Copyright and the translator
Who owns your translations?

Translators too often sign away their work without realising its financial worth. **Corinne Blésius** clarifies the legal position over ownership rights

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Thousands of pages of original work are produced by professional translators every day. But what happens to them?

Are you happy to simply part, without looking back, from every single bit of text you create in your own right, although you are actually working from an original?

Do you ever wonder what becomes of the work you are proud of and do you ever regret that this work remains anonymous? Would you really mind if someone chose to make changes to your creation without informing you?

Finally, what if the same piece of translation was to bring you much more financial reward than you originally were expecting?

These are just a few compelling ideas and thought-provoking questions which were raised by James Ware, IP lawyer and partner at Davenport Lyons, in the course of his presentation on translation copyright – *The ownership of translations, a perspective from the UK* – at the ITI Annual Conference on Saturday, 13 September 2003.

Having attended the 8th Paris Bourse financial translation conference organised by Chris Durban last June, where James Ware explored similar fascinating concepts, I was pleased he was among the guest speakers at the ITI Conference, as I believe that the question of translation copyright is an imperative issue which we, as translators and authors, cannot afford to ignore. The following is a summary of James Ware's presentations. This article is intended to deal with general principles only, and to provide a general guide to the area. The principles will not always apply and expert advice will often be needed for individual cases and disputes.

What is copyright?

Copyright is an entirely legal concept. Under the Anglo-Saxon system, it is a property right, protected by statute, which subsists in literary works. In order to be recognised by law, it has to have a material expression and involves action. As an Anglo-Saxon concept it was originally developed by English judges and was then taken up in North America by the American courts. It generally equates with the Continental European concept of copyright but some of the subtler forms of enforcement and the documentation that is required are different.

The term 'copyright' is self-explanatory. It is the right to copy. This means that if you own the copyright in a literary creation you can prevent other people copying your work, issuing copies to the public, lending, renting out your work, and performing it in public (but not in private). You can also stop them from broadcasting it, making an adaptation or a translation of it.

This last point is important because a translator can only translate or adapt a work (to the extent that an adaptation is involved) with the consent of the original copyright owner. However, if this consent is granted and the translation is then produced, the work of the translator – who essentially is an author, too – is itself protected by copyright.

Moral rights

The French, through the concept of 'droits d'auteur', introduced the idea of 'moral rights' from the earliest time that they started to protect the rights of authors when Jean-Jacques Rousseau wrote his natural *Rights of Man*. An author has a personal interest in his creation and has the right to be identified as such. In this context, this right is distinct from the ownership of copyright.

This idea was completely alien to the Anglo-Saxons who had no concept of moral rights. Selling your copyright to a publisher meant that he could do what he liked with your work, tell anyone to do what he or she wanted to do with it and there was nothing you could do about it.

However, in France it was important to look after the interests of authors who were respected and had inalienable rights to protect their works and their honour from abuse. As a result of the UK becoming an EU member and the EU harmonising copyright, moral rights became integral to UK copyright law as well.

What are the basic moral rights?

You are entitled to be identified as the author of your work and thus as the author of your translation, unless you sign a waiver to someone in an Anglo-Saxon jurisdiction. It is unlikely that you can alienate this right in France. It may be that under French and/or other laws the principle would

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be accepted for certain kinds of translations should this kind of work not require identification.

But the basic principle is that you are entitled to be credited with your own work.

You are also entitled to prevent other people being credited with your own work, so there is a negative right. If someone tries to put his or her name to your translation, you can try to prevent him or her from doing so. This means there is a positive right to be identified and a positive right to stop other people claiming that they translated your creation, leaving the impression that your translation was done by the original author rather than by a professionally qualified translator like you. Moral rights are not to be ignored and continue to exist (regardless of whether or not you own the copyright).

Consequently, as an author, you have the right to equitable remuneration if your work is used.

How and where is copyright protected?

Copyright is protected everywhere throughout the world. It is protected by virtue of local laws.

If you make a translation into English of a French work in France, your translation will be protected in France under French law. If you do the same in England, it will be protected under English law; in America under American law.

Therefore there is no unified legal system governing the protection of your works around the world. You have to examine the law of each separate jurisdiction to find out what rights you have as an author/translator.

The Berne Convention, TRIPs and WIPO

The Berne Convention for the Protection of Literary and Artistic Works was finalised in 1886 as the first instrument of international copyright law. The approach was to establish an international baseline standard, to which all member countries were supposed to adhere in their domestic legislation. The means by which individual countries chose to implement the standards under the Convention were left to their authorities. Like other instruments of public international law, the Berne Convention did not have specific measures of enforcement. Instead, the system was based largely on the aspiration towards international consensus in relation to copyright. These conventions form what is called reciprocal arrangements. There are few countries in the world that are not party to the Berne Convention, which means basically you have rights almost anywhere in the world.

However, important local differences are in place and local law will always be the law which applies.

International copyright standards have largely been developed through three distinct processes: the TRIPs/World Trade Organisation system, the World Intellectual Property Organisation (WIPO), and the Copyright Harmonisation Directives of the European Union, whose international influence far exceeds their regional effects. In all three processes, attempts have been made to include moral rights, but none of them has been able even to generate a proposal for an internationally viable standard. And there are various and holy alliances between patent owners, trademark owners and copyright owners who are keen to defend their interests.

The TRIPs Agreements resulted in a movement towards the extension of copyright on a uniformed basis throughout the world.

As far as the length of copyright is concerned, there are now longer and longer periods of copyright and companies such as Disney have been very instrumental in defending the extension of copyright because they wanted to protect image rights in their cartoons.

Does copyright subsist in a translation?

Even if you are infringing someone else's copyright or even if you are unlawfully translating someone else's work, your work will itself qualify for protection as an original copyright.

As a translator you have created something original. As long as you have not copied someone else's translation and providing you have not pledged your right to someone else, you still own the copyright.

Who owns the translation?

The author owns the translation. As a freelance translator, you as the author own the translation. However if you are an employee or a salaried worker, your employer is the owner of your translation. Authorship does not necessarily mean ownership in copyright terms. Under American law you can sign away your author's rights.

What happens if an agency commissions you?

Subject to contract and regardless of contract, you will be the first owner of copyright. You may then give that copyright away, but you are still the owner of the copyright in the translation.

Consequently, there is a layering of copyright. There is the copyright in the original language and there is then a copyright in the translation. The latter is often called a dependent copyright because it is dependent on another copyright for its existence.

As an example, Proust who died in 1922 is out of copyright in the UK (he may still be in copyright in France due to different rules) but the Scott Moncrieff translations of the works of Proust and their adaptations by later translators remain in copyright.

So, in terms of layered rights, there is a first copyright with the original work. There is then a second copyright, which is dependent on the original work. And the person who makes the revision of the works will also have a copyright.

There is another curious issue. If you are translating from Norwegian into English and then someone uses your translation to translate from English into French, you as the translator into English are entitled to charge a fee for the translation of your English translation into French. This is because – as long as you have not given that right away – somebody is layering another copyright on your copyright.

What if your translation has been partly computer-generated? Who owns the computer-generated work?

Broadly speaking, if you press the button, then you own the computer-generated work. The person who

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operates the program owns the copyright, and not the creator of the program.

However the substrata material in the computer is relevant. If the computer is simply borrowing large chunks of phrases that someone else has generated, then you may find that in creating the computer-generated work – although the final product may be yours – you may also be infringing other people's rights.

On this basis, how do you work out a relationship with the person who commissioned you? It is important to remember that it is hard to reverse a relationship once it has been established for a long time.

Several factors come into play: is the relationship properly governed by contract; what are the implicit rights granted on a translation; do you simply invoice for your services?

If you are commissioned to do a translation and this translation is used in a company report, there is no immediate problem. The translation is printed and goes out. There is what is called an implied license. If it is also contemplated that that company report will be placed on the internet, then there may be an implied licence included as part of a permanent installation on the internet. But it may not be implied that that company report or large extracts of it will be included in a book about the company written by someone else reviewing the affairs of the company five years later. In which case, you, as the author of the translation, may be able to request another fee for the translation. In the same way as a photographer, you may be entitled to repeat fees for the use of your translation.

How long is the translation protected for?

You are the author of a literary work, therefore you are entitled to exactly the same protection as any author of any literary work. Throughout most of the western world – but not all of it – you are protected for your life plus 70 years. This is the period of protection of copyright in literary works.

Can a translation float free from the original work?

If you translate a work that is in the public domain – like Shakespeare into French – you own all the copyright in your translation.

However, if you happen to translate a work that has never been published before, there is something called the archive right.

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There are special rules governing works that have never been published before. In the UK – at least until 1989 – the original author of an unpublished work would have protection whenever they died for 50 years after first publication. There is a curious overlapping right, designed to encourage people to publish manuscripts from monasteries and strange unpublished works, that gives the archive right to the person who first publishes something that has never been published before.

Take the example of Proust again, who died more than 70 years ago. If we assume his translator Scott Moncrieff did not die, we could say that the copyright of Scott Moncrieff has floated free from the original copyright and that Moncrieff is now entitled to effectively 100% of the income from that translation.

So as a translator, you can have your copyright float free from the original author at some point. A translation can float free and it can float free in layers.

Database rights

As a European right, this is relatively recent. A database can be defined as a collection of independent works, data or other materials, which are arranged in a systematic or methodical way and are individually accessible by electronic means.

Databases are not literary works and have therefore no copyright attached to them. In order to have a literary work, the creation needs to have substance; it is not a list of words or sets of columns. Short phrases don't carry copyright. Long phrases, long words, which are unique, do.

Databases include materials such as telephone directories, lists of words and dictionaries, (although a dictionary has a compilation literary copyright attached to it). The duration of database rights is 15 years only.

Who owns the database rights?

The maker owns the rights – the person who takes the initiative in obtaining, verifying or presenting the contents of a database and assumes the risk of investing in, obtaining, verification or presentation shall be regarded as the maker of, and as having made, the database.

If you put together a database you own it as the maker and the owner of the database. The value of the database on its own for you is that you can sell it to someone else.

If you are using a commercial proprietary database you won't be infringing that database if you use it for the purpose for which it was licensed to you and for which you bought it, which, in the case of translations, is to make translations. Therefore nobody can claim a share of your translation. Because your translation becomes a literary work and is not itself a database, it carries copyright.

It is thus important to make a careful distinction between the use of the database and the software in which it is embodied in the making of a new work and the actual copying of the database as such and the copying of the literary work, which forms part of the database.

As an example, if you create a database using a proprietary one, adding your own words and then putting it in a text file and giving it to a friend as a translator, then you would be infringing the database right of the person who created the proprietary database.

And if your friend gives it to someone else without your permission, that friend will be also infringing your database right.

But that does not prevent them owning the product of the use of a database.

As far as the issue of translation memory is concerned, in order to be protected by copyright your work needs to have some substance attached to it. Whole sentences will have a copyright. Words or short sentences do not qualify. You may assign your right by signing a contract. If nothing is signed, the copyright is not given away but a licence of some form will have been given away.

International aspects

It is essential to remember that copyright is a very international form of law. There are different standards depending on the country. Each country implements the basic provisions of the European law and the Berne Convention according to their customs and their underlying legal structure.

Practical issues

The contractual nexus is important. Whether you work for an agency, on a regular basis, or on a one off basis, you are within a contractual framework and your past conduct will affect what you are now entitled to. It is best to structure the correspondence in a way which makes it clear that the rights you are giving away in your translation are restricted and that the translation is for a particular purpose, possibly for a limited amount of time and for a limited kind of publication. This means that a second or subsequent payments may be available to you each time your translation is used.

Copyright: an empowering tool for the translator

Regardless of any mental block that we, as translators, may have regarding the impracticability of integrating copyright within our work and of the complexity of enforcing those rights, we cannot afford to be complacent in this respect.

Regardless of the financial aspect of what the concept means for our incomes, we can use copyright to strengthen our identities as professionals, to take a stand, and assume responsibility for what we create. There are a number of ways we can strengthen our profession and our credibility. When we sign our translations, draw up invoices or compile our translation files, we should incorporate a short description in the small print of our terms and conditions. And we should also make sure we monitor the use of our translations. And we should ensure that any piece of work is completed without giving away more than we are prepared to give away.

The reality is that most of us spend hours every week in front of a computer screen, trying to make sense, usually on our own, of highly complex documents requiring large amounts of mental energy. Do we really want to stay anonymous for the rest of our careers?

COLLECTION SOCIETIES

James Ware is a partner in Davenport Lyons, a law firm specialising in the entertainment sector and in related areas of information technology.

UK

The Copyright Licensing Agency Ltd (CLA) is the organisation which performs the function of ensuring that royalties are paid on photocopying. The CLA is owned by its members the Publisher Licensing Society (PS) and the Author Licensing and Collecting Society (ALCS).

The CLA is responsible for looking after the interests of the rights owners in regards to the copying of all books, journals, magazines and periodicals.

The process by which the CLA ensure these royalties are paid is as follows:

1 CLA licenses all Higher Education establishments in England, Wales, Scotland and Northern Ireland. The CLA issues libraries with a licence.

2 Under that licence, no copies may be distributed or made by an authorised person during any one course of study which either singly or in aggregate exceed the greater of 5% of any published edition or:

a) in the case of a book – one whole chapter

b) in the case of a periodical (including a set of conference proceedings) – one whole article

c) in the case of an anthology of short stories or poems, one short story or poem not exceeding 10 pages in length

d) in the case of law reports, the entire report of a single case

Anything below these thresholds is considered to be 'fair dealing'.

3 If a licensed library finds that an authorised person wishes to copy over that amount then they can use CLA's Rapid Clearance Service (CLARCS) and quickly obtain permission to copy amounts, which exceed the limits of their basic licence. The fees are set by the copyright holder for each work and clearance is available by telephone, fax or mail. The fee is charged to the licensee's account. As a safety precaution, and to ensure this process is not the only system in place to guarantee authors/ publishers receive their royalties, surveys are also conducted to determine what has been copied.

4. The CLA then splits the fee two ways. After CLA deductions, 50% goes to the PLS for the publisher's royalties and 50% goes to the ALCS for the author's(s') royalties.
5. Of the 50% of the fee that is paid to them on a translated literary work:
   – The original author of the work is paid 70%; and
   – The translator of the original work is paid 30%.

If the original work is out of copyright, the translator gets 100% of the fee.

The rules and practices of the CLA may change from time to time. Before making any assumption as to their application to income from any specific translation or source of income, it would be as well to check directly with the CLA.

INTERNATIONAL

The CLA is a member of the International Federation of Reproduction Rights Organisations (IFRRO). All international members of IFRRO enter into bilateral agreements with each other. Bilateral agreements provide for the exchange of licensing authority (as needed) in national repertoires of works. They also allow for the rights holders via their National Reproduction Rights Organisation (RRO) society (in the case of the UK the CLA.)

The agreements are based upon the principle of national treatment, as found in the Berne and Universal Copyright Conventions. Under national treatment, each RRO collects and distributes photocopy royalties on behalf of foreign rightsholders in basically the same way that it does on behalf of its domestic rights holders, distributions between RROs are often called 'cross-border' payments.

If an author is a member of the CLA, then the CLA (through bilateral treaties), under the umbrella of the IFFRO, can collect the author's royalties for the overseas exercise of rights such as photocopying.

For details see www.cla.co.uk