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STUDY ON THE RIGHTS OF STAGE DIRECTORS OF THEATRICAL PRODUCTIONS

prepared by Professor Ysolde Gendreau and Professor Anton Sergo

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The research for the following study was conducted by the following persons:

Ysolde Gendreau, Doctor of Law, Professor, Faculty of Law, Université de Montréal, Canada

Anton Sergo, Doctor of Law, Professor, Professor of the Department of Copyright, Related Rights and Private Law Disciplines, Russian State Academy of Intellectual Property (RSAIP), Russian Federation.

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Viktoriia Savina, Doctor of Law, Associate Professor, Professor of the Department of Copyright, Related Rights and Private Law Disciplines Chair of RSAIP, Russian Federation.

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A note on terminology

Unlike French or Russian, the English language does not have a specific word with which to name the product of a stage director's activity. Since it was inevitable that the need for this word would occur often, it was obvious from the start that the use of a long circumlocution each time it was necessary to refer to these productions would make the text too wordy and awkward to read. This is why we have used the word "staging" to refer to their activity.

Introduction

During the thirty-fifth session of the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization in Geneva, from November 13 to 17, 2017, the Russian Federation made a proposal to strengthen the protection of the rights of stage directors at the international level. This strengthening could be achieved by amending existing international agreements or by developing a new international agreement¹.

The Russian Federation invited the WIPO Standing Committee on Copyright and Related Rights to initiate a WIPO study that would pursue the following goals:

- (i) to examine national legislations of WIPO's member states with regard to the protection of stage directors' rights and the conditions for the grant of the respective legal protection;
- (ii) to examine national legislations of WIPO's member states regarding the protection of performances not fixed in any material form;
- (iii) to study the enforcement practices concerning the protection of stage directors' rights;
- (iv) to analyse the efficiency of protection of stage directors' rights in order to further evaluate possible mechanisms of international protection for the said group of rights holders;
- (v) to develop the main elements of the mechanism for the international protection and enforcement of stage directors' rights; and
- (vi) to evaluate the rationale for drafting and adopting a separate WIPO treaty with regard to stage directors' rights.

The reason for this concern about the status of stage directors is that their protection varies from country to country. Some countries specifically protect them as authors while others prefer to consider them as performers. Many countries have no specific provision about them in their copyright legislation and their status is thus dependent on judicial interpretation or on contractual agreements. This great variety also stems from the fact that no international agreement refers to them specifically in order to set a standard (even if regional agreements may contain some rules).

Why is there no consensus on this matter? Several reasons explain this state of affairs and they are, of course, related to the nature of the stage directors' activities that partake both of performers' and of authors' creativity. Performers act as intermediaries between authors (for example, playwrights or opera composers) and the audience. Their activities are characterised by the evanescence of their performance. Performing artists, as well as the director, physically participate in the creative act of the performance to create their performances. Unlike them, however, the stage director of the performance does not physically participate in the performance (play, opera, musical, etc.).

Stage directors perform a complex activity: thanks to their efforts and talents, they create the holistic artistic result that expresses the overall idea of all the elements of the work. They unite and coordinate the efforts of actors, artists, composers; they interpret the literary or other primary source on the basis of which the production is created; they play an important role on

¹ Proposal on the part of the Russian Federation with regard to strengthening the protection of theatre directors' rights at the international level, SCCR 35th Session, Geneva, November 13 to 17, 2017, SCCR/35/8, November 6, 2017.

the selection of the costumes, of the music (sometimes), as well as of the sound and light elements of the performance. In this regard, the activity of the stage director is most similar to the work of the director of an audio-visual work, whose intellectual activity enjoys copyright protection, as well as to the creations of choreographers.

The stage directors' activities and the activities of directors of audio-visual works are conceptually similar, yet the latter usually enjoy copyright protection for the result of their intellectual activity. The main difference lies in the fact that the film directors' activities are embodied in a single artistic object of protection, i.e. the audiovisual work, which can be subsequently reproduced, performed in public, etc. without any change to its physical form. The stage directors' activities, on the other hand, can result in many final forms, since each performance of the same play, for instance, can be (usually slightly) different from the others: over time, modifications, such as cast changes, may be made to each new performance. In part because of their changing character, performances by actors, dancers, musicians, etc. are not protected by copyright/authors' rights, but as objects of related rights. These considerations show the similarity between stage directors' activities and performers' activities.

The request by the Russian Federation to examine the copyright status of stage directors does not mark the first time that WIPO is involved in deliberations on this issue. In the late 1980's, cooperation between WIPO and UNESCO took shape in a committee of experts that was asked to report on the principles governing the objects of copyright protection and their rights.² Various documents were produced on this occasion and published in the *Copyright* journal of WIPO.³ As one can expect, the discussions at that time also reflect the dilemma involved in the opposition between authors' right and related rights and no firm conclusion was drawn.

This hesitation between the two main forms of copyright protection (author's rights and related rights) is again at the heart of this study. Conscious of this ambivalence, the SCCR has agreed to entrust two researchers with the present scoping study which is meant to support the work of the Copyright Law Division of WIPO. The mandate that has been given to the researchers requires the following activities:

- (i) to set out the international legal framework applicable to the rights of stage directors;
- (ii) to identify a representative sample of national legislative provisions of WIPO Member States legislations with regard to the protection of stage directors' rights and conditions for the grant of the respective legal protection, including the protection of performances not fixed in any material form and the implementation practice in the area of stage directors' rights;

² On this process, see Y. Gendreau, "Staging Stage Directors at WIPO" in A. Diez Alfonso, ed., *Cuadernos Juridicos del Instituto de Derecho de Autor 15.º Aniversario*, Madrid, Balloon Comunicacion, 2020, p. 333.

³ *Preparatory Document for and Report of the WIPO/UNESCO Committee of Governmental Experts, "Dramatic, Choreographic and Musical Works"*, Paris, May 11-15, 1987, (1987) 23 Copyright 185; Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, *Evaluation and Synthesis of Principles on the Protection of Copyright and Neighbouring Rights in Respect of Various Categories of Works – Memorandum prepared by the Secretariats, Part II – Draft Principles*, Geneva, June 27-July 1, 1988, (1988) 24 Copyright 445; Committee of Governmental Experts on the Evaluation and Synthesis of Principles on Various Categories of Works, *Report adopted by the Committee*, Geneva, June 27-July 1, 1988, (1988) 24 Copyright 506.

(iii) to prepare some case studies illustrating the systems currently in use, including one case study on a touring show with cross-border activity; and

(iv) to set out the scope of possible issues which might need further consideration, to analyse the existing solutions or proposals, and to assess the need for any further international mechanism of protection.

The present study thus aims to respond to this mandate. It will start with a presentation of the current legal regimes in a selection of countries that reflect the wide range of protection that stage directors enjoy. A brief overview of the international legal framework in which these national regimes exist will follow. The third part of this study will present information that was obtained on the basis of interviews run with various stakeholders who were able to convey the day-to-day reality of stage directors' protection (or lack of protection) in their countries. As such, it will focus on stage directors' contractual environment. Before a general conclusion, case studies will be presented to highlight the current coexistence of the various approaches to the protection of stage directors' activities. Because of the uncertainty surrounding the copyright status of stage directors, it has not been possible to obtain the same level and depth of information from all countries that were identified for this study in cooperation with WIPO. In addition to the usual differences in the quantity of information that can be obtained (a fact of life for any comparative study), access to information because of language competency and of local infrastructure also varies (another fact of life for comparative work).

Part 1. The current legal regimes of protection of stage directors' rights in selected countries

In this part, the legal regimes for stage directors in various countries are presented according to the type of protection that they enjoy. The first group of countries are those where the national legislations specifically recognize that stage directors enjoy an author's right. Countries in the second group are those where the national legislations dictate that stage directors are protected by a related right. The last group of countries are those where the legislations are silent as to the right that may belong to stage directors; this apparent gap in the copyright structure means that stage directors must rely on the interpretation of the existing notions in their respective copyright legislations to determine if they can lay claim on a form of protection. Whatever the result of this investigation may bring, it has become readily apparent that it is in these varied environments that stage directors enter into contractual agreements for specific performances.

Section A. Protection through explicit copyright/author's right

Of the countries that were identified for this study, few of them explicitly include stage directors in their list of authors or stage directions in their list of protected works.

The copyright law of **Senegal** is here particularly noteworthy: the second paragraph of its section 6 includes "dramatic works and other works intended for stage production as well as their staging" in the list of protected works. It is the only place in their law where there is a specific reference to stagings. It thus means that the legal regime that applies to them is the same as for any other protected dramatic work. In particular, because Senegalese law is closely inspired by French law, there is no specific fixation requirement as a condition for protection. Originality is thus the basic condition for protection, a protection that lasts for 70 years *post mortem auctoris*. The application of the general principles also means that it is the

stage director who is considered the author of the work. All the other rules for works in the copyright law will therefore become applicable as the need arises.

Portugal is a country that expressly protects stagings as copyright protected works. Its section 2(1)(c) refers to them together with dramatic and dramatico-musical works. It is particularly interesting to notice that the other usual types of dramatic works, choreographies, and mime works, are identified in the subsequent sub-paragraph with the obligation that they be fixed in writing or any other manner, a condition that is not imposed on stagings.

Countries that belong to the copyright tradition can also protect stage directions explicitly. Such is the case in **Kenya** where they are expressly included in the definition of “literary works” in section 2. The concern about fixation of works in countries of this tradition means here that its requirement is expressed in general terms that necessarily apply to stage directions. Together with the requirement of originality that is defined as a finding that “sufficient effort has been expended on making the work to give it an original character”, section 22(3)(b) of the Kenyan copyright law conditions the protection of works on the need for them to have “been written down, recorded or otherwise reduced to material form”. This definition is broad enough to include prompt books as well as audio-visual recordings of the plays or other productions on which stage directors have worked.

Section B. Protection through an explicit related right

Most of the countries that were identified for this study that specifically acknowledge stage directors in their laws protect them with a related right.

Foremost in this study is the case of the **Russian Federation**. Amendments in 2017 have strengthened their position⁴. Article 1304 of the Civil Code identifies stagings as objects of related rights “if [they] are expressed in a form which allows their repeated public performance while the audience remains aware of their specificity or in a form that allows their reproduction and distribution through technical means”. The first part of the definition derogates from the usual understanding of a protected performance where each performance gives rise to a different individualised object of protection each time the performer performs (a play, for instance). Here, it is recognized that the same staging as a protected subject matter exists over the entire run of a play where there may be several performances. The second part of the definition, on the other hand, is more in line with the traditional notion of “performance” because it ties the protection to its possible dissemination through technical means. As a corollary, the stage director is identified as an “artist” or “performer” in Article 1313 where he is defined as “the person who carries out the direction of a stage, circus, puppet, variety or other theatrical representation”.

As a performer, the stage director enjoys all the usual economic and moral rights that are recognized to performers. There are however two special provisions: one concerning the public performance right and another one concerning the right of integrity.

Because performances of the same staging of a production can be experienced at the same time in multiple places and/or through various technical means, paragraph 2(10) of Article 1317 specifies that the coexistence of such performances does indeed amount to public performances that come within the stage director’s exclusive rights. This situation derogates

⁴ Federal Law of March 28, 2017 N 43-Φ3 “On Amendments to Part Four of the Civil Code of the Russian Federation” // Rossiyskaya Gazeta, N 68, 03/31/2017.

from the usual understanding of a public performance for a performer who, as a physical person, cannot be in two places at the same time.

The situation of stage directors is the only one where the text on the right of integrity spells out what it may entail for them. Paragraph 4 of Article 1315 refers to “the right to protect the staging against any distortion, that is, changes that lead to a distortion of the meaning or of the perception of the staging in a broadcast or in a cable communication, as well as in public performances of the staging of the play.”

Lastly, the term of protection for stage directors is also the object of a special mention. According to the second paragraph within paragraph 1 of Article 1318, “the exclusive right of the stage director lasts throughout his life, but no less than fifty years starting on January 1 of the year following the year in which the first public performance of the stage production took place”.

The copyright laws of Kazakhstan and of the Kyrgyz Republic also protect stage directors as performers. Section 34 of the law of **Kazakhstan** states that stagings and performances are protected by a related right and section 35 reinforces the statement when it includes performers within the group of owners of these related rights. The definition provision of the law, section 2, includes a specific definition for “directors of plays” that refers to “a person who carries out the direction of theatre, circus, puppet, variety or other performance” and these directors of plays come within the broader definition of “performer”, which also refers to music conductors, in the same section of the law. Consequently, all references to “performers” in the law include stage directors as well. The law of the **Kyrgyz Republic** operates in the same manner. Its definition provision, section 4, contains similar definitions of “directors of plays” who are included in the broader definition of “performer”. In both countries, there is no time limit to the performers’ moral rights. The term of protection for the economic rights, however, are not the same: they last 70 years as of the first performance in Kazakhstan, but 20 years less in the Kyrgyz Republic.

The protection of stage directors in **Belarus** is like the one that exists in the Russian Federation, that is, it is also achieved through related rights, but its formulation is slightly different. Stagings are protected explicitly in paragraph 1 of Article 22 of the Law of the Republic of Belarus “On Copyright and Related Rights” within the concept of “performance”. In line with this approach, stage directors are defined in Article 4 through the combination of two definitions: the definition of “performer” which “means an actor, singer, musician, dancer or other person performing a work of literature, art including folk art by acting, singing, reading, declaiming, playing a music instrument, dancing or in any other way (hereinafter – performer), and a stage director and an orchestra conductor” and the more specific definition of “stage directors” that “means the person in charge of a work of theatrical, circus, vaudeville, puppet or other play (show, concert)”.

There is a special ownership rule with respect to joint “performances” in the law. Because a large number of performers participate in stage productions, such productions can easily be qualified as “co-performances”. In accordance with paragraph 1 of Article 26 of the Belarus Law, rights to co-performances belong jointly to the performers who participated in their creation, including the stage director, the conductor, and the performing artists, regardless of whether the performance is an inextricable whole or consists of elements which each may have an independent meaning. Moreover, in accordance with paragraph 2 of the same article, related rights to joint performance are exercised by the head of the group of performers and, in his absence, jointly by members of the group of performers, unless otherwise provided by an agreement between them. Thus, according to this regime, the rights to theatrical performances belong to all the performers participating in them and do not separate the stage directors from the other performers; the rights in this co-performance can be exercised by the stage director as head of the group of performers with whom they work. This flows from the defining role of the

director in creating the production. Such a rule would mean that the stage director enjoys rights in his own name, because he is identified as a performer, and also exercises the rights in the co-performance in the name of all the other performers including himself.

The term of protection for the stage directors' rights, as stated in paragraph 1 of Article 30, is the same as for other performers' rights. Given that their rights are exercised jointly with the rights of other performers, this is the logical solution. Their moral rights run indefinitely and their economic rights last for fifty years from the date of the performance, of the first recording of the performance, of the first broadcast or cablecast of the performance, or by any other means of communication to the public.

The copyright law of **Japan** also recognises that stage directors enjoy a related right. According to section 2(1) (iv), "performer" means an actor, dancer, musician, singer, or any other person who gives a performance or a person who conducts or stages a performance". Consequently, stage directors enjoy the same rights as the actors who play roles in the productions they stage. Apart from the mention in the definition of "performer", there is no other provision that specifically refers to stage directors. The more specific contents of this form of protection will appear in the contractual agreements that they sign.⁵

Section C. Impact of court cases on the identification of protection

In a good number of countries, the copyright law does not refer at all to stage directors. This lack of formal recognition has not prevented stage directors from testing their case before the courts to see if rights, either those for authors or those for performers, could apply to them. These cases represent opportunities for stage directors to understand what elements in their activities could lead to protection by an author's right or by a related right. Conversely, they also help to explain why no formal protection – of either kind – has been granted and therefore to identify the existing obstacles to a formal protection of some sort.

1. Countries where courts are favourable to the recognition of a formal right

The definition of "works", "authors", "performances" and other such terminology that identify what copyright law protects are deliberately general in order to allow for interpretation as creative practices evolve. This is particularly true of the concepts that operate in the field of authors' rights. For instance, Article 2(1) of the Berne Convention gives an illustrative list of the works that may be protected.⁶ This willingness to be inclusive is in contrast with the definition of "performer" in Article 3 (a) of the Rome Convention of 1961 which is not drafted as a list of

⁵ See, *infra*, Part 3.

⁶ "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."

examples, but rather as an exhaustive list of activities that give rise to the protection.⁷ One may thus say that, unless one comes within the definition of “performer”, the default position would be to argue that one is an author if it is possible to describe one’s activities as being akin to those of some authors whose recognition as such is well established. Stage directors have been successful in several countries where the law makes no reference to them and can rely on this recognition to claim that they are indeed protected by their national law.

Courts in **France** have developed an interpretation that recognizes stage directors as authors. The seminal case on this issue is a decision by the Court of Appeal of Paris in 1971 which dealt with the stage directions of an opera buffa. The Court accepted that the staging was a protected work because of the directions given by the stage director. These directions pertained to the general composition of the scenes, the nature of the sets, and the selection and placement of the props; to the entrances, exits, and behaviour of the actors; as well as to the tone and rhythm of the actors’ speech.⁸ In addition to their visualization by the attendance of the allegedly infringing production, these directions were also identifiable by the numerous sketches and annotations in the prompt book concerning the sets, the props, and the movements on stage that betray the stage director’s personality and the originality of the means he had used to convey visually the thoughts of the authors of the work. It is because of this interpretation that contractual practices have been able to evolve.⁹

In **Germany**, the representative decision on this issue sided with an interpretation that assimilates stage directors to performers, even if the court knew of the possibility that stage directors could also be protected as authors.¹⁰ This decision was in line with the dominant doctrine on this matter. It also had the advantage of not affecting the outcome of the proceedings since qualification as a performer or as an author made no difference on the remedy that was sought.¹¹

In **Italy**, there is no definitive statement on the protection of stage directors. The age of the legislation is a factor since the basic text of the country remains a law that dates from 1941. A mixture of court decisions and doctrine results in an environment where the tendency leans towards a recognition as author because of different reasonings. For example, a court decision from 1958 considers that a staging is an “elaboration of a creative character”, protected by section 4 of the law, because of the work involved in transforming the literary and artistic form

⁷ For the purposes of this Convention: « Performers » means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

⁸ C.A. Paris, 1st ch., 8 July 1971, (1973) 75 R.I.D.A. 134. More recent case law continues to support this interpretation: C.A. Paris, Pôle 5, 1st ch., 16 October 2013, JurisData No 2013-023724. However, one later appeal decision does not refer to the stage director as an author nor to his moral rights, but instead grounds the decision in the protection against “parasitic behaviour” and of “personality rights”: C.A. Paris, Pôle 5, 5th Ch., 5 February 2015, JurisData No 2015-001992. See X. Desjeux, « La mise en scène de théâtre est-elle une œuvre de l’esprit? », (1973) 75 R.I.D.A. 43; P. Le Chevalier, « Pour une protection des mises en scène théâtrales par le droit d’auteur », (1990) 146 R.I.D.A. 19.

⁹ See, *infra*, Part 3.

¹⁰ OLG Dresden, 16 May 2000 – *Die Czardasfürstin*, 2000 ZUM 955.

¹¹ See E.W. Grunert, “Götterdämmerung, Iphigenie und die amputierte Csardasfürstin – Urteile zum Urheberrecht des Theaterregisseurs und die Folgen für die Verwertung seiner Leistung”, ZUM 2001, 210. Additional comments on stage directors’ freedom to stage works, but without taking position on the protection of the stage directors’ activities, can be found in A.A. Quaedvlieg, “Le théâtre-laboratoire au laboratoire du droit: la liberté du metteur en scène”, (2009) 21 Cahiers de propriété intellectuelle 673.

into an acted and spoken performance.¹² In line with this reasoning, there is also the opinion that stagings are “adaptations”, a category of works that is also mentioned in the same section 4 of the law and that, of course, implies that the author of the work staged must consent to this adaptation. Another aspect that is mentioned about stagings pertains to their authorship: it would be possible to claim that they are “collective works” as a result of the coordination by the stage director of all the elements that make up his stage directions. In bringing together the text, the music, the sets, the costumes, the lighting, the movements, the acting directions, etc., the stage director is creating a new work which is “the underlying work as it is performed” or a “performance” which exists *because* of his creativity.¹³ Again, his work is based on the creative works of others whose authorization must also be obtained. Whatever be the situation, there is no uniform and automatic protection, so a case-by-case analysis is always necessary.

2. Countries where courts are not favourable to the recognition of a formal right

Just as the stage directors’ arguments in favour of a jurisprudential recognition of their rights have been accepted by some national courts, court cases in other countries have resulted in rejections of their positions. In these circumstances, their ability to enjoy some form of recognition will require them to resort to contractual mechanisms that will depend on the strength of their bargaining position without any reference to the copyright law as a source of legitimacy.

An attempt to have a court declare that stagings are protected as copyright works was made in the **United States of America** in the case of *Einhorn v. Mergatroyd Prods.*¹⁴ in 2006. The case, which gave rise to several commentaries¹⁵, did not settle the issue. The presiding judge believed he was “not in a position to make an informed judgment”¹⁶ about the copyrightability of stagings; but the few comments that he made indicate what the sources of the difficulties can be. These difficulties pertain to two fundamental conditions of copyright protection: originality and fixation.

As in all countries, US law requires a work to be original in order to be protected. The US Supreme Court has defined originality in the following manner: “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to

¹² Court of Appeal of Naples, 20 August 1958, (1959) *Il Diritto di Autore* 644.

¹³ See V. Maffei Alberti, “Opera teatrale”, (2009) 25 *Contratto e impresa* 1037.

¹⁴ 426 F. Supp. 2d 189 (S.D.N.Y., 2006).

¹⁵ See J. J. Maxwell, “Making a federal Case for Copyrighting Stage Directions: Einhorn V. Mergatroyd Productions”, (2006) 7 *J. Marshall Rev. Intell. Prop. L.* 363; M. Livingston, “Inspiration or Imitation: Copyright Protection for Stage Directions”, (2009) 50 *Boston College L. Rev.* 427; D.S. Stein, “‘Every Move That She Makes’: Copyright Protection for Stage Directions and the Fictional Character Standard”, (2013) 34 *Cardozo L. Rev.* 1571; R. Amada, “Elvis Karaoke Shakespeare and the Search for a Copyrightable Stage Direction”, (2001) 43 *Ariz. L. Rev.* 677; T. Yellin, “New Directions for Copyright: The Property Rights of Stage Directors”, (2001) 24 *Colum.-VLA J. L. & Arts* 317; L. Temme, “To Be, or Not to Be: The Potential Consequences of Granting Copyright Protection for Stage Directions”. (2018) 9 *Cybaris Intell. Prop. L. Rev.* 1; D. Leichtman, “Most Unhappy Collaborators: An Argument Against the Recognition of Property Ownership in Stage Directions”, (1996) 20 *Colum.-VLA J. L. & Arts* 683; R. Byrnes, “Give My Regards to the United States Copyright Office? A Determination of Whether Copyright Protection Should Be Extended to Stage Directions”, (2011) 1 *Ariz. St. U. Sports & Ent. L. J.* 189; J. Talati, “Copyrighting Stage Directions & the Constitutional Mandate to ‘Promote the Progress of Science’”, (2009) 7 *Nw. J. Tech. & Intell. Prop.* 241.

¹⁶ *Supra*, note 11, at p. 196.

copied from other works), and that it possesses at least some minimal degree of creativity.”¹⁷ Within this concept of originality, another analytical tool has been developed to help separate protectible subject matter from non-protectible ideas or facts: *scenes à faire*.¹⁸ This term, which has a strong theatrical connotation because of the word “scenes”, refers to the fact that some elements of works are so standard and basic in certain types of works that they cannot be appropriated by an author’s copyright. They must remain unprotected so as to allow other authors to create their own works without fear of accusations of copyright infringement. They are an application of the basic copyright concept that one cannot protect ideas or facts: it is normal to see certain elements in certain types of works, and it is not a sign of copyright infringement to find similarities between two works because of the presence of such commonplace elements in both works. The judge in the *Einhorn* decision did not apply this doctrine to the contentious staging, but merely said that he would have liked to hear arguments on its possible application to the facts at hand. Without proper arguments, he was unable to pronounce himself on the existence of originality in the staging. He could therefore not decide if a staging could be considered a work protected by the *Copyright Act*¹⁹ where there is no specific mention of stagings as copyright works.

The other condition that a work must satisfy in order to be protected according to US copyright law is to be fixed: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”²⁰ The concept of fixation is defined in the law in the following manner:

A work is “fixed” in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is “fixed” for purposes of this title if a fixation of the work is being made simultaneously with its transmission.²¹

The concern about compliance with the requirement of fixation is expressed by the judge both explicitly and indirectly. He does mention that “the parties have not addressed whether, to what extent, and when *Einhorn*’s alleged contributions were fixed in tangible form”.²² A consequence of his understanding of fixation comes across another interrogation that he has: “[n]or have the parties addressed the scope and effect of the certificate of registration given the fact that the copy of the work that was filed was only the alleged blocking script as distinguished from images of a performance depicting positions and movements”.²³ Even though his puzzlement seems to stem from the relevance of the registration documents, his questioning relates to the fact that what is registered is a written document while the work itself “lives” through evanescent movements. He obviously has difficulties making the connection between the two (or, at least, the connection has not been pointed out to him).

¹⁷ *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991), at p. 345.

¹⁸ On this issue, see L.A. Kurtz, “Copyright: The Scenes a Faire Doctrine”, (1989) 41 *Florida L. Rev.* 79.

¹⁹ Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C.

²⁰ 17 U.S.C. § 102(a).

²¹ 17 U.S.C. § 101.

²² *Einhorn v. Mergatroyd Prods.*, *supra*, note 14, at p. 196.

²³ *Ibid.*

Because arguments on the issues that he considered essential for determining the copyrightability of the staging were not made, the judge felt unable to pronounce himself on the matter. The decision therefore did not solve the question and the issue remains moot. Without a solid confirmation by the courts that stagings come within the notion of “works of authorship”, one cannot state that they are indeed protected by the *Copyright Act*. The decision does have the merit, however, of highlighting the issues that must be resolved to achieve this goal. In the meantime, stage directors have not remained idle and they can make use of contractual means to protect their activities.²⁴

The same preoccupation with the application of the conditions of originality and fixation to the activities of stage directors is reflected in two other countries of the copyright tradition, the **United Kingdom** and **Canada**. In both countries, there seems to be no court decision that would have examined the issue. However, various authors have addressed the issue and thus expressed – in very careful terms – the pros and cons of a hypothetical case. No categorical pronouncement is made.²⁵ Because of the structure of the copyright laws of these countries, a qualification of stagings as a protected work also focuses on the interpretation of the notion of “dramatic work”, a category of works which encompasses, for instance, “any piece for recitation, choreographic work or mime, the scenic arrangement or acting form of which is fixed in writing or otherwise, any cinematographic work, and any compilation of dramatic works”.²⁶ Again, as in the United States, contracts take on an added significance for the protection of stage directors.

The laws of other countries that follow the British tradition of copyright can exhibit similar concerns about the need for fixation for the works to be protected. The narrow definitions of “performers” mean that qualification as authors would be the more likely avenue for stage directors to enjoy some form of legal protection. The major hurdle would again be the requirement that a work be fixed before such interpretation were to be accepted.

As in the United Kingdom and Canada, the law of **India**, for example, does not have a broad statement on the need for fixation. Its definition provision, section 2, specifies too that the scenic arrangement or action of choreographic work or entertainment in dumb show be fixed in writing or otherwise. Unlike these two countries, however, it stresses the need for fixation when it adds that a “‘composer’, in relation to a musical work, means the person who composes the music regardless of whether he records it in any form of graphical notation”. In this legal environment, the chance that stage directions enjoy copyright protection as works is very slim.

The law of **Jamaica** is more explicit about the need for the fixation of works. Its section 6(2) states that “A literary, dramatic or musical work shall not be eligible for copyright protection unless it is recorded in writing or otherwise”. According to its section 5(1) (a), Jamaican law insists that works belong to one of the categories of protected works in order to be protected. In the case of stage directions, this should point towards the category of “dramatic works”. Their

²⁴ See, *infra*, Part 3.

²⁵ G. Harbottle, N. Caddick, Q.C., & U. Suthersanen (eds.), *Copinger and Skone James on Copyright*, 18th ed., vol. 1, London, Sweet & Maxwell, 2021, pp. 2319-2320, ¶ 26-294; M. ROSE, “Copyright in Stage Production Elements”, (1998) 9 Ent. L.R. 30; R. Arnold, “The Myth of the Auteur: Performers as Authors” in E.M. Barendt and A Firth (ed.), *The Yearbook of Copyright and Media Law 2000*, Oxford, Oxford University Press, 2000, p. 3; V. ROY, « La mise en scène est-elle protégée par la Loi sur le droit d'auteur », in Service de la formation continue, Barreau du Québec, *Développements récents en droit du divertissement (2008)*, Cowansville, Éditions Yvon Blais, p. 137.

²⁶ *Copyright Act*, R.S.C. 1985, c. C-42, s. 2. See G. Azzaria, « Les arts de la scène et la notion d'œuvres dramatique », in Service de la formation continue, Barreau du Québec, *Développements récents en droit de la propriété intellectuelle (2009)*, Cowansville, Éditions Yvon Blais, p. 1.

definition, however, provides even less guidance than in the other countries since the definition provision of the law, section 2, merely states that a dramatic work “includes a work of dance or mime”. Of course, a very open definition may provide a better opportunity for stage directions to come within its ambit, but the context of the copyright tradition makes this scenario less likely.

Part 2. Current international conventions and the protection of stage directors’ rights

The various national regimes that have been presented exist in the broader environment of international agreements. Since there is no international consensus on the regime that is applicable to stage directors and given the fact that, to the extent that some form of recognition is expressed, the regime that may form the basis of their protection can either be that of authors’ rights or of related rights, the relevant international conventions that may be at play belong to both worlds of copyright protection. It is therefore important to examine briefly which conventions may be relevant under both qualifications. Emphasis will be put on the aspects of stage directors’ activities that are more relevant to obtaining official recognition in national laws. International conventions will be examined before regional agreements.

Section A. International agreements

There are many international agreements in the broad field of copyright protection that may serve as the bases for an international consensus on the status of stage directors since both authors’ rights and related rights agreements, depending on the chosen qualification, can come into play. The authors’ rights texts will be examined before the related rights ones. Because it brings together these two worlds under one instrument, the TRIPs Agreement will be examined under each sub-section.

1. Authors’ rights agreements

The foundational stone for authors’ rights texts is the **Berne Convention** of 1886 as it has been updated until its Paris text in 1971. Several of its provisions can be examined in light of the stage directors’ activities, most of which relate to the notion of “work”.

The intentionally broad statement in Article 2(1) of the Convention that enumerates which works enjoy its protection is the primary reason why it is possible to envisage that stage directions are protected as copyright works:

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;...²⁷

This definition contains two elements of primary importance: the “production in the... artistic domain” and the warning that no exclusion is allowed on the basis of its “mode or form of expression”. That stage directions represent an artistic activity, whatever their critical success

²⁷ Emphasis added.

may be, is a position that is difficult to challenge, given the recognition that stage directors enjoy as full-fledged participants in stage productions; it would not make sense not to recognize them at all since other contributors who bring life to the underlying works (plays, operas, musicals, etc.) do enjoy recognition. At the core of the issue is the willingness to accept their activities as on par with those of writers, playwrights, composers, painters, etc. in comparison with other artistic contributors such as actors, singers, and dancers who enjoy related rights protection. The expression “whatever may be the mode or form of its expression” may be regarded as related to that enquiry: the mode or form of expression may be the written word, the spoken word, colours, paints, canvas, marble, sounds, movements, etc. Unlike many authors, stage directors can be seen as relying on various means to achieve their “work”, including movements by people, a factor that may seem to make the analysis less straightforward.

That same expression, “whatever may be the mode or form of its expression”, is often examined in light of the second paragraph of the same provision which deals with the issue of fixation:

It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.²⁸

As the presentation of various national examples has shown, there is no unanimity among countries on the approach that should be taken with respect to this condition. Indeed, the Convention itself, through the formulation it has chosen, allows for discrepancies of the kind that have been revealed. Some countries openly reject the imposition of such a requirement; some impose it only on some categories of works (and these works may vary from country to country); yet some others expect it of all protected works. This criterion probably brings to the international standing of stage directions the greatest level of variety in the author’s right protection they can receive. It might even be greater than the impact of different definitions of originality that exist from country to country.

The application of the criterion of fixation raises issues that are very similar to those of choreographies, works that are often subject to a specific fixation requirement when just a few categories of works are identified for that purpose. Fixation for choreographies can be found to exist in various styles of notations, i.e. systems whereby the movements are “written” down thanks to some recognized standards that represent the movements.²⁹ It is thus possible to envisage that a written document can constitute a form of fixation of an artistic expression that is achieved through movement. The prompt book that a stage director prepares for each staging can be seen as the equivalent of the written fixation that is made of choreographic works that enjoy copyright protection because of this kind of fixation. What makes the analogy less than perfect, however, is that the elements that make up the stage directions pertain to more than the actors’ movements on stage and may include indications about the costumes, sets, lighting, use of music or sound effects, etc. This is not to say that prompt books cannot be regarded as fixation elements: the mode of fixation of a work must fit the work that is being fixed. Just as for choreographies too, audio-visual recordings of a staged performance can be a form of fixation when written fixation is not the only form of fixation allowed. These recordings can then capture all the elements of the staging that the stage director has included in his creation. Care must be exercised in the recognition of such audio-visual recordings because the same recording can fulfil two purposes: it may be a “strict” recording (akin to pictures produced by a surveillance camera) and it may also be a recording that reaches the level of qualification as a cinematographic work because of the originality in the filming process. Recordings of the latter

²⁸ Article 2(2).

²⁹ On this issue, see A. Hutchinson Guest, *Dance Notation. The Process of Recording Movement on Paper*, London, Dance Books, 1984.

kind would thus enjoy a dual status whereby the status as cinematographic work would coexist with the fixation purpose of the recording of the staging.

Other provisions of the Berne Convention that are relevant to the status of stage directors are those concerning adaptations. Because it is possible to consider stage directions as adaptations of works, this qualification brings two provisions of the Convention in the debate. Article 2(3) states that “[T]ranslations, *adaptations*, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work.”³⁰ Their protection depends, of course, on the existence of originality in the stage directions themselves as distinct from the originality of the works that are being staged. Such a provision reinforces the fact that, if they are considered works, stage directions enjoy the protection given by the Berne Convention as fully as the works that are being staged. Its corollary is Article 12 which provides that “[a]uthors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.” It is a reminder for any person who wishes to stage a production of a work that permission of the copyright owners of the play, opera, musical, etc. that is being staged must be obtained for the two works to coexist lawfully. Moreover, it ought to be an authorization that is separate from the permission to perform the underlying work itself since it is possible to envisage that a series of performances, for whatever reason, does not materialize or that the same staging is performed in circumstances other than the original ones for which the services of the stage director were sought.

The Berne Convention is the foundation of many subsequent international agreements that incorporated it before adding new international rules. Such is the case with the Agreement on Trade-Related Aspects of Intellectual Property Rights (**TRIPS**) of 1994 and with the WIPO Copyright Treaty (**WCT**) of 1996. Neither of these texts contains any update of international copyright obligations that may affect the recognition of the status of author to stage directors.

Up until the TRIPS Agreement, the Universal Copyright Convention (**UCC**) of 1952, as well as its 1971 version, constituted the other main pillar of international copyright law. Its impact has however seriously decreased since the coming into force of the TRIPS Agreement in 1995. The reason lies in an Appendix Declaration to its Article XVII which gives precedence to the Berne Convention:

(a) Works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the International Union created by the said Convention, after 1 January 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union;

(b) The Universal Copyright Convention shall not be applicable to the relationships among countries of the Berne Union insofar as it relates to the protection of works having as their country of origin, within the meaning of the Berne Convention, a country of the International Union created by the said Convention.

If this rule already gave precedence to the Berne Convention as each country that also belongs to its Union became a member of the UCC, the situation became even more critical as of the end of the 1980’s when three major economic countries became members of the Berne Convention: The United States in 1989, China in 1992, and the Russian Federation in 1995. The incorporation of the Berne Convention in the TRIPS Agreement in 1994 has moreover greatly diminished the relevance of the UCC: since almost every country of the world is a member of the World Trade Organization, which is

³⁰ Emphasis added.

the responsible body for the Agreement, it is the Berne Convention that lies at the root of international copyright relations.

Irrespective of the relationship between the two copyright conventions, there is even less to say about the UCC and stage directors than in the context of the Berne Convention. Whereas the Berne Convention refers specifically to the possibility of fixation as a criterion of protection, no such general rule is set in the UCC.³¹ The reason probably lies in the fact that the convention was instigated by the United States where fixation was a matter of course in the copyright regime. That in itself could have nevertheless required a statement of some sort simply to confirm the rule. However, it may have been deemed unnecessary because of another feature that characterizes the convention: its emphasis on formalities. Without going as far as imposing formalities on its members, the *raison d'être* of the convention lies very much in its recognition that they can exist. These formalities – such as those that are mentioned in its Article III, i.e. deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication – presuppose the existence of a fixed copy. The application of the convention would thus depend on the willingness of each country to recognize that stage directions are works and that such works can indeed be fixed on a medium that can be used to satisfy the formalities that a country can impose in the countries where such formalities exist.

2. *Related rights agreements*

When stage directors are considered as performers, either because of a formal statement in the law or through judicial interpretation, the international conventions that become relevant are more recent than those that apply when they are seen as authors. The Rome Convention of 1961 is the best known of them, but it will be necessary to examine the impact of the TRIPS Agreement on it as well as two later agreements that seek to complement it.

It is not surprising to realise that the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations 1961, known as the **Rome Convention**, does not include stage directors in its list of protected performers. In its Article 3(a), it defines performers in a “closed” fashion: “performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works”. This limitative definition is not, however, the definitive statement on the subject. Article 9 of the Convention allows countries to extend the scope of the Convention to other categories of performers: “Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.”

Both definitions refer to different types of performers who are not meant to overlap. What distinguishes one group from the other is its relationship with what is being performed: a performer is an “Article 3 performer” if he performs a literary or artistic work, while one is an “Article 9 performer” if he does not perform such a work. The literature on the subject is quite revealing: in neither case are stage directors identified as likely performers.³² Indeed the

³¹ See A. Bogsch, *The Law of Copyright Under the Universal Convention*, Leyden, A.W. Sijthoff, 1968. The author does not refer expressly to the fixation requirement, but does specify that the definition of “writing” presupposes that it is “fixed by means of conventional signs susceptible of being read” (p. 8) and that dramatic works “are usually reduced to writing and in this case they are protected on two accounts: as writings and as dramatic works.” (p.9). Such statement could open the door to the protection of stagings as dramatic works without the need for their fixation, a conclusion that is nevertheless unlikely given the emphasis on formalities in the Convention.

³² As an example, see C. Masouyé, *Guide to the Rome Convention and to the Phonograms Convention*, Geneva, WIPO Publications, 1981, pp. 19-22 and 42. See also X. Desjeux, *La*

heading of Article 9 is “Variety and Circus Artists”, an indication that it may not be the appropriate basis for stage directors.

At the core of the analysis is the following question: can the activity of a stage director be considered a performance of a work? There are actually two questions in this interrogation: does a stage director perform something that may or may not be a work? Are stage directions works? It is difficult to say that the stage director “performs” the underlying work when he “creates” his staging, i.e., before there are actual performances of the work. If stagings are themselves works, can it be said that the stage director himself performs his stagings when the play, for instance, is being performed? That is not very likely either. The link between his activity as performer and the object of his protection is very different from the one that exists in all the other cases that are envisioned by Article 3. A similar difficulty exists with Article 9 where stagings would have to be considered as objects that are *not* works. Even if they are not works, one would have to find that the stage director is “performing” something. Is it possible to consider that one’s protected performance can take place through other persons who are themselves considered as performers in their own rights? There does not seem to be a clear acceptance of the possibility of being a performer by proxy. On the contrary, the Convention appears to be premised on the protection of human beings as far as performers are concerned.

The Rome Convention raises another issue for stage directors who would be considered performers. Their rights could be very short-lived if, either for fixation purposes or for the exploitation of their “performances”, the production were to be recorded. Article 19 states that “[n]otwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.”³³ The very recording of their stagings by any audio-visual means would lead to the extinction of their rights under the Convention. This would be tantamount to saying that stage directors who want to keep a record of their work without losing their protection would have to do so in writing only.

There seems to be important considerations that make stage directors less than a perfect match for the Rome Convention. These are questions that would need to be further investigated if there were to be a consensus that the protection of stage directors should be achieved through the status of performers. Nevertheless, other related rights agreements will be mentioned here to round off the exercise.

The next step in the international evolution of performers’ rights is the **TRIPS Agreement** which is designed as a partial update on the Rome Convention. Its Article 14 sets out the rights for performers. Even if it is primarily geared towards audio recordings of performances, an activity that is rather marginal for stage directions, it still features two rights that can be relevant: “the broadcasting by wireless means and the communication to the public of their live performance.” Otherwise, the Agreement refers to the Rome Convention to identify the various rights holders who would benefit from its protection, so the previous interrogations concerning the identification of protected performers under that Convention remain relevant.

Convention de Rome (10-26 octobre 1961), Paris, L.G.D.J., 1966, at pp. 108-110, where the author examines the categories of performers who could be protected by the Convention. The only reference to stage directors is to say that clowns and acrobats could be protected as performers in the same manner as stage directors in France where the courts recognize that the copying of their prompt books can give rise to infringement actions. French law since then has evolved to the point where the actual stagings, as opposed to the prompt books, are protected by the courts. See the discussion *supra*, accompanying notes 8 and 9.

³³ Article 7 is the text that provides the rights to performers.

The **WPPT**, the WIPO Performances and Phonograms Treaty of 1996, is also built upon the Rome Convention and therefore raises the same issues with respect to the identity of the protected performers. Similarly, like the Rome Convention and the TRIPS Agreement, its primary focus appears to be performances that are recorded on phonograms, though other activities are also envisaged. Like its sister treaty, the WTC, it was designed to bring the rights of the protected rights holders in line with Internet transmissions. The issue that is specific to performers in the WPPT, though, remains the recognition of moral rights over their performances in Article 5.

The last instalment in this evolution is the **Beijing Treaty on Audiovisual Performances** of 2012. Even if the object of this study is the status of stage directions of live theatrical productions, understood in their broadest sense, it is nevertheless necessary to refer to this Treaty for two reasons.

The first one is to see if a stage director can be considered a performer under this Treaty. The definition of “performer” in its Article 2 (a) does not seem to allow this interpretation: ““performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore”. One would have to argue that the stage direction of a literary or artistic work comes under the notion of “otherwise perform” and this interpretation appears very hazardous. Moreover, because of the similarity between the works of a stage director and of a film director, it would open up a difficult controversy on the status of film directors in light of this Treaty. To a certain extent, then, the attempt to interpret the notion of performance in the context of this Treaty highlights even more how difficult it is to adopt the same interpretation of stage directors as performers within the context of the Rome Convention or of the WPPT.

The second reason why it is worth examining the impact of the Beijing treaty on stage directors stems from the possibility to fix a stage directors’ creative activity through audio-visual means. When this is the means that are used for the fixation of his work, as opposed to some form of written notation, the result of the process may exist both as an audio-visual work (if it meets the condition of originality) and/or as the mere fixation of the stage director’s activity. If the stage director controls the process of fixation by controlling the camera work and audio recording, does this activity transform his status from stage director of a play that is being fixed, for instance, into the director of the movie of the play? Would this be a way to bypass the difficult issue of his status as a right owner of the stage directions? All these questions are nevertheless different from the basic question of deciding to qualify his creative activity as something that is performed not by the various actors he has directed, but by himself as a performer in his own right.

The international agreements in the area of related rights do not seem to offer a clear indication as to the status of stage directors as performers. They provide no real guidance to national legislators who would want to take a stand on the status of stage directors on the basis of an international standard. It would therefore appear that the countries that have chosen to protect stage directors as performers have done so as a result of their own national policy analysis rather than because of a desire to comply with an undisputed international standard.

Section B. Regional agreements

In addition to the international agreements, regional trade agreements that include provisions on intellectual property rights constitute other sources of guidance for the protection of stage directors. The term “regional agreements” here will refer only to agreements that bind more than two countries or two formalized groups of countries, since an examination of bilateral

agreements should be much too fastidious and bring about marginal information. Not all agreements can be examined here, but a selection of them can help to determine if any trend is emerging. Given that the international agreements themselves do not have clear statements on this issue, any reference to stage directors in regional agreements should be a rare occurrence.

Indeed, a quick survey of regional trade agreements in all parts of the world reveals that substantive rules on intellectual property rights are not always included in their texts. Such is the case with the MERCOSUR, the ASEAN Free Trade Agreement, the Agreement on the South Asian Free Trade Area (SAFTA), the South Pacific Regional Trade and Economic Co-operation Agreement (SPARTECA), CARICOM, for instance.

Of the trade agreements that include substantive rules on intellectual property rights, the vast majority correspond to rewordings of the international intellectual property agreements which they consider essential for their region with some deviations to take into consideration issues that have a particular relevance in the area. They do not mention stage directors and, thus, no support for one or the other characterization of stage directors' activities can be obtained from them. The same debates as those that flow from the international agreements can take place on the basis of Decision No. 351—Common Provisions on Copyright and Neighbouring Rights (December 17, 1993) (the **Cartagena Agreement**), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership of 2018 (**CPTPP**), and the Canada-United States-Mexico Agreement of 2018 (**CUSMA**).

One notable exception is the **Treaty on the Eurasian Economic Union** of 2014. Its Annex 26 is the Protocol on the Protection and Enforcement of Intellectual Property Rights which contains a chapter on copyright and related rights. The definition of "performers" in its Article 6 reads as follows:

Performers shall refer to natural persons having created a performance as a result of their creative work, including artistic performers (actors, singers, musicians, dancers or other persons performing a role, reading, reciting, singing, playing a musical instrument or otherwise involved in the execution of works of literature, art or folk art, including variety, circus or puppet shows), as well as *directors of plays (persons having directed a theatre performance, a circus show, a puppet show, a variety show or another type of dramatic or entertaining performance)* and conductors. (emphasis added)

Consequently, the countries that make up this economic union, i.e., Armenia, Belarus, Kazakhstan, the Kyrgyz Republic, and the Russian Federation, agree to characterize stage directors' activities as the basis for the existence of related rights in their favour.

Lastly, one must mention that, in addition to such regional trade agreements that include intellectual property provisions, there is the **Accord de Bangui** of 1977 which deals with intellectual property rules for the seventeen Member States of the Organisation Africaine de la Propriété Intellectuelle (OAPI). Like the other regional texts on intellectual property, except for the Treaty on the Eurasian Economic Union, it makes no reference to stage directors and it cannot thus also be used to have an indication as to which characterization should be preferred for the status of stage directors.

Part 3. The interviews – the overall importance of contracts

The mandate that was given to the two researchers for this study included that interviews be held with persons involved in the daily activities of stage directors to infuse this study with the reality of professional experience. To this end, it was of course impossible to hold such interviews with persons from every Member State of WIPO. It was nevertheless expected to cover as many geographical regions as possible and as many legal environments in which stage directors work as possible. Moreover, it was felt necessary to interview not only stage directors, but also other persons or institutions who play an important role in the management of their activities.

Various methods were used to gather this information. At the start was the preparation of questionnaires: one for stage directors and another for associations that represent them. Then came the identification of potential interviewees. The researchers themselves had the means to get in contact directly with some persons and the Copyright Law Division of WIPO has been very helpful in identifying others as well. Because it was not always possible to run these interviews orally, some answers to the questionnaires were obtained in writing and translated by the WIPO translation services. These written answers offer valuable information, of course; but the lack of oral dialogue between the researchers and the persons who are interviewed means that the inability to reformulate questions and answers, as in an oral context, may lead to ambiguous answers that do not fully reflect the reality that is being reported.

The responses to the questionnaires reveal a very multifarious situation. If there is one overarching theme among all the answers, it is that of the importance of contracts to enable stage directors to protect their interests. This is not to say that other issues were not raised; but contracts between stage directors and producers can be identified as the main vehicle that captures their preoccupations, hence the title of the present section of the report. Another very general – and not very surprising – observation is that the degree of satisfaction that stage directors express with respect to their legal condition in their country seems to match that of other authors and performers with respect to their own perception of what copyright and related rights can do for them. The quest for a strong bargaining power is thus shared with all other creators. The development of copyright law in general has shown that the existence of professional associations, be they collective management organisations or other forms of groupings, has played an important role in fostering respect for works protected by copyright law. When such associations do not exist, authors are very much left to their own devices and may not achieve as much recognition by their other creative colleagues or their business counterparts.

To guide the reader through the information that has been gathered, the researchers would like to rely on this last element as the main division of this section of the study, so that the first section of this part will deal with interview materials that has been obtained from countries that do not have such associations and the second one will cover the situation in countries where the stage directors have managed to come together to voice their claims. This is not to say that this categorization leads to results that are diametrically opposed.

Section A. Countries without associations

Chief among this category are developing countries. Interviews with two stage directors from Africa, one from **Ivory Coast** (who says the situation is the same in **Burkina Faso**) and another from **Nigeria**, reveal that stage directors must fend for themselves very much. Even if

their national laws do not recognize them formally, they rely on the general notion of “creation” as a basis for the rights they negotiate with theatre producers. Since there is no professional association to advise them, the contracts provide no standard basis for remuneration from the producer: it can depend on box office income or profits or on a lump sum payment. If the contract does not provide for additional payment in case a new run of performances takes place, additional remuneration can be at a lower rate. They can be aware that their stagings can be seen on YouTube, for example, but have no idea about the measures that would be required to obtain compensation for such uses. To prevent the copying of their stagings (for example when people use their telephones to film), there can be announcements at the beginning of performances to remind the audience that this is forbidden.

Debates on the status of stage directors are rare, not to say inexistent. To have debates, one needs awareness. In Nigeria, for example, discussions pertain to the film industry, not to the theatre world. The absence of professional associations means that there is no forum for expressing concerns about their status. Stage directors from both countries would welcome an official recognition that their work is indeed protected by the copyright law because they consider that it would improve their bargaining position. It could also lead to the creation of associations. The law could impose strong penalties for unauthorised reproductions. It could also provide moral rights.

Contrary to many other authors, the work of a stage director necessarily involves the collaboration of several people. The use of the word “collaboration” here must not be seen as automatically referring to the qualification of the activity as a “work of collaboration” according to any national copyright law. It is simply meant to refer that stage directors must work with other people in order to create their staging. The copyright status of some of these people may be well known: playwrights (as authors) and actors (as performers when their national laws recognize them) have no difficulty in referring to the copyright law as the basis of their claims. Others have a status that can vary more easily: set designers, costumes designers, lighting directors. Official legal recognition does not automatically translate into higher bargaining power. This bargaining power is needed to negotiate with the producer of the show, a producer who, in the circumstances of each production, may consider that the author of the play or one of the actors can be a greater drawing card for the promotion of the show than the stage director. As in any work situation, not every person with the “same qualifications or role” is of equal value in the eyes of the producer.

Because the strings of the purse are held by the producer, stage directors may want to act as producers too. The fluidity of the roles in the theatre world has been well described by a **Brazilian** stage director whose activities, depending on the situation, can also be those of an actor, of a playwright, or of a producer. One person can fulfil many professional tasks. The blending of activities can lead to productions that can be promoted as team works between the stage director (who can also be author and actor) and the other actors. Theatrical productions can also sometimes be regarded as having been created in a “workshop situation” where the roles that the different participants have played are not strictly delineated. All these possibilities allow stage directors to leverage bargaining power irrespective of the formal position they may have in the creative process. Experience with foreign situations may also mean exposure to more structured environments, where the stage directors are better protected, that results in more informed negotiations.

An understanding of the source of income for the productions helps to appreciate the possibility of claiming remuneration. The existence of state subsidies and of tax incentives for corporate sponsorship, as well as an appreciation of the potential level of box office income, allow stage directors to know how much remuneration can be claimed. Of importance is the likelihood of remuneration for rehearsal time which, of course, impacts on the duration of the rehearsal period. A contract may foresee that the stage director will have access to financial

information to ensure that percentages of certain incomes, when they form part of the remuneration, are well calculated.

Other contractual clauses are not necessarily of a financial nature. Foremost is language about the identification of the stage director's role in the production of the work. There can even be a clause that requires the cast to accept the stage director's work methods. Without being labelled as such, moral rights considerations form part of stage directors' concerns.

The situation in neighbouring **Argentina** offers some similarities, but also has its own issues. There is no formal recognition of stage directors in the law, yet choir directors and orchestra conductors are specifically granted some rights as protected performers. Like the ballet directors, who are considered performers of the choreographers' original work, they would be seen as performers of the authors' works. In such a context, contracts again take on a great significance. Remuneration is typically based on a contract with the producer where it is common to add a percentage of the ticket sales to the fee that is paid for the actual staging activities. This participation in the proceeds of the performances helps to make an analogy with authors who receive royalties according to a similar formula, but the payment of the initial fee runs contrary to the practice with authors who rarely receive remuneration before the work is actually commercialised. Here too, the workshop model is well known and makes all the participants' remuneration depend on the success of the production when they agree to their share in the proceeds of the performances.

Given the uncertainty as to their copyright status, debates do occur and echo concerns that exist elsewhere. The fluctuation between the identification as author or as performer is well illustrated in the appreciation of the impact of the changes to a work that a stage director may want to make because of the artistic vision that he wants to convey to the public with his staging. If the changes affect the text of the work to the extent that it is possible to say that he has created a new work, then copyright in this new work, the text, would arise and be subject to the original author's permission. A recognition as author of an adapted work would not ensue if the changes remain minor: the mere substitution of some words, the removal of some passages, or changes in the entrance/exit of characters on stage. In such circumstances, all the hesitations about his status remain relevant.

China is another country where there does not seem to be a recognized association of stage directors. Nevertheless, the very experienced stage director who answered the questionnaire spoke in terms of the exercise of his copyright over his stagings as if they were formally protected by copyright law. Again, the contracts he signs with the producers refer to his right to determine his "artistic adaptation plan", his remuneration, and his right to be identified as stage director in the various promotional materials for the production. His perception remains that his rights derive from the contracts and his preoccupations concern the daily execution of such contracts: arbitrary changes to his stagings during the run of a play without his consent and the extent of the producer's influence on his creative process. His relationship with the author of the play is also a source of questioning: to what extent changes he would bring to the play in order to make it fit better with his view of how the work should be presented to the public actually allow him to change the script of the work? If such changes are substantial, can he be credited as co-author of the play without the original author's consent?

This director was aware of exploitations of his stagings by third parties without his authorization, but did not hold anyone accountable. This does not mean that he does not consider this a problematic situation; being credited with his work brings some comfort... Exploitation abroad or online has not brought him any income and it is difficult to monitor the situation. A more formal recognition of the work done by stage directors would allow them to

address the issues they view as problematic. A professional association that would provide guidelines and policies would be welcome.

In **Italy** there is no specific regulation of theatrical rights. The director is entitled to a remuneration, which is usually based on the combination of a fee for the creation of the production (premiere) and participation in the income derived from the performances. When a production is a derivative work (which was created with the use the work of another person), the stage director has the right to count only on remuneration for the performance of the production.

There is a perception that granting stage directors copyright will only have positive consequences because the director produces a creative work, even if it is based on the creative work of others who have given their permission to do so. These rights are contractually granted in accordance with the laws of copyright and related rights. It is particularly troubling that, with respect to opera, stage directors receive copyright for the results of their work. Why should there be a dual system?

The social and economic environment in which stage directors operate strongly influence their ability to assert their rights to remuneration (in the colloquial sense of the word, not in the copyright sense that refers to something other than an exclusive right), as much as their personal professional reputation. Without professional associations to back them, the multifaceted activities that they can lead as individuals in the theatrical world can only increase their difficulty to claim to belong to a specific category of rights holders. The quest is further complicated by the fact that, despite the long history of their existence as theatre artists, the legal qualification of their activities – when it exists – continues to waver between an author's right and a performer's right. Complications also exist because many other persons are involved in the work of a theatrical performance (authors, performers, costume designers, lighting designers, etc.) and the lack of legal guidance makes the distribution of remuneration among members of all the creative groups that are involved in a stage production more uncertain.

Section B. Countries with associations

The existence of professional associations for stage directors is in itself the sign that their working conditions are less haphazard than in countries where there are none. The professional organisations can be of two kinds: "mere" professional associations that represent their interests irrespective of a formal status in the national copyright system and collective management organisations that formally administer rights flowing from the recognition of their belonging to the copyright family of rights. Sometimes these two models coexist.

1. Countries with professional associations

Even if the copyright status of stage directors is unclear, professional associations that represent their interests can exist. The stature of these associations varies greatly from country to country. In some countries, their role is quite minimal and offers little help to stage directors. This does not mean, however, that they have no opinion as to what would be helpful for their members. Their situation seems to differ little from the one in countries that have no common professional milieu. In some other countries, these professional associations, short of being collective management organisations, provide very tangible support to their members.

The information obtained from **Hungary** brings to light that the Board of Hungarian Stage Directors, even if it follows the situation closely, cannot do much for its members. It

cannot do any advocacy work for them nor can it negotiate contracts for them. Stage directors sign individual contracts for work over a production. Payment at the end of the production makes it clear that the production becomes the property of the producing theatre. Absence of subsequent remuneration is in great part due to the fact that Hungarian theatres work on a repertoire basis (a play becomes part of the general offering of the theatre company to the public and performance calendars of the theatre schedule several plays over a semester/trimester that regularly alternate; a member of the public can thus easily attend performances of 3-5 different productions within the same week at the same theatre), rather than with schedules that offer more or less long runs of plays in a consecutive manner.

The answers to the questionnaire brought to light a very interesting decision by the Council of Copyright Experts³⁴ on the status of stage directors. Depending on the extent of the stage director's contribution to the play through his staging, the protection he would receive could be assimilated to a performer's right (if his involvement remains at the interpretation level so that the story and its important elements, such as the scenes and the characters, remain intact) or could be characterized as an authorial activity if the original work is altered (through the addition of new scenes or characters, for instance) so as to affect its meaning.³⁵ This decision is considered the current reference on the status of stage directors in the country.

Given the ambivalence of this opinion, it is no surprise that the Board of Hungarian Stage Directors would welcome a stronger recognition as an association that would defend stage directors more actively. It recognizes that such a move would ruffle some feathers, but it believes that the situation would settle down over time.

Responses from a stage director from **the Republic of Korea** reveal a different environment. A Korea Directors Association exists but does not seem very active. This means that directors are very much left on their own for the negotiation of their rights. Because the law does not recognize them formally, stage directors seem to feel rather powerless when faced with various practices, especially since the law is silent as to their work. The same contract can form the basis of a 13-year relationship with a theatre; payment according to the number of performances are very rare. The collaborative nature of a stage director's activity is also seen as a specificity that makes its copyright nature difficult to ascertain, although the production of sets and costumes does not seem to be regarded as something that belongs to the copyright sphere. This attitude should thus enhance the stage director's position within copyright law because he is less in competition with collaborators who would also claim copyright protection. The pandemic has made recordings of productions for their diffusion over the Internet much more frequent and therefore more worrying. The transformation of their role through their involvement in shooting and editing adds another difficulty in asserting their status as stage directors. Diffusion over the Internet necessarily raises cross-border concerns about reproduction and streaming without authorisation. Another international issue that has been reported is the impact of the extension of the term of protection on their work. A stage director felt uncomfortable when she was unable to obtain a clear answer to the questions that it raised with respect to a production that also went abroad. Was her work that was based on a work by a famous artist – whereby she created new characters, new relationships, and new text – merely inspired by it or an adaptation? Uncertainty as to the characterization of her own work makes such questioning more complex.

Stage directors in **Japan** are recognized by their national law as owners of related rights in their work. Information from a stage director reveals that an association of stage directors does exist and issues guidelines on minimum remuneration for its members, but it does not

³⁴ The Council of Copyright Experts is a specialised body that issues opinions on different matters that are presented to it. See A. Grad-Gyenge & M. Ficsor, « Hungary » in L. Bently, ed., *International Copyright Law and Practice*, New York, Lexis Nexis, 2019, §5[2][b].

³⁵ Council of Copyright Experts, Case SZJSZT-03/12.

carry much weight in practice. Stage directors are very much left to fend for themselves when they negotiate contracts and the related right nature of the transaction is usually ignored by both parties, partly because the law is not specific enough and remains at the level of generalities. Remuneration is often split into two categories: a lump sum payment upon the finalization of the staging and, if the performance is for a long-run or a tour, payment for rehearsals and individual performances. In any event, contracts are not always the norm because stage directors are often producers as well. As far as the interviewee remembers, public funding for theatrical productions has existed for about 10 years, however, and one of the consequences is that the authorities want to see contracts to grant such a funding. Online exploitation of theatrical productions does occur, but most directors are indifferent about the phenomenon because such diffusion pertains almost exclusively to works produced by large theatres. Like authors and actors, they seem to consider it as publicity. The major cross-border issue that the interviewee may recall is with US partners. When a Japanese production is shown in the United States, the US producer only obtains a license for the script that remunerates the author, but does not want to obtain a license for the staging. When it is the other way around, that is when a US work is brought to Japanese audiences, the Japanese producer must acquire the rights to the script and to the acting plan. Some Japanese attorneys will therefore claim that they can raise the stage director's status to that of author to improve the stage director's bargaining position in such circumstances.

At the other end of the spectrum, there are professional associations that are very involved in the protection of stage directors even if the national laws of their countries do not explicitly recognize stage directors as copyright owners. Such associations exist in the United States, in the United Kingdom, and in Canada.

The Stage Directors and Choreographers Society (SDC) of the **United States** has been representing its members for over 50 years. It is very telling that stage directors are grouped together with a category of creators, i.e. choreographers, whose works are clearly identified as "works of authorship" by the copyright law.³⁶ To bypass the issue of the stage director's copyright status, the collective agreements it negotiates refer to their "intellectual property rights". The agreements recognize their rights and give producers an exclusive and irrevocable license to use their stagings so long as the stage directors are paid. The staging can be changed if the original stage director is paid in full, a rather rare occasion. Restaging provisions lead to payments to the original stage director while the "restager" does not have any intellectual property right. Payments come within two categories: "fees" for the creation of the staging and, if it is a commercial production, "royalties" for the use of the work. Stage directors can sometimes negotiate profit participation and "subsidiary participation" (when directors have an impact on the author's reputation).

Various situations of reuse by others raise different issues. The teaching of stage directorship, whether in an academic setting or in theatres outside the larger metropolitan scenes, are often occasions to show students how to copy stage directors in order to give their stagings a more professional look. The SDC sees it as part of its mandate to educate people *not* to do this. And it would like to facilitate licensing in such circumstances.

Cross-border issues are becoming more varied. A Broadway or off-Broadway production that goes to the United Kingdom or to Canada continues to be governed by the SDC agreement and a London West End production that comes to Broadway is also governed by the SDC agreement unless it is considered a "visiting production". Before the pandemic, there was apparently an explosion of appetite for Broadway productions in Asia (particularly China and the Republic of Korea) in addition to Australia and Eastern Europe. The use of digital media brings new considerations. Productions from less well-known theatres seem to be regarded as easy targets for use on social media, a situation that is considered particularly difficult. Streaming

³⁶ Copyright Act of 1976, U.S.C.A. §102 (a)(4).

offers new outlets for productions, and stage directors would like to take part in this phenomenon but want to be paid for it. The fact that their stagings are indeed captured for such diffusions is seen as a sign that there is value in their work.

Recognition of their work (along the lines of what could be called moral rights in other countries) is important, whether it be when their work is presented for the first time or when it is the subject of a revival.

In the **United Kingdom**, stage directors are members of Equity, formerly known as British Actors' Equity Association, a professional association that essentially represents actors and not authors (although, like the SDC Society in the US, it also represents choreographers). A Directors' Guild has already existed, but it was not efficient. The British copyright legislation does not recognize stage directors as authors nor as performers. Equity has negotiated agreements with (London) West End producers, off-West End producers, producers who work in subsidized theatres, producers based outside London, and producers in small theatres. These agreements provide for minimum honorariums and, if it is a West End production, minimum royalties on box office revenues. The directors sign their contracts with the producers and, usually through agents, may obtain more than what is required by the Equity contract. If they work for a subsidized theatre, standard terms are set. The individual bargaining power of a stage director, of course, differs from person to person; it can also be affected by other persons' bargaining power for a production. Depending on the circumstances, a producer may want to bank on a stage director, an actor, a music composer, etc.³⁷ Star actors wield a lot of power. Contracts provide the opportunity to foresee payments for certain uses like reuse in another production or online.

There seems to have been much discussion on the role of stage directors. In particular, their relationship with playwrights can be problematic because of the extent to which stage directions are already included in the play by the author. Traditionally, there were not many; but their occurrence has increased since the Second World War. Some authors insist on them and this affects the stage directors' creative space. Other productions, especially musicals, can lead to very elaborate directions by the stage director whose role can almost be equated with that of a choreographer. An example of such a situation is the production of *The Lion King*. The big family of the theatre world is nevertheless a small world and stage directors are wary of making waves. They will avoid taking legal action against others for fear of attracting a bad reputation and not finding work again. They would like their association to be stronger and to have greater bargaining power. However, one stage director has intimated that recognition in the text of the law would not be a solution. The development of a "rights culture" would lead to other parties seeking rights too and such a movement would have a deleterious effect on the work environment. Compared to the film industry, there is more human interaction in the theatre world because of the repetition of live performances. Actors can have more input in theatre productions over time, whereas film productions lead to fixed products.

The same stage director has said that opera stagings are very much in a world of their own: very international and very lucrative.

Associations for stage directors in **Canada** are divided along linguistic lines: the Union des artistes takes care of French-language productions in Quebec and the Canadian Actors' Equity Association exists for English-language productions in all of Canada. Thanks to reciprocal agreements, the Canadian Actors' Equity Association allows French-language productions outside Quebec to be governed by the Union des artistes contracts. A major operating distinction between the two associations is that, because of a "status of the artist" law in

³⁷ See L. McDonagh, « Plays, Performances and Power Struggles – Examining Copyright's « Integrity » in the Field of Theatre », (2014) 77 Modern Law Review 533.

Quebec,³⁸ the agreement that the Union des artistes has negotiated on behalf of stage directors with theatre producers is binding on them, whereas the agreements provided by the Canadian Actors' Equity Association is accepted by stage directors on a voluntary basis.

There is no official recognition of stage directors in the Canadian copyright law, so again contract negotiations form the basis of the relationship with producers. These negotiations set minimum conditions in agreements that are voluntary (in English Canada), but some of them have been negotiated with several associations including the Professional Association of Canadian Theatres as well as with smaller professional and non-professional groups. They include both fees for the actual work and royalties for the performances. The agreements apply to foreigners working in Canada and to Canadian productions that go overseas. An interview with a representative from the Canadian Actors' Equity Association has revealed that much importance is given to the issue of remounts – and for which stage directors receive payment – which are very common in the case of musicals. If a remount of a musical is done abroad, the stage director hopes to be credited with his work and to receive payment. For the moment, no bad news on this issue has been reported to the Association.

The filming of stage productions for further dissemination is a concern because its costs are considered prohibitive. "Archival" recordings are a different preoccupation. Theatres want to make recordings of workshop material for their own use. Should a third party want to use these recordings (a student who is doing research, for example), then permission is required. Yet another issue is that of the ownership of the prompt book. This book is put together by the stage manager, but it is recognized that it represents the stage director's work. Nonetheless, it remains the property of the producer. Unscrupulous producers are tempted to use it partially – integral copying would be too obvious – and this makes the issue of the identification of what is protected more complex. Despite all the uncertainty, the recognition of an exclusive right over stagings in the copyright law is an idea that is seen as problematic: if stage directors are given the power to say no to the use of their stagings, how is that positive for the industry? Should there be a presumption of transfer of rights to the producer? Would default of payment be considered a copyright or a contractual issue? Lastly, infringement of the moral right of integrity has never been reported, but it must have happened. The requirement that a remount be based on the chosen staging is seen as contractual wording that speaks to that concern.

Obviously, the existence of a professional association is not in itself a guarantee that stage directors enjoy better protection for their work. Some associations are very organized and helpful while some others offer little more than a forum for discussions. There is also no correlation between the existence of a professional association and formal recognition in the copyright law.

2. Countries with collective management organisations

The very existence of a collective management organization (CMO) whose membership is open to stage directors should be seen as evidence that stage directors enjoy formal protection in the copyright law of that country. That, however, may not always be the case. What is also worth mentioning from the start is that the presence of a CMO does not prevent other professional associations from playing a role in the recognition of stage directors' rights.

The situation in **France** illustrates both propositions. The French Code of Intellectual Property does not recognize stage directors as either authors or performers. Yet, case law in

³⁸ *An Act Respecting the Professional Status and Conditions of Engagement of Performing, Recording and Film Artists*, C.Q.L.R., c. S-32.1.

the early 1980's has accepted that stage directors can be protected as authors if their work is original.³⁹ Since 1986, the Société des auteurs et compositeurs dramatiques (SACD) has accepted to represent stage directors. Copyright management by the SACD is essentially an "individual" management in that it represents its members when a theatre wishes to programme one of the works whose negotiation has been entrusted to the SACD. Even then, the negotiation of the fee for the work done (conception and rehearsals) is paid by the producer based on a minimum scale that has been negotiated by a stage directors' union. It is nevertheless possible for the SACD to negotiate this creative part of the work, given that it has negotiated reference agreements with various groups of producers. In addition to this basic salary, the SACD can negotiate royalties for the use of the staging. Depending on the stage director's stature, the remuneration may be higher than what such agreements usually provide (2% of the box office). Agreements exist with privately owned theatres, but some theatre producers – essentially state theatres and independent theatres – balk at the payment of such royalties because they are perceived as a strain on their copyright budgets.

Cross-border issues are rare. If a work is exploited abroad, the SACD will rely on reciprocity agreements with sister CMO's in the European Union, for example, even if there is no author's right protection for stage directors in the targeted country. The stage director's contract with the SACD becomes the basis for the transaction. The recording of the performance can be used for online diffusion. The SACD has general contracts with major web platforms and the sums collected are shared among its members, including stage directors, according to activity reports prepared by the platforms. Despite all these activities, the SACD is conscious that the stage directors' authorial status is not as firmly entrenched as that of other authors and is perceived as an additional expense by those who hire stage directors. Formal recognition of their status is seen as an occasion to cut down the remuneration paid to other creators.

Stage directors in **Spain** can also belong to two professional bodies: the Asociación de Directores de Escena de España (Association of Stage Directors of Spain) (ADE), a professional group that discusses general issues of interest to stage directors and the theatrical world, and the Artistas Intérpretes, Entidad de Gestión de Derechos de Propiedad Intelectual (IP rights management body for performing artists) (AISGE). Spanish law does recognize a related right to stage directors, hence the related right CMO for the managements of their rights. Stage directors must personally negotiate the conditions for the provision of their services (directing, rehearsing, etc.), for which they obtain honorariums, because there is no labour agreement that governs this situation. They must also negotiate the exclusive rights granted to them by the law, such as the right to authorize the fixation of a live performance or a communication to the public of a live performance. Some other rights, however, must be collectively managed (like private copying or communication to the public of a fixed staging), and this is when the intervention of AISGE becomes necessary. Because hardly any other country provides such a structured protection to its stage directors, it is impossible for the Spanish stage directors to enjoy similar protection for the rights that are managed by AISGE when their stagings are exploited abroad. Having said that, the matters that stage directors can negotiate personally in Spain can also be negotiated personally elsewhere. ADE and AISGE have drawn up model contracts to help stage directors in these situations. Moral rights are also recognized by the law and form part of the business environment. Naturally, AISGE would welcome a better recognition of rights for stage directors in other countries so it may enter into reciprocal agreements for the benefit of its members. It is wary, though, of strictly exclusive rights for them because the remuneration rights that it administers provide them with an income that they would not want to lose.

³⁹ See, *supra*, the text accompanying notes 8 and 9.

In the **Russian Federation**, there are various associations dealing with stage directors' rights. In 2020, the Guild of Stage Directors of Russia was set up. It is a professional community, a space for discussion on topical issues of the modern theatrical process. The stage directors felt the need for such a guild because they wanted to strengthen the prestige of the directing profession and to resolve issues related to theatrical reform. Other professional associations exist, including the Association of Workers of Russian Theatres Abroad and the Moscow Association of Young Directors. In 2021, the Federation of Creative Industries was created. It brings together more than 20 leading professional organizations and stage directors consider that their participation means they have made significant progress in protecting their rights. Even if there are numerous collective management organisations, such as the Russian Authors' Society, the Russian Authors' Society for the Collective Management of the Rights of Authors, Publishers, and Other Right holders in Reproduction, Copying and Other Reproductions of Works (KOPIRUS), and the Russian Organization for Intellectual Property, no specialised organisation for the collective management of the rights of stage directors has been created. Their rights are managed by the Russian Organization for Intellectual Property which was established by performers and phonogram producers for the collective management of related rights in the areas established by the law both in Russia and abroad.

Stage directors are financially rewarded for their theatrical productions, but for a long time their remuneration scheme did not include a share in the box-office income. In contrast to the remuneration paid by the theatres to authors, where the theatres must pay them royalties on that basis, this issue was left to the discretion of the parties. Theatres have now accepted to include in the standard contract a clause on the payment to stage directors of a percentage of the gross fee received from the sale of tickets for the public performances of the performance.

The moral right to the integrity of the stage director's performance is the issue that gives rise to the largest number of grievances. However, since the 2017 amendments on director's rights,⁴⁰ both parties (the theatre and the stage director) must specify in the contract, in the clause concerning the public performance of the performance, what actions can be carried out without the stage director's consent, what is strictly prohibited without his permission, and how the two parties will interact. For example, a contract may include a ban on changing cast members without the director's consent.

Kazakhstan is a country where the interests of stage directors, who are granted a related right as performers by the law, are represented by two collective management organisations. The Republican public association "Kazakhstan Society for the Management of Intellectual Property Rights" (ROO COOPIS) and the private institution "Non-profit organization for the protection of copyright and related rights", Amanat, operate in Kazakhstan. These organisations manage related rights on a collective basis, and their main area of activity is the collection of remuneration in favour of performers and producers of phonograms published for commercial purposes. The activities of the Association of Theatres of Kazakhstan, which is not a collective management organisation, do not include specifically the protection of stage directors' rights.

The legal basis for the protection of stage directors' rights in the **Republic of Belarus** is similar to the one in the Russian Federation, that is, it is identified as a related right. Directors receive royalties for the public performance of their performances. Minimum rates of remuneration are regulated by the national legislation, but contracts between the parties can lead to increases.

Some professional organisations exist, like the Association of Theatre Studios of Belarus and the Belarusian Union of Theatre Actors, but there is no specialised association of stage directors. At the same time, there are collective management organisations such as the

⁴⁰ See, *supra*, the text that accompanies footnote 4.

Belarusian Society of Authors, Performers, and Other Right Holders (BOAIP), which has been accredited by the State, and the National Centre for Intellectual Property of the Republic of Belarus (NCIP) which collects and distributes remuneration.

Situations often arise when it is necessary to determine the applicable law. For example, an author from Kazakhstan, a translator from Russia, a director from Belarus can be involved together in the creation of a theatrical performance, and sometimes it is difficult to identify the author or other copyright holders. Sometimes, authors work permanently for a local theatre (like, for example, the Yanko Kupala Theatre), but may work for other theatres as well. This situation means that they are well versed in the types of conflicts that may arise in such situations. Consequently, 90% of authors independently resolve these issues without any organizations and conclude contracts directly.

There are always problems with foreign authors. If the author is not on the list of the National Centre for Intellectual Property, then the director himself, who is very often the producer, must search for him and conclude a contract. When it is not possible to contact the author for that purpose, the production of the play may still take place without any compensation to the author because the play is available on the Internet. Disputes arise mainly about remuneration, including re-performances.

The topic of directors' rights is not widely discussed, but there is an inclination towards authors' rights for directors even if they currently enjoy related rights. There are no uniform guidelines or policies regarding of stage directors' rights; theatres may develop some for their own uses.

In **Armenia**, the management of the rights of stage directors is carried out by the society "Armauthor". Its main field of activity is the collective management of rights of public performance and of communication by broadcast or cable, including retransmission. The Government Decree on the Establishment of Minimal Tariffs for some forms of Use of Works of January 11, 2007 No 506 established the minimum rates of royalties that the "Armauthor" applies. For a theatrical production, the remuneration is distributed among the playwright, the stage director, the stage designer, the costume designer, and the composer. The royalty rate depends on the "size" of the staging. For one-act performances, royalties are half of those for performances consisting of two or more acts. Stage directors receive 4% of the proceeds when the performances consist of two or more acts and 2% when there is only one act. However, the stage director's remuneration is significantly less than the playwright's remuneration (11%).

In **Kyrgyzstan**, the collective management of stage directors' rights is assigned to the state patent office Kyrgyzpatent. Kyrgyzpatent acts in this capacity until private collective management organisations are created in the country. When the stage director is an employee of the theatre where the performances take place, it is understood that his remuneration is included in his salary. If he is not under the employment of the theatre where the performances take place, it means that he is acting as an independent stage director and that he needs to find sponsors because his remuneration will depend on the agreement with such sponsors.

The picture that can be drawn from the various interviews that have been run is that of a group of creators who are doing their best to protect their interests in their creative products. No single method emerges as the dominant model, but institutional support, whether or not in a legal environment that recognizes their rights, clearly contributes to enhance their position. They work with the tools that are at their disposal.

Part 4. Case studies

In this part of the study, concrete examples of situations that highlight the difficult reality of stage productions that travel across borders are presented. To the readers of this study, the juxtaposition of various names of cities and countries should immediately suggest how convoluted the legal ramifications can be for stage directors in a world where the increase in travel possibilities and electronic communications have made international commercialization of creative activities so much easier.

A. *The jet-setting stage director*

Fabrice Lacolle is an internationally known stage director based in Montreal, Canada. He has been invited by the Théâtre du monde renouvelé, in Montreal, to stage a production of a new play by a very popular local playwright, Amélie Dupont. There is talk of performances at the Avignon festival. Also, because her plays are often translated for productions that can take place in theatres in Brazil and Japan as well as at the Edinburgh Festival, preliminary discussions are already taking place with producers from these countries. Fabrice Lacolle's reputation as a stage director is such that these producers are more interested in programming the play if they can advertise that Fabrice Lacolle is the stage director of the performances they would schedule.

Fabrice Lacolle is a very busy man. Big chunks of his agenda are booked years ahead, in particular because he also stages opera productions at the Metropolitan Opera House in New York City and he has recently been invited to stage the Ring cycle at the Bayreuth Festival in Germany. These opera contracts are very lucrative for him and he is eager to continue to make his name known in those circles. If he needs to block an important number of weeks for this play in so many countries, his decisions will be based not only on the travel conditions that come with jetting around the world, but also on the financial terms he will be offered for his work.

B. *The ambitious workshop theatre director*

During an international meeting that was focusing on theatre productions for teenagers in Cape Town, Ngozi Nwakaku, a stage director whose latest production with her regular team of actors had met with much success in Lagos, made several contacts with fellow stage directors from many countries around the world, including with representatives from the *Theatre European Engagement Network (TEEN)* and the International Association of Theatre for Children and Young People (ASSITEJ). She was very pleased with the fact that some of them had heard about her work and were encouraging her to seek international exposure. Her team of actors was very excited about the news when she discussed with them how they should go about it. In her eyes, they are necessarily part of the project since one of the hallmarks of her shows is that they all work together in the development of their productions in a format that is considered part of the "workshop theatre" school of creation.

They developed a strategy to approach potential producers. To allow producers and festival directors to become acquainted with her work, they decided to set up a website to promote the group in which they included the film of a short recent production that she considered most representative of her work. Ngozi Nwakaku kept up the contacts with the people she had met in Cape Town. Her efforts paid off and she was even beginning to receive manifestations of interest from places she had not expected. She would like to include stops at the Children's Theatre in Cincinnati and at the Bolshoi Theatre in Minsk. She has also been offered to take part in the CaixaEscena programme of the "la Caixa" Foundation in Spain. Her

cousin, a lawyer who is very involved in the Nollywood community, reminds her that it is important to be mindful of the legal issues that come with this new phase of her career. The advice is not falling on deaf ears: her favourite teacher from the London Academy of Music and Dramatic Arts has emailed her because she had seen her short film in the Blackpool Children's Festival which this year has been entirely online. That was quite a surprise because she had not been in touch with the organisers.

C. Performance as a part of a complex object

Since the adoption of the law on stage directors, there is no specific case law on the matter, but there is a practice of considering theatrical performances as elements of complex objects. In accordance with Article 1240 of the Civil Code of the Russian Federation, complex objects are works – such as films, other audio-visual works, theatrical performances, multimedia products, or databases – that include several protected results of intellectual activity. The person who organises the creation of a complex object acquires the right to use these results on the basis of assignments or licenses obtained from the holders of exclusive rights over the incorporated elements.

Unless otherwise provided by agreement, a person who organises the creation of a complex object is deemed to have acquired the right to use works specially created for it by an assignment from the creator of the specially created works. When a license agreement providing for the use of a work in a complex object is reached, it is deemed to cover the entire period and the entire territory of the relevant exclusive right, unless the agreement provides otherwise. Thus, if a stage director's performance is included in a complex object, then the rights over it are transferred almost forever to the person who owns the rights in the complex object because there are very few circumstances where the stage director can do "otherwise".

However, courts may acknowledge that there can be situations in which a stage director is recognised as the *author* of an audio-visual work because his staging was included in the audio-visual work. For example, Zadornov M.N. (the plaintiffs are his heirs) owned the exclusive right to a variety entertainment as well as the related right to its staging (protected as a performance). This performance was included in an audio-visual work. The Intellectual Property Court recognised that the "Az Art TV-production" society owned the exclusive rights in the audio-visual work and that M.N. owned only the exclusive right to theatrical and entertainment performances, subject to rejection on the following grounds.

According to paragraph 2 of Article 1263 of the Civil Code of the Russian Federation, the authors of an audio-visual work are:

- 1) the production director;
- 2) the scriptwriter (screen player);
- 3) a composer of music (with or without text) specially created for this audio-visual work.

As established by the court of first instance, music was not created for the creation of controversial audio-visual works. M.N. Zadornov acted as the stage director and screenwriter of the variety entertainment and of the audio-visual recordings for television that were at the heart of the dispute. The court found that he was the only author of the controversial audio-visual works.

Having interpreted the conditions of the agreement between the "Az Art TV-production" society (licensee) and M.N. Zadornov (licensor), conditions found in Agreements № 3 / 09-09 and № 7 / 11-09 of 12.11.2009, according to Article 431 of the Civil Code of the Russian Federation, the court established that the licensee, among other obligations, assumed the obligation to provide the author/licensor with technical and organisational assistance (i.e., to place the filming equipment in the concert hall, to make video filming, to do the editing) which,

by virtue of the provisions of clause 1 of Article 1228 of the Civil Code of the Russian Federation, does not entail recognition of the rights of authorship. Consequently, the licensee's technical assistance could not form the basis of a finding of co-authorship.

Conclusion – the stage directors' paradox

This study on the protection of stage directors does not automatically lead to a single obvious conclusion. The picture one can draw from this exercise is that of an extremely varied legal environment for stage directors. This great variety cannot facilitate the management of legal issues in cross-border situations. Indeed, some intervenors have pointed out that, when their own national system provides stage directors with rights upon which they can rely at home, their hope for recognition in countries whose copyright systems do not have the equivalent protection remains... uncertain. This is in sharp contrast with the situation whereby a strong national professional association can easily dictate its terms even in cross-border situations. Similarly, testimony that includes stage directors' plight within the more general difficulty to obtain respect for creators' rights in a given country coexists with efficient collective management of stage directors' rights in other countries. How can one make sense of such diversity?

It is worth noting that the issue of stage directors' rights shares some similarity with that of book publishers. Book publishers have been in the copyright environment since the beginning of copyright laws, just as stage directors – even in a more rudimentary manner – have existed since public performances have been recognised as sources of income for playwrights and music composers. One is not in the presence of a new technological phenomenon that challenges the prevalent copyright regime. On the contrary, this is a situation that has been known for centuries, by now, but that has not yet been part of mainstream copyright discussions. That in itself is quite telling. However, comparison with book publishers can stop here because the features that make the stage directors' case so difficult to assess are much more varied and complex.

What does a right in the nature of an author's right or a related right provide to its owner? A status that brings with it a bargaining power. As many examples in other sectors of copyright law amply demonstrate, this bargaining power is not always as strong as one would want in all circumstances. Yet, the formal legal recognition that comes with an author's right or a related right can be perceived as its ultimate symbol. This study has indeed brought to the fore that bargaining power is the stage directors' core preoccupation. What it has also shown is that it is possible to exercise such bargaining power without formal recognition in the law: an individual stage director may have it for himself as much as a professional association may have it for its members. Indeed, there can be strength in numbers. The problem with this situation, however, is that the space where this "merely contractual" bargaining power is exercised is generally private. It is impossible to study it extensively – and even more so in an international context – in order to assess its clout: this is the major limit to the scope of this study which has nevertheless allowed to get a glimpse of its workings.

In the case of stage directors, that reliance on contractual bargaining power, whether it be personal or collective, should play such an important role in their recognition as creators is most probably the direct consequence of the stage directors' ambivalent copyright status. Even so, this uncertainty nevertheless allows stage directors and their counterparts to set contractual terms along the lines of copyright principles (exclusivity, royalties, profit sharing, right to name, etc.). They mostly behave "as if" they were protected by an author's right or a related right. To avoid taking a stance in this process, they may even skirt the issue by referring to their

“intellectual property” rights rather than to actual author’s rights or related rights. This alignment is a constant reminder that they are part of the “copyright family”, regardless of their status in the copyright legislation or of the chosen terminology. Their problem lies in the identification of the branch of the family with which they have the greatest affinity because that rapport could dictate some consequences.

A mere number game whereby one counts the number of countries that have adopted either an author’s right or a related right as a form of protection for stage directors cannot form the basis of a decision as to which regime is more appropriate for them. It is more appropriate to evaluate which regime best reflects the very nature of their creativity. On the basis of the observations that this study has allowed, it is impossible to endorse either option as the easy and necessary solution; but it appears that the status as author would be the better of the two. We believe that the nature of the creative work of theater directors is similar to the nature of the creative work of a film director who enjoys copyright protection. Therefore, we believe it should be possible to protect theatrical performances with copyright too. In particular, modern technology has increased the use of recordings of theatrical performances; in the context of the COVID-19 infection, the use of recorded theatrical performances has become even more prevalent than the offer of live performances. It is likely that the momentum that the pandemic gave to this evolution will not be defeated and that the use of theatrical performances on the Internet will remain high. This means that, in fact, many theatrical performances are becoming nothing more than audiovisual works, something which once again confirms the fairness of the choice of an author’s right as the protection mechanism for stage directors.

This conclusion requires explanations and leads to further questions that make any attempt at decisive measures in consequence thereof premature. Moreover, it is necessary to remember that it is very difficult to make countries accept changes to their national laws when their nationals are used to a system that differs from what is envisaged or when their status quo is not challenged from within their own borders.

Nobody seriously questions the creativity involved in the stage directors’ work nor the fact that this creativity is akin to an author’s creativity. The performers’ participation in the overall scheme of related rights has also given rise to the comment that, unlike phonogram producers and broadcasters, creativity is the hallmark of their activity. This is an important consideration because it means that the stage directors’ creativity does not automatically determine which regime should apply to them. The same goes for their ability to exercise moral rights: since the WPPT and the Beijing Treaty, performers enjoy moral rights just as authors do. Neither creativity nor moral rights are exclusive hallmarks of the authors’ protection status.

The crux of the matter lies in how stage directors deploy their creativity. Theirs is a people-oriented organizational type of creativity, very much like that of a film director. The analogy with film directors, however, must stop here because an important element is missing: the fixation of their work. The resort to the film (as in picture track) is not merely designed to fix an existing work that has its own autonomy: it is the very substratum of a new work, the cinematographic work. In the case of the stage director, the fixation of his creation by its filming is simply meant to record it (when there is no cinematographic purpose added to the activity). Moreover, the exploitation of a cinematographic work over any period of time does not lend itself to the slightest alteration of the work from its original state. In the case of stagings, the live dimension of stage productions can lead to variations even if a recording of the original staging is made. They may not happen often, but the potential is there. Yet, even without its recording, it is possible to recognize a staging from performance to performance and between productions with different actors. The lack of international consensus over the need for a work to be fixed in order to be protected⁴¹ is probably at the root of the enduring indifference towards the status of stage director because it would be essential to confront the situation unreservedly.

⁴¹ Even the Berne Convention allows for differences of treatment of the fixation requirement in Article 2 (2).

The stage director directs. So does the orchestra conductor. What is it about the stage director's activity that distinguishes him from the orchestra conductor whose status as a performer is a matter of fact? The ensembles that both oversee can include a large number of persons as well as smaller entities. The orchestra conductor, however, leads a group whose members remain relatively nameless in the eyes (or ears...) of the public, whereas the actors with whom a stage director works can be highly individualized and can interact with each other on a one-to-one basis that is essentially unknown in an orchestra context. Very often too, the conductor represents the orchestra itself. That is a situation that rarely happens with the stage director: the standard image of the stage director is not as the figurehead of a cast who blend in a fuzzy mass behind him.

Another thorny issue with stage directors is their relationship with creators – other than actors – whose contributions to their work are essential. This is true whether the stage directors are seen as authors or as performers. The status of costume designers, set designers, lighting designers, and other persons involved in the creation of stage productions is far from clear from a copyright perspective. In some instances, they will be considered authors, but not always. Uncertainty as to their copyright status can lead, as in the case of cinematographic works, to general assignments to the producer of the show, irrespective of a strict legal analysis of the object of the assignment, or to mechanisms like the US work-for-hire rule. The potential copyright status of their creations raises the awkward issue of the stage directors' role in their creation. Are they merely providers of more or less specific ideas? To what extent is their involvement in other people's creations the basis of their own rights? What happens in case of a conflict over the result of these other creations?

All these comments and issues have plagued stage directors ever since they started to be more actively interested in a form of legal recognition, but there does not seem to be definite answers to them. Even when national laws declare that they are protected, whatever the regime, the impression that they are not well protected can easily persist because the international picture of the situation is too unfocused. Another reason for this unsatisfaction is that the legislative decision to protect them is rarely accompanied by provisions that specifically address their reality. It is as if the mere legislative declaration that they are authors or performers is a sufficient response to meet their needs. Such legislative decision can be rooted in two different kinds of considerations. One stems from a general policy consideration that is not unique to stage directors: the legislator may be wary of providing special measures for "new" classes of creators and instead may prefer to rely only on rules that are already known. The idea would be to favour a copyright law that provides as general a framework as possible so as to allow it to accommodate evolutions as they come up without having to intervene. This is not new. To a certain extent, the development of copyright laws has been about the need to intervene precisely because it is believed that existing rules have reached their limits. Moreover, copyright laws regularly provide for particular situations for specific categories of works for various reasons: photographs, architectural works, cinematographic works, computer programs are all examples of works that have led to the bending of some general rules. In the case of stage directors, the very discussion of their place in the copyright scheme may always sound a little untimely: unlike issues tied to technological developments, stage directors have always been around. This simple truth may explain why they attract little attention since, to many, it may seem that the new-found interest is at odds with the indifference that the issue has met over time. In such a context, initiatives like those that have led to tailor-made rules like those in the Russian Civil Code are particularly rare and offer a promising basis for discussions once there is greater awareness of the chaotic international picture that the legal status of stage directors offers.

There may be another angle to this situation. Another reason for the general lack of explicit legislative measures for stage directors may be that stage directors' copyright issues

simply do not carry as much weight as those of other copyright stakeholders. Since “the show must go on”, they have managed to carry on with their work and have become used to the fatality of their status quo. If some form of legal recognition occurs, it is not certain that it changes their bargaining position overnight when they negotiate their contracts, though many stage directors who were interviewed would welcome it.

The global picture that emerges is one where many protection models coexist and indeed have coexisted for many years. As stage productions increasingly travel across borders, either through live performances on tour or thanks to the many types of telecommunications of recorded performances that can be offered to the public, stage directors face increasing difficulties in ensuring their remuneration, despite the greater visibility of their work, because the bases for protection differ. It is easy for producers to take advantage of these differences and collective management organisations that represent stage directors are acutely aware of this situation. Many creators today – and not just stage directors – are confronted with a similar reality.

The long-standing heterogeneity of the legal mechanisms for the protection of stage directors’ activities complicates the international use of theatrical productions and prevents the identification of an easy and obvious solution. Those who can live with their current conditions and, even more so, those who are satisfied with the institutional support they enjoy would look on any change with at least some suspicion. Without saying that conditions cannot be improved on a more general scale to meet the needs of more stage directors around the world, any proposal that does not garner the support – or at least the interest – of those who are satisfied with their current situations is bound to fail. If one takes the examples of the WPPT and of the Beijing Treaty that were designed to update the performers’ protection scheme, the stage directors’ situation is very different: the fundamental characterization of the performers’ rights as a form of related right was not at stake in those instruments, whereas that of the stage directors is not uniform among the countries where they are officially protected and is still moot in many others.

To bring the debate to another level, further research might be necessary to see if it is possible to lessen the impact of national differences. It could be informative to identify *all* countries that protect stage directors through a recognition in the copyright legislation, whether as author or as performer, and examine the extent to which the general rules that apply to authors or performers have been modified or supplemented by distinct measures so as to reflect their specificity. The resulting picture should help to identify what elements of copyright protection have so far been regarded as necessary characteristics of their protection. These elements could then be compared with the contractual conditions that professional associations and collective management organisations ensure in order to appreciate if it is possible to find some common grounds among various models of protection.

To provide a background to this analysis, it may be helpful to enquire to what extent copyright laws include rules whose applications are restricted to some categories of works. The idea is to explore the relationship between rules of general application and rules of exception within copyright regimes. Do legislators often resort to exceptional rules for certain types of works? Which parts of copyright regimes are most often subject to differential treatment? Authorship/ownership? Term of protection? Exceptions? Moral rights? The findings of such an investigation could help to appreciate the acceptability of eventual specific rules for stage directors as official newcomers in the categories of protected authors.

At the same time, it must be said that, compared to the other creators that authors’ rights and related rights protect, stage directors enjoy a fairly low level of visibility. The variety of protection modes again probably contributes to this situation: it is difficult to form a united group of creators to raise their profile when daily realities differ so much. One important drawback of

this relative isolation from each other must be a generally low awareness of the protection measures that do exist in the countries where stage directors enjoy better protection and that could serve as models for those who would benefit from their experience. Activities that would contribute to the sharing of information among stage directors and producers from various backgrounds should help to provide a reality check on actual needs and become testing grounds for proposals. A concrete goal could be the identification of best practices that would contribute to the improvement of the general lot of stage creators around the world while work on an eventual international text would be undertaken.

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