present contribution does not aim to formulate concrete suggestions for improvement, but to point out that the emergence of new artistic forms calls some modifications of the existing legal framework.

Similar discussions could also be held on direct public funding. Some specific grants could for example be provided for the production and the broadcast of a capture. The capture and audiovisual broadcasting of live performances could become a criterion for evaluating artistic projects in order to grant structural funding to operators. More generally, the notion of a "*representation*" could also be questioned: can a live online diffusion be assimilated to a performance on stage? This is not anecdotal, since the contracts concluded between the subsidizing authority and the beneficiary generally require a certain number of representations.[63] In sum, the growth and the sophistication of this practice questions public funding conceived in terms of sectoral silos. While the difficulties encountered in the field of copyright and related rights can mainly be solved by mastering the existing rules, the issues related to public funding entail deeper reflections, which could lead to some changes public cultural policies.

4 From the Stage to the Screen: the Loss of the Performing Arts' Essence?

Beyond legal aspects, a fundamental question remains to be addressed: is the recording of live performances merely a more or less satisfactory substitute for live productions in front of an audience and, if so, should this substitute be strictly confined to periods of crisis[64]? Or, on the contrary, does the recording of a live performance bring something more than the live performance or, at least, something different? If so, shouldn't this difference be taken into account and exploited in times of crisis as in ordinary times (and, therefore, develop suitable public financing instruments)? To put it another way, could we not add some nuance to the strong condemnation of the French director Roger Planchon, for whom "recording the best live performances on

[60] Article 194*ter*/1, § 2, sub. 1, 2°, of the Belgian Income Tax Code.

[61] As listed in article 194*ter*/1, § 3, of the Belgian Income Tax Code.

[62] Which confirms that the production is completed, a necessary condition for the fiscal advantage granted to the investors to be definitive.

[63] Some project grants also require the completion of the project through a representation.

[64] Or as an *additional* form of diffusion aiming to reach a wider audience (as, for example, the Paris Opera and the Metropolitan Opera of New York had already been doing).

film, even with care, is the worst thing you can do in the theatre and in cinema, both lose their souls"[65]? Without claiming to exhaust a question whose main interest is undoubtedly to avoid any univocal answer, we would like to launch a few leads for the reader's consideration.

In his text on *The Work of Art in the Age of its Technological Reproducibility*, Walter Benjamin (1892–1940) observes that, passed through the photographic or cinematographic prism, the image loses "the here and now of the work of art—its unique existence at the place at which it is to be found" [26: 13]. This loss, inevitable even in the best reproduction, would affect the *aura* of the work of art.[66] Extracted from the tradition and cultural heritage in which the authentic image is embedded, the reproduced image would acquire the status of a mass image. Although the reproduced image loses its aura, it nevertheless allows us to better penetrate the fabric of reality by multiplying the points of view and by proposing a richer reality thanks to the work of editing. Thus, if on the one hand, there is a loss, on the other hand, the cinematographic editing of a multitude of images makes it possible to multiply the points of view and, consequently, to apprehend the reality more subtly. The cinematographic technique allows, in the final analysis, a deeper understanding of reality because it exceeds the usual perceptive possibilities of the spectator: "with the close-up, space expands; with slow motion, movement is extended" [26: 30]. The reality of the camera is not the same as the one of the eye, so that when it has passed through a camera, we rediscover the real.[67] Capturing a performance and editing it therefore implies a loss of aura but, at the same time, opens up new possibilities.

To present an example of this dialectic of loss and opening up of possibilities, we can cite the case reported by the director Peter Brook on the occasion of a round table devoted to the act of filming theatre: referring to the few films showing Sarah Bernhardt acting, he pointed out that the effect on the contemporary audience is totally out of sync with the effect that the actress' acting must have had on the audience present at the performance. Today, the impression is comical. Back then, they were impressed and moved. Thus, the document we have "is not capable of communicating to us the totality of what happened, because it only presents a very partial reality, because it only gives us an external aspect of Sarah Bernhardt without allowing us to understand how her gestures were received at the time" [28: 22]. Nevertheless, although these recordings do not give us access to the conditions of the reception of the performance, they offer us a rare access to past performances and constitute invaluable documentary tools for cultural history.

In the end, the reality apprehended by the camera remains the reality of the *mise en scene*. When a performance is filmed, the possibilities of capturing this reality in

[65] Translation by the authors, original citation: "Enregistrer les meilleurs spectacles sur film, même avec soin, est la pire chose que vous pouvez faire au théâtre et au cinéma, les deux perdent leurs âmes", quoted in [1: 10].

[66] Benjamin also defines the *aura* as "a strange weave of space and time: the unique appearance or semblance of distance, no matter how close it may be" [27: 518].

[67] The film image gives us access to a reality that is inaccessible to the eye and, therefore, to a part of reality that, although real, is not perceptible. In this respect, Benjamin compares the work of a filmmaker to the work of a psychoanalyst: the former allows us to discover regions usually inaccessible to the eye, while the latter allows us to access regions usually inaccessible to the human mind [27: 510 *et seq.*].

a way other than by human optical means allow for a different apprehension, but the fact remains that this capture does not allow for an account of the entirety of an experience situated in a given time and place. In other words, as Benjamin had already pointed out, the *aura* does not pass through the capture. Filming theatre therefore always implies a loss but, at the same time, opens up unheard-of possibilities.

5 Conclusion

As soon as the cinematograph was invented, the stage was filmed. From the outset, cinema—and, later, television and Internet broadcasting—and live performance have been closely linked, which, legally speaking, has led to the emergence of new issues. From the point of view of copyright, the possibility of adapting an existing work to the screen constituted a new mode of exploitation whose contours had to be defined. If, at first, the cinematographic exploitation right was assimilated to the theatrical exploitation right, the two modes of exploitation were later clearly distinguished. Thus, a relative confusion of the legal regimes of theatre and screen exploitation has been replaced by a clear distinction since the transfer or licensing of audiovisual exploitation rights must now be the subject of a separate contract. From the point of view of public funding, theatre and cinema are now also subject to two formally different regimes.

By establishing clearly distinct regimes for the performing arts and the audiovisual sector, the legislator thus seemed to have removed the legal uncertainty of the early days of cinema. It stabilized the disruptive element constituted by the appearance of a new art form. However, recently, a new disruptive element came to disturb the legal regime of the performing arts: the Covid pandemic. In the emergency, many institutions proceeded to record and broadcast performances and concerts, thus raising new legal issues in terms of copyright and related rights. From the point of view of public funding of the cultural sector, this pandemic also led to fundamental questions and, here too, the clear distinction that was made between the audiovisual sector and the live performance sector showed its limits regarding the practices of cultural institutions.

The significant increase in hybrid forms due to the coronavirus crisis has certainly enabled cultural institutions to reflect on their practices, since it is true that the recording of a work opens up new possibilities, without however replacing a live performance. The law, as a tool at the service of social practices, provides them with a framework—as it did following the appearance of cinema. It now remains to be seen whether political authorities will adapt this framework, to better seize the renewed hybridity between cinema and performing arts.

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