

The Copyrightability of Stage Direction

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1 Introduction

Theatre consists of three elements: the play – the dramatic text – the stage production and the audience. Thus, even if the dramatic text constitutes the starting point for the performance, it only becomes theatre in conjunction with its presentation, on a stage before an audience. Research into drama, both in its literary and theatrical forms, has emphasised the significant difference between these two forms of expression. The distinction is of fundamental importance in the context of this thesis which applies an analysis, based upon copyright law perspectives, of the transformation from the dramatic text to the stage production, which is made by the stage director.

The approach, both in Sweden and internationally, is to recognise some form of copyright protection in favour of the stage director. The issue is how that protection should be formulated. Of decisive importance in this regard has been whether the director should be treated as the creator of the stage production or as the interpreter of the dramatic text. The assessment of the stage director's achievement can in this sense be traced to the division of copyright into the two major categories of *copyright* (which refers hereafter to copyright in a classical sense excluding neighbouring rights) and *the neighbouring rights*.

Copyright extends to the individual who *creates* a work, but even individuals who adapt or translate a work, or convert it to another literary or artistic form, enjoy copyright. The neighbouring rights include protection, inter alia, for what are known as the performing arts. The category "performing artist" is typically regarded as including actors, singers and musicians, that is, those individuals who *interpret* a work.

A prerequisite for determining to which category the director belongs – as an author and therefore entitled to copyright or as a performing artist and therefore entitled to the more limited protection pursuant to the relevant neighbouring right – is to identify what it is which constitutes the basis for making a distinction in the Swedish Copyright Act between the two categories. The

difference between the two categories has been examined through an analysis of the statutory text, the preparatory works, case law and doctrine.

2 Stage Directors' Copyright in Scandinavian law

According to the preparatory works relating to the Swedish Copyright Act, stage directors will in normal circumstances fall within the category of performing artists.¹ It is apparent; however, that directors can in some cases be entitled to copyright protection. According to the preparatory works, the stage direction should, as soon as it can be said that it has added "something new" to a dramatic work as a result of the director's individual creative effort, be entitled to protection as an adaptation of the dramatic work.

The Danish, Norwegian and Finnish Copyright Acts agree, in all principal aspects, with the Swedish treatment of the stage director's copyright. There is a requirement in each of those countries that the director add something to the dramatic work in order for the stage direction to be entitled to copyright protection. As a prerequisite for protection, this requirement is regarded as being somewhat higher than with respect to other categories of work.

As in Sweden, the preparatory works relating to the Norwegian Act provide that the director will be entitled to protection as a performing artist – and not as an author – in those cases where he has not contributed something new to the work. The preparatory works in Denmark and Finland do not include a corresponding provision, but it has been established in case law, that the director is entitled to protection as a performing artist.² Case law also confirms the proposition, which can be derived from the preparatory works, that the standard required in order for stage direction to be protected as an adaptation, is set higher than with respect to other types of work.³

3 A Comparative View

As in the Scandinavian countries, the stage director is presumptively regarded in Germany as a performing artist. This is apparent from the preparatory works and is also implicit in the German Copyright Act. However this does not expressly exclude the possibility of the director being afforded copyright protection as author. The prevailing view espoused in the doctrine is that the stage director will normally be regarded as a performing artist and not as an author.

The objections in the doctrine against affording directors the status of author (and therefore an entitlement to copyright protection) are primarily founded upon the argument that the director interprets a work and cannot therefore be creative in the manner required by copyright. Some authors are of the view,

¹ Govt. bill (Prop) 1960:17 p. 75.

² UfR 1978 p. 42 – *Skibelund* (NIR 1981 p. 383); Supreme Court Finland 2.12.1987 – *De sista frestelserna* (Nordisk Domssamling 1987 p. 602).

³ UfR 1965 p. 394 – *La Serva Padrona*.

however, that stage directors can, and in some cases should, be afforded copyright protection as authors – adapters – irrespective of whether there has in reality been an adaptation of the dramatic work. Direction consists, according to these authors, of a transformation of the written form to the theatrical. That transformation presupposes a creation.

In France the legal status of the director is somewhat different than it is in Germany and the Scandinavian countries. This is primarily a result of the fact that until 1985 the distinction was not made in France, as in Germany and Scandinavia, between authors and performing artists. In French law, both the author and the performing artist were regarded as being creators in a copyright sense, the former of a work, the latter of an interpretation of a work.

A discussion has been taken up in French doctrinal works, especially those dating from the beginning of the century, as to whether protection should be afforded to stage directors as co-authors of the performance. That approach has been accepted in the case law in those cases where the visual impact has been of significant importance for the performance, e.g. “son et lumière” – performances (sight and sound spectacles). The Court of Appeal, having found that the direction exhibited originality, held in a judgment in 1971 that stage directors were entitled to protection as authors of the stage direction. An issue of decisive importance was whether the stage direction satisfied the requirement of originality.⁴

Protection for performing artists, corresponding to the protection required pursuant to the Rome Convention, was inserted in the French Copyright Act in 1985. Only after the introduction of this legislative protection has the French Copyright Act made the distinction between copyright in the classical meaning and the rights of performing artists, in the sense that this distinction is made in Scandinavia and Germany. Despite the fact that specific protection for performing artists has been introduced in the Act, the approach formerly applied and expressed in the case law, to the effect that performing artists are entitled to protection under copyright, has not been fully relinquished. Stage directors are usually regarded as an example of the entitlement of performing artists to enjoy copyright protection.

The US federal Copyright Act does not provide for any protection for performing artists, and it is not therefore appropriate, as has been undertaken with respect to the other countries referred to above, to review the status of directors according to US law in terms of the relationship between the author and the performing artist.

Notwithstanding that the issue of copyright in stage direction is not dealt with either in legislation or case law, a comparison with phenomena similar to stage direction suggests that it is possible to protect it as a “work of authorship” provided that it is fixed in one form or another and provided that the requirement of originality – which is regarded as being low – is satisfied. The explicit restriction in the US Copyright Act against protection for ideas and methods has been emphasized in the debate relating to protection for stage direction, but has not been regarded as excluding such protection.

⁴ CA Paris 8.7.1971 – *Ba-Ta-Clan* (RIDA 75 (1973) p. 134).

Also of importance for the status of stage direction in copyright in the US is the provision relating to "works made for hire" which attaches copyright to works which are produced during the scope of employment with the employer. According to one case, the stage director's contribution was regarded as produced during the course of employment, which meant that in the absence of separate, contrary agreement entered into between the director and producer, any contribution by the director to the stage direction in the nature of copyright would be regarded as accruing to the producer rather than the director.⁵

4 The Stage Director – Author or Performing Artist?

The difference between copyright protection for the creation of a work, and the more limited right of protection afforded to the performing artist, is thus of decisive importance for the classification of stage direction in the context of copyright in Scandinavia and Germany. The consequence of the category to which a specific product is allocated is of decreasing importance due to the increase in the level of protection granted to performing artists. However, several decisive differences remain. The performing artist is not, for example, protected, as is the author, against plagiarism and adaptation. In addition, the content of the moral rights differs in Sweden as between the two categories in the sense that the performing artist is only afforded a moral right in conjunction with the transmission of his performance by some technical means. Consequently, if the director is regarded as a performing artist, no moral right will attach to the live performance of the stage direction. In a recent judgment in Germany, however, such a distinction was not found to exist between the performing artist's and the author's moral rights.⁶

In Scandinavian and German doctrine, especially in older texts, the dividing line between the author's rights in copyright and the performing artist's neighbouring right has often been characterised as a difference between the *creation* on the one hand and *interpretation* on the other. This presupposes that interpretation excludes creation, i.e. that an individual who interprets a work cannot at the same time create. That approach – which is founded upon the doubtful proposition that there is a clear distinction between interpreting and creating – has sometimes been used as the justification for categorising the stage director as a performing artist instead of as an author. According to that approach, the stage direction merely constitutes an interpretation and there is no scope in the direction for the creation of a work.

There are circumstances other than the lack of a creative element which have been relied upon as the reason for regarding the director as a performing artist and not as an author. These include the argument that the director's achievement – the stage production – like the performing artist's achievement, is dependent upon a pre-existing work. That such dependence does not in itself comprise a

⁵ See *Julian v. Society of Stage Directors and Choreographers Inc.* (1975) (2 Trade Cases 60, 541).

⁶ OLG München 8.2.1996 – *Iphigenie in Aulis* (NJW 1966/17 p.1157).

barrier to the stage direction being protected as a work in copyright is apparent merely from the fact that, for example, adaptations and translations enjoy protection despite that their existence is dependant upon other works.

Another argument against protecting stage direction as a work relies upon the circumstance that stage direction, like the achievements of performing artists, is not fixed. With the exception of the US, however, there is no general requirement in the countries reviewed here, for any fixation of the work. The US requirement of fixation can, however, be dealt with, e.g. in a prompt book describing the stage direction or through a recording of the production. It is not necessary for the work to reach the audience in a fixed form.

The view has been advanced that although the lack of fixation cannot in itself constitute an impediment to copyright protection, it is a circumstance which makes it more difficult to assess the achievement and which produces evidential problems and thereby constitutes a reason for not affording direction copyright protection. There is no reason, however, for the evidential problems which the lack of fixation produces to result in stage direction not being protected as a work. The lack of fixation is not relied upon in any other instances in Swedish copyright law as an argument against affording a product copyright protection as a work. An improvised musical piece can, e.g. be protected in copyright notwithstanding any evidential difficulties. The evidential difficulties which may exist in the context of certain types of infringement – a problem not unknown in copyright – is a complication which simply must be accepted.

Thus the circumstances that stage direction constitutes an interpretation of a dramatic work, that it is dependent upon another work and that it is not fixed, do not, either jointly or severally, constitute grounds for relegating the director to the category of performing artist.

5 Stage Direction as a Work in Copyright

One circumstance which clearly separates the director from the performing artist is that the director's achievement, unlike the performing artist's, can be seen independently from the person responsible for the achievement. The director relinquishes the stage direction in conjunction with its premier performance. The stage direction has its own life, independent of the director. It is not necessary for the stage direction, unlike the achievement of the performing artist, to be fixed in any form in order for it to be used again. This produces specific relevant consequences in formulating the copyright protection to be afforded the director, both with respect to the moral and economic rights.

The stage direction satisfies the criteria which can generally be required of a product in order for it to be the subject of copyright protection. The requirement of originality has, however, been regarded as a stumbling block in determining whether direction should be subject to copyright protection. That requirement cannot, however, be used as a general restriction against affording copyright protection to stage direction. It must be assessed in each specific case whether the stage direction satisfies the criteria of originality. Like all works which are based upon a pre-existing work – e.g. translations, different types of adaptations

and compilation works – the issue of originality is more intricate than with respect to completely independent art. There is no reason, however, to start from a presumption that a stage production *cannot* satisfy the requirement of originality.

Stage direction, if characterised as a work, exhibits certain weaknesses when compared to other types of work. The scope for originality in the achievement is theoretically limited. Stage direction, in addition, is not usually fixed and it can be difficult to distinguish it from the contributions of other individuals involved. In addition, there are the evidential difficulties generated by both these circumstances. These factors, which can also arise in the context of other works, do not, however, constitute grounds for according special treatment to stage direction in the sense that it is generally not afforded the opportunity of being protected as a work.

A comparison with two other categories of work – translations and films – supports the recognition of copyright for stage direction as a work. The translator's achievement, like the director's, constitutes an interpretation of the original work. The protection of translations is perhaps the clearest example that it is possible to grant a copyright to an individual who has interpreted a work. In addition to *translations* and *adaptations*, the Copyright Act also affords protection to individuals who have *converted* a work to another literary or artistic form. It is difficult to find any substantive or systematic reason as to why the categories referred to above should enjoy copyright protection as works, but not stage direction. That the translator but not the director enjoys such protection is an inconsistency.

Film direction, which is usually subject to copyright protection, is often compared to theatre direction. One specific comparison sometimes made, to the detriment of the latter, is to compare the film work to the dramatic work. It is thereafter asserted that whilst the film direction is a necessary element for the existence of the film work, the theatre direction is not a necessary precondition for the existence of the dramatic work. The result reached, if that assertion is accepted, is that the film director but not the stage director would be entitled to copyright protection.

It is, however, erroneous to compare the film work with the dramatic work in this fashion. The film work is the final result of the film production. The dramatic work, by contrast, constitutes the basis for the stage production. This erroneous comparison between film works and dramatic works is probably founded upon the fact that the Copyright Act includes film work and dramatic work in its exemplification of what is entitled to copyright protection.

The film work, instead of being compared to the dramatic work, should be compared to the stage production. The comparison can thereafter be broadened to embrace on the one hand the film script, the film direction and the film work, and on the other hand the dramatic text, the stage direction, and the stage production. In that way the film director's work can be treated as similar to the stage director's. Both categories of directors set out to convert a text – the film script or the dramatic text respectively – to the medium of film or theatre respectively. The difference between film and stage direction is rather a question

of degree than of type. That suggests that the same approach should be applied with respect to stage direction as to film.

6 Conclusion

The comparison between authors and performing artists has shown that among the differences which are often advanced, there is only one of major importance: whereas the author and his work are separable, the opposite applies to the performing artist and his achievement. The director in this regard is similar to the author rather than the performing artist. The product of his effort – the stage direction – can exist independently of the director. The consequence of this is that the stage director needs protection which is essentially the same as the author.

Stage direction is able to satisfy the requirements in order for it to be protected in copyright. The assessment of stage direction can, in the context of copyright at any rate, be equated with the assessment of film and dance which was undertaken prior to the introduction of the 1960 Copyright Act. Film was initially regarded merely as a vehicle for the transmission of the mime. In a similar way, dance was only protected on the condition that it portrayed a dramatic work. According to the present Act, film is protected as a cinematographic work and dance can often be protected as a choreographic work. It is conceivable that attitudes to stage direction are developing along similar lines: from being regarded as merely a medium for the literary work, to being accepted as an art form in itself.

Stage direction differs in a decisive way from the performing artist's achievement. It satisfies the criteria for copyright protection and should benefit from such protection. No satisfactory justification exists for not affording stage direction copyright protection. The provision in the Copyright Act providing protection for an individual who has transferred a work to another literary or artistic form or the provision pursuant to which adaptations are protected could be invoked.