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Artworks Behind the Curtain – Creativity and Copyright Law of Theatre Set Designs

Abstract: Theatrical productions are often developed through the collaboration of directors, actors, producers, and many contributors, such as the costume and scenery designers. The copyright law protection for scenery designers and costume designers seems clear in many European countries, which means it can be protected by copyright law. On the contrary, in the copyright law of the United States of America, stage sets and costumes are not clearly protected. Even in those countries where protection is clearer, there are problems with the application of the law, especially in relation to the unauthorized use or adaptation of sets and costumes. Thus, the question arises as to which modifications to a set design violate the designer's copyright. The study pays special attention to the differences for copyrightability of set designs in the United States and in two European countries (Italy and Hungary) where the protection is clearly defined. In the first half of the article, the conceptual approach to the relevant works, the legal background for the copyright protection of set design, the issue of functionality, and the copyrightability of

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masking and lighting are presented. The following part sheds light on the exploitation of set design, as the boundaries of adaptation and replica and non-replica licences.
The study is based on the legal sources, relevant legal literature, and legal practice of the given countries.

Keywords: copyright law of set design, copyrightability of scenography, copyrightability of theatrical costumes, adaptation of set design, copyright law in the theatre

Introduction – From a Cultural Perspective to a Copyright Approach

> When the curtain went up in the third act, a foreign gentleman sitting next to me exclaimed in admiration. He was right: when you see a miracle, you must acknowledge it. Otherwise, someone will come along and figure out that it wasn't a miracle. Let's do another one instead. God forbid![1]

Stage productions can be found worldwide whose sceneries evoke experiences like that of the above quote. Although the quote is about the deservedly famous and praised scenery and stage visuals of the Hungarian State Opera's production of *La Bohème*, this is just one example out of hundreds of breathtaking stage designs. Puccini's opera, with the magical scenery of Gusztáv Oláh[2] (who designed many theatre set designs across Europe[3]), has been on the repertoire of the Hungarian State Opera since 1937 – an almost historical feat in theatre – and has been performed nearly 1,000 times to date. The globally acclaimed designer,[4] called the "magician of the stage",[5] died in 1956. This date foreshadows the legal consequence that the grandiose sets he dreamt up for the most famous operas, dramas, and ballets around the world will fall into the public domain in just two years, from 1 January 2027, due to their expiring copyright protection.

The term of protection in copyright law is a special legal institution that encompasses much more than the fact that the work can be used freely, without

[1] https://momus.hu/hangversenyek/operabemutatok/sok-ev-utan-a-bohemelet-a-moban [accessed: 22.09.2025].

[2] https://www.opera.hu/en/castandmembers/profile/olah-gusztav/2982/ [accessed: 22.09.2025].

[3] G. Staud, *Az Opera varázslója. Díszlettervek Oláh Gusztáv életművéből* [The Wizard of Opera: Ornamental Paintings from the Oeuvre of Gusztáv Oláh], "Film Színház Muzsika" 1966, Vol. 19, pp. 24-25, https://mek.oszk.hu/04100/04135/html/Staud.htm [accessed: 22.09.2025].

[4] S. Márai, *Egy megnyert ütközet* [A Battle Won], "Pesti Hírlap" 1940, Vol. 62(14).

[5] Z. Kovács-Burda, *A színpad varázslója – 65 éve hunyt el Oláh Gusztáv* [The Magician of the Stage – Gusztáv Oláh Died 65 Years Ago], 19 December 2021, https://nemzetikonyvtar.blog.hu/2021/12/19/a_szinpad_varazsloja [accessed: 22.09.2025].

permission or royalty payment, after the author's death – in most cases 70 years afterwards.[6] In line with the Berne Convention,[7] the term of protection shall be at least 50 years from the author's death, although a longer term may be indicated in domestic law. Most countries – with some exceptions[8] – take advantage of this opportunity and stipulate a term of protection of 70 years from the death of the author. Although the expiration of the copyright term of a given work may seem discouraging to the successors of the authors or those who protect copyright interests – as they may identify it with concepts such as "erosion", "oblivion", and "becoming free" – the fact that a work has entered the public domain does not mean its extinction. The determination of the term of protection and the goals behind the ideal duration are very complex.[9] On the one hand, the specificities of a copyright law relationship shall be taken into account, such as the pursuit of balance[10] and the fact that the subjects of this legal relationship (author, user, and society) might typically be guided by different purposes. On the other hand, when calculating the ideal length of the term of protection,[11] economic and market perspectives cannot be ignored,[12] since copyright is a living, moving property right that is highly exposed – to not only technological, but also market changes. For this reason, the term of protection is "ideal" if it can be a guarantee for authors and rightsholders and it remains competitive. Nonetheless, this detachment can be justified by the distancing of the successors from the creator, as well as by the fact that the creator may have created the work drawing on the existing cultural, scientific, and social environment, which ultimately "returns" to this milieu.[13]

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[6] In compliance with the above-mentioned empowerment of the Berne Convention for the Protection of Literary and Artistic Works (9 September 1886, revised at Stockholm on 14 July 1967), Article 31 of the Hungarian Copyright Act (1999. évi LXXVI. törvény a szerzői jogról) states that copyright rights are protected during the author's lifetime and for 70 years after their death.

[7] According to Art. 7 of the Berne Convention, "[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death".

[8] A shorter term of protection (50 years) can be found, for example, in the copyright law of Afghanistan, Bangladesh, Barbados, Belarus, Bolivia, Cambodia, China, Cuba, Egypt, Ethiopia, Fiji, India (60 years), Iran, Kazakhstan, Lebanon, Malaysia, Maldives, Monaco, Morocco, New Zealand, Syria, Thailand and Tunisia. However, there are even longer periods, such as in Mexico, where the term of protection lasts 100 years after the death of the author – Creative Commons, *Global Aspects of Copyright*, https://creativecommons.org/course/cc-cert-edu/unit-2-copyright-law/2-2-global-aspects-of-copyright/ [accessed: 22.09.2025].

[9] G. Dworkin, *The EC Directive on the Term of Protection of Copyright and Related Rights*, in: H.C. Jehoram, P. Keuchenius, J. Seignette (eds.), *Audiovisual Media and Copyright in Europe*, Brill, Leiden 1994, p. 30.

[10] D. Jongsma, *Creating EU Copyright Law: Striking a Fair Balance*, Hanken School of Economics, Helsinki 2019, https://ssrn.com/abstract=3547904 [accessed: 22.09.2025].

[11] R. Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term*, 2009, https://rufuspollock.com/papers/optimal_copyright_term.pdf [accessed: 22.09.2025].

[12] K. Yoon, *The Optimal Level of Copyright Protection*, "Information Economics and Policy" 2002, Vol. 14(3), pp. 327-348.

[13] A. Pogácsás, *Védelmi idő a szerzői jogban* [Term of Protection in the Copyright Law], in: A. Jakab et al. (eds.), *Internetes Jogtudományi Enciklopédia*, 2023, p. 7.

It is undeniable that culture (and dramatic works as the ancient way of cultural self-expression[14]) has an important place in society and in the legal policy of copyright lawmaking,[15] and that this special connection or relationship[16] can be reflected in both the aim of copyright law and the term of protection. Ultimately, the goal of copyright regulation is to increase *cultural public welfare* by expanding the public domain. Moreover, although the financial benefit will no longer flow to the successors, the survival of the author's name – and its legal guarantee[17] – is perhaps more important at this point than financial gain.

Therefore, to the question of whether Gusztáv Oláh's set designs are "in cultural danger", we can basically say that the expiration of the term of protection does not directly lead to the work being devalued or forgotten, but its use, modification, and adaptation do become easier.

The main research question

It is undeniable that theatrical productions are often developed through the collaboration of directors, actors, producers, and many contributors, such as the costume and scenery designers.[18] Although the question of authorship raises problems[19] in the theatre industry, especially about the copyright law status of the theatre director,[20] the copyright law protection of scenery and costume designers seems more clear – at least as far as the legislative patterns of European countries are concerned. The term "clarity" in this context refers to the fact that legislators generally stipulate that works created by scenery and costume designers are protected by copyright if they met the legal requirement. However, in practice, there are problems with the application of the law, especially in relation to the unauthorized use of sets and costumes or unauthorized adaptations of these works, which

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

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

16 R. Towse (ed.), *Copyright in the Cultural Industries*, Edward Elgar, Cheltenham 2002, pp. 141-164.

17 Art. 6bis of the Berne Convention.

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

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

20 See e.g. 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; R. Amada, *Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction*, "Arizona Law Review" 2001, Vol. 43(3); 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); E. Sápi, *A European Panorama on the Copyright Status of Stage Directors*, "Santander Art and Cultural Law Review" 2023, Vol. 9(2); L. McDonagh, op. cit.; D.S. Stein, *"Every Move that She Makes": Copyright Protection for Stage Directions and the Fictional Character Standard*, "Cardozo Law Review" 2013, Vol. 34, p. 1584.

generate questions. Thus, the question of what modifications to the set design, costumes, or the entire stage setting violate the author's copyright, typically moral rights, is particularly interesting. The other interesting aspect is the American situation, where the legal literature indicates that stage sets and costumes are not protected clearly, even though legal protection is needed.[21] By analysing the regulations of the U.S. Code,[22] it can be observed that no references to theatre set designs appear within.[23] This difference between the regulations of the USA and of the given European countries is interesting, both from a scientific perspective and from a practical viewpoint. In terms of authorization (for example, foreign plays or sets), the different regulations might complicate licensing, the scope of rights, and the contracting process.

Consequently, the study pays special attention to the distinction between the dogmatic base for set designs in the United States versus certain European countries. During the research, I have examined the copyright law of many European countries[24] and found no significant differences regarding the copyrightability of theatre set designs. Therefore, in the article I have chosen two European countries where set designs are *expressis verbis* protected. The first is Italy, where the protection of set designs is strong and unique; the other is Hungary, whose jurisdiction is familiar to me. It should be mentioned that – according to the legal interpretation and the traditionally non-exhaustive lists of copyright acts – the protection is acknowledged in the other above-mentioned European countries as well. It is also interesting, when the adaptation (or modification) of a theatrical set design may constitute an infringement and when it is considered a lawful adaptation. This issue is particularly sensitive because even a lawful adaptation – i.e. one carried out with permission – may infringe the unity of the original work (in this case, the set, costumes, and visual design) and thus the moral rights of the original author. This situation exists even when protection is clearly declared, but in the absence of declared protection, it could cause even greater harm to rightsholders and the theatre industry.

The methodology of the research

The study essentially seeks to review, in a comparative legal approach, the possible differences and similarities between the copyright rules of the Anglo-Saxon and the chosen European systems as they apply to theatrical set design and its elements. Among the research methods, the normative and dogmatic methods are the most prominent. Critical and dogmatic analyses of the relevant legal institutions and

21 M. Bailey, *Exit Stage, Enter Streaming: Copyright of the Theatrical Stage Design Elements in a Changing Theater Industry*, "Journal of Intellectual Property Law" 2021, Vol. 28(2), p. 370.

22 U.S. Copyright Act (U.S.C.), 17 U.S.C. §§101 et seq.

23 In §102 of the U.S.C., the list of works does not mention them in any form.

24 Hungary, Italy, Germany, France, Greece, Czechia, Poland, Slovakia, Croatia, and Slovenia.

legal practice were carried out in the study, because there can be different interpretations regarding the dogmatic base and the applicability of the relevant rules. Preparing the findings of the study and conducting the research, I examined some relevant legal cases from Hungarian, Italian, and American practice. In the practice of Hungarian copyright law, there have been cases where a court has had to adjudicate, and the Hungarian Council of Copyright Experts (Szerzői Jogi Szakértő Testület [SZJSZT]) has had to formulate professional opinions in legal disputes related to theatrical set designs; these professional opinions can facilitate the legal interpretation and legal development. These cases are introduced later in the paper, as appropriate to the topic.

Copyright Law Protection of the Theatrical Scenery and Scenic Design – The Difference between European and American Approaches

Conceptual approach to scenography, set design, and costumes

It is undeniable that when the scenery emerges from behind the curtain, in many cases we see excellent and elaborate works of art, whether it is a modern or classic design. Of course, it should be borne in mind that in many contemporary theatres, because of a lack of space or resources, the sets and costumes are more functional. There are basically three concepts in this area that we need to distinguish from each other: scenography, set design, and scenery.

The term "scenography" derives from the Greek word *skenographia*, which combines *skēnē* (a small building) and *graphia* (writing, drawing, or painting).[25] In theatre jargon, scenography refers to the stage image and stage world created by costumes and sets.[26] Although scenography is primarily associated with the theatre in art history, it has recently become a term that encompasses an increasingly broader range of subjects. Artistic and practice-based research in particular has contributed to moving scenography out of the theatre to encompass essentially any occurrence in any constructed or natural setting.[27] In the 20th century, the term gradually spread as it drew attention to the dynamic use of stage space for the experience of performances. Contemporary theatre studies do not identify scenography with stage decoration, but consider it a component of the entire performance.[28] Consequently, scenography is the *comprehensive planning* of the visual framework of theatrical

[25] A. von Rosen, *Why Scenography and Art History?*, "Konsthistorisk Tidskrift / Journal of Art History" 2021, Vol. 90(2), p. 65.

[26] J. McKinney, P. Butterworth, *What Is Scenography?*, in: *The Cambridge Introduction to Scenography*, Cambridge University Press, Cambridge 2009, p. 4.

[27] A. von Rosen, op. cit., p. 68.

[28] J. McKinney, P. Butterworth, op. cit., p. 4.

performances and the course of the plot, which, in addition to static structures and sets, also includes costumes, lighting, the use of colours, and the on-stage effect of visual changes resulting from movement.[29] Scenography is therefore much more than a general term for the set design, decoration, and costumes, as it encompasses the complete appearance, visuality, and unity of the stage image, and can also be viewed as the shaping of the stage performance. Legal science does not define the concept of scenography but relies on the definition used in the profession.[30]

The term "scenery" is related to this category, having a specialized meaning, as it can be considered a blueprint of the designed stage. The scenery has a much more technical nature than the scenography, as it involves the design and furnishing of the space of the play: the stage. The theatre's set designer is responsible for the operation of the various elements of the stage image, and their duties may be combined with those of the set designer and the scenography designer.[31]

The scenic designer and the scenography designer do not perform the same task, while the task of the set designer is more technical in nature. The role of scenography designer can cover the task of the set designer and costume designer, if a theatre manages the tasks uniformly. They are generally responsible for creating an intellectual work and continuing creative work. It can therefore be said that their task is to condense the writer's image for the play onto the stage.[32] The relationship between the two roles (scenic designer and scenography designer) and their attitude towards the finished stage scenery can be captured in the same way as the legal status and relationship of the architect and the contractor in the case of architectural works.[33]

Considering that a visual design cannot be examined from a copyright point of view without its individual elements, this study focusses on the individual elements of the visual design, such as costumes, sets, masking, and lighting. Although the saying goes that clothes do not make the man, a well-chosen costume for a character is already half the battle. It is no coincidence that the best costumes are eloquent.

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29 G. Székely, *Magyar Színházművészeti Lexikon* [Hungarian Theatre Art Encyclopaedia], Akadémiai Kiadó, Budapest 1994, p. 449.

30 In one case, for example, the SZJSZT interpreted scenography as "the display of the devices and graphics specified by the client on a digital photograph taken of an existing surface. The devices requested to be displayed may be light boxes, totem poles, construction nets, car graphics, etc. For example, the client may request that the design company display on the visual design required for the municipal licensing procedure how a certain light box will look above a certain store. In such cases, the visual designer cuts out the light box from the image of the light box or draws the light box and fits it onto the image of the store, above the store", Szerzői Jogi Szakértő Testület, *Konstrukciós tervek, gyártmánytervek és látványtervek szerzői jogi megítélése* [Copyright Assessment of Construction Plans, Product Designs, and Visual Designs], SZJSZT-23/10.

31 G. Székely, op. cit., p. 727.

32 Szerzői Jogi Szakértő Testület, *Díszletterv átdolgozása* [Revision of Set Design], SZJSZT-12/09/external expert opinion.

33 For more information, see J. Barta, *The Complex Presentation of Design and the Copyright Protection of Architectural and Engineering Works and Plans*, Patrocinium, Budapest 2018, pp. 227-456.

Recognizing the versatility and artistic value of prose theatre, in my point of view the most famous costumes (and sets) that reach a wider audience are associated with musical theatre. The reason for this might be that musical theatre productions, by their nature and tradition, generally rely more on visuals than prose performances. For example, Dorothy Gale's red shoes and blue apron, the costumes in *Cats*, the Phantom's mask, or Joseph's amazing technicolour dreamcoat are considered among the ten most famous costumes in musical history.[34]

Theatre theory provides a conceptual approach to costumes, related to their purpose in a stage performance. In terms of its function, the costume contains information about the nature of the play, the era it is intended to depict, the mood of the piece, its possible distorting/parodistic purposes,[35] and, perhaps most importantly, about the character. It is no coincidence that the comedian, the naïve, and the prima donna wear different styles of costume. The costume also expresses character development.

The literature states that

> it happens that some costumes start to function as sets, stretching the space, like on the runways of fashion designers who start with a grand or deliberate provocation, where the inexperienced eye, looking at the unexpected ideas, has difficulty noticing the new, hidden, very functional, practical idea.[36]

Copyright case law has also pointed out that "costumes are much more than clothes; they embody the psychological, social and emotional state of the character at a given moment as defined in the script".[37]

Legislative solutions for the copyrightability of set design

The stage set design and its (background) elements play a decisive role in terms of the dramaturgy of the given work,[38] so it is necessary for the director and the set designer to develop the play in cooperation, linking their creative activities.[39] Essentially, the set designer's activity is a creative work in the vast majority of cases. In those cases where the originality and individual nature of the work can be ascer-

[34] Y. Elahi, *Top 10 Iconic Musical Theatre Costumes*, "Home of Theatre", 15 March 2021, https://www.theatrehaus.com/2021/03/top-10-iconic-musical-theatre-costumes/ [accessed: 22.09.2025].

[35] G. Székely, op. cit., p. 339.

[36] A. Forgács, *A díszlet mint kép* [Stage Set Design as a Picture], 22 December 2005, https://szinhaz.hu/2005/12/22/a_diszlet_mint_kep [accessed: 22.09.2025].

[37] Budapest Court of Appeal, P. 26.279/2010/77.

[38] P.É. Kiss, *A színpadi tér. A téralkotás elemei, és azok dramaturgiai hatása* [The Stage Space: The Elements of Spatiality and Their Dramaturgical Impact], PhD dissertation, Hungarian Academy of Fine Arts, 2006.

[39] T. Koskinen-Olsson, N. Lowe, *Educational Material on Collective Management of Copyright and Related Rights. Module 6: Management of Rights in Dramatic Works*, WIPO, 2012, p. 11.

tained, the plan and the materialized form can also be subjects of copyright law.[40] However, it should be taken into consideration that the above-mentioned requirements of copyright law must be detected in the work. This also means that a case-by-case analysis is required and that the mere fact that a set has been designed by a professional set designer is not enough. This is basically true for all creative works and subjects of copyright law, as the peculiarity of this legal field is that works listed in the law of a given country are under legal protection if they meet the additional conditions. Thus, when the article mentions sets and costumes as works of authorship, following this interpretation I assume that the set in question meets the copyright criteria: it is original and an individual result of the set designer's work.

The copyright protection of costumes and sets per se has not been in question for quite some time in European countries, as these can be classified as a separate category of visual works.[41] Although the Berne Convention does not mention set design, scenery, or costumes directly as "literary and artistic works",[42] according to the interpretation of the law these works are considered subjects of copyright law. Basically, it can be stated that the copyright laws of the European countries examined herein provide some level of declared protection for costumes and – particularly – set designs, as we will see in some examples below. In the analysis of the specificities of creative works that serve as the basis for legal protection, I also start from this general regulatory environment.

In Italy, Chapter IV of the Copyright Act[43] deals with rights in designs for stage sets. According to the Act,

> the authors of designs for stage sets, which do not constitute intellectual works covered by copyright within the meaning of the provisions of Part I, shall have a right to remuneration when such design is subsequently used in theatres other than the theatre for which it was created. This right shall subsist for five years as from the first performance in which the design is used.

[40] See the related legal practice of Hungary: Szerzői Jogi Szakértő Testület, *Díszletterv*..., SZJSZT-12/09.

[41] Z.K. Kiss, *Díszletek és jelmezek szerzői jogi védelme* [Copyright Protection of Scenery and Costumes], "Iparjogvédelmi és Szerzői Jogi Szemle" 2021, Vol. 4, p. 35.

[42] Art. 2(1) of the Berne Convention: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science".

[43] 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 (Italian Copyright Act).

The Italian law – similarly to other continental European copyright laws – contains a list of example works which mentions set designs.[44] According to the legal interpretation,[45] sets and interior designs, room designs, etc. can be subject to legal protection.[46] The peculiarity of the legal regulation here is that if the set cannot be considered a work of authorship – because it does not meet the legal criteria – it still imposes a licensing and royalty payment obligation on the rightsholder, even if they want to use it in a theatre other than the original. This legal provision therefore goes a long way towards protecting creativity and appropriately encouraging further creative work.

Article 1(2)(n) of the Hungarian Copyright Act states that costumes, scenery, and their plans are protected by copyright. As a result of this provision, the law grants copyright to costume and set designers if the legal conditions for their work are met, i.e. the work is an individual, original creation resulting from the author's intellectual activity.[47] Before 2013, interpretative anomalies could be ascertained regarding the protection of the finished, materialized form of scenery and costume designs in judicial practice, as the act only mentioned the plans of costumes and scenery. For this reason, legal practice has repeatedly reached the erroneous conclusion that since the law only names the plan, the finished, materialized form is not under legal protection. However, after the inconsistent interpretations, a copyright expert opinion emphasized that plans of costume and set designs are complex plans/documentations,[48] while the materialized forms of costumes and sets are works of art, which are close to works of fine art and applied arts,[49] complemented by mobility and the variability of lighting.[50] This interpretation is in compliance with the wording of theatre theory, as a set design is changeable, movable, and replaceable stage equipment that marks the location of the action of a stage work. Its essence is that it is an architectural and fine art that reflects the period style, the author's instructions and the director's and set designer's concept, determined by the work to be presented.[51] As a result of the professional dialogue between

[44] Art. 2(4) of the Italian Copyright Act: "In particolare sono comprese nella protezione: [...] 4) le opere della scultura, della pittura, dell'arte del disegno, della incisione e delle arti figurative similari, *compresa la scenografia*".

[45] V. Iaia, *Copyright Protection for Stage Opera Direction*, "GRUR International" 2022, Vol. 71(3), p. 258.

[46] M. Bariè, M. Annoni, *Cross-Border Copyright Guide*, TerraLex Italy, 2018, p. 2.

[47] Art. 1(3) of the Hungarian Copyright Act.

[48] Szerzői Jogi Szakértő Testület, *Szerzői jogdíjak jelmezterveken* [Copyright Royalties on Costume Designs], SZJSZT-2/2006.

[49] Explanatory memorandum to the Hungarian Copyright Act.

[50] E. Huszthy, *Az előadás, a színpadi tér és a látvány – egy tervező szemével* [Performance, Stage Space and Spectacle – Through the Eyes of a Designer], "Criticai Lapok" 2015, https://www.criticailapok.hu/2-uncategorised/39606-az-el%C5%91ad%C3%A1s,-a-sz%C3%ADnpadi-t%C3%A9r-%C3%A9s-a-l%C3%A1tv%C3%A1ny [accessed: 22.09.2025].

[51] G. Székely, op. cit., p. 164.

legal scholars and practicing lawyers,[52] the Hungarian Copyright Act was amended in 2013.[53] Not only the plans of costume and set designs, but also the finished, materialized form[54] is now protected.

There is a different situation for designers in the legal environment of the USA, as mentioned above, because the U.S. Code does not regulate the protection of set designs, costumes, and other visual elements of a theatrical work. However, the legal literature elsewhere refers to the fact that as works of visual art, they could be subject to legal protection[55] – even though their express legal protection is not enshrined in law.[56] However, the Copyright Office of the USA took the position that "registration does not extend to the costume, prop, set or lighting itself",[57] since items used in set design, scenery, props, and costumes are regarded as "useful articles", which are not subjects of protection. On the other hand, this means that set designs and costumes are considered to be intrinsically utilitarian because the designs incorporate useful articles that have the shape and appearance of items commonly used in everyday life.[58] However, if a useful article incorporates any separable and original artwork, such as graphics, pictures, or sculpture, only the artwork may be protected. This situation might lead to unclear authorship. The interpretation of the U.S. Copyright Office adds that in such cases, the authorship should be specifically described, such as "artwork on scenery" or "soft sculpture".[59] Some legal scholars[60] do not agree with this approach either, because they emphasize the aspect – which is more acceptable to me as well – that set designs and costumes are "nonverbal visual expressions"[61] and "the sole purpose of theatrical designs on the stage is to re-create the playwright's words

[52] P. Munkácsi, *Kiss Zoltán Károly: A vizuális művészetek és a jog 2. – Az építészet, a fotóművészet és az alkalmazott művészetek szabályozása* [Zoltán Károly Kiss: Visual Arts and Law 2 – Regulation of Architecture, Photography and Applied Arts], "Állam-és Jogtudomány" 2022, Vol. 3, p. 124.

[53] 2013. évi XVI. törvény a szellemi tulajdonra vonatkozó egyes törvények módosításáról [Act XVI of 2013 amending certain laws on intellectual property], Art. 33.

[54] Explanatory memorandum to the Hungarian Copyright Act.

[55] L.A. Kamps, *Art Behind the Scenes: The Rights of Artists for Works of Visual Art Used in Television and Motion Picture Set Decoration*, "Syracuse Law and Technology Journal" 1976, p. 17.

[56] K. Gregg, *Intellectual Property Norms in American Theater*, "The University of Chicago Law Review" 2021, Vol. 88(8), p. 1844.

[57] U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, 3rd ed., 2021, §202.

[58] M. Nimmer, D. Nimmer, *Nimmer on Copyright*, Lexis Nexis, 1963, §2.08 [B], at 2-82-97 (1988).

[59] U.S. Copyright Office, op. cit., § 808.11(D).

[60] Such as Rebeca Sanchez-Roig, Matteo Mancinella, Mark Bailey, Kelly Gregg and Jennifer Womack. See also J. McKee, *Property Rights and Wrongs: Playwrights Have Well-Established Protections for Their Work, but How about Directors and Designers?* "American Theatre", 19 January 2018, https://www.americantheatre.org/2018/01/19/property-rights-and-wrongs/ [accessed: 22.09.2025].

[61] R. Sanchez-Roig, *Putting the Show Together and Taking It on the Road: Copyright, the Appropriate Protection for Theatrical Scenic and Costume Designs*, "Syracuse Law Review" 1989, Vol. 40(3), p. 1122.

by portraying the thing or place that the playwright intends while bombarding the audience" and not merely portraying the appearance of the article.[62]

The issue of the functionality of set designs and costumes

One of the most interesting and divisive issues in the legal protection of costumes and sets is their *functionality*. While in the selected European countries, the functionality of a work does not in itself exclude copyright protection, according to American copyright law, functionality is able to negate copyright protection.[63] However, according to the European practice, a double interpretation shall be followed regarding functionality, as some set elements are less or hardly usable off-stage, thus having reduced functionality. The same is true for costumes, as many costumes are useless in everyday life and are more likely to be considered works of art, as

> compared to general costume designs and dress patterns, [they are] further from being defined by purpose and closer to decorative and characteristic works of thought, that is, works of art in the narrower sense. The basic problem of copyright protection for works of utilitarian use, namely that the determinative power of function excludes all intellectual scope, arises less frequently. The result of the design, the three-dimensional realization, is marketed as a work of art rather than as a commodity – the latter being typical of industrial design.[64]

Since, in accordance with the expert opinions of the Hungarian Council of Copyright Experts,[65] costumes and set designs can be interpreted from a copyright law perspective as a special type of works of fine art and are related to them, the question arises as to how to judge those sets, and especially costumes which are completely functional. In more than one performance, it can be observed that the performers appear in their everyday clothes, among completely everyday objects. Can these costumes and the previous design phase be said to be individual, original works from a copyright perspective? According to my point of view, such costumes cannot be considered copyrightable because they hardly meet the requirements of originality and individuality. If such costumes were to be copyrightable, it could reduce the level of protection so much that it could not serve the purpose of copyright law well.

[62] 17 U.S.C. §101.

[63] M. Mancinella, *Copyright Subject Matter and a "Light" for Designers' Rights*, "Santa Clara High Technology Law Journal" 2012, Vol. 29(3), p. 539.

[64] P. Gyertyánfy, *A szerzői jog bírói gyakorlata 2006-tól* [The Judicial Practice of Copyright from 2006], "Iparjogvédelmi és Szerzői Jogi Szemle" 2012, Vol. 4, p. 42.

[65] Such as SZJSZT-23/10, SZJSZT-12/09/external expert opinion or SZJSZT-2/2006 (all cited above), as well as Szerzői Jogi Szakértő Testület, *Fotórészlet felhasználása új szerzői mű létrehozásához* [Use of Photo Excerpts to Create New Copyrighted Works], SZJSZT-40/07 and Szerzői Jogi Szakértő Testület, *Színpadi díszlet megváltoztatása* [Changing Stage Sets], SZJSZT-39/07.

Visual accessories: Makeup and lighting

The art of theatre distinguishes between two categories of face painting: masking and makeup. According to the theatre arts, a mask can be either a mask or the modification or alteration of the actor's facial features with paint, prostheses (nose, ears, chin, etc.), or false hair, according to the role.[66] The latter case is called "masking" in theatre jargon,[67] which is performed by a mask master in more complex cases.[68] In comparison, makeup in the theatrical sense means "the emphasis or covering of the actor's own, characteristic facial features so that his mimicry can be effective in the stage lighting. If the actor's facial features are also transformed according to the role with face painting, we are talking about masking".[69]

The question may arise as to whether masking can stand its ground as a work that provides a basis for copyright protection. In copyright systems based on Anglo-Saxon principles, the greatest concern[70] regarding the copyright protection of theatrical artistic makeup is its lack of fixation.[71] At the same time, the U.S. Court of Appeal dealt with the copyright protection of artistic makeup designs in the Broadway musical *Cats* and found that the makeup designs used in the play may be protected by copyright,[72] since although their "fixation" is lost from night to night, as the actors wash it off after each performance, the characters' makeup is applied in the same way every time. It is interesting to note that according to the American legal environment, face painting and makeup with a distinctive characteristic may also be protected by trademark law.[73]

However, for the sake of completeness, it is worth noting that fixation is not an exclusionary requirement for copyright law protection, i.e. it is not always a prerequisite for protection. In line with the Berne Convention, fixation is a "possible requirement", meaning that it shall be a matter for the legislation of the Member States of the Berne Union whether works shall be protected only if they have been fixed in some material form.[74] Originally, the requirement of fixation emerged in line with choreographic works, but the issues generated by the condition have

66 G. Székely, op. cit., p. 494.

67 Ibidem, p. 495.

68 Ibidem.

69 Ibidem, p. 688.

70 O. Veldkamp, *Makeup Artistry and Copyright Protection: University of British Columbia*, "Intellectual Property Law", 8 March 2021, https://iplaw.allard.ubc.ca/2021/03/08/presentation-makeup-artistry-and-copyright-protection/ [accessed: 22.09.2025].

71 "In order for a work to be copyrightable, it must be 'an original work of authorship'; that is, it must be (i) original and (ii) fixed in a tangible form" (17 U.S.C. § 102(a)).

72 *Carell v. Shubert Organization, Inc.*, 104 F. Supp. 2d 236 (S.D.N.Y. 2000).

73 S. Elie, *Protect Your Face: Body Art and Copyright (Part II)*, "Center for Art Law", 18 April 2016, https://itsartlaw.org/2016/04/18/protect-your-face-body-art-and-copyright-part-ii/ [accessed: 22.09.2025].

74 Art. 2(2) of the Berne Convention.

been in the crossfire of criticism.[75] Consequently, the Berne Convention left the question for the legislators of the Union Members.

Looking at the issue from the perspective of continental European regulation, we believe that copyright protection for artistic makeup cannot be inherently excluded. However, it is necessary that it is truly artistic makeup – that is, it goes beyond the limit of "merely making the character look prettier" and carries an individual, original character. For example, the makeup used in *Cats* truly meets this condition, since disguising the performers as cats required eight layers of makeup, applied over several hours.[76] According to some, artistic makeup is actually analogous to painting, with the only difference being that while the painter works on canvas, the mask master works on a human face.

Here again, we can interpret the makeup and mask design as an accompaniment to the costume design, as they are also conceptually designed to match the mood of the given performance.[77] For my part, I consider artistic stage makeup to be an integral part of the costume, so artistic makeup can also be the subject of copyright protection. It should be noted that in many cases, separate people design the costumes and the makeup. This can be observed, for example, in *The Phantom of the Opera*, where the creation of the complete Phantom masking was the result of a separate design process. For example, it might be interesting to consider the case of joint works, if we think about the complete design of the Phantom (masking and costume). According to my point of view, it all depends on the character itself. Can we think of the Phantom without his mask or his familiar costume? If the masking and costume are inseparable from each other in terms of the character itself, its features, its development, and its history, then it could be considered a joint work.

Just as makeup and masking are complementary to costume design, lighting is a similarly important component of theatrical scenery, and thus of the complete stage design, as lighting is able to assist in altering the mood of the performance,[78] which is a significant element of dramaturgy. In the case of many stage productions, lighting design can also play an important role dramaturgically, and sometimes light effects are also used on stage. In several European countries, a so-called lighting designer is employed,[79] whose work must be coordinated with the set designer. Lighting designers create a light plot, which includes a schematic of where all the theatrical

[75] It was pointed out that it was not logical to require fixation in the case of certain categories of productions and not in the case of others – 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. 25.

[76] M. McBride, *Appeals Court Says Cats Makeup Copyright Case Goes to Civil Trial*, "Playbill", 21 December 2000, https://www.playbill.com/article/appeals-court-says-cats-makeup-copyright-case-goes-to-civil-trial-com-93959 [accessed: 22.09.2025].

[77] Szerzői Jogi Szakértő Testület, *Fotórészlet*..., SZJSZT-40/07.

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

[79] A. Forgács, op. cit.

lighting equipment in the theatrical venue should be installed.[80] In the American theatre industry, the activity of the lighting designer is the least protected by copyright, a situation that we must again attribute to the issue of fixation.[81] Although European copyright laws provide a more secure copyright basis for sets and costumes than the U.S. Code, we can still ascertain that in the former, the copyright protection for lighting designers is the most questioned, especially in theatre practice. However, the number of infringements and cases of copying is probably the lowest here, as the different stage sizes and lighting capabilities make copying difficult.[82]

Exploitation of Set Design – The Boundaries of Adaptation

About exploitation in general

According to the rules for the use of costumes, set designs, and the related visual elements which are protected by copyright, the exercise of economic rights can be done with a usage contract from the author. For example, if a stage set is modified without the consent of the copyright holder in such a way that the stage image changes, this may constitute infringement.

Economic rights infringements against the authors of costumes and sets involve three typical behaviours, all of which are based on unauthorized use. One case is when the costumes and sets are copied for another stage work. Another, more common case is when the licence does not cover all possible uses – for example, it applies only to use in the permanent theatre and not to the external performance.[83] In such situations, royalties or a part of them are sometimes not paid. In Hungary, for instance, the court should adjudicate the damage and the amount of the royalty in the event of unauthorized use of theatrical costumes.[84] In practice, it is quite common for the designer's fee to be paid in one lump sum. The third behaviour usually occurs in unauthorized adaptations, which we will discuss in more detail in a later section.[85] In connection with the unauthorized use of a set design, the *Musenich* case[86] should be mentioned. This case concerns the set designs of productions such as *Rigoletto*, *Lucia di Lammermoor* and *The Merry Widow*, which were used and reworked in several cases, both domestically and abroad, without the designer's permission, crediting him by name, or any payment.

80 M. Bailey, op. cit., p. 379.

81 K. Gregg, op. cit., p. 1844.

82 J. Womack, op. cit., p. 225.

83 Supreme Court of Hungary, Pfv.IV.21.771/2008/7; Court of the Capital (Hungary), 6.P.24.970/2006/7.

84 Szerzői Jogi Szakértő Testület, *Szerzői…*, SZJSZT-2/2006. See also the related judicial decision: Court of Appeal of Győr, Gf.IV.20.228/2005/30.

85 Court of Appeal of Győr, Pf.I.20.055/2011/7.

86 Tribunal of Genoa, n. 157/2024.

Although U.S. copyright law does not provide clear protection for set designers, the use of sets can operate within a serious contractual framework,[87] even though it is not based on copyright, but rather on commercial grounds.

It should also be noted that, according to the rules and jurisprudence of the European legal systems examined, these violations may also be linked to the infringement of moral rights. Unauthorized reproduction may infringe the right to attribution of the original author, while modifications and adaptations may infringe the unity of the work. A few years ago, an Italian judgment[88] was released in which the issue of authorship of opera productions was examined by the court. Although the primary issue in the case was the director's copyright, the conduct that gave rise to the legal dispute was the unauthorized photography and its publication of stage and set designs under the name of another author.[89]

However, in the USA, this assessment is significantly narrower, as the reference to integrity is also a bottleneck. It can be applied almost exclusively to the visual arts under the Visual Artists Rights Act of 1990,[90] but – as mentioned above – theatrical sets do not yet fall under the protected categories of copyright law in the USA.

Framework of usage in replica and non-replica licensing

Replica and non-replica licences are most often used in cases where successful foreign musicals – most often those running on Broadway – are intended to be presented elsewhere than in the production's home country. If a theatre obtains a replica licence for a dramatic work, its production will be – true to the name of the licence – a copy, a *replica* of the original, including a copy of the costumes, sets, and choreography. In contrast, a *non-replica* performance means that the play performed abroad – with the permission of the original author, of course – will not be a copy of the original in the manner of the set design and costumes.[91] In the case of replica licences, the performance and creation of the necessary conditions is usually done by the creative team of the original piece, travelling to the country where the licence was issued to create costumes and sets that match the original.[92]

87 S. Keller, *Collaboration in Theater: Problems and Copyright Solutions*, "UCLA Law Review" 1986, Vol. 33(3), pp. 927-928.

88 Supreme Court of Cassation (Italy), Judgment no. 17565 of 18 June 2021, https://sentenze.laleggepertutti.it/sentenza/cassazione-civile-n-17565-del-18-06-2021 [accessed: 22.09.2025].

89 N. Berardi, *La regia di un'opera teatrale è autonomamente tutelabile dal diritto d'autore*, "RPLT", 1 July 2021, https://www.rplt.it/la-regia-di-unopera-teatrale-e-autonomamente-tutelabile-dal-diritto-dautore/ [accessed: 22.09.2025].

90 Pub. L. 101–650 title VI, 17 U.S.C. §106A.

91 C.M. Boursiquot, *Forging New Roads: Expanding the Theatrical Touring Market Internationally*, MA thesis, Columbia University, 2014, p. 23.

92 This is what happened, for example, with the licensing of foreign replicas of the Broadway musical *Wicked*. Ibidem, p. 29.

Replica and non-replica licences are on different financial grounds. On the one hand, theatres usually pay less for non-replica licences than for replica licences, where a complete "brand" is purchased.[93] In contrast, in performances based on a non-replica licence, the authors do not stage a complete copy of the original play, but stage it based on the creative work of the foreign theatre. Non-replica plays also convey added artistic value, and thanks to the licence, the director and other creators can bring their own intellectual activity and individuality to (some) elements and scenes of the play. Moreover, non-replica licences explicitly state that there cannot be identity of the original stage work and the foreign one, for example, in terms of costumes, sets, or choreography. However, it is very important to emphasize that the "creative space" cannot turn into an adaptation, which is mostly prohibited in these contracts. Consequently, there is no derivative work in this case either. Although in terms of copyright, the only changes that can be made in non-replica pieces are those that do not reach the level of adaptation and do not affect the entire work – but only one of its elements – the creators are still given greater creative freedom. In these stage works, the costume, set, and choreography are considered such works, *inspired by* the original and *not a derivative work*.

The replica licence limits actual creative activity and "merely" copies the original piece and the elements of the original play (direction, dramaturgy, costumes, and set designs). This staging is devoid of originality and individuality in the sense of copyright, since the piece is practically "copied" – but with the authors' permission.

Adaptation as an infringement

Adaptation creates a derivative work according to copyright law, but for the adaptation to be legal it is necessary for the rightsholder to grant permission, as it falls under the author's monopoly rights. If the changes to the sets go beyond technical modifications and constitute a reworking of certain stage elements, then the permission of the set designer is required.

A Hungarian case specifically concerned the unauthorized adaptation of stage set designs and the distortion (integrity) of the work.[94] The set designed for the stone theatre was modified because the play was to be performed in a larger open-air theatre. In this case, the fundamental problem was that the changes to the sets went beyond the "technical" changes and reached a level that qualified as a reworking of certain stage elements, for which the set designer had not given permission. In this case, the Council of Copyright Experts pointed out that despite the different stage conditions between a stone theatre and an open-air stage, no director's concept can extend to the point of reworking sets without the permission of the set designer, who is considered the author.

93 C. Lamb, J. Hair, C. McDaniel, *MKTG 5*, South-Western College Publishing, 2011, p. 67.

94 Szerzői Jogi Szakértő Testület, *Színpadi…*, SZJSZT-39/07.

In another case,[95] a legal dispute involved unauthorized modifications to the sets of a musical. The director modified the original sets for a performance in another city without the set designer's permission, and the set designer's name was omitted. The question was whether there was an adaptation in the sense of copyright law or whether the changes created a new, original work. Taking into account the specific set elements, it was determined that there was a reworking, but the modifications could not be considered new works, as they were only "resizing" due to the stage conditions.[96]

Since adaptation affects the essence of the work, it may even infringe the author's personal rights, namely the right to the integrity of their work. If the modified set design was likely to create a negative opinion about the author in professional circles, it could be damaging to their honour and reputation, thus infringing their right to the integrity of their work.

In the theatre, a modification can only be considered an adaptation under copyright law if the legal conditions are met. For example, we cannot speak of an adaptation if something is only modified technically. Such an adjustment could be if a theatre cannot technically resolve Juliet speaking to Romeo from a balcony, so a different stage technology is used for the platform. At the same time, stage technology transformations always depend on the specific legal relationship and changes – for example, an adaptation can be made to the stage design if it shows a difference in detail and elaboration compared to the previous one.[97]

However, other issues regarding the set designs may also arise from the point of view of integrity. It is a current trend to modernize classical plays and operas by using minimalist sets and costumes that are in keeping with today's fashion. It is possible to accept that this much modification of the spirit of the play alone will not constitute a violation of integrity. However, this barrier can be broken if the play uses obscene, subversive costumes and sets that are far removed from the spirit of the work.

Conclusion

While the actors, dancers, and singers are the most prominent characters in a performance, there are also key players hiding in the background and "invisibly" performing their roles: the director, the costume and set designers, and the choreographers. In the case of theatrical works, the creation and protection of creative persons cannot be limited to the protection of the contributions of the author, the performers, and possibly the composer, since the authorship of a dramatic work can be considered "polyphonic",[98] being the joint work of the performer, the writer, the director, the set designer, the costume designer, the composer, the dramaturg,

[95] Court of Appeal of Győr, Pf.I.20.055/2011/7.

[96] Szerzői Jogi Szakértő Testület, *Díszletterv*..., SZJSZT-12/09.

[97] Ibidem.

[98] L. McDonagh, op. cit., p. 31.

and the consultant.[99] Theatrical works are therefore characterized by a certain complexity, which is the result of the many interests that meet and thus clash in this genre. For example, in the design of the stage scenery, the views of the creators of the copyrighted sets and costumes must be reconciled with those of the director, who, in most cases, shall make a finished, underlying literary work suitable for stage performance.

The complexity that characterizes the stage work is also reflected in the theatrical stage design, since, as we shall see, more than one person is involved in the design of the scenery. Consequently, some American judgments, such as in the abovementioned *Cats* case, emphasize the collaborative nature of theatrical works, especially Broadway productions, and thus consider joint authorship. However, the legal literature sheds light on the fact – and I am inclined to agree with this point – that the application of joint authorship might cause unclear situations,[100] especially in the event of a partial adaptation of a dramatic work. If it is a co-authored work overall, and the given costume or set design is adapted but the play itself is not, the contracting processes should be separated. This also affects the issue of royalties, as well as any potential moral rights issues. For all these reasons, I would not consider it appropriate if the play, as a complete and complex production, were legally treated as a co-authored work. Although it is true that the collaboration of several people is necessary to stage a play, the individual creative activities could be separated. In my opinion, it would be unwise to confuse the work of adapting the script and adding music with that of makeup, set, or costume design. For this reason, I consider the regulatory concept of Italy and Hungary more beneficial: to display the set design and/or costumes among the list of copyrighted works. Basically, the other continental European countries also protect these works even if they do not name them, since they fall under the broad category of artistic works, and the European lists are generally not exhaustive. However, in my opinion, it would certainly not be a disadvantage if the stage scenery and costumes were also listed in the legislation, as this might demonstrate uniformity and a higher, clearer level of protection.

The study reviewed the main cornerstones of the activity of theatrical set and costume designers from a copyright perspective. It is evident that in the American system, copyright protection of costume and set designers is not recognized, primarily due to the functional nature of the works. In contrast, in European systems, legal protection is not negated by functionality, but rather given a specific meaning. Therefore – and from the relevant positions of the legal scholarship – we can conclude that the copyright rules of European countries place the interests of the designer and the symbolic and legal recognition of their creative work more prominently.

[99] G.E. Bentley, *The Profession of Dramatists in Shakespeare's Time 1590–1642*, Princeton University Press, Princeton 1971, p. 198.

[100] M. Kieffer, *"The World Was Wide Enough": Granting Copyright Protection to Theatrical Costumes in the Streaming Era*, "University of Illinois Law Review" 2023, Vol. 2, p. 598.

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