Copyright and e-rights in the particular case of literary translation

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The aims: awareness, change of regulations and means of implementation

The Situation: Three important international translation-related organisations, FIT, PEN and CEATL, agree on the authorship of the translator and his/her copyright resulting from the acknowledgment of his/her authorship.

FIT:

14. A translation, being a creation of the intellect, shall enjoy the legal protection accorded to such works.

15. The translator is therefore the holder of copyright in his/her translation and consequently has the same privileges as the author of the original work. (Translator's Charter, Section II, Rights of the Translator)

PEN:

Article 3. The translator should be treated as an author, and as an author should receive due contractual rights, including copyright. (Declaration on the Rights and Responsibilities of Translators)

CEATL:

Copyright is based on the idea of originality: any new expression that is different from existing expressions is considered the inalienable intellectual property of its author and, as such, enjoys automatic protection.[…] This is why the translator enjoys exactly the same legal rights as a writer. It also means that literary translation is not just work for hire: when signing a license contract with a translator, a publisher is actually commissioning an original work that bears the stamp of its author. (http://www.ceatl.eu/translators-rights/legal-status/)

Although FIT is concerned with all translators (not just the literary) and PEN is more interested in writers than translators, and although CEATL is a European organisation whilst FIT and PEN are global institutions, there are no substantial differences in the wording of the documents. With so much concord, how can anything go wrong?

Firstly, all these definitions and conclusions (including the Berne Convention and UNESCO's Nairobi Recommendation from 1976) exist as a cloud hovering above national legislations. Not many of the definitions have made it into law (even in the case of some of the countries that signed the documents) and even if they have been included, it has only been done vaguely in the case of most national legislation. This means that a lawsuit often results in a long, complicated and therefore expensive procedure, in which the costs outweigh the benefits. States are generally very unwilling to automatically proceed in the case of a copyright violation, especially in the field of translation. In general, the interested party is directed towards a civil suit.

This typically becomes a case of David against Goliath, of a freelance artist against an organisation (a publishing house, Internet provider etc.), which normally has a professional legal department. The freelancer must then assume the role of Michael Kohlhaas, the character in the 1811 novella by Heinrich von Kleist who embarks upon an almost fanatical quest for justice, which is a very unrewarding position.

It would be wrong, however, to assume that such ill intentions are common amongst the many participants in the chain of publishing who use translated literary works. In many cases it is simply a lack of awareness in many different areas:

— The awareness of the translator being an author and not just a hired hand.
— The awareness of the amount of original creativity, or creative originality, contained in a particular translation.
— The awareness that the business relationship with the translator is not over once a book is printed.
— The awareness that the rights of the translator are not the same as the rights of the author. This means that a work can be in the public sphere in terms of authorship, but not in terms of the translator's rights.
— The awareness that the terms of a contract between a translator and a publisher have, to a large extent, been outlined in several internationally recognized and accepted documents and that it is not a one-off agreement created from scratch.

In some cases the situation can be remedied – sometimes completely, sometimes partially – by different actions that help raise awareness. In other instances much more is needed, such as clearly defined regulations that specify the rights of the translator. A clear definition is very efficient in discouraging misuse and civil suits and has a very positive influence on the wording of contracts. But if even clearly defined laws can be easily disobeyed, it would help if the states that passed them showed a readiness to engage in enforcement. This has become especially important in the expanding field of digital rights. In 2009, CEATL conducted a survey on digital rights and published the results in 2010.

Publishing in electronic media

The development of electronic media (often referred to as digital media) has not radically changed relationships, but it has laid bare some of the weak points in the system. We can compare the developments in digital media piracy with a situation

in which valuables are locked in a safe, which is then locked within an institution and protected by walls, guards and cameras vs. a situation in which the valuables are displayed in public places and made accessible. In both situations it is illegal to touch, take or appropriate the valuables and, in public places, an explicit warning against such an act is usually given in several languages. Yet both cases amount to theft. In the first case, the theft equates to all the planning, work and effort that went into locking the valuables up, whilst in the second case, it is the simple act taking and running away with the goods that is deplored. Is the thief in the second case less guilty, and will the legislation be more lenient in his case?

And piracy is not the only consequence of technical progress without legal control. Translated works digitalized in this manner can remain accessible indefinitely, which is contrary to the basic demands expressed in CEATL's Hexalogue.

At this point, it is important to differentiate between lasting principles and transient technicalities. The most important lasting principle is that no matter how easy the access to translated literary content might be, each phase and form of publishing an original work by a translator, if still within the boundaries of copyright protection, requires his/her permission and adequate remuneration.

CEATL's digital rights survey (http://www.ceatl.eu/wp-content/uploads/2010/10/CEATL_E-RIGHTS_2010EN.pdf), which reflects the current situation, differentiates between downloads for readers, downloads for PC (read only and print), downloads for smart phones, downloads for audio books and print-on-demand. Except in the case of telephones, where the download figure was less than 50 %, all the other categories had a download figure of 70 %, meaning availability in particular countries.

It is conceivable that, in the near future, this differentiation will assume another form, or cease to exist. For example, as soon as a folding or expandable screen comes into widespread use, it is possible that the divisions between PCs, tablets and smart phones will ultimately be abolished. Therefore the demands of translators for legislation should not be too technical. This is because a word like "reader", if it enters any form of legislation, might soon become obsolete.

Prior to the PETRA congress, the CEATL survey will be repeated with additional questions. It is to be expected that the percentage of countries in which such downloads exist will radically go up (and we need to remember that many downloads can no longer be described as "national". Instead, they tend to take place via servers located in those areas of the world where legislation is less important than the fees owed to the hosting states).

It will be interesting to see if the expected rise in availability is matched by alterations in contracts. In 70 % of countries surveyed the ceding of rights in digital publications was common practice.

In most countries (74 %) there was no differentiation between the various forms of digital publication. This accords with the aforementioned assertion that technical specifications should not affect the legal principle in great detail, otherwise constant changes might be needed. However, in the case of some of the varieties of media currently available, an all-encompassing approach might also disadvantage

either the publisher or the translator.

It is possible that the question about whether digital rights belong to the category of primary or secondary rights was not properly understood by some associations/ individuals. The new survey will therefore contain a short explanation of these terms, which might also become clearer in the meantime. This will probably have an impact on the results.

Copyright fees and royalties are the categories in which major changes and differences are anticipated. Experience shows that even within a single country the price paid by the different (major) publishers for printed material can vary from nothing to full recommended amount. Interestingly, the publishers set the standard fees in some countries but, in others, the publishers accept the recommendations made by translators' associations.

In almost half of the countries surveyed, the remunerations for digital rights are paid in the form of a share in the profits. This is interesting, because in LWUL countries (the ones whose language is described as less widely-used) there is a tendency towards a one-off initial payment for a translation, due to the fact that very little income can be expected from sales. However, future developments in the field of digital rights cannot be predicted (and even less was known at the time of the survey). It is obvious that, in the past, translators were paid once and did not get a second chance to earn a further fee in the digital era. In terms of this "second go", they have been open to other types of arrangement. Publishers, however, have been very uncertain about the digital market and rather inclined to eventually share more money than they would do normally through a one-off payment but, at the same time, protect themselves from possible failure. In countries with a language that is understood more widely, there is a strong tendency towards sharing the income generated by sales, even to the point that a translator might accept a lower initial remuneration if a high turnover is expected. Profit sharing is therefore to be expected in these countries. What the new survey might show is that this figure is beginning to diminish, as translators in the LWUL countries realize that a one-off payment is perhaps preferable after all, just as in the case of the initial remuneration. At the same time, the publishers might accept this under the provision that the payment is substantially lower than the initial remuneration. CEATL's new, additional visibility research also contains a question that is very relevant to the subject of copyright and e-rights: are the rights of the translator explicitly mentioned in the copyright laws of individual countries? If they are, it is only to be expected that there are differences in the way they are mentioned. The results will be made public at the conference.

While the majority of European countries are in the process of adjusting criteria and trying to find a compromise solution that satisfies all the parties involved, there are still some very extreme examples worthy of attention. The translators in Italy repeatedly claim that they are powerless against a closed phalanx of publishers and the translators of Lithuania warn against the agreement between the local publishers, that insists upon a total buy-out or, in other words, the eradication of all the translator's rights once the initial remuneration has been received. This is a very dangerous precedent, because it contravenes the basic principles laid down

by FIT, PEN, CEATL and the aforementioned Berne Convention and Nairobi Recommendation, as well as the basic principles of the EU. The situation in Turkey is also alarming, because in this country the translator and the publisher are both held responsible if a particular work is deemed to be a violation of the local moral standard, even though it is considered high-end literature elsewhere. The absurdity is magnified when one considers the fact that there is a high percentage of copyright violation in Turkey due to the unauthorized publishing of translations. On one hand, the translator is therefore held responsible for the contents of a literary work but, on the other, he cannot effectively protect his translation of the work whose contents he is liable for.

The outline of the desired situation

The combined efforts of all the translation-related forces need to create full awareness of the issues described. Currently, when it comes to the production and exploitation of a literary work, the issues are only partly present in the common knowledge of the parties involved.

This newly created consciousness should trigger another kind of awareness – one that necessitates a change to the existing legislation and certain practices.

The change in the legislation should strive towards the creation of universal European standards, which will still allow for local variants adapted to the nature and "size" of a language and its underlying local culture. This applies to copyright in particular because there is a chain reaction, both positive and negative: if the rights of the translator are violated, this will automatically endanger his/her social status, which will create negative visibility. If his/her rights are recognized, then it is likely that this will lead to positive visibility and improved economic and social status.

How can the EU help?

— By opening all channels for the input of information from the translators' world This would certainly make all the future evaluations and decisions easier because there would be less necessity for financing individual surveys and studies. In addition, the insights into the existing situation would be deeper and more precise.
— By exerting pressure on national legislative bodies to adjust their laws and regulations. Standards should be defined in accordance with the conclusions drawn from the interaction between the national legislative bodies and the world of translators (and its permanent and temporary institutions).
— By cutting financial support to the markets in which best practice is flouted and by re-directing resources to the markets that manage to make major improvements in this field.
— By financing projects instigated by translation-related institutions and those bodies whose aim it is to improve the existing situation.