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# Translation and Copyright: A Canadian Focus

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## Translation and Copyright: A Canadian Focus

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Translation is an important activity not always considered as a whole in the copyright texts. What follows is a version of an entry prepared for an encyclopaedia the author is writing on Canadian copyright law for both lawyers and the general reader. The entry considers primarily those matters in which translators, publishers and their advisers would be interested. The focus is on Canadian law, but comparisons are drawn from the law of other Commonwealth countries and the United States. Some historical and international perspectives conclude the entry.

### Definitions

#### General

Translation is broadly the product of a change from one language or dialect to another,<sup>1</sup> and typically aims to maintain the content, form and function of the source work.

A translator differs from an interpreter. A translator records her work in writing or some other form. An interpreter usually translates orally and often simultaneously, for example, a speech at a conference, although an interpreter's work that is recorded can qualify as a translation.

#### Legal meaning

From 1868 to 1923, translation meant, in Canadian copyright law, changing a literary work from 'one language into other languages'.<sup>2</sup> Since 1 January 1924, however, the copyright owner's right extends simply to 'any translation of a work'.<sup>3</sup> Translation still essentially remains the changing of a work from one human language or dialect to another.<sup>4</sup> All classes of work — not just literary works — are within the copyright owner's 'translation' right.

1 *Pasickniak v Dojacek* [1928] 2 DLR 545, 550, 552 (Man. CA); *Apple Computer Inc. v Mackintosh Computers Ltd* (1987) 44 DLR (4th) 74, 83, 89 (Fed. CA), affd without deciding this point (1990) 71 DLR (4th) 95 (Can. SC). In United Kingdom, *Byrne v Statist Co.* [1914] 1 KB 622; *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680.

2 Copyright Act 1868, 31 Vic., c. 54, s. 3; see also s. 4, Copyright Act 1886 and Copyright Act RSC 1906, c. 70.

3 Copyright Act RSC 1985, c. C-42, s. 3(1)(a).

4 *Apple Computer Inc. v Mackintosh Computers Ltd*, Note 1,

Changing words from one form or symbolic representation to another, for example, from standard lettering to morse, braille or shorthand, or *vice versa*, is not translation. If a knowledgeable person could produce in ordinary notation the exact words the code represents, the code transcribes or reproduces, but does not translate, the source work.<sup>5</sup> (In fact, transcribers who take down a speech delivered without notes can each have separate copyrights in their versions.<sup>6</sup>) The distinction is important: someone wishing to make a braille or other coded version must make sure he is dealing with the owner of the reproduction, not the translation, right.

In literary or artistic practice, translation can mean transformation or expression in another medium or form<sup>7</sup> or even the ordinary process of interpreting any utterance within the same language.<sup>8</sup> This is not so in Canadian copyright. A transformation from two dimensions into three or *vice versa* 'reproduces' the source work 'in any material form whatsoever';<sup>9</sup> it does not translate it. The right to reproduce excludes translation or other transformations — for example, dramatising a novel, 'novelising' a drama,<sup>10</sup> or making sound recordings of a work<sup>11</sup> — specifically set out in the Copyright Act. Since every right within copyright can be (and often is) dealt with separately, overlaps between them should be avoided.

The conceptual borderland between reproduction and translation is, admittedly, unclear. A working test, based on economics, is to ask whether the second work is differently expressed and destined for a different market. If so, the second work is more likely a translation than a reproduction of the source work.<sup>12</sup>

#### 'Translating' computer languages

The object and source codes of a computer program are both literary works.<sup>13</sup> The electrical circuitry or symbolic representation of object code 'reproduces' the source code even though the two look different.<sup>14</sup> Programmers may talk of 'translating' source code to object code but, legally, they are just 'reproducing' one code in another. At a time when the copyright status of object code was unclear, some judges hedged their bets by saying object code *either* reproduced *or* translated the source code.<sup>15</sup> Now that the Canadian Supreme Court has held that object code reproduces the source code from which it derives,<sup>16</sup> it is

44 DLR (4th) at 89; *Computer Edge Pty Ltd v Apple Computer Inc.* [1987] FSR 537 (Aust., majority view).

5 *Apple Computer Inc. v Mackintosh Computers Ltd*, Note 1, at 89; *Walter v Lane* [1899] 2 Ch. 749, 758, affd [1900] AC 539.

6 *Walter v Lane*, Note 5 (AC); *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320.

7 *Shorter OED* (1959), at 2232.

8 George Steiner, *After Babel: Aspects of language and translation*, OUP, 1992 (2nd edn), at 28 to 29.

9 Copyright Act, s. 3(1); *Supersal Corp v Glaverbel-Mecaniver Can. Ltée* (1975) 20 CPR (2d) 77, 80 (Ex.); *King Features Syndicate Inc. v O. & M. Kleeman Ltd* [1941] AC 417.

10 Copyright Act, s. 3(1)(b) and (c).

11 *Ibid.*, s. 3(1)(d).

12 Paul Goldstein, 'Derivative Rights and Derivative Works in Copyright' (1982) 30 Jo. Cop. Soc. USA 209, 217.

13 Copyright Act, s. 2 (definitions of 'computer program', 'literary work').

14 *Apple Computer Inc. v Mackintosh Computers Ltd*, Note 1 (Can. SC).

15 A similar phenomenon has occurred elsewhere: *IBM Corp. v Computer Imports Ltd* (1989) 14 IPR 225, 245 (NZ).

16 *Apple Computer Inc. v Mackintosh Computers Ltd*, Note 1.



unnecessarily confusing to call the same activity translation, especially since the two codes are part of the same product destined for the same market.<sup>17</sup>

A change from one computer language — for example, Fortran to Pascal — is called in the Copyright Act at one point 'translating'.<sup>18</sup> This seems more computer jargon than legal usage, though lawyers may still claim, when it suits them, that Parliament used the word in its legal sense.

## Copyright in Translations

Anyone may translate a work that is out of copyright. For other works, the copyright owner has the sole right to produce, reproduce, and publish a translation. Her consent is also necessary to hold a public performance of the work in translation, for example, as a play.<sup>19</sup> In the United States, translation is a species of derivative work, also fully controlled by the copyright owner.

Translations have long been entitled to a separate copyright.<sup>20</sup> Judges affirmed this despite the silence of the Copyright Act. It was not till 1988 that the Canadian Parliament included translation as a specific category of protected work. Then, oddly, it was classified as a category of literary work only.<sup>21</sup> Parliament had forgotten that other classes of work were also translated. Judges presumably would have interpreted the amendment to refer only to translations of literary works: a translation of a dramatic work may still be a dramatic work, a translation of a libretto that was part of a score may still be a musical work, and the subtitles to a foreign film may still be part of the cinematographic work.<sup>22</sup>

The North American Free Trade Implementation Act of 1993 has corrected the oversight. As from 1 January 1994, translations are no longer classed as literary works. They have their own category under the general head of 'every original literary, dramatic, musical and artistic work'.<sup>23</sup> A translation within a genre may now stay part of the same genre: a translated drama may stay a dramatic work.

## Originality

To have copyright, a translation must, like any other work, be original. This is usually easily established. The reason often given is that a good translator uses at least as much skill and judgment (although of a different kind) as the author of the source work. But this reason does not account for the fact that copyright protects mediocre and botched versions as much as inspired ones, since a work's merit does not matter. Originality lies, really, in the translator's mental effort of applying her acquired or innate proficiency

to transform the source work. The proficiency, though usually linguistic, may lie elsewhere: a medium, who claimed to translate automatically, without any conscious knowledge of her interlocutor's source language, presumably had a skill special enough to give her product originality.<sup>24</sup> Similarly, an editor may do enough original work in producing another version of the translation to acquire a copyright separate from the copyrights in the source work and the unedited translation, even though the editor does not know the source language.<sup>25</sup>

Some translations produced by computers may, nevertheless, not qualify (see Computer-generated translations, below), nor may the literal translation of a few words from one language to another, if it is 'a fairly mechanical process requiring little originality'.<sup>26</sup> The comment comes from a US case where copyright was denied to a translation, for input into a hand-held electronic translator's database, of 850 single words and 45 short phrases from English into phonetically spelt Arabic. It is hard to square this result with an earlier US decision that found copyright in a single double-sided page containing a Russian alphabet guide and language chart, and listing correspondences between Russian and English pronunciation and the two alphabets.<sup>27</sup> In Canada, too, the comment would probably have been inappropriate. There a work similar to the English/Arabic list — a 775 word English/French glossary — was found to have copyright.<sup>28</sup> To Canadian eyes, enough skill and effort, hence originality, lay in the work done by the US translator in producing the English/Arabic list, by choosing appropriate translations for a large number of words and consistent phonetic equivalents for the Arabic. The fact the firm commissioning the work thought it good enough to take and reproduce without authority confirms the finding of originality.

## Rights accorded to a translation

The copyright owner of a translation has the same rights as any other copyright owner. So if an English version of a French play is publicly performed, the consent of the copyright owners of the French version and of the English translation must be obtained. This is so even if the play is adapted, for example, by setting it in a different locale, so that its translated version is not slavishly taken: taking a substantial part of the translation is still infringement.<sup>29</sup> A producer who puts on a translated play without the translation copyright owner's consent may have to pay her, as damages, at least the fee a competent translator would have charged to produce the translation; he need not, however, share his profits with her.<sup>30</sup>

Copyright in the translation is unaffected by the expiry or non-existence of copyright in the source work. A fresh translation of Shakespeare or Voltaire has full copyright

17 See test suggested above by Goldstein, accompanying Note 12.

18 Copyright Act, s. 27(2)(l), dealing with the right to adapt a program to make it compatible with the computer one is using.

19 *Ibid.*, s. 3(1)(a).

20 *Pasickniak v Dojacek*, Note 1; *Wyatt v Bernard* (1814) 3 Ves. & B. 77; *Walter v Lane*, Note 5, at 758; *Pollock v J.C. Williamson Ltd* [1923] VLR 225, 230.

21 Copyright Act, s. 2 (definition of 'literary work'), effective from June 8, 1988.

22 David Vaver, 'The Canadian Copyright Amendments of 1988' (1988) 4 IPJ 121, 143, Note 76.

23 Copyright Act, s. 2, definition of 'every original literary, dramatic, musical and artistic work' as amended by s. 53(2) of the NAFTA Act 1993.

24 *Cummins v Bond* [1927] 1 Ch. 167.

25 *Craft v Kobler* (1987) 667 F. Supp. 120, 125.

26 *Signo Trading Int'l Ltd v Gordon* (1981) 835 F. Supp. 362, 364. Similarly, *Walter v Lane*, Note 5, at 854.

27 *Nikanov v Simon & Schuster Inc.* (1957) 246 F. 2d 501.

28 *National Film Board v Bier* (1970) 63 CPR 164 (Ex.). See too *College Entrance Book Co. Inc. v Amsco Book Co. Inc.* (1941) 119 F. 2d. 874, 876, where the taking of a 1540 French/English work included in a school textbook infringed the latter's copyright.

29 *Wood v Chart* (1870) LR 10 Eq. 193, 206.

30 *Pollock v J.C. Williamson Ltd*, Note 20, at 235.



protection for the translator's life plus 50 years, whether the source work is that of a living author or not.

## Authors and Owners

### General

The translator is the author and first owner of the copyright in the translation, except where she produced it as an employee; then her employer is its first owner.<sup>31</sup>

A freelance translator is, technically, entitled to the copyright; even an employee, translating for her employer in her spare time and for separate pay, may fall into this category.<sup>32</sup> There may be an express oral or written agreement that the copyright owner of the source work will own copyright in the translation; but very often it is simply assumed that the person commissioning the translation will own its copyright. For this assumption to be effective where the translator is or may be working freelance, it is wise to obtain a written assignment of the copyright from her on completion.

The translator of an oral conversation or speech is usually considered the sole author of the translation. The speaker might also sometimes qualify as an author, for example, if he makes substantial changes to the translator's final version of the speech. If the speaker and the translator collaborate on the changes, they may become joint authors of the final version; otherwise, there may be two copyrights, one in the raw and one in the edited version.<sup>33</sup> In India, a judge has gone further to claim that a speaker is a joint author of the translation just by dint of speaking.<sup>34</sup> Commonwealth and US law generally reserve this status to those contributing the *form*, that is, the language, in which a work is expressed.<sup>35</sup> This is so also in Canada,<sup>36</sup> unless the conventional view that an oral speech has no copyright is rejected. There is, however, an available argument that an orally delivered speech — not just daily chit-chat — does have copyright in Canada: both the speaker and his authorised translator might then be joint authors of the translation.

The copyright owner can assign or license the translation rights, language by language, region by region, as she likes. A person wishing to obtain a translation right must make sure he deals with the owner or exclusive licensee of that right, or their representative.

### Moral rights

Despite any employment or assignment, the translator has moral rights of attribution and integrity. Her translation has to be credited and cannot be altered so as to prejudice her honour or reputation. She may forego these rights if she chooses, in the translation agreement or even orally.<sup>37</sup>

The author of the source work also has the same moral rights, exercisable against the translator or others, to be

credited as the author and to prevent the circulation of garbled or inadequate translations that prejudice her honour or reputation. These rights, too, are waiveable. See also Contracts, below.

## Copyright in Unauthorised Translations

The copyright status of an unauthorised translation is unsettled. Some think nobody should own a work that is unlawfully created.<sup>38</sup> Yet even a thief can stop everyone else, except the true owner or the police, from interfering with his possession of the stolen goods. An unauthorised translator should be no worse off; in fact, his position is better because he has created something new and valuable. The copyright owner of the source work may not care about the infringement, or the copyright may since have expired without her objecting to the translation. Why may someone freely take the translator's work, when the person most interested in the translator's title, the copyright owner of the source work, has never attacked it?

A copyright owner who cares can, of course, stop an unauthorised translation. She can have copies of it destroyed, but she cannot sell them because she is not their owner.<sup>39</sup> Nor can she treat the translation as her own, for this would be to take another's work free: two wrongs make no right.<sup>40</sup> She should get any damages the unauthorised translator receives from someone infringing copyright, but the translator should equally get some allowance to recognise that his labour, albeit wrongful, produced the windfall.

In Canada, therefore, an unauthorised translation should have its own copyright, first owned, just like an authorised translation, by the translator or her employer. The owner should then be able to stop others from copying or retranslating her version.

## Computer-generated Translations

Not every translation produced with the aid of a computer program may have copyright in Canada.<sup>41</sup>

A computer program may have copyright as an original literary work, but it does not follow that something made by using it has copyright. A translator may create her own translation program, or may adapt someone else's program sufficiently for it to become another original work. If she then uses it while translating, she can claim that the product is her original work. Originality may also be found elsewhere. For example, weather forecasts in Canada are machine-translated, with little post-editing, into French and English from a special 'disambiguated' form of source language. Originality might be found in the labour and

31 Copyright Act, s. 14(3); *National Film Board v Bier*, Note 28, at 175 to 176.

32 *Byrne v Statist Co.*, Note 1, at 624, 627.

33 *Compare Craft v Kobler*, Note 25.

34 *Najma Heptulla v Orient Longman Ltd* [1989] 1 FSR 598, 609 to 610.

35 For example, *Ashmore v Douglas-Home* [1987] FSR 553, 560; *Ashton-Tate Corp. v Ross* (1990) 16 USPQ 2d 1541, 1546 onward.

36 *Kantel v Grant* [1933] Ex. CR 84.

37 Copyright Act, ss. 14.1(1), (2), 28.1, 28.2(1).

38 *Ashmore v Douglas-Home*, Note 35.

39 Copyright Act, s. 38. Canada retains the provision under which a copyright owner becomes the owner of infringing copies. This is no longer the case in the United Kingdom after the Copyright, Designs and Patents Act 1988.

40 *Pasichniak v Dojacek*, Note 1; *Redwood Music Ltd v Chappell & Co.* [1982] RPC 109, 120; *Pollock v J.C. Williamson Ltd*, Note 20, at 233, and *APRA Ltd v 3DB Broadcasting Co. Ltd* [1929] VLR 107, 110; David Vaver, 'Infringing Copyright in a Competitor's Advertising: Damages "at large" can be large Damages' (1984) 1 IPJ 186, 189 to 190.

41 Generally, see Barry B. Sookman, *Computer Law*, Carswell, 1989, §3.4(c), at 3-16 to 3-26.



skill in creating and matching this language to the program.

An original work may also result where the program, whether the translator's or a third party's, produces a raw version that requires substantial human post-editing, or where an interactive program requires the translator to make choices or use other mental skills as she goes along.<sup>42</sup> But a translator cannot claim originality if she just faithfully enters a source work into the computer, runs a third party program to produce an automatic translation, and does no or only minor post-editing. No or little intellectual effort means no originality. Paradoxically, the better the translation program, the less likely the result has copyright.

The creator of a third party translation program may claim to be a joint author, with the computer operator, of a translation produced using the program. This begs two questions: (1) should *anyone* be considered an author, and (2) should the product count as *original*? Where the programmer has no control or creative choice over what the translation program is applied to, and the source work owner has no control or creative choice over the workings of the program, neither deserves to be called an author, nor has either produced anything original in the *actual translation*. The copyright owner of *Roget's Thesaurus* cannot claim joint authorship in a novel just because the novelist constantly consulted the thesaurus.

In its 1988 copyright law, the United Kingdom has plugged the authorship gap in a 'computer-generated work' (one lacking a human author) by saying that the author

shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.<sup>43</sup>

So computer-generated works join the list of other works for which the UK Act has created a fictitious author: the producer of a film or sound record, the maker of a broadcast, the provider of a cable service programme<sup>44</sup> — almost all of which are equally fictitious *persons*, that is, corporations rather than humans. The reason for protection has nothing to do with encouraging human creativity and everything to do with protecting the product of capital investment from unfair competition or misappropriation.<sup>45</sup>

The UK provision does not, however, resolve the question of originality. Authorship and originality are not equations: I may author a straight line, but the work is not original and so has no copyright in either Canada or the United Kingdom. The provision starkly highlights the problem that, in Canada, a translation produced by a computer program's mechanical interaction with an inputted text, without more, has no copyright. A work that qualifies for copyright in the United Kingdom, but lacks originality or a human author, has no copyright in Canada and can be freely taken by anyone.

42 *A Charter of Rights for Creators* (1985, Supply & Services Canada), 43.

43 Copyright, Designs and Patents Act 1988 (UK), ss. 9(3), 178 ('computer-generated').

44 *Ibid.*, s. 9(2).

45 John E. Appleton, 'Computer-generated output — the neglected copyright work' [1986] 8 EIPR 227.

## Contracts

There is no publishing or translator's contract in universal use, but writers' or translators' societies recommend various models as guides. Every provision of a contract offered by a publisher is open to negotiation. Instead of acceding to a publisher's offer, a translator with bargaining power may wish, preferably with professional advice, to set the terms on which she is willing to work; if the publisher agrees to them, this will be the legal contract between them.

### Author/publisher contract

A contract where the author gives a publisher the sole right to publish a work typically entitles the publisher, for the same period, to arrange and publish translations. This may be done in-house or by a freelance translator, where the author receives a lower royalty to offset translation costs, or by licensing another publisher to arrange and publish a translation, where the author may ask for 75 per cent to 90 per cent of her publisher's proceeds (although as little as 50 per cent is quite common in US contracts).<sup>46</sup>

The author's publisher, where acting as the author's agent, should choose a publisher who will be conscientious in the choice of a competent translator. The careful author will, however, not rely entirely on her publisher to make a deal that protects her interests. She may wish to reserve to herself final approval not only of the translator, perhaps upon seeing samples of the translator's work, but also of the final translation. After all, the same work can be competently translated in many ways — there are at least 50 English versions of Bashō's famous seven-word *haiku* about the jumping frog<sup>47</sup> — and an author may feel greater empathy with one translator's method or style over another's.

### Translator/publisher contract

The contract between a translator and a publisher may provide for a flat fee calculated per word or, especially for a source work out of copyright, an advance plus a small royalty (1 per cent or 2 per cent) on sales.<sup>48</sup>

As an author, a translator can probably insist on a royalty arrangement, rather than a flat translation fee, and on a prominent byline. But, in the United States, where even a freelance translator can end up working 'for hire' (that is, as an employee), copyright is regularly allotted to the person commissioning the translation; the translator may get only a flat fee and no royalty, and sometimes has difficulty getting even a byline.<sup>49</sup> This has also occurred

46 For examples of publishers' agreements selling translation rights to another publisher, see Lazar Sarna, *Authors and Publishers*, Butterworths, 1987 (2nd edn), at 116; Charles Clark, *Publishing Agreements: A Book of Precedents*, George Allen & Unwin, 1984 (2nd edn), at 71 onward.

47 Nobuyuki Yuasa, 'Translating "The source of water": Different versions of a *Hokku* by Bashō', in William Radice & Barbara Reynolds (eds), *The Translator's Art*, Penguin, 1987, at 231.

48 For examples, see Sarna, Note 46, at 160 onward; Clark, Note 46, at 59 onward.

49 Michael Landau (ed.), *Lindey on Entertainment, Publishing and the Arts: Agreements and the Law*, Clark Boardman Callaghan, 1981, updated annually to 1993 (2nd edn), at 1-108 to 1-114.2. Compare Form 1.05-1 at 1-111 onward with the less favourable Form 1.05-2 at 114 onward.



where foreign lyrics are put to a hit song.<sup>50</sup> Translators can of course refuse to work unless the publisher offers them a better deal.

### Translator's obligations

The translator's duties are usually specified in the contract. If not, the appropriate standard for a literary translator is

to express the idea or mood of the original work in a style appropriate to the subject. In a proper translation, the translator, however, must be content with his role and not attempt to rewrite, revise or alter the ideas, mood or style of the original.<sup>51</sup>

In the case in which this comment was made, an American judge found that the French translator of Victor Seroff's 1950 biography of Rachmaninoff had sometimes departed from his role:

[T]he translator may have consciously sought to sensationalize and inject pungent language in order to make the book more attractive to a certain segment of the French public; or the translator, having a tendency in that direction, may have allowed himself free rein to express his own conception of what he believed were the implications in the original work.<sup>52</sup>

The author sued his New York publisher for defamation but the judge, though sympathetic, dismissed the claim. The publisher had chosen a competent French house to arrange and publish the translation, so the author's only legitimate complaint was against the French publisher and the translator. Not surprisingly, the author did not want to go abroad to litigate. The author might have averted the problem by exercising better control over his publisher's disposal of the translation rights, and insisting on pre-publication approval of the translation.

Much depends on industry practice. For example, a lyricist asked to prepare a French version of a mass market hit song in English may take more liberties than a literary translator turning an English poem into French. Some composers may be concerned mainly about retaining full credit for the song and not allowing the translator to participate in the royalties. They may care that the new lyrics are appropriate to the melody. The lyrics may indeed differ so much from their source as not to be a translation: consider, for example the French version of the hit song 'There goes my everything' entitled 'Quand tu liras cette lettre'. If the lyrics have as little to do with one another as the titles did, they may not be a translation.<sup>53</sup>

### Points to watch

The copyright status of the translation should be clearly set out. The translator will wish to retain copyright, but this is not always possible. Three points should be noted:

(1) The translator's copyright lasts for her life plus 50 years. It will not likely end just when copyright in the source work ends unless both authors die simultaneously. (This suggests that a person wanting to acquire copyright in a translation should choose a translator as much for her youth, health and aversion to life-threatening activities, as for her translating competence.) The contracts should provide for the contingency of different copyright expiry dates. For example, do royalties continue even if the source work's copyright has expired? Can another translation be commissioned if the translation copyright expires earlier?

(2) A contract that allocates copyright in a translation to anyone other than the translator is ineffective to transfer the copyright in Canada unless the translator is translating as an employee or the translation is then complete. In all other cases, the translator should sign a transfer of the copyright when the work is completed.<sup>54</sup>

(3) Clauses sometimes provide that the author or translator waives all or some of her moral rights in advance, or irrevocably appoints the publisher as the author's or translator's agent to exercise them. Provisions like this should be resisted. If appearing in a 'take-it-or-leave-it' contract that gives no opportunity to the author or translator to bargain, the provisions may sometimes be unenforceable; but this is costly to establish and it is better to try to have the provisions removed before the agreement is signed.

### Infringement

A person translating a work, or a substantial part, that is still in copyright infringes the copyright, unless she first obtains the copyright owner's consent or her taking is a fair dealing. The principal reason that prevented translation from being an infringement in many states in the 19th century — that it was an entirely new work that itself took great skill (see How Translation Rights came to be recognised, below) — no longer holds in the 20th century. A work may be original and yet infringe another's copyright, and so it is with translations.<sup>55</sup> Today, it is also thought right that the copyright owner should benefit from any translation market. Unauthorised translations unfairly compete with her own translations or prevent her from arranging them.<sup>56</sup>

### Clearances

A firm once thought it could freely publish a photocopied English translation of Jean Genet's *Journal du voleur* (*The*

50 *Blue Crest Music Inc v Canusa Records Ltd* (1974) 17 CPR (2d) 149, 157 to 158, affd (1977) 30 CPR (2d) 14 (Fed. CA).

51 *Seroff v Simon & Schuster Inc.* (1957) 162 NYS 2d 770, 773, affd (1960) 210 NYS 2d 479.

52 *Ibid.*, 773.

53 *Blue Crest Music Inc. v Canusa Records Ltd*, Note 50, at 155 to 156, where the court found the translation right infringed, but the point was not discussed.

54 The assignment of copyright in a future work is not fully effective in Canada: one cannot transfer something that does not yet exist. Only when the work is completed can the translator be compelled to sign a transfer — if she has not meanwhile sold the copyright in the work to someone else who does not know of the earlier attempted assignment.

55 *National Film Board v Bier*, Note 28, at 171.

56 *Radji v Khabaz* (1985) 607 F. Supp. 1296, 1302, where the *Iran Times* was enjoined from distributing a Farsi translation of serialised excerpts of *In the Service of the Peacock Throne* by Iran's former ambassador to Britain, in competition with an authorised Farsi translation of the book.



*Thief's Journal*) in the United States because the translation, for technical reasons, had no US copyright. But the firm forgot that the French source work was still in copyright in the United States. The consent of the copyright owner was still necessary before any translation could be published there.<sup>57</sup>

What clearance is needed depends upon what is to be done with the original version or the translation. If an English work is translated into German, someone wishing to copy that version needs consents from the owners of the German version's reproduction right and the English work's translation right.<sup>58</sup> For retranslation from the German version into a language other than English, the consents must come from the owner of the English work's translation right into that language, and from the owner of the German version's translation right. If the retranslation is a back-translation into English, then consent from the English work's reproduction right owner, and perhaps also from the German version's translation right owner, is required.

## Recompilations

If I see an alphabetic compilation of English words with their French equivalents and recompile them, putting the French words alphabetically with their English equivalents alongside, I infringe copyright in the compilation. This last work is unoriginal and has no independent copyright:

Once [the second compiler] had before him the English—French translation, it is merely a mechanical operation to reverse this and put the French terms in alphabetical order with their English equivalents. No question of selection, translation, or other matters involving skill and judgment is involved, as there would be in the case of a dictionary if the terms had to actually be defined in the other language and not merely translated.<sup>59</sup>

## Botched translations

An unauthorised translation infringes copyright, whether the translation is good or bad.<sup>60</sup> Indeed, a botched translation, if widely circulated, may harm the copyright owner even more, and should increase the amount of compensation due to the owner. The author can also claim that her moral rights are infringed.

Theoretically, of course, a translation may be so bad — like the apocryphal computer that rendered 'nous avions' by 'we aeroplanes' — that it will not infringe the source work because the latter cannot be identified.

## Consulting other translations

A translator may consult and use other sources or translations, if she acts fairly. Her own translation has its own copyright. A source work may have multiple translations, each with its separate copyright.

The extent of permissible consultation is illustrated by a case involving the National Film Board of Canada. In 1969 the NFB produced a draft English/French glossary

of terms used in Canadian cinematography. A film lab published, without the NFB's authority, a booklet that included the glossary. The lab claimed the NFB had no copyright in its draft: 228 of the 775 words in the glossary had been taken from an American handbook on cinematography, and so it was said the NFB's work was not original. The judge disagreed and issued an injunction against the lab:

No doubt the original list of words and many of the translations were obtained from other sources, but, in examining these various sources and making a selection from them and then adding independent translations some knowledge and judgment was involved. Anyone who has had any experience in translation from one language to another realizes that selection of the most appropriate or apt translation for any given word frequently involves both considerable research and discussion with other translators.<sup>61</sup>

There are, according to one translator, three possible qualifications: (1) it is dishonest to publish a translation that simply combines the best parts of other translations, (2) 'you must of course be ready to be pillaged yourself by any new translator who generally likes your work but thinks he can improve on parts of it' and (3) some passages in a translation are so individual ('near-miracles') that a later translator should not take them.<sup>62</sup>

Point (1) is good advice: to combine the best from each of three translations may infringe copyright in all three, since a substantial part of each may have been taken. Point (2) sensibly encourages translators not to be too sensitive when later comers take phrases or sentences from their work, even ones on which much time and thought may have been lavished. A substantial part of the *whole* work is probably not taken by such isolated extractions. Point (3) is good ethics but legally unnecessary. Despite misconceptions perpetuated by the permissions departments of publishers, the occasional paragraph from a book may be reproduced without infringing copyright. One can take 'a substantial particle', even an inspired choice, but not a substantial part. But, at some point, the taking of too many inspired choices does become infringement — it's all a question of degree, as judges helpfully say — so behaving ethically can turn out to be good insurance.

## How Translation Rights Came to be Recognised

Today, it seems self-evident that the copyright owner of a work should alone be authorised to allow translations, but this right was not unequivocally recognised in the United Kingdom or United States until the beginning of the 20th century. Until then, in those countries, translations were grouped with abridgments, dramatisations and reviews as allowable uses.

When, in 1752, Johannes Stinstra translated Samuel Richardson's *Pamela* into Dutch, he wrote to tell the author what he had done and to express admiration for the source work. A flattered Richardson offered to pay for four copies of Stinstra's work, and eventually persuaded him to arrange a translation of Richardson's next work,

<sup>57</sup> *Grove Press Inc. v Greenleaf Publishing Co.* (1965) 247 F. Supp. 518, 525.

<sup>58</sup> *Murray v Bogue* (1852) 1 Drew. 353, 367 to 368.

<sup>59</sup> *National Film Board v Bier*, Note 28, at 171. Similarly, *Butterworth v Robinson* (1801) 5 Ves. Jun. 709.

<sup>60</sup> *Chatenay v Brazilian Submarine Telegraph Co. Ltd* [1891] 1 QB 79, 82.

<sup>61</sup> *National Film Board v Bier*, Note 28, at 174.

<sup>62</sup> Donald Frame, 'Pleasures and Problems of Translation', in John Biguenet & Rainer Schulte (eds), *The Craft of Translation*, University of Chicago Press, 1989, at 70, 82 to 83.



without thought of payment.<sup>63</sup> According to Immanuel Kant, translations represented only the thoughts, not the speech, of the author and so did not take anything of which the author could complain.<sup>64</sup> If any good, they also took time and skill to create; moreover, they did not compete with the originals. Far from complaining, authors were grateful that somebody cared enough to translate their work and bring their name before a new readership.<sup>65</sup>

Having no translation right could prove beneficial in other ways. When Mark Twain found *The Jumping Frog of Calaveras County* had been translated in France, he translated the French version literally back into English and published the result in the United States as *The Frog Jumping of the County of Calaveras*.<sup>66</sup> Had enforceable translation rights existed in France or the United States, this amusing back-translation would probably have never seen the light of day.

Uninhibited translation also distributed knowledge quickly at a time when publishers were more concerned with home markets and undisposed towards meeting foreign demand. In India, for example, as late as the 1890s, judges were allowing translations from English into Hindi, and from one Indian language into another. This violated neither Imperial copyright (the Literary Copyright Act 1842) nor the Indian law that copied the 1842 Act.<sup>67</sup> In one case involving the translation of English school texts, the judge wasted little sympathy on their publisher, Macmillan, which had taken 40 years to go into the translation business, and this only after some of the unauthorised translations had already run into their 21st edition. Indian students deserved better.

There were some exceptions to the rule. Translations appealing to the same readers as the source work might infringe. This occurred in the law book market, at a time when lawyers could work with equal facility in English, French or Latin. Translations of legal texts and form books between these languages were treated as obvious infringements.<sup>68</sup> British and American courts also banned the publication of translations of unpublished works, maintaining the author's right to privacy as paramount.<sup>69</sup>

By the mid-19th century, the move towards recognising authors' rights over translations had started gathering momentum as the increasingly literate middle classes clamoured for access to the world's literature. The bonds of mutual admiration that united the Richardsons and Stinstras of the mid-18th century began breaking throughout Europe and North America. International copyright treaties between European states began to stop the translation of foreign works without the copyright owner's

authority.<sup>70</sup> If one event galvanised the movement to protect translation rights, it was the plight of Harriet Beecher Stowe's book, *Uncle Tom's Cabin*.

Immediately the book came out in the United States in 1852, Stowe lost control over it outside her country because her publisher had not thought to take steps to acquire imperial or other foreign copyrights. The book was published and translated without Stowe's authority throughout the world in a host of languages, with only the occasional voluntary sum sent by a conscience-ridden English publisher.<sup>71</sup> The final rub came at home. Stowe authorised a translation in German for the immigrant market in the United States, but was unable to prevent competition from an unauthorised German translation. A US judge ruled that

A translation may, in loose phraseology, be called a transcript or copy of [Stowe's] thoughts, but in no correct sense can it be called a copy of her book.<sup>72</sup>

Stowe's predicament did not go unnoticed. The copyright laws in the Canadian provinces had, till then, lacked any translation rights. This may have served British and French interests in central Canada after the British became established in the mid-18th century, but all changed with Canada's first Copyright Act in 1868. From now on, the copyright owner of a literary work had the sole right to allow translations 'from one language into other languages'.<sup>73</sup> Canada beat the United States in redressing the inequity exemplified by *Uncle Tom's Cabin* by two years, and in 1875 extended its benefit beyond persons domiciled in the British Empire to citizens of countries having an international copyright treaty with the United Kingdom.<sup>74</sup> It took until 1870 for the United States to recognise the author's right over translations. Even then, recognition was only partial: the author first had expressly to reserve the right,<sup>75</sup> presumably by saying so on the title page or some other conspicuous part of her work.

Contemporary British and American textwriters, insouciant of the unmet needs of readers and students hungry for knowledge in far-off lands, argued forcefully for absolute translation rights,<sup>76</sup> and in 1886 the first Berne Convention on international copyright reflected the growing pressure from the author and publisher groups of industrialised states to grant copyright owners translation rights (see next section). Still, it was not until the 1909 US and 1911 UK copyright acts that an unqualified translation right was granted for all works. Canada continued its right, in modified language based on the UK 1911 Act, in its 1921 legislation.<sup>77</sup>

63 William C. Slattery (ed.), *The Richardson-Stinstra Correspondence and Stinstra's Prefaces to Clarissa*, Southern Illinois University Press, 1969, at 22, 56 to 57.

64 Tom G. Palmer, 'Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects' (1990) 13 Harv. J. Law & Pub. Policy 817, 839.

65 *Burnett v Chetwood* (1720) 2 Mer. 441; *Millar v Taylor* (1769) 4 Burr. 2303, 2310.

66 This and *La Grenouille Sauteuse du Comte de Calaveras* are found in Charles Neider (ed.), *The Complete Humorous Sketches and Tales of Mark Twain*, Doubleday, 1961, at 267 onward, with Mark Twain's explanation at 261 to 262.

67 *Munshi Shaik Abdurrahman v Miraz Mahomed Shirazi* (1890) 14 India LR (Bombay) 586; *Macmillan v Khan Bahadur Shamsul Ulama M. Zaka* (1895) 19 India LR (Bombay) 557, 570.

68 *Gyles v Wilcox* (1740) 2 Atk. 141, 143; *Alexander v Mackenzie* (1847) 9 Sess. Cas. 2d 748, 752.

69 *Prince Albert v Strange* (1849) 2 De G. & Sm. 652, 693.

70 *Lauri v Renad* [1892] 3 Ch. 402.

71 Forrester Wilson, *Crusader in Crinoline: The Life of Harriet Beecher Stowe*, Lippincott, 1941, at 327 to 331, 398.

72 *Stowe v Thomas* (1853) 23 Fed. Cas. 201, 208.

73 Copyright Act 1868, 31 Vic., c. 54, s. 3.

74 Copyright Act of 1875, 38 Vic., ch. 88, s. 4.

75 Rev. Stat. § 4952 (1874), repeating the provision of the Act of July 8, 1870.

76 T.E. Scrutton, *The Law of Copyright*, William Clowes, 1903 (4th edn), at 142 to 143; Eaton S. Drone, *A Treatise of the Law of Property in Intellectual Productions in Great Britain and the United States*, Little Brown, 1879, at 450 to 456.

77 Copyright Act 1909 (US), § 1(b), Copyright Act 1911 (UK), s. 1(2), Copyright Act 1921 (Can.), s. 3(1)(a).



## International

Under the Berne and Universal copyright conventions, authors have the exclusive right of making and authorising translations of their works for the full period of copyright in the source work.<sup>78</sup> So nobody in Canada can translate a work made or first published in France or another Berne or UCC member without the consent of the owner of the relevant translation right. Foreign copyright owners have all the rights of a local owner against local infringers.

States that primarily import information and literature have not always readily accepted this right. In particular, developing states have been reluctant to have their balance of trade adversely affected by royalty export; they have become impatient when access to learning is delayed through lengthy and costly negotiations with copyright owners who lack interest in small markets; and they often want local industry to break the stranglehold exercised by foreign multinationals over the publishing, translation and distribution of copyright material.<sup>79</sup>

The history of the Berne Convention reflects these attitudes. Though central to this first major international copyright treaty, translation rights were given full recognition only slowly. Imperial powers like Britain were reluctant to give up a useful tool of colonisation, the ability to translate freely without let or hindrance. One strategy of effective colonising involved the displacement of native culture by the coloniser's language and culture. This required first understanding, hence translation, of the local culture into the coloniser's language. Translation in this context was less a humanising exercise than an act of dominion, since it was thought that only British, not native translators, could be trusted to act appropriately. Natives could not interpose any right between their texts — written or oral — and the translator, who inevitably reconstructed them according to his own biases. The translation became the authentic version of native culture both for coloniser and colonised, often as a prelude to its being demonised and displaced in favour of the 'superior' British culture and religion.<sup>80</sup>

Still, over British opposition, the first Berne treaty in 1886 gave copyright owners the sole right to authorise or make translations for 10 years after the work was first published in a member state. In 1896, the treaty went further to allow owners sole translation rights over the whole term of their copyright, but these rights had to be exercised within 10 years, otherwise anyone could translate into a language for which no authorised publication had been arranged. By 1908, however, over much opposition, full control of translations over the term of the copyright was given to the author, ostensibly to ensure reliable translations. This caused Russia to refuse to join the Berne Union, existing members such as Japan and Holland refused to be bound by this provision, and several other states that later became members of the Berne Union followed Japan's and Holland's lead.<sup>81</sup>

Translation continued to be a thorn in the side of international copyright. The Universal Copyright Convention, signed in 1952 to bring the United States and other

Pan-American states into some international copyright relation with the Berne Union, allowed states to grant compulsory translation licences where a work had not been translated into the language within seven years of first publication or editions of such translations were no longer in print. Developing nations, especially from Asia, Africa and Latin America, capitalised on this development to insist on having further special provisions for translation in the next rounds of treaty revisions.

The latest 1971 versions of Berne and the UCC contain the fruits of these efforts. Essentially, they allow developing nations to translate works under a compulsory licence for teaching, scholarship or research three years after a work is published, if no authorised translation is then in print or is published within six months of a notice to the copyright owner indicating an intention to translate under licence. The licensee must pay fair royalties, but the licence ends once an authorised translation is available at a reasonable price.<sup>82</sup>

Although the provisions were controversial when introduced, many developing nations have not taken advantage of them and have left translation demands to be met by the market. The provisions have accordingly had limited success,<sup>83</sup> except in encouraging copyright owners to respond more energetically to the demands of foreign markets to forestall the risk of a compulsory licence application. The effectiveness of this encouragement is debatable. Books still are translated more frequently from English than *vice versa*.<sup>84</sup> For example, for every German book translated into English, 100 English books are translated into German.<sup>85</sup> The statistics for non-European and smaller languages can be little different.

## Canada

The position the Berne Convention reached in 1908 had almost always been Canada's policy. The Dominion's second Copyright Act, passed in 1875, extended the benefits of Canadian copyright to citizens of a country that had an international copyright treaty with the United Kingdom. They were treated no differently from Canadian or other authors domiciled in the British empire.<sup>86</sup> Paradoxically, the Berne Convention made foreigners worse off in one respect in Canada: treaty claimants no longer could have copyright in Canada for more than the term in the work's country of origin.<sup>87</sup> From 1 January 1924, this restriction was dropped with the coming into force of the 1921 Copyright Act, only to return in 1931 in a narrow class of case: for a work of joint authorship, a national from a state with a shorter copyright term than Canada's cannot claim longer protection in Canada. Now that the NAFTA is implemented, the United States and Mexico are exempt from this limitation.<sup>88</sup>

82 Berne Convention, Note 78, Appendix, Arts., II and IV(6); Ricketson, Note 81, ch. 11.

83 Ndéné Ndiaye, 'The Berne Convention and Developing Countries' (1986) 11 Columbia-VLA Jo. Law & the Arts at 47, 55.

84 Robert J. Moskin, *The future for publishing across language frontiers*, Bertelsmann, 1988, at 12.

85 Mark W. Rectanus, *German Literature in the United States*, Otto Harrassowitz, 1990, at 28.

86 Copyright Act of 1875, 38 Vic., ch. 88, s. 4.

87 Copyright Act of 1889, 52 Vic., ch. 29, s. 1, amending ss. 4 and 5 of the 1875 Act. Section 4 also referred to a treaty with the United Kingdom 'in which Canada is included', a qualification mysteriously dropped in the 1906 consolidation: Copyright Act, RSC 1906, ch. 70, s. 4.

88 Copyright Amendment Act of 1931, 21–22 Geo. V, c. 8, s. 4.

78 Berne Convention for the Protection of Literary and Artistic Works (Paris Act), 1971, Article 8.

79 Philip G. Altbach, *Publishing in India: An Analysis*, OUP, 1975, at 53 to 56.

80 Tejaswini Niranjana, *Siting translation: history, post-structuralism, and the colonial context*, University of California Press, 1992, ch. 1, *passim*.

81 Staniforth Ricketson, *The Berne Convention for the Protection*