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THE RIGHTS OF PERFORMERS

THESES OF THE Ph.D. DISSERTATION

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Szeged, 2023

1. The object of the research

The authors have been supported and protected by the legal system of modern copyright since 1709, when the Statue of Anne was incorporated in Great Britain. In these three hundred years legal researchers have focused mainly on authors' rights, while the phenomenon of neighbouring rights protection appeared much later, only at the beginning of the 20th century.

However, in most cases cultural contents or products are consumed by the general public not directly, but through the interpretation of performing artists, including actors, singers, dancers, performers. Since the second half of the 20th century, the economic importance of performing activity has increased considerably, in some cases becoming comparable to that of authors. In Hungary, however, not a single monography has been written on the rights of performing artists, and there are only a dozen legal articles in Hungarian regarding rights of performers at all. In fact, the legal literature in foreign languages is poor, too, counting not more than a few monographies on performers' rights.

In addition, from the Millenium, digital technologies in general, and sampling and artificial intelligence specifically have created new challenges for actors, musicians and dancers. The primary impact of the mass use of the Internet at the turn of the millennium was limited to taking away performers' control over the use of their fixed performances. However, performers are now losing the control over their performances, too, due to the mass application of sampling and artificial intelligence.

This dissertation serves a dual purpose. Its primary goal is to summarise the system of performers' rights according to the international treaties, the law of the European Union and the Hungarian law, and to evaluate the transposition of international legal developments by the European Union, its member states and, in particular, Hungary. The other main objective of the research is to examine whether it is justified to maintain the differences in the level of legal protection between authors and performers.

2. Methodology of the research

Since there is hardly any legal literature available on the rights of the performing artists, the dissertation builds heavily on the two decades of practical experience I have accumulated as a lawyer specialising in copyright issues.

My research was also supported by the records of the diplomatic conferences, which adopted the Rome Convention in 1961 and the WPPT in 1996. From a professional point of view, it is fascinating to review the compromises made by the delegates during the mentioned diplomatic conferences, which later became the cornerstones of the protection of performers' rights. On the other hand, it is worth to mention, that the records of the Beijing Treaty on Audiovisual Performances, adopted in 2012, is still not available, not even for research purposes.

My research also builds on the sources of the *acquis communautaire*, the directives of the European Union, their preparatory documents, and the relevant judgments of the Court of Justice of the European Union. While studying the member states of the European Union I have applied the methodology of W. J. Kamba, who argues that a comparison of the legal systems at the same level of development is the appropriate method to obtain relevant results.[1]

Finally, of course, I have used as sources the Hungarian copyright legislation enacted since 1884, the published judgments of the Hungarian courts and the relevant experts' opinions of the Hungarian Copyright Expert Board.

3. Structure of the dissertation

Following the first introductory chapter of the thesis, the second chapter analyses the definitions of the 'performer' and the protected 'performance'. In this framework, I identify those aspects, which are relevant for the legal protection and those, which are not taken into account by the legislator. I have pointed out the relationship between the protection of authors and the rights of the performer, the complementarity nature of the protected work and the result of the performer's interpretation, and finally, the legal importance of the object of the performance, the aim of communication and the personal character of the protected performance. The second

[1] W. J. KAMBA: *Comparative Law: A Theoretical Framework*, In International & Comparative Law Quarterly, Volume 23, Issue 3, July 1974, p. 506.

part concludes with an analysis of the border areas, such as extras, professional stunts, athletes, hosts of TV and radio shows, imitators.

In the third chapter, following the tradition of the Hungarian copyright legislation and theory, I analysed the moral rights of the performers. I examined how the right of attribution complements the right to object certain modification of the performance, and how digitisation affects them. I have compared the moral rights of authors to the moral rights of performers, including the right of publication, a right that only authors possess in Hungary.

In the fourth part of the dissertation, I analysed the various economic rights of the performers. As a first step I reviewed the exclusive rights, then the remuneration rights without an exclusive right to authorise or prohibit the exploitation, and finally I examined the result of the internal development of Hungarian national law. In each case, the analysis follows the chronology, i.e. it explores the process by which these rights were granted at the level of multilateral international treaties, from where they were transposed into the law of European Union and from there into the body of the national law. Again, the obvious point of comparison of the economic rights is the identical right of the authors, from which similarities and differences can be identified.

The fifth part of the thesis examines the practical questions arising from the widespread use of sampling and artificial intelligence. Since digital technology has had a profound impact not only on the consumption of the cultural content, but also on the process of recording and producing performances, the dissertation in this case necessarily covers the system of moral and economic rights, too.

4. Research hypothesis and results

The first hypothesis of the research is that the activities of performers are closer to the authors than to the activities of other related right holders, e.g. producers of sound recording or broadcasting organisations. I have demonstrated that not only authors but also performers are protected mainly because their personalities are reflected in some way in the results of their work or activity. Meanwhile, the economic rights of other related right holders were granted only for the reason of investment protection, and as a consequence, their protection is in no way dependent on personality.

The dissertation analyses how the legal protection of performances seems to rely heavily on the copyright protection of those works, which serve as a basis for the performances. However, the analysis also demonstrates that the protection of performances is in fact broader than the copyright protection of the works. This is mainly because, in addition to the works actually protected by copyright, those performances are also protected, which are based on a work that is no longer protected or could never have been protected by copyright. However, there is no doubt that international treaties today exclude from protection performances based on content, which are not created by a natural person but, for example, by artificial intelligence. Although, from the viewpoint of the actual activity of the performer, it is not the source of the work, rather its genre, interpreted by the performer, which has importance. The sequence of rehearsals and performances within a given genre is essentially the same, regardless of whether the work, which is interpreted by the performer was created hundreds of years ago, is a contemporary work, a work of folklore or a 'creation' generated by artificial intelligence.

I also showed that there is no legitimate policy reason for the legislator to grant additional exclusive rights to performers – beyond the general personality rights – to the mechanical representation of a work, which completely lacks elements of the personality of the performer. The personal characteristic that is being represented via the interpretation of the work is enriched with layers of emotion and meaning, not necessarily derived from the work itself. For a legal point of view, it is therefore relevant, whether or not the performance is mirroring the personality of one specific performer. The relationship between the performer and their performance is typically reflected in the personal nature of the performance and its ‘authenticity’. The research has shown that the personal nature of a performance, as a condition for legal protection, is not a new theory at all, and that it was already developed by the German and Hungarian legislator in the first quarter of the 20th century.

The performers’ intention to communicate to the public has also particular importance for the legal protection of performance. Since the rights of performers were not granted in isolation, but, historically, in accordance with the objectives of copyright protection, performances which did not serve to communicate cultural products to the public has to be excluded from protection. In other words, the aim of protection is founded on the performer's intention to interpret the work to his audience. As I have shown in the dissertation, the legal focus on this aim directly follows the position of the art theory, according to which there is no performing art without an

audience. However, it is a fact that the intention of communication is not mentioned explicitly in international treaties. Legal certainty would be served by revising the concept of protected performances in such a way as to explicitly include the intention of communication.

The second and third hypothesis of the dissertation is that the level of the legal protection of performers is noticeably lower than the legal protection of authors. This lower level of protection of the performers is primarily not due to dogmatic or legal reasons, but to economic reasons, and it serves the interest of authors, producers. In order to prove these hypotheses, the dissertation analyses the moral and economic rights of performers in detail, moving from the level of the international treaties to national law.

Since international treaties have only guaranteed performers' moral rights – focusing on performances fixed in sound recordings – since 1996, it can be said that these rights have been regulated very belatedly. This delay contributes to the gap between the level of protection of authors, and performers. Moreover, although it was the Article 6^{bis} of the Berne Convention, which served as a starting point to the wording of the WPPT, the later regulated the moral rights to a level far below compared to the Berne Convention. This was done without any argument to justify this difference either at the plenary sessions of the Diplomatic Conference or at the meeting of the Main Committee, which was responsible for the technical work. To make matters worse, the Beijing Treaty reiterated the rules of WPPT without any aim to revise the rules of WPPT. It Is worth to mention, that the negative effect of this low level protection of the international treaties are counterbalanced by the majority of national legislation by harmonising the level of protection of authors' and performers' moral rights.

However, in order to compare the moral rights of authors and performers, it is also necessary to analyse the right of publication, since, although this right is not based on international law, a significant part of national laws grants it only to the authors. Since the performances are rarely used exactly in that form, they were originally fixed or recorded, performers bear the risk of how their performances are reshaped or modified by producers. As a result, the performers have essentially no control over exactly how their performances appear in the final version of the performances. The author does not face such a risk; the entire creative process is usually under the direct control of the author, even in the case of a genre that has more than one author. The analysis has shown that the performers have a legitimate interest in deciding whether the final version of the performances are suitable for publication. As the right of publication is not based

on an international treaty, it is for the national legislator to introduce an analogous moral right for performers.

The dissertation also provides a detailed overview of the development of economic rights of performers. The first stage of this development ended in 1961, when the Rome Convention was adapted. During this first period, no economic rights were granted to performers at international or regional level, and only exceptionally were they included in national law. Examples of the latter are the German legislation of 1910 and the Hungarian legislation of 1921, which, as described in detail in the thesis, granted performers some protection in respect of sound recordings.

The second phase of the development of economic rights lasted until 1994 in international law, when the TRIPS Agreement was adapted, and 2001 in EU law, when the Infosoc Directive was enacted. In this context, the Infosoc Directive is noteworthy, because it regulated the making available rights of works and performances the very same way. It was therefore a transitional period which, on the one hand, verified the need of economic rights for performers, but also showed, why it was wrong to give performers a lower level of protection than to authors. The parallel adaption of the WCT and the WPPT were conducted also during this period, a process which was in many respects blocked by the Beijing Treaty.

In terms of economic rights, the emancipation of the performing artist has been completed in the legislation of the EU after of the Millennium. Following the adoption of the Infosoc Directive, there was a series of legislative steps that provided the same protection for authors and performers in all respects. It is true that until 2019, this legislative process was markedly dominated by provisions extending the scope of exemptions and limitations, but the SatCab II and CDSM Directives treated both right holders in the same way in all respects.

The dissertation thus highlighted the process by which the economic rights of performers have been steadily broadening. It was also well documented that the number of economic rights increased where performers were granted fully equivalent rights to those of authors. At the same time, the scope of economic rights could not be equivalent to authors, even if performers had been granted the same rights for all uses, because of the significantly different length of the term of protection. However, even if we take aside the question of length of protection, legal emancipation cannot be considered complete, as this would require a review of all previously

established economic rights, which at present does not appear to be open to the international community or the EU legislator. This unfair situation is most clearly illustrated by the case of the communication to the public of fixed performances.

The Rome Convention and the Beijing Treaty do not impose any economic right in this area, and the WPPT limits the economic right to the communication to the public of phonograms released for commercial purposes. But even the WPPT does grant an exclusive right to performers, but only a remuneration right, which places performers into a weaker position. Due to the fact, that the EU law basically follows the minimum rules of international treaties in this area, the differentiation of performers has also had a strong impact to the EU legislation. Meanwhile, the international treaties and their records do not provide any explanation as to why it was justified or necessary to grant performers weaker rights than authors. For example, when an audiovisual performance is run on television directly injected, the performer is not entitled to any remuneration, even though the composer of the film receives a remuneration for each and every run.

The Hungarian rules on the communication to the public is also worth to highlight since it is highly objectionable from both a structural and theoretical point of view.

One of the pillars of regulation is the Article 73(1b) of the Hungarian Copyright Act (hereinafter referred to as 'HCA'), according to which the communication to the public of an unfixed performance is subject to an exclusive right of the performer. This economic right is exercised by performers individually.

The second pillar of the regulation is the provisions of Article 77 of the HCA, which grants performers only a remuneration right only in respect of the communication to the public of the performances fixed in phonograms released for commercial purposes. This remuneration right is managed by a collecting management organisation. The mentioned rule therefore does not cover any economic right in respect of the audiovisual performances.

The third pillar of the Hungarian legislation is Section 28(2) of the HCA, which grants performers a remuneration for the simultaneous, unchanged and unmodified retransmission of their fixed performances, without, however, specifying the exact nature of this economic right. Moreover, performers are not entitled to manage that right individually, and the legislator

designates, solely for historical reasons, the collective management organisation of literary and musical authors to administer it.

The situation became even more complex in the summer of 2021, following the implementation of the SatCab II Directive. The Hungarian legislator interpreted the definition of direct injection as ‘broadcasting’. As a consequence, different rules have been established for the retransmission of uncoded and coded (directly injected) program carrying signals. While in the case of unencrypted transmissions there is an economic right covering all performances, in the case of encrypted broadcasting, performers can only claim a remuneration for their commercial phonograms. The legislator has also failed to take into account the fact that the experience of the audience is identical, when they perceive unencrypted and encrypted broadcasts.

Regarding to making available rights, which is also a form of communication to the public, the Hungarian legislator has created an exclusive right, when the rules of international treaties and EU directives were implemented. This right is managed by a collective management organisation under the extended collective administration regime.

Fifthly, in the field of communication to the public, it is necessary to mention the performers' rights under Article 74(2) of the HCA regarding the rerun of their TV and radio programmes. The mentioned economic right is a remuneration right, which falls within the scope of a voluntary collective management system.

All of the above clearly demonstrates how the various sub-cases of the communication to the public of fixed performances are systematically and substantively divergent. The current chaotic, substantively objectionable solution complicates and destabilises the practice of law.

The fourth hypothesis of the dissertation is that the mass use of sampling and artificial intelligence calls for a review of the economic rights granted to performers. Most of the economic rights granted by international treaties derive from the analogue world, and are based on physical copies of performances. The dissertation has confirmed the assumption that the generation of performances using artificial intelligence and traditional forms of sampling can be legally subsumed under the same umbrella, and that, consequently, the legal problems require partially identical answers.

As long as it was not technically possible to manipulate the fixed performances after the record session took place, the recordings were made in a linear way. In practice, this meant that the performer had to be act in front of the microphone or camera, exactly the way as it was later perceived by the audience of the fixed performance. One of the consequences of this technical limitation was that fragments of the recording could never be taken out of context of the original recording. From a legal point of view, the most important development of the recording technique was the possibility to record performances in several parts and to edit the recordings afterwards. The primary goal of this development was to ensure that the final version of the film or sound recording would be as popular and commercially successful as possible and, in other genres, would reflect the highest possible artistic standards. However, it soon became clear that the possibility of editing also brought additional advantages for less skilled performers, because it allowed an infinite number of attempt to be carried out in order to create the final form of the performance.

From a technological point of view, digital recording can be seen as a logical extension of the analogue recording and editing process, but its importance clearly goes beyond that. Digital technology has, in a first approach, broadened the range of technical possibilities of recording activity: it has made it possible, among other things, to use digital instruments and to record details of recordings on different places. At the same time, digital technology has revolutionised the way in which recordings are communicated to the public through interactive uses and made sampling technics quicker, cheaper, and better in quality. This process has created new tools, new ways of distribution, and has had an overall impact on the cultural environment, which has restimulated the technological developments. This interaction has led to the spread of sampling as a technique, and nowadays, solutions based on generative artificial intelligence.

There were three basic conditions had to be met simultaneously in order to sampling become widespread in practice: widespread access of preexisting cultural products, the availability of technical developments, and a supportive cultural environment. By the turn of the millennium, virtually all previous recordings were available, there was also a positive cultural milieu for sampling, and finally, recently the machine learning-based AI solutions were also available to the creative industries at relatively low cost.

‘Recycling’, as a cultural phenomenon is by no means linked to technological progress alone. The use of past cultural products has always been part of the creative process, whether in

classical or popular art. As Peter Burkholder writes, for example, ‘in the history of Western music, using existing music to make new music is not an anomaly: it is a central thread’.[2] The way in which entire musical genres draw on earlier works is well documented, for example, 19th century American popular music built on operas, while the genres of ragtime, jazz, blues and rock and roll on African musical structures.

It should also be note that different sampling techniques rips apart of the unity of the performer and his performance. Until the end of the 19th century, musician and his concert, actor and his theatrical performance were inseparable in space and time, and consequently each performance was unique and unrepeatable. The possibility of recording first broke the unity of space and time, allowing the performance to be perceived repeatedly at different times, and then blurred the linear nature of time within the performance. Finally, sampling also made it possible to cut the logical, intellectual and conceptual unity of the performance and the work, which serves the basis of the performance. Thus, a performance based on a given work also could serve as a source of another performance, based on a work, totally independent from the previous one.

The analysis also pointed out that the mentioned aspects of sampling and artificial intelligence creates new challenges to performers' moral rights. Indeed, in the vast majority of cases, sampling does not only entail the mutilation of the performance, but also the distortion or other alteration of the mutilated part. One should also take into account, that in many cases the purpose of sampling is to weaken the intellectual link between the performer of the original or source recording when the extracted part of the performance is placed into a new cultural context. The use of artificial intelligence, however, often has the opposite effect, since the generated performance typically seeks to exploit the personality of the original performer. The result is that a performance could be linked to the personality of a performer, who never performed the mentioned performance. From a performer's point of view, however, sampling is important not only because it allows the previous performances to be recycled, but also because it creates the possibility of crossing genre boundaries between performing arts. However, technological progress has not only blurred the boundaries between the different performing arts, but has also opened up new ways of crossing the previously contoured boundaries between the performing arts and the activity of authors. A good example of this is the motion capture technique used for film making.

[2] J Peter BURKHOLDER: *Borrowing*, In New Groove Dictionary, Oxford University Press, Oxford, 2001, p. 21.

In addition to the above, it is a fact that sampling is most often seen from the point of view of recycling. The reuse of preexisting fixed performances necessarily could result that fragments of previous performances continue their life cycle out of their original context. However, in the vast majority of cases, sampling cannot be regarded as a mechanical activity. In this process, layers of performances are stacked on top of each other in such a way, that they are enriched with new elements and new meanings. Samples extracted from previous recordings thus contribute to the creation of new performances, a process, in which the personalities of the sampled and sampling performers somehow mixing each other.

From the point of view of the legal protection of performers, source performances used as input for sampling, as well as recordings generated as output, need to be considered separately. Before the Millenium, mostly protected performances were used for sampling. However, not only protected performances but also the performers themselves can be omitted from the sampling process. The output side is partly independent from the question, whether protected performances or non-protected recording are used as input of the sampling process. One should also take into account, that AI-based technologies do not necessarily use identifiable segments of the source recordings, since their purpose is not to copy but to imitate. This approach is comparable to the concept of pastiche, or imitation of style, which is also characterised by the fact that it does not use the work itself as a source, but 'only' the stylistic features of the author. In this respect, the pastiche does not constitute a copyright use of the source work itself. Instead, the AI highlights those personality elements of the performer by which the members of the public can link the performance with a particular performer. The leads us to the conclusion that the generated output performances should be protected by economic rights, where the output represents the personality of the performer.

In this thesis, I have developed five possible ways to address the legal issues raised by sampling and AI. The common starting point of these proposals is the assumption that the general civil law protection of personality does not provide sufficient protection for performers. The fact that the general protection of personality does not extend, or only to a very limited extent, to deceased persons obviously supports this assumption. A person’s image and voice are protected by general personality rights, in parallel with neighbouring rights, but this protection end when

the person dies, and the remaining rights are very limited under the Civil Code.[3] Therefore, under the rules of civil law, audio and video recordings of a deceased performer would be more or less free to be used for sampling as long as they do not violate the memory of the performer.

Another common starting point of the proposals is that international treaties and EU law do not in any way restrict the possibility to ensure a higher level of protection, where there is no obligation to harmonise the right concerned in merit. Of course, it would be better in all respects if the rules on sampling and AI were uniformly regulated by the international community or, failing that, by the EU, but effective legal protection can be developed at level of the member state, too.

The best method would be, if the legislator creates a sui generis economic right for the performer regarding samples, including AI methods. This new economic right would increase the level of protection only if it parallelly covers the input and output of the process, as described in detail in the thesis. The new economic right should cover – on the input side – all protected performances and – on the output side – all performances in which the performer's personality is reflected.

Another possible solution is to extend the definition of reproduction, covering not only the performance itself, but the personality of the performers, too. This would be necessary because the use of AI does not necessarily require the reproduction of the performance itself, in order to generate new ’performances’ using samples of protected performances.

A third possible solution would be to grant the performer an exclusive right to authorise the adaptation of his performance. Today, only authors have such a right, but the extension of the performers’ right to adaptations would not be without precedent. The analysis suggests that an extended interpretation of adaptation right should cover all adaptations where a performer's performance is detectable either at the input or output end. The exclusive right of adaptation could also provide adequate protection for performances which would otherwise be excluded from protection only because it contains, on the input side, recordings which are not protected meanwhile reflecting the performer's personality. This method would also provide a solution for those performances, which contain AI-generated performances on the output part.

[3] GÖRÖG, Márta: *Gondolatok a merchandising jelentéstartalmához, egyes típusaihoz,* In Iparjogvédelmi és Szerzői Jogi Szemle, 6. (116) évfolyam, 3. szám, 2011, p. 24.

A fourth possible solution would be to provide an exclusive right for the merchandise of performances, similar to the right that authors have to commercialise the original character of their work. The sampling of performances, and in particular the use of AI, falls within the intersection of the so-called 'personal merchandising' and 'copyright merchandising'. It involves exploiting the personality of the performer, in a similar way to the exploitation of a character of a literary work. Because of the similarities in the way of the exploitation, the protection could be modelled based on how it was developed for authors.

Finally, as a fifth solution, if there is an inseparable combination of the authors' work and performers' performances, the legislator should grant the status of co-authorship for performers. The technique called 'motion capture' is a good example of such a combination, where the layers of the work and the performance cannot be separated. This last solution is symbolic, which could resolve all the problems, which is caused only by the forced separation of the levels of protection of performers and authors. A possible co-author status could lead to the complete emancipation of performers, regarding its moral and economic rights.

5. Publications published in connection with the dissertation

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BÉKÉS Gergely: *The performers' economic rights in the international treaties and the EU directives*, In Comparative Law Working Papers, 7. évfolyam 2. szám