

## **COPYRIGHT PROTECTION OF DRAMATIC WORKS IN THE LAW OF THE EUROPEAN UNION\***

EDIT SÁPI

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### **1. Introductory remarks – The (lack of the) legal regulations**

First of all, it shall be stated that the legal harmonization of copyright law is fragmented, because the legislator of the European Union does not touch all of the artworks and all of the uses of copyright subject matter. Dramatic works are subject matter of most of the countries' copyright laws. To put it in a nutshell, dramatic works are such works, which are intended to perform in a theatre, such as plays, dramas, operettas, operas and musicals.<sup>1</sup> During the former research regarding to the writing of the article, we have observed a kind of lack, because the rules concerning to dramatic works are almost completely missing. The lack is not the dramatic works' "fault", it means neither that they are less important than other artworks and nor that they do not deserve the legislator's attention or the protecting umbrella of the law.

In fact, there are two main reasons, which results the lack of the European Union's rules pertaining to dramatic works. On the one hand, one reason covers the comprehensive factors of the partial and fragmented harmonization. In this circle one of the main reason of the lack of regulation is that the fundamental, essential issues of copyright law have not been harmonized until nowadays in the EU.

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\* Supported by the ÚNKP-17-3. New National Excellence Program of the Ministry of Human Capacities.

<sup>1</sup> See the conceptual approaches in the Hungarian legal literature for example: KNORR Alajos: *A szerzői jog magyarázata (1884. XVI. törvénycikk)*. Ifj. Nagel Otto Kiadása, Budapest, 1890, 146; KENEDI Géza: *A magyar szerzői jog. Az 1884. XVI. törvénycikk rendszeres magyarázata, valamint a vele egybefüggő törvények és rendeletek*. Athenaeum Irodalmi és Nyomdai Részvénytársulat, Budapest, 1908, 156; PALÁGYI Róbert: *A magyar szerzői jog zsebkönyve*. KJK, Budapest, 1959, 148–149; ALFÖLDY Dezső: *A magyar szerzői jog különös tekintettel a M. Kir. Kuria gyakorlatára. Az 1921: LIV., az 1922: XIII., az 1931: XXIV. t.-cikkek és a velük összefüggő törvények és rendeletek szövegével*. Grill Károly könyvkiadó vállalata, Budapest, 1936, 130; LONTAI Andre: *Polgári Jog. Szellemi alkotások joga (szerzői jog és iparjogvédelem)*. Tankönyvkiadó, Budapest, 1986, 81; FÜR Sándor–MALONYAI Dezső: *Színpad művek*. In: BENÁRD Aurél–TÍMÁR István (szerk.): *A szerzői jog kézikönyve*. KJK Kiadó, Budapest, 1973, 231–248.

*Levente Tattay* mentions as one of the reasons of the partial harmonization that the nature of copyright law is distant from the initial ambitions of the European integration, which concentrated to economical and commercial issues. On the other hand, he mentions that the collaboration of the European countries in the field of culture and education started later, which resulted that the copyright artworks' impact on competition was recognized later than the competitive impact of the creations of industrial property.<sup>2</sup>

The other, more specified factor of the partial harmonization is concerning directly to the lack of the EU regulations of dramatic works. *Gábor Faludi* and *Anikó Grad-Gyenge* in their joint article emphasize the strange situation, that while the public performance right of authors is not harmonized, it's pair in the field of neighbouring rights is mentioned in the InfoSoc Directive.<sup>3</sup> The above cited authors attribute to the lack of harmonization that the impact of the (*live*) public performance to the internal market of the EU is slight.<sup>4</sup>

The unification of the economic rights, which have the greatest importance in relation to dramatic works, such as the right of adaptation and live public performance, is still missing.<sup>5</sup> It is also important to mention that beside the right of adaptation and right of (live) public performance, the harmonization of moral rights is also missing.<sup>6</sup> Both the adaptation and the public performance rights are the author's exclusive rights. According to the rules of the Hungarian Copyright Act,<sup>7</sup> the author shall have the exclusive right to adapt his work or to authorise another person therefor. Adaptation covers the translation of the work, its stage or musical arrangement, its adaptation for a cinematographic production and any other alteration of the work as a result of which another work is derived from the original one.<sup>8</sup> According to the HCA, author shall have the exclusive right to perform his work to the public and to authorise another person therefor. The making of the work perceptible to those present shall be regarded as mean performance. The terminology "performance" covers the performance of the work to the public by a performer in person in the presence of an audience, such as stage performance, concert, recital, reading out ("live performance") and it also encompasses the making of the work communicated or distributed (as a copy) to the public become audible by loudspeaker or visible on screen.<sup>9</sup>

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<sup>2</sup> TATTAY Levente: A szellemi tulajdonjogok védelme az Európai Unióban. *Magyar Jog*, 2012/7., 415.

<sup>3</sup> Directive 2006/116/EC Article 8.

<sup>4</sup> FALUDI GÁBOR–GRAD-GYENGE ANIKÓ: A nyilvánossághoz közvetítési (előadási) jog értelmezése az Európai Bíróság gyakorlatában. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/1., 77.

<sup>5</sup> GOLDSTEIN, Paul–HUGENHOLTZ, Berni: *International Copyright. Principles, Law and Practice*. Oxford University Press, 2013, 327.

<sup>6</sup> In our view the moral rights of indication of the author's name and especially, the protection of the integrity of the works have great importance in relation to dramatic works.

<sup>7</sup> Act LXXXVI of 1999 on Copyright (henceforward abbreviated: HCA).

<sup>8</sup> HCA Article 29.

<sup>9</sup> HCA Article 24.

Similarly, the contracting relations of copyright legal relationships are not harmonized, because the legal settlement of contracting relations is traditionally remain the competence of the Member States.<sup>10</sup> So, it can be found that the harmonization of all of the substantial copyright elements of dramatic works has not occurred yet. Accordingly, to say the least, in the caselaw of the Court of Justice of the European Union (CJEU) there are not much cases, which deal with copyright issues of theatrical performances or live public performances.

## 2. Search for legal basis

The European Commission denoted already in the first lines of its Green Paper on Copyright and Related Rights in the Information Society of 1995<sup>11</sup> that the protection of copyright and related rights is vital to the Internal Market, and has cultural, economic and social implications for the Community. At the same time, it was emphasized that the information society will facilitate creation, access, distribution, use and similar activities, and consequently increases the number of situations in which differences between the laws of the Member States may obstruct trade in goods and services.<sup>12</sup>

In the European Union, eleven directives were adopted in the field of copyright law:

- Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,<sup>13</sup>
- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases,<sup>14</sup>
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society,<sup>15</sup>
- Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art,<sup>16</sup>
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights,<sup>17</sup>

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<sup>10</sup> *Study on the conditions applicable to contracts relating to Intellectual Property in the European Union* (Final Report). Institute for Information Law, Amsterdam, The Netherlands, 2002, 8.

<sup>11</sup> Green Paper – Copyright and Related Rights in the Information Society (COM (1995) 382 final, Brussels) Henceforward abbreviated: Green Paper 1995.

<sup>12</sup> Green Paper, 1995, 10.

<sup>13</sup> OJ L 248, 6. 10. 1993, 15–21.

<sup>14</sup> OJ L 77, 27. 3. 1996, 20–28.

<sup>15</sup> OJ L 167, 22. 6. 2001, 10–19.

<sup>16</sup> OJ L 272, 13. 10. 2001, 32–36.

<sup>17</sup> OJ L 157, 30. 4. 2004, 45–86.

- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,<sup>18</sup>
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights,<sup>19</sup> and later, the Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights,<sup>20</sup>
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs,<sup>21</sup>
- Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works,<sup>22</sup>
- Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market,<sup>23</sup>
- Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.<sup>24</sup>

The listed directives can be separated into two main categories: a part of them are about the harmonization of the rules on the protection of a given type of copyright works or a special circle of users, such as the newest directive. Their other part deals with certain issues and legal instruments of copyright law, which can be concerning to several artworks. Directives 93/83/EEC, 96/9/EC, 2001/84/EC, 2009/24/EC and 2017/1564/EU can be classified into the first group, while Directives 2001/29/EC, 2004/48/EC, 2006/115/EC, 2006/116/EC, 2011/77/EU, 2012/28/EU, and 2014/26/EU into the second group. While the directives of the first group are not relevant in relation to the topic of this article, the general regulations of the second group directives could be applicable to dramatic works too, at least in principle.

In the article we will outline the directives mentioned in the second group, because theoretically they can contain regulations concerning to dramatic works. At

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<sup>18</sup> OJ L 376, 27. 12. 2006, 28–35.

<sup>19</sup> OJ L 372, 27. 12. 2006, 12–18.

<sup>20</sup> OJ L 265, 11. 10. 2011, 1–5.

<sup>21</sup> OJ L 111, 5. 5. 2009, 16–22.

<sup>22</sup> OJ L 299, 27. 10. 2012, 5–12.

<sup>23</sup> OJ L 84, 20. 3. 2014, 72–98.

<sup>24</sup> OJ L 242, 20. 9. 2017, 6–13.

the same time, we will not analyse them in details, because the detailed analysis is not the aim of the paper.

### 2.1. *The InfoSoc Directive*

The InfoSoc Directive, which is maybe the most comprehensive directive in the field of copyright law, lists the economic rights covered by the Directive in Chapter II. In line with this, the Directive specifies the reproduction right, the right of communication to the public of works and right of making available to the public other subject-matter, and the distribution right. Actually, the important issues of the Green paper 1995 were settled in the Directive.<sup>25</sup>

Among these three economic rights, the right of communication to the public of works is the closest to the theatrical productions and to right of public performance. The HCA regulates both economic rights individually. In our view, we could talk about reproduction and distribution rights too, if the theatre performance is recorded and produced on a DVD, which would be distributed and reproduced. Nevertheless, in this case it is completely irrelevant that the DVD contains a recorded theatre performance. In this case there is a tangible form, the DVD, and it is irrelevant from this view, if the DVD contains a music concert, or a drama or a musical.

According to Article 3(1) of the InfoSoc Directive, Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

The Directive extends the scope of the right of communication to the public to four types of neighbouring rights owners too. They are the performers in relation to the fixations of their performances, the phonogram producers relating to their phonograms, the producers of the first fixations of films in relation to the original and copies of their film and the broadcasting organisations, about the fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.<sup>26</sup> As the explanation of this rule, Recital 23 of the Directive declares that *this right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates*. Furthermore, it states that this right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting too but it should not cover any other acts. Indeed, the right of communication to the public declared by the Directive is a kind of *umbrella right*,<sup>27</sup> because it covers all non-tangible forms of transmission of the work to the people

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<sup>25</sup> TÓTH Andrea Katalin: Az európai szerzői jogi harmonizáció és a territorialitás kérdése. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2016/4., 11.

<sup>26</sup> Directive 2001/29/EC, Article 3(2).

<sup>27</sup> STAMATOUDI, Irini–TORREMANS, Paul: The Information Society Directive. In.: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2014, 408.

who are not at the place where the communication originates, but this umbrella is not big enough to encompass the live public performance. In line with the regulations of the Directive it can be stated that a public performance, i.e. when the performance of the work and public is in the same place at the same time, is not covered by the InfoSoc Directive,<sup>28</sup> because in a theatrical performance:

- on the one hand, the members of the public do not individually chose the place and the time of the performance, but they can see the performance at the time and place on line with the theatrical program, and
- on the other hand, the members of the public are present at the time of the performance and in this case we cannot talk about *making available to the public, by wire or wireless means*.

It is another question that the technics can make it possible, that the currently running live performance would be recorded and broadcasted. If the theatrical performance, such as sports events, are recorded and broadcasted immediately and the member of a public can see the performance at home on the television, then in relation to this member of the public, it is not a public performance, but a broadcasting. In such a case, the theatrical performance becomes available for several layers of the public, by more exploitation. In relation to the public, who are at the present in the theatre, we can talk about “*public performance*” and in relation to the television viewers it is a making available to the public.

The decision ‘Circul Globus Bucuresti’<sup>29</sup> of the CJEU in 2011 was not born in relation to theatrical issues, but in this case, the Court had to decide about making available music for the audience which is present at the place of communication, which can have relationship with the topic. The essence of the case<sup>30</sup> was that the Circul Globus in its capacity as organiser of circus and cabaret performances, publicly disseminated musical works for commercial purposes between May 2004 and September 2007 without obtaining a “non-exclusive” license from UCMR-ADA<sup>31</sup> and without paying the appropriate copyright fees to UCMR-ADA. The UCMR-ADA went to the court (*Tribunalul București*) and argued that, under the Copyright Law, the exercise of the right to communicate musical works to the public is subject to compulsory collective management. The Circul Globus reacted that it entered into contracts with the authors of the musical works used in the performances organized by it and under which copyright had been waived, and that it had paid

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<sup>28</sup> FALUDI GÁBOR–GRAD-GYENGE ANIKÓ: A nyilvánossághoz közvetítési (előadási) jog értelmezése az Európai Bíróság gyakorlatában. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/1., 77–93. See: STAMATOUDI–TORREMANS: op.cit. 409.

<sup>29</sup> Case C-283/10 (Circul Globus București [Circ & Variete Globus București] contra Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor [UCMR – ADA])

<sup>30</sup> Faludi Gábor and Grad-Gyenge Anikó summarizes the case too in their cited above article. See: FALUDI–GRAD-GYENGE: op. cit. 90–2.

<sup>31</sup> UCMR-ADA, i.e. the Romanian Musical Performing and Mechanical Rights Society is a Romanian collective rights management organization.

those authors an appropriate fee in return for using their works, furthermore, according to the Article 123(1) of the Copyright Law, there was no legal basis for the claim for payment made by the collective management organisation.<sup>32</sup> The court stated that Article 123a (1) (e) of the Copyright Law<sup>33</sup> expressly provides that the exercise of the right to communicate musical works to the public must be managed collectively, consequently the circus was obliged to pay the amount to the collective management organisation regardless the contracts with the authors. After this, the Circul Globus brought an appeal against the decision to the Romanian Supreme Court (*Înalta Curte de Casație și Justiție*) and it argued that the Directive 2001/29/EC had been incorrectly transposed into Romanian copyright law. From the viewpoint of our topic, the Romanian court's first question is important, which was, whether the "communication to the public" in the Article 3(1) of Directive 2001/29/EC has to be interpreted that it means exclusively communication to the public where the public is not present at the place where the communication originates, or also any other communication of a work which is carried out directly in a place open to the public using any means of public performance or direct presentation of the work? According to the answer, the cited rule of the Directive only covers the form of use, when the public is not present at the place of the communication of the work.<sup>34</sup>

## 2.2. The Enforcement Directive

The adoption of the Directive 2004/48/EC reacted to the fundamental demand to make the law possible to act against infringement with harmonized legal instruments in the whole area of intellectual property.<sup>35</sup> This is the only directive, which regulates the whole area of intellectual property completely, and not just the area of industrial property or the copyright law. The Directive does not constrain the scope for only those artworks, which are already harmonized by EU legal instruments. It

<sup>32</sup> According to the English translation of the Romanian Copyright Act (No. 8 of 14 March 1996): *Art. 123 (1) Owners of copyright and neighboring rights may exercise their rights recognized by the present law individually or through collective management organizations, according to the present law.*

<sup>33</sup> *Art. 123a (1) Collective management is compulsory for the exercising of the following rights:*  
*a) right to compensatory remuneration for private copy;*  
*b) right to equitable remuneration for public lending provided for in Art. 144 paragraph (2);*  
*c) resale right;*  
*d) right to broadcast musical works;*  
*e) right to communication to the public of musical works, except the public projection of cinematographic works;*  
*f) right to equitable remuneration recognized to performers and producers of phonograms for communication to the public and broadcasting of phonograms of commerce or of the reproductions thereof;*  
*g) right to retransmission by cable.*

<sup>34</sup> TATTAY Levente: *Versenyképesség és szellemi alkotások az Európai Unióban*. Wolter Kluwer, Budapest, 2016, 283.

<sup>35</sup> *Ibid.* 180.

is also a comprehensive, complex Directive, because it contains both substantive and procedural rules.<sup>36</sup> According to the Recital 13 of the Directive, *[i]t is necessary to define the scope of this Directive as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned.* The wider scope of the Directive covers the artworks of copyright and industrial property as well. The Directive does not contain any restrictions about which kind of artworks fall within its scope, so it does not exclude neither dramatic works, nor dramatico-musical works. It is also comprehensive in the relation to the sanctionable infringements, because it defines legal consequences for all infringements (“*any infringement*”). At the same time, there are legal consequences<sup>37</sup>, which can be applied against commercial scale infringements.<sup>38</sup> The legal consequences, which can also be found in the HCA because of the legal harmonization obligation,<sup>39</sup> shall be applied in the case of infringements of dramatic works as well. By the way, it can be stated that, according to the Hungarian judicial practice, most of the cases rightholders claim the restitution of the economic gains achieved through infringement of rights or compensation for damages in relation to dramatic works too.<sup>40</sup>

### 2.3. The Rental Right Directive

In the adoption of the Directive, it was a significant fact, that rental and lending of copyright works and the subject matter of related rights protection is playing an increasingly important role in particular for authors, performers and producers of phonograms and films.<sup>41</sup> Notwithstanding, it is also relevant to emphasise in relation to our topic, that neither the rental and nor the lending right are the most important uses and economic rights of dramatic works. According to the definition of the Directive, “*rental*” means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage.<sup>42</sup> On the other hand, “*lending*” means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.<sup>43</sup> Within the meaning of the Directive, we shall exclude from rental and lending certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or

<sup>36</sup> STAMATOUDI, Irini: The Enforcement Directive. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary.* Edward Elgar. Cheltenham, Northampton, 2014, 530.

<sup>37</sup> Article 6(2), Article 8(1), Article 9(2).

<sup>38</sup> STAMATOUDI: op. cit. 541.

<sup>39</sup> See more: BACHER Vilmos–FALUDI Gábor: Jogérvényesítés a szellemi tulajdonjogok területén. *Jogtudományi Közlemény*, 2005/9., 372–387.

<sup>40</sup> See for example: Fővárosi Ítéltábla Pf. 20.323/2016/3., Szegedi Ítéltábla Gf.II.30.523/2014/4., Győri Ítéltábla Pf.V.20.167/2011/4., Legfelsőbb Bíróság Pfv.IV.21.865/2009/5.

<sup>41</sup> Directive 2006/115/EC recital 2.

<sup>42</sup> Directive 2006/115/EC Article 2(1) a).

<sup>43</sup> Directive 2006/115/EC Article 2(1) b).



making available for on-the-spot reference use. Moreover, lending within the meaning of this Directive should not include making available between establishments which are accessible to the public.<sup>44</sup>

The Commentary of the Hungarian Copyright Act highlights that rental right is relating to all of the copyright works, with the exception of buildings, products of applied arts, and industrial arts, because it only applies to their plans and designs.<sup>45</sup> Consequently, the right touches dramatic works (as an underlying literary work, which can be performed on stage), librettos and musics too, but it shall be emphasized that the act of rental in itself does not constitute copyright authorization. The author's rent the scenario in vain, it will not result an authorization of public performance of the drama. Accordingly, the Rental Right Directive does not give any concrete indication in relation to the ordinary, common use of dramatic works.

#### 2.4. *The Term Directive*

The Directive 2006/116/EC on the terms of copyright and related rights was modified and completed by the Directive 2011/77/EU. On the one hand, the Term Directive refers to the Article 2 of the Berne Convention and on the other hand, it contains special regulations on certain works. Cinematographic or audiovisual works (Article 2) and photographs (Article 6) can be found in the Directive as nominated artworks. It also contains special provisions concerning to the term of protection of related rights (Article 3).<sup>46</sup> So dramatic works cannot be found as special, nominated artworks in the Directive, but it cannot be a huge problem, because in accordance with the Article 1 of the Berne Convention, Article 1(1) of the Directive states that the 70-year term protection shall be applied to those works, which are defined in the BC.<sup>47</sup> Dramatic works shall be part of the group of 'literary and artistic works', as declared by the Berne Convention,<sup>48</sup> so the regulation of the Article 1 of the Directive also covers them. Since lots of dramatic works, espe-

<sup>44</sup> Directive 2006/115/EC recital 10.

<sup>45</sup> GYERTYÁNFY Péter (szerk.): *Nagykommentár a szerzői jogi törvényhez*. Wolters Kluwer, Budapest, 2014, 188.

<sup>46</sup> See more about the topic: GRAD-GYENGE Anikó: A védelmiidő-irányelv módosításáról szóló szabályok átültetése a magyar jogba. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2012/4.

<sup>47</sup> MINERO, Gemma: The Term Directive. In: Irini STAMATOUDI–Paul TORREMANS (ed.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2014, 254. p., similarly: WALTER (2010a) 520.

<sup>48</sup> Berne Convention, Article 2.: *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.*

cially musicals, operas and operettas were born in the way that several authors make them together<sup>49</sup>, for example they compose the music and the lyric of the rock opera together, so the term of protection is calculated from the first day of the year following the death of the joint author dying last.

Otherwise the Directive discusses the provisions on the term protection of related rights at length, of which the protection of performers is relevant in relation to the paper. In accordance with the Directive, the rights of performers (which covers theatre actors too) shall expire 50 years after the date of the performance.<sup>50</sup> As a result of the modification in 2011 two exceptions were declared from this 50-year general rule:

*However*

- *if a fixation of the performance otherwise than in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier,*
- *if a fixation of the performance in a phonogram is lawfully published or lawfully communicated to the public within this period, the rights shall expire 70 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.*<sup>51</sup>

With this rule, the Directive separated the situation of those performers, who performs musical works or sound fixed in a phonogram, and the other performers whose performances are fixed otherwise than in a phonogram and performers of non-musical works.<sup>52</sup> *Gemma Minero* mentions performers and performances of movies as an example of the latter group.<sup>53</sup>

In 2002, the CJEU discussed the so-called *Ricordi-case*<sup>54</sup>, which had theatrical relations. Although the decision does not construe the essential elements and copyright nature of dramatic works, it is still the only case, which is in relation to theatre performance, so we will give it a few attention.<sup>55</sup> The preliminary ruling focused two basic issues: the questions of interpretation were mainly generated by

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<sup>49</sup> The Recasting of Copyright & Related Rights for the Knowledge Economy, Institute for Information Law, University of Amsterdam, The Netherlands, 2006, 144.

<sup>50</sup> Directive 2006/116/EC Article 3(1), first sentence.

<sup>51</sup> Directive 2011/77/EU.

<sup>52</sup> MINERO, Gemma: The Term Directive. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2014, 269.

<sup>53</sup> *Ibid.* 269.

<sup>54</sup> Case C-360/00 *Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH*.

<sup>55</sup> The lack of lawsuits about dramatic works in the CJEU also does not call the birth of regulations, because in the field of copyright law the CJEU has powerful developing and interpreting role. This fact was explained in details by Christophe Geiger. See: GEIGER, Christophe: The Role of the Court of Justice of the European Union: Harmonizing, Creating and sometimes Disrupting Copyright Law in the European Union. In: Irini STAMATOUDI (ed.): *New Developments in EU and International Copyright Law*. Wolters Kluwer, The Netherlands, 2016, 435–446.

the prohibition of discrimination<sup>56</sup> and the legal institution of the term of protection gave the copyright background. The starting point of the case was the unauthorized use of Puccini's opera, *La Bohème*. *La Bohème* was staged first on 1<sup>st</sup> of February, 1896, under the conduction of *Arturo Toscanini* and based on the libretto of *Luigi Illica* and *Giuseppe Giacosa*. The underlying story was the *Scènes de la vie de bohème* short story series, written by *Henry Murger* in 1847. Not the opera, but the play, entitled *La vie de bohème* as a joint work of *Murger* and *Théodore Barrière* was the first stage adaptation of *Murger's* work. This play was performed first in 1849, in the *Théâtre des Variétés*.<sup>57</sup>

According to the state of affairs, the right holder of performance of Puccini's *La Bohème* was the *G. Ricordi & Co. Bühnen- und Musicverlag GmbH*, which is a well-known publishing firm, specialized in music and libretto publishing.<sup>58</sup> The *Staatstheater of Wiesbaden* staged the opera numerous times in the season 1993–1994 and in the next season as well without any authorization. Because of the unauthorized performances, the dispute became a court case. The *Bundesgerichtshof* went to the CJEU for a preliminary ruling.<sup>59</sup>

The complication was caused by the provision of the German Copyright Act<sup>60</sup> (UrhG) applicable at that time (in 1965). According to the German rule, copyright protection lasts 70 years after the death of the authors. On the contrary, the Italian Copyright Act<sup>61</sup> stated that the copyright protection of the works is 56 years after the death of the author. The defendant, Land Hessen, the maintainer of the theatre referred to the regulation of the UrhG, which prescribed, that the law shall draw a distinction between the works of German and foreign authors. The differences originates from the rule, that while German authors enjoyed protection for all their works, whether published or not and regardless where they were first published,<sup>62</sup> the works of foreign authors are protected only in the case if they were published in

<sup>56</sup> See also the so-called *Phil Collins-case* (C-326/92) about the prohibition of discrimination in the area of copyright law.

<sup>57</sup> BUDDEN, Julian: *Életek és művek: Puccini*. Európa Könyvkiadó, Budapest, 2011, 153–157.

By the way, Puccini, Illica and Giacosa were more careful about copyright at the staging *La Bohème*, then the *Staatstheater* in the abovementioned case. Illica and Giacosa was afraid of that the opera will infringe copyright, but Puccini sought, that *Murger's* work was published in 1851 as a book and because *Murger* died in 1861 without heirs, this works wasn't protected (because of the rules of that time). However, the joint play by *Murger* and *Théodore Barrière* was protected, because *Barrière* was still alive. They eliminated the situation in the way, that the opera was strictly went along the book, and not along the action of the play. See in details: WINKLER Gábor: *Barangolás az operák világában*. III. Tudomány Kiadó, Budapest, 2004–2006, 1945.

<sup>58</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28<sup>th</sup> February 2002, 13.

<sup>59</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28<sup>th</sup> February 2002, 21–23. See also: MUNKÁCSI Péter: „Bohémélet” Luxemburgban – Két felvonás a közösségi jogi hátrányos megkülönböztetés tilalma és a szerzői jog viszonyához a „Ricordi”-eset kapcsán. *Iparjogvédelmi és Szerzői Jogi Szemle*, 2003/6.

<sup>60</sup> Gesetz über Urheberrecht und verwandte Schutzrechte, UrHg.

<sup>61</sup> Law No 633 of 22 April 1941 on the protection of copyright and related rights .

<sup>62</sup> UrhG 120 (1), see the same: COOK, Trevor: *EU Intellectual Property Law*, Oxford University Press, New York, 2010, 16.

Germany first time, or within 30 days of their being first published.<sup>63</sup> According to the further provisions of the UrhG, foreign authors enjoyed the protection afforded to their rights by international treaties.<sup>64</sup> This rule provided an opportunity to the Land Hessen, to defend with the argument; the *La Bohème* is protected in accordance with the Italian rules, because the first performance did not happen in Germany, so the term protection expired in 1980.<sup>65</sup> Actually, the theatre selected from the regulations of the Berne Convention, and while it took into consideration the Article 7(1), which was more favorable for him,<sup>66</sup> and did not take into consideration another section of this Article. Under the Article 7(6), contracting parties may grant a longer term of protection.

The question which the Court had to ascertain first was whether the prohibition of discrimination in Article 6(1) of the EC Treaty is also applicable to the protection of copyright in cases where the author had died 30 years before when the EEC Treaty entered into force in the Member State of which he was a national.<sup>67</sup>

In the summary of his Opinion, Advocate General *Ruiz-Jarabo Colomer* suggested that the Court shall declare the provision in question of the German Copyright Act discriminatory, because it distinguishes the authors on the grounds of nationality and it leads to lesser protection for foreign authors.<sup>68</sup> The Court accepted the argumentation of the Advocate General and decided in accordance with it.

## 2.5. *The Orphan Works Directive*

The European Union adopted the Directive on certain permitted uses of orphan works in 2012. According to the Article 2 of the Directive *[a] work or a phonogram shall be considered an orphan work if none of the rightholders in that work or phonogram is identified or, even if one or more of them is identified, none is located despite a diligent search for the rightholders having been carried out and recorded [...]*. The orphan work status could happen for many reasons, for example the author have never been publically known, or the work was published anonymously, or never published before, or the identity of the author was once known but after that the information was lost.<sup>69</sup> The Directive covers only works, which are first published in a Member State,<sup>70</sup> so works are excluded from the scope of

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<sup>63</sup> UrhG 121 (1)

<sup>64</sup> UrhG 121 (4)

<sup>65</sup> SAPPÀ, Cristiana: The Principle of Non-Discrimination. In: Irini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2016, 33.

<sup>66</sup> *The term of protection granted by this Convention shall be the life of the author and fifty years after his death.*

<sup>67</sup> Puccini died on 29 November 1924, 33 years before the adoption of the Rome Convention.

<sup>68</sup> Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 28 February 2002. 61.

<sup>69</sup> LIFSHTZ-GOLDBERG, Yeal: *Orphan Works*, WIPO Seminar, May 2010. [www.wipo.int/edocs/mdocs/sme/en/wipo\\_smes\\_ge\\_10/wipo\\_smes\\_ge\\_10\\_ref\\_theme11\\_02.pdf](http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_ge_10/wipo_smes_ge_10_ref_theme11_02.pdf) (Date of downloading: 14. 11. 2017.)

<sup>70</sup> Directive 2012/28/EU Article 1(2).

the Directive, if they are first published or broadcasted elsewhere in the world.<sup>71</sup> Furthermore, the Directive makes it clear, that which works are the subject matter of the Directive, and states, that:

- works published in the form of books, journals, newspapers, magazines or other writings contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions,
- cinematographic or audiovisual works and phonograms contained in the collections of publicly accessible libraries, educational establishments or museums as well as in the collections of archives or of film or audio heritage institutions; and
- cinematographic or audiovisual works and phonograms produced by public-service broadcasting organisations up to and including 31<sup>th</sup> December 2002 and contained in their archives.

This enumeration is less generic and accordingly less broad in scope, such as the scope of the Term Directive, which refers to the rules of the Berne Convention. It is also true, that the (*or other writings*) element of the first group is quite generalizing approach, especially, because other elements of the list are concrete. *Uma Suthershanen* and *Maria Mercedes Frabboni* wonders in this context, whether this element can be interpreted in a broad sense that it incorporates softwares, photos, and costume designs.<sup>72</sup> In our view, the delimitation of the scope can concern to the works, they mentioned and consequently in principle to scenarios (as a kind of literary works) and librettos too, but we think, there can be only a few scenarios, and dramas are orphan in the practice. The EUIPO<sup>73</sup> runs an orphan works database<sup>74</sup>, in which the *search by category* is only contains audiovisual works, cinematographic works, fine art, illustration, literary works, map/plan, phonogram, poster and photography. So, in the database, in accordance with the scope of the Directive, we cannot see dramatic works, as a category, but in the category of literary works, we can find a few works, which title refers to dramatic works, for example a Dutch work.<sup>75</sup> Despite this, according to our opinion it can be quite rare, that a dramatic work is orphan.

<sup>71</sup> JANSSENS, Marie-Christine–TRYGGVADÓTTIR, Rán: Orphan Works, Out-of-commerce Works, and Making the European Cultural Heritage Available: Are We Nearly There Yet? In: Iriini STAMATOUDI (ed.): *New Developments in EU and International Copyright Law*. Wolters Kluwer, The Netherlands, 2016, 193.

<sup>72</sup> SUTHERSHANEN, Uma–FRABBONI, Maria Mercedes: The Orphan Works Directive. In: Iriini STAMATOUDI–Paul TORREMANS (eds.): *EU Copyright Law. A Commentary*. Edward Elgar, Cheltenham, Northampton, 2014, 659.

<sup>73</sup> European Union Intellectual Property Office.

<sup>74</sup> <https://euiipo.europa.eu/orphanworks/#search/basic>

<sup>75</sup> <https://euiipo.europa.eu/orphanworks/#viewOW/2186/work> (Date of downloading: 16. 11. 2017.)

## 2.6. The Collective Rights Management Directive

One of the newest Directive in the field of copyright law is about the collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The Directive has importance in relation to our topic that in some countries, the authorization of uses of dramatic works and dramatico-musical works is happening by a collective rights management organization (CMO). In line with this situation, the Recital 19 of the Directive says, that *Having regard to the freedoms established in the TFEU, collective management of copyright and related rights should entail a rightholder being able freely to choose a collective management organisation for the management of his rights, whether those rights be rights of communication to the public or reproduction rights, or categories of rights related to forms of exploitation such as broadcasting, theatrical exhibition or reproduction for online distribution, provided that the collective management organisation that the rightholder wishes to choose already manages such rights or categories of rights. (...) This Directive should not prejudice the possibility for rightholders to manage their rights individually, including for non-commercial uses.*

Although the Collective Management Directive entailed changes in Hungary too, inter alia a new act, the Act XCIII of 2016 on the collective managements of copyrights and related rights, its relevance is less in connection to dramatic works, because in line with the Article 24(3) of the HCA the authorization of literary works and dramatico-musicals intended for stage can be granted by the author, or the right holder directly, not from the collective rights management organization.

The cited recital of the Directive reserves the right to the rightholders to manage their rights individually, if the given country's law makes it possible. Indeed, because of the above-mentioned situation, the importance of the Collective Management Directive is less, but in some countries the authorization of public performance of dramatic works and dramatico-musical works is happening by a collective rights management organization. In some countries collective management organizations are a kind of representatives. Accordingly, in some countries the CMO concludes a framework agreement with the theatre for the authorization of the performance of a play. Collective management in the field of dramatic works dates back to France in the 18<sup>th</sup> century, when the *Société des auteurs et compositeurs dramatiques* (SACD) was founded in 3<sup>rd</sup> of July in 1777 by the French playwright, Pierre Augustin Caron de *Beaumarchais* to ensure recognition and respect for authors' economic and moral interests in theaters.<sup>76</sup> The number and nature of representatives varies from country to country and in many countries CMOs take part in the authorization process, such as in France (SACD) and in Germany (GEMA).<sup>77</sup>

<sup>76</sup> KOSKINEN-OLSSON, Tarja-LOWE, Nicholas: *Educational Material on Collective Management of Copyright and Related Rights Module 6: Management of rights in dramatic works*. WIPO, 2012, 10.

<sup>77</sup> KOSKINEN-OLSSON-LOWE: op. cit. 17.

### 3. Final considerations

In our view, the reason of the less attention for dramatic works from the European Union legislator is that, the theatrical activities belong to the classical area of copyright law and the direct challenges of technology influence in this area has a smaller extent. The Green Paper 1988 of the European Commission<sup>78</sup> stated in the way that: *In the more traditional domains of copyright applying to literary, musical and dramatic works, this has not posed a significant problem since independent works of the same genre can in law and practice still compete with each other quite fairly.* (Just think about dramatico-musical works, where music and literary works draw up jointly the given dramatico-musical work – mentioned by the author.) *In areas which have developed more recently, however, the restrictive effects of copyright protection on legitimate competition have on occasion risked becoming excessive, for example, in respect of purely functional industrial designs and computer programs.*<sup>79</sup>

Most of the existing directives concentrate to the possible answers of the challenges of the information society, the digitalization and the technology, which are really the most pressing problems.<sup>80</sup> In its Green Paper on Copyright in the Knowledge Economy, the European Commission mentions the freedom of knowledge and innovation as the “fifth freedom of the internal market.”<sup>81</sup> Since dramatic works are less affected by the digital world, it is understandable, that the EU does not pay any particular attention to these works. It is also true, that in relation to dramatic works, the most significant factors are contractual relationships (especially with the content of adaptation right and public performance) and moral rights, which traditionally are not the subject matter of the European harmonization, but we dare not to state that this “dereliction” will not have negative effect in the future. Or, and perhaps it is a better expression: it may have a positive effect, if the European legislator pays attention to this category of works too. However, from our point of view, the harmonization of the above-mentioned factors of copyright law would not be unproblematic, especially because of the issues of moral rights, because on the one hand it is a sensitive area and on the other hand, lots of interests and respects shall be taken into consideration during the haphazard harmonization and it may be incompatible.

We think, that it would not be harmful, if a material – even if it has no formal legal value – could be born in the future, which would clear the basic and comprehensive issues of copyright law. In the field of European copyright law, it is not a wild idea, because in 2010, the so-called *European copyright code* was born by the

<sup>78</sup> Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action (COM(88) 172 final, Brussels, 7. 6. 1988).

<sup>79</sup> Green Paper 1988, 5.

<sup>80</sup> See in this topic for example the monographies of Péter Mezei: MEZEI Péter: *Digitális sampling és fájlcseré*. Szegedi Tudományegyetem, Állam- és Jogtudományi Kar, 2010; MEZEI Péter: *A fájlcseré dilemma – a perek lassúak, az internet gyors*. HVG-Orac, Budapest, 2012.

<sup>81</sup> Green Paper on Copyright in the Knowledge Economy (COM [2008] 466 final, Brussels, 17. 6. 2008).

*Wittem-project*. This paper had the main objective to promote the transparency and consistency of the European copyright law, without making a recodification of the EU copyright law.<sup>82</sup> Although the European copyright code does not deal with dramatic works in details, beyond that in the Article 1.1.(2) it lists dramatic works as copyrighted works,<sup>83</sup> but it contains some basic regulations about moral rights.<sup>84</sup> In this material lists of economic rights also can be found and public performance and adaptation rights are also mentioned and ruled basically.<sup>85</sup> According to the Article 4.5. of the European copyright code, the right of communication to the public covers the *public performance* too.<sup>86</sup> In line with the explanation of *public performance*, it includes *public recitation* as well, which refers to the live public performance. So the Wittem-project's European copyright code went further than the law of the European Union.

In our view it is not necessarily a good practice, that the law-maker concentrates to digitalization and online sphere so greatly that during all of this he forgets the classical areas of copyright law. Even so, that the classical, traditional artworks of copyright law has really significant impact<sup>87</sup> to the cultural identity and cultural heritage of Europe.

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<sup>82</sup> European Copyright Code (2010) 5–6.

<sup>83</sup> Art. 1.1.(2) c) Plays and choreographies.

<sup>84</sup> Article 3 – Moral rights.

<sup>85</sup> Art. 4.6 *The right of adaptation is the right to adapt, translate, arrange or otherwise alter the work.*

<sup>86</sup> Art. 4.5. (1) *The right of communication to the public is the right to communicate the work to the public, including but not limited to public performance, broadcasting, and making available to the public of the work in such a way that members of the public may access it from a place and at a time individually chosen by them.*

<sup>87</sup> See in the objectives of the Green Paper 1995.