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A European Panorama on the Copyright Status of Stage Directors

Abstract: The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions states outright in its guiding principles that culture is one of the main aspects of development, which is as important as its economic aspects, and which individuals and people have the fundamental right to participate in and enjoy. Theatrical productions are one of the best-selling forms of entertainment. From a cultural and artistic perspective, they are one of the oldest methods of expression which, in addition to self-expression, is also a mirror of the social and political order. The aim of this article is to present the theoretical, legislative, and jurisprudential positions on the copyright situation of the theatre director. The focus of the article is on the question of how the legal status of the theatre director is settled and regulated in different European legal systems. In several European countries there are no specific legal provisions on this matter. This article is organized as follows. First, the historical and cultural aspects of theatrical productions are introduced. After that, the most important copyright law features of dramatic works are reviewed, together with an overview of some European laws. In the core of the article, the current legal situation – and possible copyright law solutions for theatre directors – are elaborated.

Keywords: copyright law, dramatic works, theatre directors, stage directors, European copyright laws

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Introduction

It is undeniable that culture has an important place in society; theatre and acting in particular are integral parts of culture. Intellectual creativity played an important role in the early stages of human development, and has influenced socio-economic development.¹ Acting, as an artistic expression, was very popular in ancient times and has remained so ever since. Even the so-called “Dark Middle Ages” were a significant period for drama. Peter Gülke puts it bluntly: “The Middle Ages were by no means dark: even the periods of almost complete immobility were illuminated by the exciting discoveries and questioning of brilliant minds [...]”.² Historians of the theatre point out that, although drama ceased to be cultivated after Seneca’s death, it began to be revived in the middle of the 10th century. Its revival can be traced back to the Christian liturgy, followed by mystery plays.³ It is true that the importance of the theatre has waxed and waned over time,⁴ but it has never disappeared, and the different social and political moods and eras have given it different forms.⁵ It is therefore safe to say that, from a social perspective, it is one of the best-selling forms of entertainment; and from a cultural and artistic perspective, it is one of the oldest methods of expression, which in addition to self-expression is also a mirror of the social and political order.

The cultural sector has an increasing influence and importance in terms of both economic growth and employment.⁶ In addition to live performances, activities related to creating, performing, and recording music can be included in the music, theatre, and opera categories. The most important sub-categories within the theatre are the activities of composers, songwriters, choreographers, directors, and performers; the printing and publishing of sheet music; multiplexing of sound recordings; retail and wholesale of sound recordings; and creation and interpretation of artistic and literary works, performances, and agencies.⁷

Copyright law protection primarily serves the purpose of creating new works of high artistic and scientific value. In order to ensure this objective, copyright law guar-

¹ J.W. Slattery, *Art Law in Transactional Practice*, “Wake Forest Journal of Business and Intellectual Property Law” 2012, Vol. 12(3), p. 365.

² P. Gülke, *Szerzetesek, polgárok, trubadúrok. A középkor zenéje* [Monks, Citizens, Troubadours. Music of the Middle Ages], Zeneműkiadó, Budapest 1979, p. 15.

³ F. Kerényi (ed.), *Magyar színháztörténet*, vol. 1: 1790-1873 [History of Hungarian Theatre], Akadémiai Kiadó, Budapest 1990, p. 12.

⁴ P. Rouyer, *Western Europe*, in: D. Rubin (ed.), *The World Encyclopedia of Contemporary Theatre*, vol. 1: *Europe*, Routledge, London–New York 1994, p. 14.

⁵ E. Axer, *A rendező helyzete korunk színházában* [The Position of the Director in Contemporary Theatre], in: G. Lengyel (ed.), *A színház ma*, Gondolat, Budapest 1970, p. 407.

⁶ R. Towse, *Introduction*, in: R. Towse (ed.), *Copyright in the Cultural Industries*, Edward Elgar, Cheltenham 2002, p. xviii.

⁷ R.G. Picard, T.E. Toivonen, M. Grönlund, *The Contribution of Copyright and Related Rights to the European Economy Based on Data from the Year 2000: Final Report*, 20 October 2003, p. 21.

antees the social respect of creators through moral rights and financial appreciation in the form of economic rights. In the context of copyright law, the theatre is relevant from two interrelated viewpoints. On the one hand, the purpose of copyright law is to encourage the creation and enrichment of culture,⁸ in which dramatic works play an essential role. On the other hand, it is accepted that copyright law and culture also have a stimulating and positive impact on the economy, which in turn requires a clear copyright legal framework for the creation and performance of dramatic works and for the protection of the rights of the participants in the creative process.

In recent decades, the relationship between copyright law and culture has attracted the attention of both lawmakers and legal scholars.⁹ The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions¹⁰ states outright in its guiding principles that culture is one of the main aspects of development, which is as important as its economic aspects, and in which individuals and people have the fundamental right to participate and enjoy.¹¹

The main research question

The answer to the seemingly poetic question of “who could be considered the author of a dramatic work?” is not limited to a single person. In the theatrical entertainment industry, the question of authorship raises problems¹² that are much easier to answer in other genres. Indeed, a theatrical work is typically a complex work of art, a result of the collaborative creative activity of several individuals. In particular, dramatic works are often developed through the collaboration of directors, actors, and producers.¹³

The original author of a play is undoubtedly protected by copyright law as the original author of the work. The actors, singers, dancers enjoy protection as “neigh-

⁸ B. Freemal, *Theatre, Stage Directions and Copyright Law*, “Chicago-Kent Law Review” 1996, Vol. 71(3), p. 1019.

⁹ R. Towse (ed.), *Copyright in the Cultural Industries*, Edward Elgar, Cheltenham 2002, pp. 141-164; J. Lie-des, *Cultural Diversity and Copyright*, in: L. Tattay (ed.), *Emlékkönyv Ficsor Mihály 70. születésnapja alkalmából barátaitól*, Szent István Társulat, Budapest 2009, pp. 204-224; Z. Csehi, *A kulturális javak fogalmáról – egy univerzális dologkategória születésének történetéhez* [On the Concept of Cultural Goods – The History of the Birth of a Universal Category of Things], in: G. Faludi (ed.), *Liber Amicorum. Studia P. Gyertyánfy Dedicata*, ELTE ÁJK, Budapest 2008, pp. 153-183; M. Ficsor, *A szerzői jog és a kulturális sokszínűség védelme* [Copyright Law and the Protection of Cultural Diversity], in: M. Kocsis, T.G. Kucsera (eds.), *Fundamenta Profunda 1. Az alkotás szabadsága és a szerzői jog metszéspontjai*, MMA MMKI, Budapest 2016, pp. 77-90; M. Király, *A kulturális sokszínűség védelméről szóló UNESCO Egyezmény és az Európai Unió* [The UNESCO Convention on the Protection of Cultural Diversity and the European Union], in: G. Faludi (ed.), *Liber Amicorum. Studia P. Gyertyánfy Dedicata*, ELTE ÁJK, Budapest 2008, pp. 243-252.

¹⁰ 20 October 2005, 2440 UNTS 311.

¹¹ *Ibidem*, Art. 2(5).

¹² J. Womack, *Big Shop of Horrors: Ownership in Theatrical Design*, “Fordham Intellectual Property Media & Entertainment Law Journal” 2007, Vol. 18(7), p. 228.

¹³ L. McDonagh, *Performing Copyright: Law, Theatre and Authorship*, Hart, Oxford 2021, p. 70.

bouring right owners” as performers of the work. Scenery, costume designers, and composers are entitled to copyright law as authors according to national and international laws. Although the stage director coordinates the process of creating a play, his or her copyright status is questionable in most countries. Accordingly, courts have a great impact on the adjudication of the question.¹⁴ In consequence, courts decide each case on a case-by-case basis, considering all the relevant circumstances. This approach is however detrimental to the interests of theatre directors, as their status becomes foggy.

This complex issue is at the core of this article, and a series of related questions and issues arise in connection with the topic. Defining what rights a theatre director has with respect to the work he or she is directing is one of these thorny questions. This unresolved status raises several practical questions, the answers to which are unpredictable because each case is decided differently, depending on the approach of the court to the fundamental question of whether or not the director is a copyright owner. In theatre practice, it is easy for a foreign director to see a performance in another country and copy it on his or her home stage. Without a proper legal framework, the consequences of this conduct are haphazard. As a result, in some cases such conduct constitutes an infringement of copyright, while in other cases it does not. The consequences are dependent on how the tenets of copyright law in each jurisdiction deal with and are applied to the director’s activities. In such cases, the original director often has no right under the copyright laws of European countries to take any legal action. Another problem that arises in relation to the activities and copyright position of theatre directors is connected with moral rights. In some cases directors may drastically modify the original work, which infringes the moral rights of the original author. There are some judicial judgments which have addressed the issue of the director’s copyright status through the integrity of the original work; namely whether or not he or she has the right to modify or reinterpret the original work.¹⁵ This issue leads to the original question, posed in this text, i.e. whether or not the (original) director can be considered an author. The working hypothesis – that Hungarian and German copyright laws are probably not the only legal systems that have not resolved the issue of the legal status of theatre directors – was confirmed during the writing of this study. Therefore the main question of this study is whether, and how, European copyright laws regulate the status of the theatre director, as this issue remains unresolved in current copyright law practice.

In the legal practice and theory there are two approaches to the copyright law situation of theatre directors: one regards the stage director as an “author”; and

¹⁴ Y. Gendreau, A. Sergo, *Study on the Rights of Stage Directors of Theatrical Productions*, Standing Committee on Copyright and Related Rights, 21 May 2021, SCCR/41/5, p. 8.

¹⁵ See the Regional Court of Appeal of Győr, Decision No. Pf.V.20.167/2011/4; County Court of Győr-Moson-Sopron, Decision No. P.20.188/2010; District Court of Munich I, 21 O 1686/15; District Court of Frankfurt/Main, 14 August 1975, 2/6 O 229/75; Higher Regional Court of Frankfurt, 4 December 1975, 6 U 156/75; District Court of Leipzig, 23 February 2000, ZUM 2000.

the other deals with the issue under the umbrella of “neighbouring rights”, and considers theatre directors to be a “quasi performer”. To put the differences between “author”, “neighbouring rights owner”, or “performer” in a nutshell, the issue can be approached from the point of view of making a “creative contribution” to the completion of the work. The author is a natural person, who creates a work which is protected by copyright law, and consequently the author is the creator who is entitled to authors’ rights, which entail both moral¹⁶ and economic rights.¹⁷ Performers fall under the umbrella of “neighbouring rights” (including also moral¹⁸ and economic rights¹⁹), which traditionally imply a weaker position and lesser protection than the copyright of the author.²⁰ According to international documents, performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.²¹ In other words, authors *create* the works, while performers *interpret* the works which are created by an author. A difference between the extent of the economic rights of authors and performers can also be observed: in most European countries, authors’ economic rights are much broader than those of performers. Both the national and the international legal frameworks ensure a non-exclusive list of economic rights for authors, and an exclusive list of those rights for performers. Therefore, performers have fewer exclusive rights, and thus are in a weaker negotiating position than authors, both in legal terms and in entertainment practices.

The methodology of the research

During the research work, the acts of several European countries, and the legal literature, case law, and the practice of the legal experts are all of utmost importance as the basis for the work. The examination of the legislation of other states can serve as examples of differing legislation and the accompanying different legal interpretations. Among the research methods, the normative and dogmatic meth-

¹⁶ Moral rights of authors are: to decide on the publication of the work; the right to claim authorship; the right to indicate the name of the author on the work; and the right to the inviolability of his or her work (integrity right).

¹⁷ Economic rights of authors are, in particular, the exclusive right and the authorization of the reproduction of a work; the distribution of a work; the public performance, i.e. making a work available to the public; the adaptation of a work; and the exhibition of a work.

¹⁸ The right to claim to be identified as the performer of his or her performances; to object to any distortion, mutilation, or other modification of his or her performances that would be prejudicial to his reputation (integrity right).

¹⁹ The exclusive right of authorizing the broadcasting and communication to the public, making available to the public, and the commercial rental to the public of their unfixed performances and the fixation of their unfixed performances; the exclusive right of authorizing the direct or indirect reproduction of their fixed performances.

²⁰ H.T. Silverberg, *Authors’ and Performers’ Rights*, “Law and Contemporary Problems” 1958, Vol. 23(1), pp. 125-164.

²¹ WIPO Performances and Phonograms Treaty, 20 December 1996, Art. 2(a).

ods are highlighted the most. Critical and dogmatic analyses of the relevant legal institutions and legal practice were both carried out in this study, because there are different interpretations regarding the legal situation of the theatre director in the fields of theatrical science, practice, and legal theory. In the theatre practice, it is particularly difficult to determine whether the modification of a particular work can be considered as an adaptation under copyright law,²² or whether it does not reach – or exceeds – this level. In this connection, the so-called “aleatoric” nature of dramatic works should be mentioned. Aleatoric elements of dramatic works mean that the director is entitled to make some changes that arise from his creativity.²³ Additionally, the conceptual method in line with the definition of dramatic works and the empirical method²⁴ played a particularly important role during this research.

Consequently, this article places the emphasis on the copyright law features of dramatic works, with an overview of some European legislation, as well as the specialties and the role of theatre directors. At the end of the article, the current legal situation, and possible copyright law solutions for theatre directors, are presented.

The Specialties of Theatrical Works and the Role of the Stage Director

The development of drama as a genre and its millennial life and value for more than two thousand years was brought about by ancient Greek drama. Despite the historical and cultural popularity of drama,²⁵ there is no uniform definition in copyright law of what is considered a play or a dramatic work,²⁶ although some viewpoints

²² Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, at Brussels on June 26, 1948, at Stockholm on July 14, 1967, and at Paris on July 24, 1971, and amended on September 28, 1979 (“the Berne Convention”), Art. 12: “Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works”. Stage adaptation covers any kind of modification in the underlying original work. In contrast, copyright law adaptation means and requires that a derivative work was born. Accordingly, the concept of adaptation, which is known and applied in the theatrical world, has much broader sense than the copyright law concept of adaptation. This difference also causes difficulties in legal interpretation.

²³ See M. Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO, and Glossary of Copyright and Related Rights Terms*, WIPO, Geneva 2003, p. 312.

²⁴ The research has been assisted by the professional contacts with Hungarian theatres, stage directors, and theatrical agencies.

²⁵ For a Spanish approach to theatre, culture, and copyright law, see L. Surwillo, *The Stages of Property: Copyrighting Theatre in Spain*, University of Toronto Press, Toronto 2007, pp. 3-21.

²⁶ A.-A. Wandtke, C. Ohst, *Praxishandbuch Medienrecht*, Walter de Gruyter, Berlin 2014, p. 267; C.J. Caselman, *How to Produce and Perform: A Guide to Audio-Visual and Live Stage Licensing and Acquisition*, International Intellectual Property Institute, 2010, p. 2; S. von Lewinski, *International Copyright Law and Policy*, Oxford University Press, Oxford 2008, p. 41; H. MacQueen et al., *Contemporary Intellectual Property, Law and Policy*, 2nd ed., Oxford University Press, Oxford 2008, pp. 70-71; L. Bently, B. Sherman, *Intellectual Property Law*, Oxford University Press, Oxford 2014, p. 69; W. Cornish, D. Llewelyn, T. Aplin, *Intellectual Property: Patents, Copyright Trademarks and Allied Rights*, 7th ed., Sweet and Maxwell, London 2010, p. 450.

stress that works of drama include dance and pantomime.²⁷ The general feature of a dramatic work is that it must be suitable for performance.²⁸ It is worth adding that in terms of historical approaches, the performance right was recognized at the legislative level after a long struggle, as performances seemed much more elusive and uncertain than printing.²⁹ According to the German legal literature, the term “dramatic work” includes drama, comedy, musicals, pantomime, and choreographic works³⁰ that affect both the audience’s eyes and ears.³¹ Of course, a necessary and fundamental condition for the legal copyright protection is that the work on stage must have an individual and original character. As a further important element, it is stressed that dramatic works (also sometimes called “theatre”; “works of theatre”; or “theatrical works”), are often co-authored.³² As Luke McDonagh reflects on the special nature of theatrical works: “What is fascinating about a work of theatre is that it problematizes such distinctions – between original and copy and between work of art and speech in action”.³³

A copyright law-related definition of dramatic works can be described as follows: A dramatic work is a complex genre, which is a directed plot with or without music based on a literary artwork, usually involving the creative work of more than one person, and is suitable for public performance.

Some authors emphasize that theatre is unique among the arts, because it is created by mixing two elements: words and plays.³⁴ Theatre is like a crucible of art: as a new, whole work of art, a dramatic work is the result of the “admix” of artistic activities and creative activities.³⁵ Therefore, theatrical productions are predominantly collective.³⁶ Traditionally a play, i.e. a literary work on which theatrical creation is based, is one of the oldest and most popular forms of artistic expression. Simultane-

²⁷ Copyright, Designs and Patents Act 1988, c. 48, Section 3(1); G. Taliashvili, *Copyright Works*, GRIN, Bremen 2008, p. 5; C. Colston, K. Middleton, *Modern Intellectual Property Law*, Cavendish, London 2005, p. 69.

²⁸ P. Torremans, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press, London 2016, p. 206; Y.H. Lee, *United Kingdom Copyright Decisions 2017*, “International Review of Intellectual Property and Competition Law” 2018, Vol. 49(3), p. 24; E. Cutler, T.E. Smith, F.E. Weatherly, *The Law of Musical and Dramatic Copyright*, C&C, London–Paris–Melbourne 1892, p. 18.

²⁹ D. Miller, *Performative Performances: A History and Theory of the “Copyright Performance”*, “Theatre Journal” 2012, Vol. 64(2), pp. 161-170.

³⁰ C. Dietz, J. Ehrhardt, *Theaterrecht*, in: A.-A. Wandtke, C. Ohst (eds.), *Praxishandbuch Medienrecht*, vol. 2: *Schutz von Medienprodukten*, Walter de Gruyter, Berlin 2014, p. 267.

³¹ H. Schack, *Urheber- und Urhebervertragsrecht*, Mohr Siebeck, Tübingen 2010, p. 219.

³² B. Kehrl, *Urheber- und Leistungsschutz, Verwertungsgesellschaften*, in: H. Kurz, B. Kehrl, C. Nix, *Praxishandbuch Theater- und Kulturveranstaltungsrecht*, C.H. Beck, München 2015, p. 584.

³³ L. McDonagh, *Copyright and Authorship on Stage*, “LSE Legal Studies Working Paper” 07/2021, p. 5.

³⁴ S. Keller, *Collaboration in Theater: Problems and Copyright Solutions*, “UCLA Law Review” 1986, Vol. 33(3), pp. 891, 909.

³⁵ In other context, see J. Collins, A. Nisbet, *Theatre and Performance Design: A Reader in Scenography*, Routledge, London 2012, p. 99.

³⁶ J. Gripsrud, *Creativity and the Sense of Collective Ownership in Theatre and Popular Music*, in: M. van Eechoud (ed.), *The Work of Authorship*, Amsterdam University Press, Amsterdam 2014, p. 215.

ously, creative activities have an equally important role in theatrical works, particularly in terms of their audience-entertaining character. Costumes and set designs are creative, and performers – whether in prose, music, or opera – are artists engaged in artistic activities.³⁷ In the case of musicals, the composer, conductor, and orchestra express themselves artistically during performances. All of these autonomous artistic and creative activities, which are an essential part of the enjoyment of a theatrical production, draw from and contribute to the preservation of culture. The legal protection of theatrical works is thus in line with the complexity of the genre.

The legal literature emphasizes that authorship of a theatrical production is “polyphonic”, since it can be considered as the joint work of the performer, writer, director, set designer, costume designer, composer, dramaturg, and consultant. In addition, the question of how each element of a stage production can be assessed from a copyright point of view, and whether it is eligible for protection at all, makes it difficult to assess authorship clearly. Moreover, there are contributors whose copyright status is haphazard and uncertain; such as the director, even though his or her contribution to creating a theatrical production is unquestionable. However it cannot be said that the director’s activity is inherently excluded from the scope of copyright protection, because the director’s concept does not remain at the level of a mere idea, but is a formed thought, which is realized in a concrete theatrical production.

It is fair to acknowledge that the position of the theatre director is in the grey area of copyright law, as it is on the borderline between the status of the author and the performer. According to some viewpoints, theatre directors are the losers in copyright law, because while a playwright, a composer, a choreographer, and a costume-and-set designer can claim copyright protection according to the copyright laws, this right is not clearly guaranteed to the director.³⁸ At the same time, it is clear that the director’s activity is relevant from the perspective of copyright law, as we can consider the director as either an interpreter (quasi performer) or an author of the work.

European Solutions about the Legal Protection of Dramatic Works and Stage Directors

International and European framework for the protection of dramatic works

Dramatic works are recognized as an integral part of copyright law and culture, although it’s true that dramatic works entertained the public long before copyright law introduced the protection of the intellectual creations of an author. Copyright law was created as a result of a long line of developments, but dramatic works

³⁷ For more details, see G. Békés, *Az előadóművész személyhez fűződő és vagyoni jogai* [Moral and Economic Rights of the Performer], PhD dissertation, University of Szeged, 2023.

³⁸ D.M. Nevin, *No Business Like Show Business: Copyright Law, the Theater Industry, and the Dilemma of Rewarding Collaboration*, “Emory Law Journal” 2004, Vol. 53(3), p. 1557.

played a major role almost since their inception. It is sufficient to recall that even the original text of the 1886 Berne Convention contained rules on the copyright of dramatic works.³⁹ It should be noted that early court cases (in the 19th and 20th centuries) mentioned and discussed certain issues in connection with the copyright protection of pantomime and choreographic works, because they could be considered theatrical works if they had a corresponding dramatic element.⁴⁰ The exclusive right of public performance for the authors of dramatic works was first laid down in a text revised in Berlin on 13 November 1908, but modified in Brussels in 1948 and in Stockholm in 1967.⁴¹

Insofar as concerns the European Union's *acquis* of copyright law,⁴² it can be observed that the EU legal harmonization of copyright law has been fragmented, given that it does not extend to all artworks and all of the uses of the subject matter of copyright. Most of the existing directives concentrate on the possible responses to the challenges of the information society, digitalization, and technology, which are the most pressing problems of these days, while theatrical activities belong to the "more classical area of copyright law" and the direct challenge of technology influences this area to a smaller extent. Consequently, the framework of specific rules concerning dramatic works is completely missing from the copyright legislation of the EU.

The next two subsections of this text offer a European panorama on the legal status of the stage director. First, those European countries are presented where there are no concrete regulations on the copyright law status of stage directors, but the protection of dramatic works is provided for. Thereafter, legislative solutions of specific countries are introduced where there are concrete legal regulations on the copyright law status of theatre directors, so they can be regarded as examples for other countries' legislation.

Protection of dramatic works in the absence of any regulation on theatre directors

In providing an overview of the legal solutions of some European legal systems in terms of their protection of dramatic works, it is worth starting from the copyright laws of the countries concerned. However, it should be noted that the following acts protect dramatic works directly or indirectly, and they do not currently contain any detailed special provisions on the position of theatre directors.

³⁹ The Berne Convention (Berne Text, 1886), Arts 4, 9; see also P. Goldstein, B.P. Hugenholtz, *International Copyright: Principles, Law and Public*, Oxford University Press, Oxford 2013, p. 205.

⁴⁰ P. Goldstein, B.P. Hugenholtz, op. cit., p. 138. See also B.I. Frye, *Copyright in Pantomime*, "Cardozo Arts & Entertainment Law Journal" 2016, Vol. 29(7), pp. 307-355.

⁴¹ A. Bogsch, *Guide to the Berne Convention for the Protection of Literary and Artistic Works*, WIPO, Geneva 1978, p. 64.

⁴² European Commission, *The EU Copyright Legislation*, <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation> [accessed: 07.08.2023].

This means that courts have to interpret this issue without concrete legal guidelines. Thus courts mostly interpret the issue on the basis of “neighbouring rights” or “authors’ rights”, but the decision is ad hoc.

In its list of types of works granted protection, the German Copyright Act does not mention dramatic works as typical works of authorship.⁴³ However, it does include pantomime and choreographic works among its list of protected subject matters. Of course, the fact that theatrical works are not specifically mentioned in the Act does not mean that they are excluded from protection, since German legislation uses an exemplary list, while the condition of protection is whether the work results from an intellectual activity.⁴⁴

The UK Copyright Act includes dance and pantomime in the framework of dramatic works which are subject matters of copyright law protection.⁴⁵

In light of the Polish Copyright Act, the object of copyright shall be “any manifestation of creative activity of an individual nature, established in any form, irrespective of its value, purpose, or form of expression”.⁴⁶ Similarly to the Hungarian and German solutions, the Polish Act also set out a non-exhaustive list,⁴⁷ which includes theatrical works, theatrical and musical works, and choreographic and pantomime works as subjects of copyright.⁴⁸

According to the Hungarian Copyright Act all literary, academic, scientific, and artistic works are protected by copyright regardless of whether they are designated under the Act or not.⁴⁹ The law states that a work or creation is entitled to

⁴³ *Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* [Copyright and Related Rights Act (Copyright Act)], Bundesgesetzblatt 1965 Part I p. 1273;

“§ 2 Geschützte Werke

(1) Zu den geschützten Werken der Literatur, Wissenschaft und Kunst gehören insbesondere:

1. Sprachwerke, wie Schriftwerke, Reden und Computerprogramme;
2. Werke der Musik;
3. pantomimische Werke einschließlich der Werke der Tanzkunst;
4. Werke der bildenden Künste einschließlich der Werke der Baukunst und der angewandten Kunst und Entwürfe solcher Werke;
5. Lichtbildwerke einschließlich der Werke, die ähnlich wie Lichtbildwerke geschaffen werden;
6. Filmwerke einschließlich der Werke, die ähnlich wie Filmwerke geschaffen werden;
7. Darstellungen wissenschaftlicher oder technischer Art, wie Zeichnungen, Pläne, Karten, Skizzen, Tabellen und plastische Darstellungen.

(2) Werke im Sinne dieses Gesetzes sind nur persönliche geistige Schöpfungen”.

⁴⁴ H. Kurz, B. Kehrl, C. Nix, *Praxishandbuch Theater- und Kulturveranstaltungsrecht*, C.H. Beck, München 2015, p. 584.

⁴⁵ Copyright, Designs and Patents Act 1988, c. 48, Section 1(1): “Copyright is a property right which subsists in accordance with this Part in the following descriptions of work – (a) original literary, dramatic, musical or artistic works”; Section 3(1): “dramatic work includes a work of dance or mime”.

⁴⁶ *Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych* [Act of 4 February 1994 on Copyright and Related Rights], Dziennik Ustaw 1994 No. 24 Item 83, Art. 1(1).

⁴⁷ A. Gundersen, B. Lindner, *Intellectual Property Protection in Poland*, 2 March 2002, p. 54.

⁴⁸ *Ustawa z dnia 4 lutego 1994 r. o prawie autorskim...*, Art. 1(2)(8).

⁴⁹ 1999. évi LXXVI. törvény a szerzői jogról [Act LXXVI of 1999 on Copyright], Magyar Közlöny 1999 No. 61, Art. 1(2).

copyright protection based on its individualistic and original nature derived from the intellectual activity of the author, and it does not depend on quantitative, qualitative, or aesthetic characteristics or any judgment of the quality of the work.⁵⁰ The Act lists the most typical works subject to copyright,⁵¹ and dramatic works, dramatico-musical works, choreographic works, and pantomimes are included in the exemplary list.⁵² It regulates the copyright status of film directors in line with audio-visual works,⁵³ but it does not mention theatre directors at all. According to judicial decisions,⁵⁴ stage directors perform artistic creations and are entitled to copyright, however other legal interpretations regard them as “performers” and “neighbouring rights” owners.

Dramatic works are mentioned as protected subjects in the Italian Copyright Act.⁵⁵ The category includes works of dance or mime; for example, this might be a script for a play, a dance routine that has been choreographed, or the screenplay of a book for film.⁵⁶ A unique solution of the Italian Act is that it deals with dramatic works in separate chapters.⁵⁷ An Italian court decision from 2021⁵⁸ deals with the legal protection options of the direction of opera and is mainly based on the fact that the Italian copyright law includes cinematic direction within the area of copyrightable works. The conclusion highlights that there are no substantial differences between the two directions which would justify their diverse treatments.⁵⁹

The French Intellectual Property Code protects the rights of authors on “all works of the mind” whatever their kind, form of expression, merit, or purpose, so long as they are original. The Code lists the works eligible for copyright protection including dramatic and dramatico-musical works,⁶⁰ but it has no specific regulations for theatre directors. However, French courts have developed an interpretation that recognizes stage directors as authors.⁶¹

⁵⁰ Ibidem, Art. 1(3).

⁵¹ Ibidem, Art. 1(2).

⁵² Ibidem, Art. 1(2)(d).

⁵³ Ibidem, Art. 64(2).

⁵⁴ Regional Court of Appeal of Győr, Decision No. Pf.V.20.167/2011/4.

⁵⁵ *Legge 22 aprile 1941, n. 633 sulla protezione del diritto d'autore e di altri diritti connessi al suo esercizio* [Law No. 633 of 22 April 1941 on the Protection of Copyright and Other Rights related to Its Exercise], *Gazzetta Ufficiale* No. 166, 16 July 1941.

⁵⁶ M. Bariè, M. Annoni, *Cross-Border Copyright Guide*, TerraLex Italy, 2018, p. 1.

⁵⁷ *Legge 22 aprile 1941, n. 633 sulla protezione del diritto d'autore...*, Chapter IV, Section I, Dramatico-Musical Works, Musical Compositions with Words, Choreographic Works, and Works of Dumb Show.

⁵⁸ Court of Cassation (Italy), Judgment of 18 June 2021, No. 17565.

⁵⁹ V. Iaia, *The Copyrightability of Opera Direction*, “GRUR International” 2022, Vol. 71(3), pp. 226-229.

⁶⁰ *Loi n° 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle* [Law No. 92-597 of 1 July 1992 Relating to the Intellectual Property Code], *Journal officiel de la République française* 153, 3 July 1992, Art. L112-2.

⁶¹ Y. Gendreau, A. Sergo, *op. cit.*, p. 28.

Theatrical works are *expressis verbis* protected under the copyright law of the historical home of theatre, Greece,⁶² but there are no specific rules in this Act on either dramatic works nor on directors.

In Spain, dramatic works are also protected as one of the most important examples of the subject matter of copyright.⁶³

In Norway, like other Nordic countries, the roles of creative contributors to the theatre are governed by copyright law (copyright in a play, set design, costume design, choreographies, and other works of authorship), and “neighbouring rights” for performing artists (visual, musical, and dance).⁶⁴

European examples of the legislative protection of stage directors

The following paragraphs provide examples of legislation in European countries which contain specific references to stage directors. The copyright law of the Czech Republic, Slovenia, Croatia, Slovakia, and Estonia contain particular regulations for this issue. The fact that the copyright acts of several Central-European countries deal with directors, while as shown above, others do not, is particularly interesting.

In the Czech Republic, the Copyright Act declares that dramatic works are subject to copyright.⁶⁵ The Act mentions theatrical directors in some points but does not *expressis verbis* touch on the issue of their legal status vis-à-vis copyright law. However, the fact that rules on theatre directors can be found within the rules on the rights of performers has an indicative value.

Theatrical works are protected under the Slovenian copyright law as well.⁶⁶ It also stipulates that the term “performers” shall refer to actors, singers, musicians, dancers, and other persons who act, sing, deliver, recite, play in, interpret, or otherwise perform copyright work or folklore expressions. Directors of theatrical presentations, conductors of orchestras, choir directors, sound editors, and a variety of circus artists are also deemed performers in the preceding paragraph.⁶⁷

⁶² Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα [Law 2121/1993 on Intellectual Property, Related Rights, and Cultural Issues], Φύλλα Εφημερίδας της Κυβέρνησης Α 25, 4 March 1993, Art. 2.

⁶³ Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia [Royal Legislative Decree 1/1996, of 12 April 1996, Approving the Revised Text of the Intellectual Property Law, Regularizing, Clarifying and Harmonizing the Legal Provisions in Force on the Matter], Boletín Oficial del Estado No. 97, 22 April 1996, Art. 10.

⁶⁴ J. Gripsrud, op. cit., pp. 215-216.

⁶⁵ Zákon č. 121/2000 Sb. ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů (autorský zákon) (ve znění zákona č. 50/2019 Sb.) [Act No. 121/2000 Coll. of 7 April 2000 on Copyright, Rights Related to Copyright and Amendments to Certain Acts (Copyright Act) (as amended by Act No. 50/2019 Coll.)], Sběrka Zákonů České Republiky 2000, No. 36, Art. 2(1).

⁶⁶ Zakon o avtorski in sorodnih pravicah (kot je bil spremenjen 22. oktobra 2016) [Copyright and Related Rights Act (as amended on 22 October 2016)], Uradni list Republike Slovenije No. 63/16, Art. 5(2)(4).

⁶⁷ Ibidem, Art. 118(1)-(2).

A similar situation can be observed in Croatia. The Croatian Copyright Act sets out a non-exhaustive list of protected works, which states that dramatic or dramatico-musical works are subject to copyright.⁶⁸ With regard to the legal status of stage-directors, the Act stipulates that a director of a theatrical performance and conductor of an artistic ensemble shall also be deemed performers.⁶⁹

The Estonian Copyright Act declares the protection of dramatic works in its subject matter.⁷⁰ In Article 68, the rules on authorization to use the performance are detailed, where the Act stipulates the following: “In order to use a work performed by a group of persons, the consent of all members of the group is required. The leader of an ensemble, a conductor, leader of a choir, director, or another person authorized by the group of persons may grant an authorization in the name of the group”. While this legislation does not provide detailed provisions on the copyright status of the director, it can be inferred from the quoted passage that the director is considered closer to the performer than to the author.

The Slovak copyright law has a unique solution because, in addition to declaring that “Work means a [...] theatrical work [...]”⁷¹ it also gives a proper legal definition of the genre. According to it, “[t]heatrical work is in particular a staged dramatic work with or without music, a pantomimic work and staged dance choreography or other type of choreographic work; in which cases an author is primarily a director who created the work by his or her own creative and artistic activity”. This solution is unique in the sense that, in addition to the proper legal definition of dramatic works, it clearly states that their author is primarily a director who created the work by his or her own creative and artistic activity.

Is the Stage Director a Performer or an Author?

As mentioned above, mostly two approaches are followed in establishing the legal copyright status of the theatre director: a “neighbouring rights” owner; or a right-holder of author’s rights.

The Anglo-Saxon legal literature emphasizes that when talking about the copyright protection of a director, it should also be taken into consideration that the director is not the same kind of author as the stage author, who is the author of the original play. The basic difference is that the latter begins the creative pro-

⁶⁸ *Zakon o autorskom pravu i srodnim pravima i Djela o izmjenama i dopunama zakona o autorskom pravu i srodnim pravima* (NN 167/2003, 79/2007, 80/2011, 141/2013, 127/2014, 62/2017) [Law on Copyright and Related Rights and Acts on Amendments to the Law on Copyright and Related Rights (Official Gazette 167/2003, 79/2007, 80/2011, 141/2013, 127/2014, 62/2017)], Narodne novine No. 96/2018, Art. 5 (1)-(2).

⁶⁹ *Ibidem*, Art. 122.

⁷⁰ *Autoriõiguse seadus, Vastu võetud 11.11.1992, RT I 1992, 49, 615, jõustumine 12.12.1992* [Copyright Act, adopted 11.11.1992, RT I 1992, 49, 615, entry into force 12.12.1992], Riigi Teataja No. I, 28.12.2011, 5, Art. 4(3)(6).

⁷¹ *185 Zákon z 1. júla 2015 Autorský záko* [Act No. 185 of 1 July 2015 Copyright Act], Zbierka zákonov Slovenskej republiky No. 57/2015, Section 3(2).

cess with a blank paper that is constantly filled in with characters, situations, and other original elements; while by contrast a director's creative work usually begins after another work has already been completed.⁷²

First, the status of the stage director, "as a performer" is introduced. As previously mentioned, there are legal solutions in which stage directors are protected as "performers". Among the above-mentioned countries, some Central-European states (except for Poland and Hungary) establish the copyright law situation of theatre directors at the legal level.

As was presented above, the Czech Copyright Act mentions stage directors in one of the rules governing performers' rights. The Slovenian copyright law stipulates that the term "Performers" covers the artists who interpret copyright works, and that directors of theatrical presentations shall also be deemed to be performers.⁷³ A similar solution can be observed in the Croatian legal regime, as the Act declares that the director of theatrical performances and the conductor of an artistic ensemble shall be deemed performers.⁷⁴

According to an opinion of the Hungarian Council of Copyright Experts "staging, like acting, is an essential means of interpreting, mediating for the audience, transmitting in a figurative sense, a work".⁷⁵ The experts also refer to the essence of the so-called "interpretative margin", namely that the written text of a play usually contains only dialogue, in addition to the most basic authorial instructions. This means that the author creates the work knowing in advance that it will be received by the audience through the interpretation of the director. Because of this interpretative latitude, it is common for the author to leave the director's hands untied and allow him or her to shape the scenery, movements, sets, costumes, and characters. In sum, the experts concluded that "the director's interpretation necessarily carries individual characteristics inherent in the director's personality; however, by virtue of its function as a means of communicating the work to the audience, stage direction is closer to the performance of a performer than to the work of the author".⁷⁶

If the question is seen at the *level of authorship*, the first thing to point out is that the regulation of the Slovak Copyright Act is unique among the legal solutions of the states examined, as it declares that directors are creating the work through their own creative and artistic activity, so she or he is considered an author. However, as mentioned above most European countries' copyright laws do not explicitly provide for the director's copyright status.

⁷² R. Amada, *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, "Arizona Law Review" 2001, Vol. 43(3), p. 685.

⁷³ *Zakon o avtorski in sorodnih pravicah...*, Art. 118(1)-(2).

⁷⁴ *Zakon o avtorskom pravu...*, Art. 122.

⁷⁵ Hungarian Council of Copyright Experts, Case SZJSZT-03/12.

⁷⁶ *Ibidem*.

If the view that the stage director is closer to the creative process than to the interpretation of works can be accepted, then his or her status as an author can be interpreted and settled in several ways.

For example, Luke McDonagh analyses joint authorship for theatrical works.⁷⁷ While it can be accepted that the director is carrying out a very serious, creative job in staging, it is however important to have a joint decision relating to the creation of the work, which can happen only during the life of the original author.

Another view claims that the theatre director uses the underlying play as the primary source for his or her interpretation, but at the same time the director's work is necessary for the written play to come to life according to its basic purpose;⁷⁸ therefore, it lies beyond the interpretative task.

Others see the theatrical director as a translator in a special sense, translating written text into stage production.⁷⁹ Furthermore, the real question is not whether directors should be entitled to legal protection, but to what extent they should enjoy the protections granted by copyright law.⁸⁰

If it can be accepted that stage directors can be regarded as authors, there are different ways to settle their situation. There are some unambiguous situations in which directors cannot be considered authors, as in the case of replica licenses,⁸¹ because of the lack of creative space. In some cases the director makes a derivative work through adaptation, therefore she or he enjoys copyright protection if the staging of the dramatic work fulfils the legal requirements for adaptation. In several cases, the director's contribution is so individual, original, and novel that she or he entirely reinterprets the play. Consequently, the dramatic work is a new independent work. In this situation, the director should be considered the author of the stage work. However, the moral rights of the original author place limits on this.⁸²

Finally, one more question should be raised: Is it really necessary to choose between performer and author status? According to some viewpoints⁸³ – which can

⁷⁷ L. McDonagh, *Performing Copyright...*, pp. 83-85; H. Boshier, *Book Review: Performing Copyright: Law, Theatre and Authorship*, "The IPKat", 22 November 2021, <https://ipkitten.blogspot.com/2021/11/book-review-performing-copyright-law.html> [accessed: 07.08.2023].

⁷⁸ C.A. Guerrero, "And If It Wasn't for Me [Rrick], Then Where Would You Be Ms. Gypsy Rose Lee?" *An Argument for Copyright Protection for Theatre Directors Through a Reasonable Definition of Theatrical Stage Directions and an Understanding of the Theatre Community*, "Akron Intellectual Property Journal" 2007, Vol. 1(1), p. 115. Guerrero offers several alternatives as to which legal protections can be invoked by a director: joint work, employment, derivative work, and collective work.

⁷⁹ M. Livingston, *Inspiration of Imitation: Copyright Protection for Stage Directions*, "Boston College Law Review" 2009, Vol. 50, p. 438.

⁸⁰ *Ibidem*, p. 481.

⁸¹ Under replica licenses, it is not permitted to make any changes to a piece. The director does not perform directing activities in this case. Replica licenses are mostly applied, when famous Broadway shows of West End musicals are performed abroad.

⁸² G. Rabkin, *Is There a Text on This Stage? Theatre/Authorship/Interpretation*, "Performing Art Journal" 1986, Vol. 9(2&3), pp. 142-159.

⁸³ G. Békés, *op. cit.*, pp. 53-54.

be accepted – the stage director can be regarded as *performer in every case*, because it is obvious she or he will interpret the work for the audience. But there are other situations – such as mentioned above – when the director will contribute to the dramatic work in a creative way which *can be grounds for the author status*.

Instead of a Summary: The Main Legislative Question

Instead of a “classical summary” or repetition of the abovementioned text, the article focuses here on the main legislative question, namely: *Do stage directors need a legally declared protection*. The short answer is *yes*, stage directors should be entitled to legal protection, but the precise legislative question concerns the details and the scope of the protection. The more detailed question is whether the legislation of a given country provides protection to directors based on neighbouring rights or copyright, considering the cultural and historical traditions of that country. However, inasmuch as most European countries do not have any copyright rule specifically tailored to the theatre director, it would be appropriate to establish the fact of legal protection in the first instance.

All the specificities detailed above demonstrate that the copyright status of stage directors is unsettled, which can raise practical problems. But courts alone cannot resolve this issue. The copyright status of stage directors should be (and can be) settled at a higher level. In most cases, theatre directors’ contributions reach the same level of creative work as film directors, who are rewarded with copyright protection. However, the above-mentioned examples of judicial practice show that in the case of stage adaptations, directors often reinterpret the original works so strongly that their unity is infringed. This could create an odd situation. If directors make creative contributions to the work, they can establish authorship based on derivative works or new authorship, while at the same time their contribution can be a violation of the integrity of the original work, thus violating the moral right of the author.

Nevertheless, in most cases the work of stage directors is closer to the author’s creative process than the interpretation by a performer. However, it should be recognized that the director’s contribution does not always reach the level of authorship. Therefore it would not be appropriate to grant them copyright protection generally, *in every case*. One solution could be enshrining the principle that if the creative process (e.g., adaptation, joint work, or new independent work) cannot be established in the work of a given stage production, the director should be considered a “neighbouring rightholder”, as a “quasi performer”. This could reduce the number of problems arising in licensing issues and could eliminate the questionable situation of when and how a person contributes significantly to the creation of a dramatic work.

The lawmaker should take every opportunity to ensure the position of the creators of cultural works. This would have several advantages. On the one hand,

theatre practice has already considered stage directors as creators,⁸⁴ so the recognition of their legal protection would not be a radical change in this area and would not lead in a negative direction. At the same time, it would provide the legal basis for a practice that is already to a large extent well established. In addition, it would also make the task of courts easier, as the provision would set out guidelines and frameworks and help to achieve a higher level of legal certainty. Finally, to return to the original thesis, a declaration of protection – both of author's or performer's rights – would also contribute to the inherent purpose of copyright legislation: to encourage creative work and to enrich the cultural life and diversity of nations and the world by providing legal recognition and guarantees for creators.

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⁸⁴ E. Einhorn, *A Case for the Stage Director's Copyright*, <https://web.archive.org/web/20200112170817/http://www.untitledtheater.com:80/DirectorsCopyright.htm> [accessed: 07.08.2023].

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