

**Translation and Copyright: the Transmission of the Law**

Paper presented at MIT 6, Stone and Papyrus, Storage and Transmission  
MIT, April 24-26, 2009

**[To readers of this text: please note that this is a first draft intended as an introduction to a book on copyright and translation that I'm currently working on – the spoken paper at the MIT Media and Transition Conference in April 2009 will have a different focus, yet build on this platform].**

**INTRODUCTION**

Many cultural practices of the early twenty-first century appear born digital. *Mashing-up*, “taking a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources, to create a new derivative work,” or *sampling*, “the act of taking a portion, or sample, of one sound recording and reusing it as an instrument or a different sound recording of a song,” are two cases in point. Both are nonetheless examples of *appropriation*, an activity with a long and illustrious history. And befitting an investigation of this kind, “the use of borrowed elements in the creation of new work”, as well as the two first definitions stems from a digital source: [www.wikipedia.org](http://www.wikipedia.org).

Practices such as the ones described above may feel new, but they are not. Think of scrap booking, think of Marcel Duchamps drawing moustaches on Mona Lisa, and think of the subject matter of this book: translation. The paper cuttings glued together with photos to make a montage, the penciled-in addition on *La Gioconda's* upper lip, the textual and paratextual choices that make *Frøken Smillas fornemmelse for sne* (1992) into *Smilla's Sense of Snow* (1993); whether these transformations involve texts, art, images, film, or music—by internal referencing or in various cross-media combinations—all have in common the reliance on an existing work in order to make a new one. That the intertextuality of culture relates to and expands through new media and the materiality of machines is perhaps a redundant observation, but

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we should keep in mind that borrowing, adapting, abridging, translating, appropriating and even copying are facts of life, rather than isolated incidents brought on by radical shifts in technology. For all their ubiquitousness, however, the current “copyright wars” emphatically prove that such usages sit uneasily within the framework of the law. Digitization expands the horizon of creative possibilities and in doing so puts pressure on the viability and applicability of a legal regime constructed for an analogue world.

Broadly speaking, the purpose of the present study is to address the thorny relationship between cultural transformation and intellectual property law. More specifically, I will do so by engaging in a diachronic inquiry on translation *in* and *of* copyright. Primarily using translation at its most commonsensical—Roman Jakobson’s interlingual translation or *translation proper*—I hope to draw substantially on the productiveness of a term that in addition implies a broader interpretative structure as well as a distinct interventionist practice.<sup>1</sup> Throughout the next chapters, translation is an operational concept as well as a theoretical perspective. It is the Swiss Army Knife of method, theory, and object of study all rolled into one shell.

Two important consequences arise from this stated ambition of using translation proper (with its comparative stance) as a means to an end (ultimately seeking to capture the more general contours of cultural transformation). The first is that the historic trajectory of translation allows me to anchor my approach in the “old media” of print culture. A wealth of primary material documenting national and international interventions by authors, publishers, and politicians during more than two centuries provides important sources for my argument. Second, because translation and copyright are transnational by definition, this project must be framed within an international, rather than national, context. An increase in transnational flows of texts made translation one of the major problems addressed in the diplomatic conferences leading up to the 1886 Berne Convention. I will argue that the same dilemma is of continuous interest throughout all the six revisions of the Convention, but reach an especially acute level at the 1967 Stockholm Diplomatic Conference. At that conference—almost a century after signing the original convention—a new geopolitical reality of decolonialization brings new urgency to the question of translation, cultural flows, and globalization. The text of the Berne Convention, documents from the diplomatic conferences, and from the journal *Droit d’Auteur* furthermore provide unique insight into the general expansion of authorship and the concomitant effacement of readers in intellectual property law. Tracking translation rights from the Berne Convention 1886 to the WIPO Copyright Treaty in

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1996 move us from old to new media, but also, as translation become code and programmers authors, from man to machine. What is a copy? How does cultural transformations affect the ideology of authorship? What are the legal and aesthetic meanings of a derivative work? How has the international copyright regime transformed translation globally and in what way?

However, it takes the much less explored approach of chapter two, where I consider how the text of *copyright* is translated, to move this study into more uncharted territory. Understanding more of how the text of the *law* travels, and how legal doctrine is submitted to transformation by translation will, I believe, add substantially to our knowledge of translation as well as copyright. So, drawing on the way the previous question was formulated: is there a way for us to uncover the influence translation has had on the construction of the international copyright regime? Who is the author/translator in the increasing convergence of legal texts? If “the mode of translation is precisely where the historicity of so-called content is played out and where the circulation of meaning is made possible,”<sup>2</sup> it is worth pointing out that content in reference to translation mostly refers to literary works. One of the main points of this study is to move the searchlight beyond this taken-for-granted position and consider translation in respect to the *content and circulation of meaning in the law*, and how copyright law, just like other texts depend on translation for its continued circulation and use. While the intersection of translation and the law have generated substantial interest and offers a wide spectrum of approaches,<sup>3</sup> I would still argue that from the perspective of copyright, translation studies is underused as a theoretical concept serving “as an occasion for law to reflect upon its foundations and function as an economic and political instrument.”<sup>4</sup> I am suggesting neither that translation has been completely absent from scrutiny by scholars who work with intellectual property, nor that translation studies has ignored the question of copyright,<sup>5</sup> merely noting that the theoretical instruments developed within translation studies bring a new potential for reflexivity to the study of intellectual property.

The third chapter expands into the question of epistemological translation and how the scholarly *interpretation* of copyright moves. Do legal scholars quote colleagues in the humanities and vice versa? How does scholarship on copyright “travel” internationally? Does the major/minor trajectories of print transmission that is a central concern to the history of translation as well as that of copyright also apply to the exchange of scholarly research? Paraphrasing the vocabulary of translation, is there a source and target language relationship in intellectual property

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scholarship? Is it possible that the interdisciplinary potential of copyright scholarship only moves one way – from law into other disciplines, and not INTO law from other disciplines? I will use citation-impact to trace citations in the database Hein-On-Line's most quoted intellectual property law journals to see how many references can be distinguished as non-law based and written by scholars outside the tradition of Anglo-American copyright. Thus the work of translation goes on also between disciplines, and this is the focus of the last chapter.

Even though the reader will have to wait for a more in-depth discussion on disciplinary tribulations, at this stage something must nonetheless briefly be said on the reasons for bringing together two fields of inquiry that only sporadically have informed one another previously.



The personal experience articulated in the preface is synthesized in the in-between space bordering two larger research fields: intellectual property scholarship and translation studies. How to define your own work in disciplinary terms sometimes serve little purpose beyond standard academic knit picking. On balance, however, trusting that the present undertaking is grounded enough to contribute to both fields in question, the main ambition is to inspire intellectual property scholars to recognize the potential of translation studies to provide a new momentum to the study of copyright.

Although "the academic discipline related to the study of the theory and phenomena of translation,"<sup>6</sup> has come into its own as an academic field and been gradually institutionalized through university programs, conferences and journals since the 1970s, a similar statement about intellectual property *studies*, is not possible.<sup>7</sup> This is not to say that intellectual property scholarship does not exist, even flourishes. On the contrary, scholars in history, law, comparative literature, media and communication studies, anthropology, political science and other disciplines in the humanities and social sciences have during the last fifteen years dedicated themselves to the historical, political, economical, and cultural significance and impact of intellectual property.<sup>8</sup> However, despite the array of themes that would appear to lend evidence to the contrary, law remains a privileged disciplinary sounding board for those who undertake studies on copyright or patents. The consequences of this predilection will be discussed further in chapter three.

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Translation studies battles also with an amorphous identity spanning linguistics, cultural studies, and comparative literature, but it is less certain if one of these areas trump the others in the same way as law towers above intellectual property scholarship. Lawrence Venuti, whose steadfast commitment to promoting translation studies inside academia is matched only by his dedication to make the role of the translator more visible outside it, argues that the most marked characteristic of translation studies is a strong empiricist orientation. This propensity, in turn, takes shape in two main lines of attack, one rooted in linguistics, the other in literary and cultural theory.<sup>9</sup> Belonging to the second category, Venuti has astutely remarked on the limitations of the linguistic approach, criticizing it for being over-picky and giving the impression that truth is in the details.<sup>10</sup> I agree that the mere documentation of linguistic difference in choice and adaptation through word-for-word translation is interesting only up to a certain point. Yet, there is undeniable strength in the practical, comparative approach of translation studies. In its best moments it provides a mental space that resembles the physical form of a table. That most mundane of artifacts provide us with the simple opportunity for display, seeing what is placed on the surface differently by taking a step back, even enabling new combinations of ideas by shuffling things around.<sup>11</sup> The true challenge of translation studies lies therefore in its ability to distinguish the back and forth in the circularity of flows, rather than remaining limited to the one-directional source-target movement alone.

If the transnational and multilingual propensity of translation studies moves beyond linguistic minutiae it can help disclose the power of various modes of transformation in a world dominated by the hegemony of the English language. In the context of copyright, it offers a way to come to grips with the friction between national laws and their embeddedness in and dependency on international and global conventions. Strangely enough, the latter aspect has left few imprints on the theoretical tools used to deconstruct the history of copyright. Something like an "anxiety of influence" seems to be at play in copyright scholarship, which partly may account for the relative unease by which lessons from other jurisdictions, the complexity of bilingualism, and the experience of the other is used to highlight problems in the law. We should be able to ask questions of copyright with the aid of translation studies that consequently are important also in terms of theory, guiding us through our own assumptions of linguistic and cultural difference. When Pierre Legrand speaks about "an urgent need to appreciate how various legal communities think about the law, why they think about the law as they do, why they would find it

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difficult to think about the law in any other way, and how their *thought differ from ours*,"<sup>12</sup> he might as well have described the project of translation studies, as well as that of scholarly self-reflexivity in general.

Despite the difference in the interdisciplinary integration of their respective intellectual projects and their varying level of academic institutionalization and relation to surrounding disciplines, the reason for wanting to think intellectual property scholarship and translation studies together relates in equal measure to the fact that they share certain fundamental concerns.

Authorship, for instance, is at the core of translation studies in the same way that it has been of fundamental interest to intellectual property scholarship. Lawrence Venuti, Susan Bassnett, Jacques Derrida, Gayatri Chakravorty Spivak, and Walter Benjamin have all drawn attention to the importance of authorship in translation studies, engaging in flows of culture and their geopolitical power relations by highlighting the invisibility of the translator-as-author and cultural purveyor. Well-known names such as James Boyle, Peter Jaszi, and Martha Woodmansee in the field of intellectual property have been instrumental in highlighting authorship as fundamentally linked to the development of copyright into its current form. The question of what constitutes an original and what makes a copy, and most important, how the balance between these two is negotiated culturally and legally, is another such common theme.

The intersection of intellectual property and translation studies provides promising potential to explore new questions and generate novel areas of inquiry, of which the malleability of authorship and the pervasiveness of the copy are but two paramount dimensions.

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### NOTES

1. In his well-known division into three main types of translation, Jakobson includes "intralingual translation or *rewording* (the interpretation of verbal signs by means of other signs of the same language); interlingual translation or *translation proper* (the interpretation of verbal signs by means of other signs of the some other language); and finally intersemiotic translation or *transmutation* (the interpretation of verbal signs by means of signs of nonverbal sign systems). Roman Jakobson, "On Linguistic Aspects of Translation," in *The Translation Studies Reader*, ed. Lawrence Venuti (London & New York: Routledge, 2000 (1959)), 114. The broader meaning of translation as "Transformation, alteration, change; changing or adapting to another use; renovation," is from the *Oxford English Dictionary*, and the reference to the practice of translation as an intervention hails from Venuti.
2. Lydia H Liu, "Legislating the Universal: The Circulation of International Law in the Nineteenth Century," in *Tokens of Exchange: The Problem of Translation in Global Circulations*, ed. Lydia H Liu (Durham, N.C: Duke University Press, 1999), 134. Liu coins the term "textual event" to describe the way that authors and readers are implicated in all instances of translation. My triple approach into translation and copyright can consequently be interpreted as constituting three "textual events" of the kind she delineates. Liu, "Legislating the Universal," 137.
3. Representative anthologies include Marshall Morris, ed., *Translation and the Law* (Amsterdam/Philadelphia: John Benjamins Publishing Company, 1995); Frances Olsen, Alexander Lorz, and Dieter Stein, eds., *Translation Issues in Language and Law* (Basingstoke: Palgrave Macmillan, 2008). It is important to underline that many of these contributions focus on interpreting – the oral side of translation – where for instance court interpretation is a recurring theme. Salah Basalamah is one of the few who have undertaken more consistent work on copyright and translation. Salah Basalamah, "Translation Rights and the Philosophy of Translation. Remembering the Debts of the Original," in *In Translation: Reflections, Refractions, Transformations*, ed. Paul St-Pierre and Prafulla C. Kar (Amsterdam/Philadelphia: John Benjamins Publishing Company, 2007).
4. Basalamah, "Translation Rights," 118. Lawrence Venuti is one translation studies scholar who has engaged directly with copyright, see chapter three, "Copyright," in Lawrence Venuti, *The Scandals of Translation: Towards an Ethics of Difference* (London, New York: Routledge, 1998).
5. See for instance Melissa J. Homestead's and Colleen Glenn Boggs' work on *Stowe v. Thomas* in Melissa J Homestead, *American Women Authors and Literary Property 1822-1869* (Cambridge: Cambridge University Press, 2005); Colleen Glenn Boggs, *Transnationalism and American Literature: Literary Translation 1773-1892* (New York: Routledge, 2007). My own discussion on the two English-language translations of Peter Høeg's international bestseller *Frøken Smillas fornemmelse for sne* is another example. Eva Hemmungs Wirtén, *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (Toronto: The University of Toronto Press, 2004).
6. Jeremy Munday, *Introducing Translation Studies: Theories and Applications*, 2 ed. (London: Routledge, 2008), 1. The number of anthologies in translation studies has skyrocketed. Intended for students, Munday, *Introducing Translation Studies: Theories and Applications*. offers a good current overview of the major tendencies of the field, and Lawrence Venuti, ed., *The Translation Studies Reader* (London: Routledge, 2000). provide access to central primary texts.
7. But see Siva Vaidhyanathan's effort at trying to include intellectual property scholarship into something he calls "critical information studies." Siva Vaidhyanathan, "Afterword: Critical Information Studies: A Bibliographical Manifesto," *Cultural Studies* 20, no. 2-3 (2006).
8. It is worth repeating though, that copyright has been the dominating intellectual property right under scrutiny. Patents and trademarks have, with notable exceptions, been less studied.
9. Lawrence Venuti, "Translating Derrida on Translation: Relevance and Disciplinary Resistance," *The Yale Journal of Criticism* 16, no. 2 (2003): 247.
10. *Ibid.*: 248-9. Venuti's project has always related to the politics of translation studies, and he refers to what he calls a double academic marginality, a neglect in cultural studies of the materiality of

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translation, and the lack in translation studies of the "philosophical implications and social effects that accompany every translation practice." Venuti, "Translating Derrida," 241. For an example of the limitations of the empiricist approach when applied to a publishing phenomena like Harry Potter, see Gillian Lathey, "The Travels of Harry: International Marketing and the Translation of J.K. Rowling's Harry Potter Books," *The Lion and the Unicorn* 29 (2005).

11. I owe this use of the table to Bruno Latour's discussion on the jungle in Bruno Latour, *Pandora's Box: Essays on the Reality of Science Studies* (Cambridge, Mass.: Harvard University Press, 1999).
12. Pierre Legrand, "Issues in the Translatability of Law," in *Nation, Language, and the Ethics of Translation*, ed. Sandra Bermann and Michael Wood (Princeton: Princeton University Press, 2005), 34.