

“GIVING LIFE TO A WORK OF ART” – DRAMATIC WORKS AND THEATRE DIRECTORS FROM THE VIEWPOINT OF COPYRIGHT LAW

„OŽIVENIE UMENIA“- DRAMATICKÉ DIELA A DIVADELNÝ REŽISÉR Z POHLĀDU AUTORSKÉHO PRÁVA

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ABSTRACT

The paper focuses on the special copyright law features and issues of dramatic works in the Hungarian, German, and English copyright laws. The paper put emphasis on the role and situation of the theatre director. The director has a vital role in the staging process. However, this essential role, his copyright law situation is not fully recognized and settled by the legislator. After a brief general introduction about copyright protection of dramatic works, the role of the director is presented due to the specialities of dramatic works, so in line with the aleatoric nature of dramatic works, the theatrical specialities of adaptation and the theatre-specified application of integrity right. In the paper I outline some solutions for this incomplete situation of theatre director according to the Hungarian, English, and German legal theory and practice.

ABSTRAKT

Prspevok sa zameriava na osobitn prvky a zležitosti autorskho prva tkajce sa dramatickch diel v maďarskom, nemeckom a anglickom autorskom prve. Prspevok zdoraňuje rolu a pozciu divadelnho reжіsera. Reжіser m zsadn rolu v rmci inscenanho procesu. Avšak tto jeho rola, jeho situcia v oblasti autorskho prva, nie je zkonodarcom dostatone reflektovan. Po krtkom vseobecnom uvode o ochrane autorskch prv k dramatickm dielam je predstaven rola reжіsera z pohľadu osobitosti dramatickch diel, a to s prihliadnutm na aleatorick povahu dramatickch diel, divadeln osobitosti adaptcie a s prihliadnutm na osobitosti aplikcie prva na integritu v rmci divadelnch podmienok. V prspevku navrhujem urit riešenia vo vzťahu k takejto nekompletnej situcii ohľadom divadelnho reжіsera podľa maďarskej, anglickej a nemeckej prvnej terie a praxe.

I. INTRODUCTORY THOUGHTS

In the article I would like to outline some copyright law specialities in line with dramatical works, theatrical productions and especially with the special situation of theatre director.

Dramatic works shall be regarded as integral part of copyright law and culture as well since theatre plays entertained the audience long before the birth of copyright law. Copyright law was born as a result of a long development,² but this type of work has played a major role almost from its initial phase. It also shall be admitted that theatres have a positive impact on the

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² For an overall description about the historical development of copyright law see: ATKINSON, B.–FITZGERALD, B. *A Short History of Copyright-The Genie of Information*, Springer International Publishing, Switzerland, 2014.; BOYTHA GYRGY, *Whose Right is Copyright? Festschrift fur Eugen Ulmer zum 80. Geburtstag*, GRUR, Int., 1983, pp. 379-385.; SILKE VON LEWINSKI, *International Copyright Law and Policy*, Oxford University Press, 2008.

economy, cultural life and cultural tourism of a given country. The activities of theatres are important from the point of view of the business as well.³

As I mentioned it before the copyright law protection of dramatic works was the result of a long development, just as the born of copyright law itself. However, the protection of dramatic works was undoubted since the beginning of the copyright law declaration. It is enough to think that even the first version of the Berne Convention⁴ declared the copyright law protection of dramatic works. The Berne Convention⁵ is often called as the mother of all copyright conventions,⁶ or as the Magna Charta of international copyright conventions.⁷ The BC has had a huge impact on the international protection of authors and its importance is still indisputable.⁸ It was the first document which provided effective and cross-border protection to authors.

II. THE PROTECTION OF DRAMATIC WORKS IN THE NATIONAL COPYRIGHT LAW ACTS

Dramatic works, as a definition, can be interpreted in a wider and narrower sense. In the wider sense it includes all works created for stage, such as dramatic works, dramatico-musical works, choreographic works, and pantomimes.⁹ In the narrower sense dramatic works mean plays and musicals which are intended for a theatrical performance. It is quite interesting, that we can not find a unanimous definition for dramatic works in the copyright law legal literature.

For example, in the German legal literature, the expression of dramatic work is a concept which includes drama, comedy, musicals, pantomimes and choreographic works as well,¹⁰ which are often co-written.¹¹ The German copyright act (UrhG¹²) declares that artistic and literary works are protected by copyright law. The list of the artworks in the UrhG is a non-exclusive, but an exemplary list.

The British copyright law (CDPA¹³) protects dramatic works, with the requirement that they shall be recorded or fixed in a tangible form in order to get copyright protection.¹⁴ The CDPA regulates the subject matter of copyright law and lists the protected works in the Section 1. In this regulation dramatic works can be found.¹⁵ The British legal literature emphasises, that it is a surprisingly difficult task to define dramatic works, because it seems self-explanatory, but

³ For example, in Hungary, the Madách Theatre obtained the first non-replica performance right in the world for most of the musicals of Andrew Lloyd Webber. Furthermore, the dramas of Ferenc Molnár are played not only in Hungary but in other countries with great success as well.

⁴ Berne Convention for the Protection of Literary and Artistic Works (henceforward abbreviated as: Berne Convention or BC).

⁵ Following the strong impact of technical progress on copyright law, the BC was supplemented and revised eight times since its adoption.

⁶ RAMCHARAN, ROBIN: *International Intellectual Property Law and Human Security*, Asser Press, Springer, TheHague, 2013. s 47.

⁷ KOUMANTOS GEORGES: *The Future of the Berne Convention*. Columbia- VLA Journal of Law & the Arts, Vol. 11 : 225. 1986, 230.

⁸ BENTLY, LIONEL – SHERMAN, BRAD: *Intellectual Property Law*, Oxford University Press, 2014. 40.; Reinbothe, Jörg – von Lewinski, Silke: *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP*, Oxford University Press, 2015. 3.1.0.1; Koumantos: *Op.cit.* 225-237.

⁹ Unesco – WIPO, *Committee of governmental experts on dramatic, choreographic and musical works*, Report, Paris, 1987, p. 7.

¹⁰ CLAIRE DIETZ – JAN EHRHARDT, *Theaterrecht*, In, ARTUR – AXEL WANDTKE – CLAUDIA OHST, *Praxishandbuch Medienrecht, Band 2. – Schutz von Medienprodukten*, Walter de Gruyter GmbH, Berlin, 2014, p. 267.

¹¹ BEATE KEHRL, *Urheber- und Leistungsschutz, Verwertungsgesellschaften*, In, Hanns Kurz – Beate Kehrl – Christoph Nix, *Praxishandbuch Theater- und Kulturveranstaltungsrecht*, C.H. Beck, München, 2015, p. 584.

¹² Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), 1965 (henceforward abbreviated as: UrhG)

¹³ Copyright, Designs and Patents Act 1988 (henceforward abbreviated as: CDPA).

¹⁴ MAHFUD MAHFUD - FAISAL A . RAN, *The Idea - Expression Dichotomy n Artistic Works: The Case Study in the United Kingdom*, *Journal of Intellectual Property Rights* Vol 25, May-July 2020, 92.

¹⁵ CDPA 1. § (1) a) 1 Copyright and copyright works. 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.

we have to separate the plot or libretto and the complete theatrical performance,¹⁶ which shall be capable for performance.¹⁷ The British judicial practice first emphasized the significance of capable for performance in the Hugh Huges v Broadcasting Corporation of New Zealand¹⁸ case.¹⁹

According to my point of view, the copyright law related definition of dramatic works can be described, as the following: 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 it is suitable for public performance.

It seems to be general, that most of the European copyright laws do not contain specified regulations to dramatic works, so the general rules shall be applied to them. This situation can cause problems and legal disputes between parties, because dramatic works have quite complex nature, therefore some interpretative

In the following lines I show some national examples for the copyright protection of dramatic works.

First of all, it shall be noted, that in Hungary there is the fourth copyright act²⁰ in effect, which states that dramatic works are protected by copyright law. According to the rules of the Hungarian Copyright Act (HCA) all literary, academic, scientific, and artistic works are protected by copyright, regardless of whether they are designated in the Act.²¹ The Hungarian Copyright Act adds that a work or creation is entitled to copyright protection based on its individualistic and original nature deriving from the intellectual activity of the author. Copyright protection does not depend on quantitative, qualitative, or aesthetic characteristics or any judgment of the quality of the work.²² Following this key phrase, the Act lists the most typical works that are subject to copyright.²³ It is important that, similarly to the German and Austrian²⁴ copyright law systems,²⁵ the Hungarian Copyright Act only uses an exemplary list, however, as I mentioned it above, the Act states that dramatic works are protected by copyright law. But in advance, it shall be noted that the Hungarian Copyright Act does not contain detailed provisions about dramatic works. It states that plays are subject to copyright,²⁶ but in other questions (e.g. usage, licensing, moral rights, rights of director) it doesn't give us special rules, so we shall take into consideration the general rules. It is not the best solution, because there are lots of special features of dramatic works, which have to be taken into account in relation to the nature of the protection.

¹⁶ WILLIAM CORNISH – DAVID LLEWLYN – APLIN TANYA, *Intellectual Property: patents, copyright trade marks and allied rights. Seventh Edition*, Sweet and Maxwell, London, 2010, p. 450.

¹⁷ PAUL TORREMANS, *Holyoak and Torremans Intellectual Property Law*, Oxford University Press, United Kingdom, 2016, p. 206. See also: Hugh Huges Green (Appeal No. 18 of 1989) v Broadcasting Corporation of New Zealand (New Zealand) [1989] UKPC 26 (18 July 1989).

¹⁸ Hugh Huges Green (Appeal No. 18 of 1989) v Broadcasting Corporation of New Zealand (New Zealand) [1989] UKPC 26 (18 July 1989).

¹⁹ LEE, Y.H. United Kingdom Copyright Decisions 2017. *International Review of Intellectual Property and Competition Law*, vol 49, 2018, 324.

²⁰ Act LXXVI of 1999 on Copyright (Henceforward abbreviated as HCA or Hungarian Copyright Act).

²¹ HCA, Section 1 (2).

²² HCA, Section 1 (3).

²³ HCA, Section 1 (2).

²⁴ Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz) BGBl. Nr. 111/1936.

²⁵ HANNS KURZ - BEATE KEHRL - NIX CHRISTOPH, *Praxishandbuch Theater- und Kulturveranstaltungsrecht*, C. H. Beck, München, 2015, p. 584.

²⁶ HCA, Section 1 (2) d).

III. THE SPECIAL ROLE OF THEATRE DIRECTOR

Lots of people participate at the process of staging a dramatic work and they all have crucial role in relation to the success of the production. These characters are the author of the work, the performers, the costume and scenery designers and the director.

As we saw it in the definition, one of the most important, essential elements of dramatic work that it is *directed*. Therefore, the role and work of directors are vital and indispensable. The director is the key role of a theatrical play because the threads of this genre come together in his person. The reason of it can be found in the complex nature of dramatic works. In the following I would like to show those elements of dramatic works which shall be interpreted in a special way in the system of copyright law, because of the special role of director and the special nature of dramatic works as well. These aspects, which shall be interpreted in a special way in line with dramatic works are the followings: the aleatoric nature of dramatic works, the importance of adaptation and the connection between the work of director and the right to integrity.

1. The aleatoric nature of dramatic works

The WIPO Glossary emphasizes, that „*The way a dramatic or dramatico-musical work is performed and presented to the public, usually in a theater. Under certain national laws, stage productions are protected as a separate category of works, provided they correspond to the requirements of originality. In such a case, in general, the director of the stage presentation is recognized as the author thereof.*”²⁷ In the definition part of the Glossary the Organization deals with the features of aleatoric works and says that the most important in these works, that the author leaves space for the creative contributions of those who perform or otherwise present the work for the audience. This situation mostly occurs with dramatico-musical works. The Glossary adds that “*the majority of dramatic works correspond to the features of aleatoric works, in the sense that their authors do not determine all the elements of what is supposed to emerge as a stage production of such works.*”²⁸ Finally we can read the following: “*The contributions of the persons who complete such works may be protected – according to the nature of the contributions and to the legal characterization of the emerging result in the given national law – as specific adaptations or contributions to a composite work.*”²⁹

So, in line with the WIPO’s opinion, aleatoric elements of dramatic works mean that the director (as a contributor) is entitled to make some changes which are arisen from his creativity. Of course, if these changes reach the level of adaptation, the authorisation of the author or the right owner is required not only to the public performance of the play but for the adaptation of the original work as well.³⁰

In my opinion the aleatoric attribute of dramatic works can be appear in two ways. One way is when a novel or a short story, which the author did not write to stage originally, became dramatized (e.g. Margaret Mitchell’s *Gone with the wind*, which was presented as a musical in 2003). In this case the director can form some scenes, elements of the work for the purpose it could be performed at the stage. In such cases adaptation is quite necessary. In the other form when the author writes a play originally for the theatre’s order. In these cases, the aleatoric nature and the necessity of adaptation occur rarely. It may occur that the author does not want to determine every element of a scene and leaves possibility and latitude to the director.

²⁷ FICSOR MIHÁLY, *Guide to the Copyright and Related Rights Treaties Administered by WIPO, and Glossary of Copyright and Related Rights Terms*, World Intellectual Property Organization, Geneva, 2003, p. 312.

²⁸ FICSOR: *op. cit.*, p. 265.

²⁹ FICSOR: *op. cit.*, p. 265.

³⁰ See in details: SÁPI EDIT, *Aleatoric nature of dramatic works*, In: KÉKESI TAMÁS (ed.), *MultiScience - XXXI. microCAD International Multidisciplinary Scientific Conference*, Miskolci Egyetemi Kiadó, Miskolc, 2017, pp. 1-8.

As a summary, we can state that dramatic works has aleatoric nature, because the author does not, and in most of the cases (s)he can not, define every elements of the work. This speciality results a kind of artistic freedom for the director, but this does not mean that the director automatically turns into the position of the author in the copyright sense.

The director can be considered an author only if (s)he exploits the aleatoric nature of the dramatic work in such way that explodes the free space, latitude got from the author. Aleatoric nature gives the director freedom to show the own creativity, to incorporate the thoughts into the work. But we need to take into consideration that the abovementioned freedom can not result the harm of the original author's rights, especially the right to adaptation and the right to integrity.

2. The right to adaptation

Dramatic works are regularly used by public performance and adaptation. Between the right to public performance³¹ and the right to adaptation³², the former is the less problematic in the light of copyright law regulations. Here, at that point we can find the connection between the activity of the director, the aleatoric nature of dramatic works and the right to adaptation. Interpretation of the copyright features of the *adaptation right* is much more difficult than any other economic rights.

The Berne Convention regulates the right to adaptation in the Article 12 when declares that "*Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.*" in line with this provision the Convention provide the exclusive, monopoly right to authorize the preparation of derivative works.

According to the Section 29 of the HCA, "*Authors have the exclusive right to adapt their works and to authorize other persons to do so. Adaptation constitutes the translation, stage or musical adaptation, and motion picture adaptation of a work (...) as a result of which a work that is different from the original is created.*"

The legal basis of this situation, is that copyright protection extends to the reworking, adaptation, or translation of the work of another author, without any injury to the rights held by the author of the original work, if it has an individualistic and original nature.³³ A work can be regarded a derivative work, if it has the conditions of copyright protection, so it have individualistic and original nature,³⁴ which is deriving from the intellectual activity of the author.³⁵

The UrhG interprets adaptation (*Bearbeitung*) in line with its definition. According to the §3 of the UrhG translations and other adaptations of a work which are the adapter's own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work.³⁶ A reworking occurs when the adapter introduces a change in the form

³¹ The Article 15 of the German Copyright Act provides rules about the exploitation in general. In addition, the Article 15 (3) sets out the definition public, which is important from the viewpoint of public performance (öffentliche Wiedergabe). According to the German copyright law, another form of public performance right is also known, which can be regarded as theatrical public performance and is called *bühnenmäßige Aufführungsrecht*. This one means the theatrical performance of musical works, dramas, or other works of art. In the British copyright act, the Article 16 (c) sets out the obligation to authorize the public performance of copyright works by the rightholder. In the HCA right to public performance means that authors have the exclusive right to perform their works publicly and to authorize other persons to do so. Performance constitutes making the works perceptible to those who are present.

³² HCA Section 29.

³³ HCA Section 4 (2) See also: TATTAY, LEVENTE: *Intellectual Property [Hungary]*. The Netherlands, Wolters Kluwer, 2019, 88-90.

³⁴ RAHMATIAN, ANDREAS, *Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure*. International Review of Intellectual Property and Competition Law, Vol. 44, 2013, 5.

³⁵ About the Hungarian rules of adaptation and its relation to theatre, see: SÁPI EDIT, *Átdolgozás vagy nem átdolgozás: ez itt a kérdés. Az átdolgozás jogának érvényesülése a színpadon*, Iparjogvédelmi és Szerzői Jogi Szemle, 2018/4., pp. 7-29.

³⁶ UrhG §3 *Übersetzungen und ander e Bearbeitungen eines Werkes, die persönliche geistige Schöpfungen des Bearbeiters*

or/and content of the original work. It is also an important condition, that this change shall be personal to the creator and shall be individual.³⁷ Revisions may be made by altering the original work, such as translating it or converting it into another genre (e.g. from a novel to a stage production), or possibly updating it from a linguistic point of view, except where it is purely technical in nature.³⁸ The §23 of the UrhG emphasises the exclusive nature of adaptation, when it states that adaptations or other transformations of the work may be published or exploited only with the consent of the author of the adapted or transformed work.³⁹ In line with the relationship of these two rules we can see, that §23 protects the rights of the original author, and §3 constitutes copyright law to the adapter.⁴⁰ Adaptation involves changing in the form of the underlying work, but it is not the only case of adaptation.⁴¹ In the sense of copyright, adaptation means that the workflow of the adapter covers such margin which allows to shape the original work in his own image (*Gestaltungsspielraum*).⁴² The adapter does not acquire the rights belonging to the original work because of the adaptation. This is the reason why the use of the original work requires the consent of the author. However, the reverse is also true, so the adapted derivative work cannot be used by the original owner without the consent of the adapter.⁴³ The UrhG fixes the rule of “*freie Benutzung*”⁴⁴, which incorporates the notion of “*freie Bearbeitung*”. According to this, if an independent work created in the free use of the work of another person it can be published or exploited without the consent of the author of the original work. The name of this rule mirrors the case of a kind of “free adaptation”.

The British Copyright Act (CDPA) deals with the right to adaptation in the Section 21. Under the relevant rule, the right to adaptation is limited only to the literary, theatrical and musical works.⁴⁵ In this sense, adaptation means on the one hand the translation and on the other hand it covers the dramatization of a non-dramatized work and vice versa.⁴⁶ Elsewhere, it is emphasized that it is not possible to regard any modification or alteration of a literary or dramatic work as an adaptation. For example, just the shortening of a literary work is not an adaptation.⁴⁷

In case of dramatic works, the interpretation of adaptation right can be much more complicated because of the special nature of dramatic works. Firstly, the notion of adaptation in the field of copyright law and in theatrical science and practice is different. In theatrical literature and practice, the adaptation for stage has a broader sense than the adaptation in the area of copyright law. We can see that the adaptation in the sense of copyright law, means, that a derivative work is born.

In the theatrical world, reworking or adaptation can be of particular importance in many ways. Adaptation can have positive impact on the development of culture and the arts. The difference between the content of the two type of adaptation (the copyright-sense and the theatrical-sense) can cause problems in relation to the theatrical participants and artists, when they are trying to judge their own artistic contribution through the eye of copyright law, since

sind, werden unbeschadet des Urheberrechts am bearbeiteten Werk wie selbständige Werke geschützt.

³⁷ ERICH SCHULZE, *Urheberrecht in der Musik*, Walter de Gruyter, Berlin-New York, 1981, p. 117.

³⁸ KIRSTEN-INGER WÖHRN, 2. Kapitel – Das Werk, In: Artur-Axel Wandtke (ed.), *Urheberrecht*, De Gruyter, Berlin, 2016, p. 90.

³⁹ UrhG § 23 *Bearbeitungen oder andere Umgestaltungen des Werkes dürfen nur mit Einwilligung des Urhebers des bearbeiteten oder umgestalteten Werkes veröffentlicht oder verwertet werden.*

⁴⁰ SCHACK, HAIMO: *Urheber- und Urhebervertragsrecht*. 5. Auflage, Mohr Siebeck, Tübingen, 2010.134-135.

⁴¹ WÖHRN, *op.cit.*, p. 89.

⁴² SCHACK, *op.cit.*, p. 135.

⁴³ SCHACK, *op.cit.*, p. 136.

⁴⁴ UrhG § 24 (1) *Ein selbständiges Werk, das in freier Benutzung des Werkes eines anderen geschaffen worden ist, darf ohne Zustimmung des Urhebers des benutzten Werkes veröffentlicht und verwertet werden.*

⁴⁵ CDPA Section 21 (1).

⁴⁶ CLAIRE HOWELL – BENJAMIN FARRAND, *Intellectual Property Law*, Pearson, Harlow, 2014, p. 46.

⁴⁷ TIM PRESS, *Intellectual Property Law Concentrate: Law Revision and Study Guide*, OUP Oxford, 2013, p. 25.

they are basically start from the theatrical approach rather than the narrower and more restrictive copyright approach. The discrepancies arising out of this difference do not helps the relationship between theatrical art and copyright law, which is otherwise vulnerable as well. If we would like to compare the definition of adaptation in the copyright law and in the theatrical sense, we can see, that the theatrical concept basically focuses on the ways in which a dramatic work is born. This includes translation, re-stylization, overhaul and updating.⁴⁸ However, this concept of theatrical adaptation cannot be wholly matched to the concept of adaptation in the copyright law. While in the copyright law adaptation means and requires that a derivative work is born, the theatrical adaptation does not require it. 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.

3. The aspects of moral rights – the sensibility of the integrity right

3.1. About the integrity in general

Moral rights of authors are vital part of the system of copyright law. According to the Hungarian – and to most of the European – copyright law system authors cannot assign or waive their moral rights or have these rights assigned to another person in any other manner.⁴⁹

The Hungarian Copyright Act deals with three moral rights: the right to publication the work,⁵⁰ the right to designation the name of the author⁵¹ and the right to integrity.⁵²

According to the German Copyright Act moral rights of author are also protected (*Urheberpersönlichkeitsrecht*) in the §§ 12–14. Similarly to the HCA, the UrhG lists the moral rights, so the right to publish the work (*Veröffentlichungsrecht*)⁵³, the right to designation of name (*Anerkennung der Urheberschaft*)⁵⁴ and the right to integrity (*Entstellung des Werkes*)⁵⁵. These central moral rights rules are complemented with the §§ 25, 39 and 42.⁵⁶

In the CDPA moral rights can be found in Chapter IV, where it lists the right to be identified as author or director and the right to object to derogatory treatment⁵⁷ of work.⁵⁸

An essential problem of moral rights is that they are highly protected due to the rules of copyright law in theory, but in practice, they are very vulnerable. This kind of vulnerability can be discovered and detected much easier in some cases and it raises serious interpretative questions in other cases. For example, the violation of the right to indication the name of the author can be identified easier than harming of the integrity of the work.

The right to integrity of the work, or with other terminology, the protection of the unity of the work raises the most interesting questions amongst moral rights. According to the HCA “*The moral rights of an author shall be considered violated by every kind of distortion and*

⁴⁸ See in detail: SZÉKELY GYÖRGY, *Magyar Színházművészeti Lexikon*, Akadémiai Kiadó, Budapest, 1994.

⁴⁹ HCA § 9 (2).

⁵⁰ HCA Section 10 (1) Authors decide whether their works can be published.

⁵¹ HCA Section 12 (1) Authors have the right to be designated as the author on their works or in publications pertaining to their works - depending on the size and nature of the publication. Authors must be designated when a part of a work is adopted, quoted, or presented. Authors are entitled to exercise their right to designate their name in an appropriate manner and depending on the nature of use.

⁵² HCA Section 13.

⁵³ UrhG. § 12.

⁵⁴ UrhG. § 13.

⁵⁵ UrhG. § 14/

⁵⁶ GROSHEIDE W. Moral rights. Research Handbook on the Future of EU Copyright / E. Derclay (ed.). Cheltenham: Edward Elgar Publishing, 2009. P. 262.

⁵⁷ IONA HARDING - EMILY SWEETLAND: Moral rights in the modern world: is it time for a change? *Journal of Intellectual Property Law & Practice*, Volume 7, Issue 8, August 2012, 566.

⁵⁸ CDPA. Section 80; See also: DE WERRA, JACQUES: The moral right of integrity. In: Derclay, Estelle (ed.): *Research Handbook on the Future of EU Copyright*, Edward Elgar Publishing, Cheltenham, 2009. 267-285.

mutilation or alteration in any manner or any form of misuse of his/her work which prejudices the honour or reputation of the author”.

The protection of the integrity of the work (non-distortion) is one of the most important and elementary personal rights of authors but also it is the most complex and it is complicated because it shall be applied in a wide variety of disputes. The right to integrity expresses the close relationship between the work and the author, so the basic purpose of the legal regulation can be understood: the work of the author shall be presented to the public without any distortions, or such changes, which would harm the reputation and honour of the author. The reason for this rule is that the author is adjudged on the basis of his works by both society and the profession. This situation makes the right to integrity the most sacred right – besides the abovementioned name right, – because the works shall be published in the way the author created it.

The British legal terminology – where the terminology of right of respect can be used besides the right of integrity – reflects that this right includes the appreciation and respect of the author. The purpose of this rule is to prevent the disadvantageous influencing the author’s social and professional adjudication by outsider people.

The protection of the unity of the work must be identified with the concept of completeness and sacredness. This does not necessarily mean the physical unity of the work, but rather it is intended to ensure the spiritual unity, the integrity of the message of the work. The purpose of integrity protects the work as a whole, including its title as well, but it is also important that it shall not be limited to those works which are materially embodied in copies.⁵⁹ The actual enforcement of the very abstract general rule of integrity shall be applied in a different way in the variant forms of works. In connection with the rule of integrity the most important consideration is that this right request different interpretations in each types of works. In a dispute over the interpretation of integrity, when we shall answer the question whether the unity of the work was harmed or not, we can only give a correct answer by considering all aspects of the concrete case and all special aspects of the concrete genre.

The right to integrity is emphasized in many European countries as well. Jacques de Werra thinks that the German and French copyright law provide for the most protective regimes for moral rights and specifically for the right of integrity.⁶⁰

The German copyright law applies a special rule to protect the integrity of authors⁶¹ and performers⁶² and does not prohibit the modifications generally to the latter, but only protects them from such changes that have a negative impact on their reputation and honour.

In the CDPA we can also find the integrity rule. According to the Section 80 of the CDPA, the author of a copyright literary, dramatic, musical or artistic work, and the director of a copyright film, has the right not to have his work subjected to derogatory treatment.⁶³ The Act also adds that treatment of a work means any addition to, deletion from or alteration to or adaptation of the work, other than a translation of a literary or dramatic work, or an arrangement or transcription of a musical work involving no more than a change of key or register.⁶⁴ Due to the Act the treatment of a work is derogatory if it amounts to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author or director.⁶⁵

⁵⁹ GYERTYÁNFY PÉTER (ed.). *Nagykommentár a szerzői jogi törvényhez*, Budapest: Wolters Kluwer, 2014.

⁶⁰ DE WERRA: *Op.cit.* p. 279.

⁶¹ *UrhG.* § 14.

⁶² *UrhG.* § 75.

⁶³ CDPA. Section 80 (1).

⁶⁴ CDPA. Section 80 (2).

⁶⁵ CDPA. Section 80 (3).

3.2. The harm of the integrity in theatrical productions

The right to integrity can often be harmed due to a theatrical adaptation, but there are not so many published legal cases about this topic. This situation can be traced back to some reasons, which can limit the real enforceability of the harm of the right to integrity. On the one hand it can be observed that such radical interventions into the spirit of the original work are often done for works which term of protection has already been expired. On the other hand, disputes between the theatre and the author are often closed with a perpetual agreement. For these reasons, it is often difficult to “catch” the harm of the integrity of the given work in the stage, even if it is felt that the original piece has barely stayed on the stage. As we mentioned it before, the unity, integrity of the work covers the physical unit and the unit of the content of the work. However, it cannot be stated with certainty that the disintegration of the physical unity of a work would result always an infringement of the integrity. The mere fact that the intermission of the play, for various technical reasons, is not put to the exact place where the author of the original work intended, does not mean that the integrity of the work is gets hurt. Consequently, we shall regard the play as a complete unit, and it would be unreasonable for such a rigid application of the rule would damage the integrity of the work. At the same time, it cannot be completely said that the disintegration of the physical unit would never constitute a breach of integrity.

During theatrical performances we can see at several times that the original features and original spirit of the work is fading on the stage or moreover it might appear unrecognizable. The most important question in relation to this topic is, which are the most common examples of the infringement of integrity right of dramatic works. It is quite hard task to list the cases of infringement of right to integrity because all aspects of the certain case shall be taking into consideration. If we would like to outline the most common examples of the infringement of unity of the work, the following cases can be examples: distortion and misrepresentation of the content or the message of the work, deleting important scenes while others are exaggerated, if these changes result injurious effect to the author. For example, if the theatre performs the work in a way, where the original script is radically changed, and the political storyline is highlighted at a disadvantage of the lovestory, this can constitute the infringement. It also can be infringing if the theatre changes the scenery design, the decoration of the performance without the consent of the scenery designer, and it is harmful for the reputation and honour of the designer, because (s)he is entitled to copyright due to the HCA.

The German copyright law applies a special rule to protect the integrity of authors⁶⁶ and performers⁶⁷ and does not prohibit the modifications generally to the latter, but only protects them from such changes that have a negative impact on their reputation and honour. The German legal literature on the theatrical dimension of the right to integrity emphasizes that the author is not only interested in receiving his remuneration, but also in communicating his work to the public in the way he wrote it. Because of this, authors or their heirs, often require a controlling right in the performance contract to oversee and protect the integrity of the work on the stage. Within its scope, the author can influence the choice of director, actor or set designer.⁶⁸

In the German jurisprudence we can find such stage productions where the original work is hardly met by the new stage version.⁶⁹

The stage version of Bertold Brecht's *Baal*, by a director named Frank Castorf, is a very famous legal dispute in Germany. Castorf was a member of the so-called Regietheater (the

⁶⁶ UrhG § 14.

⁶⁷ UrhG § 75.

⁶⁸ Schack, *op.cit.*, p. 559.

⁶⁹ For example the *Baal*-case, the *Götterdämmerung*-judgement and the *Csárdásfürstin*-case.

director's theatre) movement and was already famous for his peculiar productions before Baal. In 2015, the Munich Residenztheater was sued by the heirs of Brecht, because according to their point of view, Castorf interpreted the concept of theatrical directing too freely and Brecht's work was staged in such a way that, there was little left of the original work. His peculiar adaptation was most manifested in the fact that he has taken texts from the works of several other authors and incorporated them into Baal, and he relocated the plot to the time and place of the Vietnam War. The Suhrkamp-Verlag, representing Brecht's heirs, sued the theatre on the ground that the settlement had infringed copyright and the licence agreement between them.⁷⁰ According to the terms of the contract between Suhrkamp-Verlag and the theatre, a prior permission from the Suhrkamp-Verlag is required to modify the text of the play.⁷¹ Eventually, the theatre became a loser by the court order. The Baal could be performed once more in Munich and once more at the Theatertreffen in Berlin.⁷²

According to the judicial practice we can say that the infringement of integrity right can be found in such situations, where the original meaning of the work is distorted, or some scenes are overemphasized others are deleted, and the meaning of the production became strange or aggressive, and eventually it is detrimental to the original work and its author.

IV. INTERPRETATIONS AND SOLUTIONS ABOUT THE COPYRIGHT LAW PROTECTION OF THEATRE DIRECTORS

1. Scientific viewpoints about the copyright situation of theatre director

I think that theatre directors have so crucial role in line with the dramatic work, that they shall be entitled by a kind of legal protection. In the followings we will see that it is possible to argue both for and against the copyright protection of the director. The director plays a role in connection with the conflict of rights between the creators of most stage productions. The map of conflicts of rights is most often drawn either in such a way that the rights and interests of two directors' conflict with each other, or in such a way that the director conflicts with the author or the costume or set designer. These conflicts can be solved much more easily if the legislator would clearly take a stand in connection with the situation of director.

The Anglo-Saxon legal literature emphasizes that when we talk about the copyright protection of a director, we shall take into consideration, that the director is not the same kind author as a stage author, the author of the original play. The basic difference is that the latter begins the creative process with a blank paper, which is constantly filled with characters, situations, and many other original elements. In contrast, a director's creative work usually begins when another work has already been completed.⁷³ According to some viewpoints, theatre directors are the losers of copyright law, because while a playwright, a composer, a choreographer, and a costume and set designer can claim protection from their copyright according to the copyright laws, this right is not clearly guaranteed to the director.⁷⁴

There are some opinions, which expressly deny that directors shall be entitled by copyright protection. According to *Beth Freemal*, the works of directors shall not be protected by copyright law, because she thinks the directors' concept shall be regarded as an idea, which can not be protected.⁷⁵ I can not agree with this view, because I think is a simplified interpretation

⁷⁰ LG München I - 21 O 1686/15.

⁷¹ PODSZUN, RUPPRECHT: Frank Castorf's „Baal” – Director's Theater on Trial – Theater Directors in Conflict with Copyright Law in Germany, SSRN Electronic Journal, April 2016. p. 3.

⁷² LG München I - 21 O 1686/15.

⁷³ AMADA, RICHARD: Elvis karaoke Shakespeare and the search for a copyrightable stage direction, *Arizona Law Review*, 2001/3. p. 685.

⁷⁴ NEVIN, DOUGLAS M.: No business like show business: copyright law, the theater industry, and the dilemma of rewarding collaboration, *Emory Law Journal*, 2004/3. 1557.

⁷⁵ FREEMAL, BETH: Theatre, Stage Directions and Copyright Law, *Chicago-Kent Law Review*, 1996 April, 1019.

of the directors' work. The directors' concept does not remain in the level of a mere idea, because on the one hand it is fixed in writing and on the other hand, it is a formed thought, which is realizing in the concrete theatrical production.

Carlos A. Guerrero speaks specifically in favour of the copyright to be granted to directors. On the one hand, of course, he acknowledges and does not dispute that the theatrical director uses the underlying play as his primary source for his interpretation, but at the same time he stresses that the director's work is necessary for the written play to actually come to life according to its basic purpose.⁷⁶ Guerrero offers several alternatives on the basis of which legal protection could be established on the part of the director: joint works, works in employment, derivative works and collective works.⁷⁷

Margit Livingston interprets the theatrical director as a translator in a special sense who translates the written text into a stage production.⁷⁸ I think this interpretation is an acceptable and correct view. Her another viewpoint, which can also be accepted, is that the copyright protection of a director's performance can also be established through the analogy of derivative works.⁷⁹ She disagrees with Freeman about the director's concept and emphasizes that the concept is met with the requirement of fixation (this is what the Anglo-Saxon terminology calls a so-called "prompt book").⁸⁰ Livingston believes that the question is not whether directors should be entitled to legal protection, but to what extent they enjoy the protection granted by copyright law.⁸¹ In connection with this question, it is worth saying a few words about the so-called "*scènes a fair* doctrine". *Scènes a fair* doctrine means that elements and scenes used in a stage performance that draw from real-life experiences and thus become part of the general public perception cannot be protected by copyright. Similarly, standard elements known from literary or cultural history may not claim copyright protection. These elements can be protected if the way they are interpreted and shown on stage is individual and original. As an example, the mere idea that the children of two antagonistic families fall in love with each other will not be protected by copyright law, but the West Side Story or Romeo and Juliet which builds on this idea as a concrete musical stage work, already does.⁸² Dramatic works are typically good examples for the practical appearance of the *scènes a fair* doctrine, as playwrights often took over themes, topics⁸³ but it cannot be a problem, because "theatres do not play themes, but plays".⁸⁴

2. Solutions for the settlement of the directors' role

In many European copyright law, the legal status of theatrical director is still unresolved. However, we believe that its position shall and can be settled at the legal level. In connection with this, we have outlined the possible directions in order to clarify the copyright position of the stage director.

1) It is an absolutely exceptional case when the director sets the dramatic work on a stage within the framework of a replica "turn-key" license. Due to the special nature of the license, it

⁷⁶ GUERRERO, C. A.: „And if it wasn't for me [Rick], 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 Intellect Prop J. 2007/1. p. 115.

⁷⁷ GUERRERO: Op.cit. 138-139.

⁷⁸ LIVINGSTON, MARGIT: Inspiration of Imitation: Copyright Protection for Stage Directions. 50 Boston Collage Law Rev. 427, 2009, 438.

⁷⁹ LIVINGSTON: Op.cit. 442.

⁸⁰ LIVINGSTON: Op.cit. 445.

⁸¹ LIVINGSTON: Op.cit. 481.

⁸² SCHECHTER, ROGER E. – THOMAS, JOHN R.: Intellectual Property. The Law of Copyrights, Patents and Trademarks, Thomson West, 2003. 53.

⁸³ FÁBRI PÉTER: A színész és a telefonkönyv. A színházi szöveg világa, Színház- és Filmművészeti Egyetem, Budapest, 2006. p. 135.

⁸⁴ FÁBRI: Op.cit. p. 135.

is not permitted to make any changes on the piece in this case, which means the director even has to expressly refrain from doing so. In fact, the director does not perform directing activities in this case. The replica licence can be considered as a “licensed copying”, which inherently excludes any individuality from the side of the director.

2) The other “extreme” situation is when the staging of the director is so individual, original that the original features of the genuine work begins to become obscured. Therefore, the new dramatic work cannot be considered as an adapted derivative work, but as a new independent work. In such cases, the director shall be considered the author of the dramatic work.

3) The director is an adapter and therefore he enjoys copyright protection if the staging of the dramatic work is following the legal requirements of the adaptation. In this case, we have to refer again to the fact that it would be worth considering the concept of theatrical adaptation, its elements and the concept of copyright adaptation, and furthermore, it would be necessary to approximate their practical interpretation to one another, and to possibly widen the framework of copyright interpretation.

4) The director – with the exception of replica pieces – necessarily displays his own personality and perspective during the staging of the dramatic work, which has to be evaluated from the point of view of the copyright law. In this circle, the protection structure of joint works seems to be the most appropriate which means the director is comparable to the editors of the collection of works. According to the HCA, compilations are protected by copyright if the collection, arrangement, or editing of their content is individual and original (collection of works). Collections of works are protected by copyright even if their parts or components are not or cannot be protected by copyright.⁸⁵ Editors are entitled to copyright in the entire collection of works. This, however, does not concern the independent rights of the authors of the individual works and the owners of related rights that have been included in the compilation.⁸⁶ This rule can also be applied to the works resulting from the stage arrangement because:

- the director collects, arranges, “edits” the dramatic work, the scenery, the play of the actors and the movements to an integrated, complete artwork;⁸⁷
- his own perspective and intellectual activity are manifested in this activity, which is individual and original;⁸⁸
- the dramatic work itself as a complete work is protected even if certain elements of it (e.g. some elements of the scenery, certain dialogues) cannot be protected by copyright;⁸⁹
- the director (as a quasi-editor) may have the copyright over the entire work, but his rights cannot undermine the rights of other authors (author, composer, costume designer, stage decorator).⁹⁰

5) As the last construction, the legal institution of joint works may also arise. According to Subsection 1 of Section 5 of the HCA, if the parts of a joint work produced by several authors cannot be used independently, the joint authors shall be entitled to copyright protection jointly and, if there is any doubt, in equal measure. In this case, however, it is important to have a joint decision relating to the joint creation of the work by the parties.⁹¹ This agreement between the author and the director can only be concluded if the dramatic work is put on stage by the director during the life of the author, and they jointly participate in the staging process of the work, i.e. the author is also involved in the staging.

⁸⁵ Subsection 1 of Section 7 of the HCA.

⁸⁶ Subsection 2 of Section 7 of the HCA.

⁸⁷ First sentence of the Subsection 1 of Section 7 of the HCA.

⁸⁸ First sentence of the Subsection 1 of Section 7 of the HCA.

⁸⁹ Second sentence of the Subsection 1 of Section 7 of the HCA.

⁹⁰ Subsection 2 of Section 7 of the HCA.

⁹¹ GYERTYÁNFY: Op. cit.

V. SUMMARY

The primary task of the director is to artistically plan, teach, and ultimately create the unity of the theatrical play.⁹² The role of the director - and that of the other actors as well - has changed over time. At the time of the Shakespeare-theatre, it was even more typical that a stage performance is created by one person, as the author wrote and directed the play.⁹³ The great playwrights were also actors and often directors. For example, Molière was also a leading actor, Ibsen was a dramaturg and Brecht was a singer and director.⁹⁴ From the second half of the 19th century, the process and tendency began for the director to take a role in the real control and collaboration of stage production. In today's theatrical environment, the director performs a number of creative functions.⁹⁵ Showing the diversity of his tasks by ensuring that the production is creatively cohesive from the first moment until the curtain goes down, and often even after that, until the piece is removed from the repertoire. He plays a big role in selecting the actors, reviewing the textbook, and in practice, the director even adds new scenes to each play. He is the one who directs the work of the costume and set designer, giving them instructions on how to make the designs.

It can be said, then, that in a stage work the director plays a central role, whose involvement is essential. Nevertheless, the copyright status of theatre directors is unclear. They are in a kind of "floating" status, between copyright and neighbouring rights status. This floating status and the fact that the legal position of such a central person is unclear is unfortunate. The fog surrounding the director's copyright position is also arisen by the fact that there is a contradiction between theatrical and legal practice and terminology.

Relevant domestic and foreign lawsuits show that the ambiguity of the copyright status of a theatre director is a living problem. It is not a negligible question to what extent the director's right extends, what he can do with a given work in reference to artistic freedom, and what the outcome of this amendment might be.

Most legal disputes – not only in Hungary but also abroad – derive from a conflict of rights between the director and the author. It seems right to call them and their relationship "*Montagues and Capulets in the drama of law.*"⁹⁶

KEY WORDS

copyright law, dramatic works, theatrical copyright law, stage director, public performance, adaptation

KLÚČOVÉ SLOVÁ

autorské právo, dramatické dielo, divadelné autorské právo, režisér, verejné vystúpenie, adaptácia

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⁹² SZÉKELY: *Op.cit.* p. 646-647.

⁹³ LIVINGSTON: *Op.cit.* p. 437.; RHINE, ANTHONY S.: A great confusion in theater management, *The Journal of Arts Management, Law and Society*, Spring, 2006.

⁹⁴ FÁBRI: *Op.cit.* p. 11.

⁹⁵ STEIN, DEANA S.: „Every move that she makes”: Copyright protection for stage directions and the fictional character standard, *Cardozo Law Review*, Vol 34. 2013. 1575.

⁹⁶ AMADA: *Op.cit.* 681.

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