The Protection of Translations under European Copyright Law

Victor Mütter

ABSTRACT

Translations may be placed somewhere on a spectrum between an independent work and a copy of an existing work. A translation will always be dependent on an already existing text and the aim of the translation will be to convey the meaning of this text in a new language. From a copyright perspective this raises several issues, including the question of when a translation will be considered protectable as an original work in its own right. This article explores this issue from a European perspective, and provides a comprehensive assessment of how the general requirements for copyright protection developed by the Court of Justice of the European Union apply to translations. In addition, it explores how different national courts in Europe have assessed the question of copyright protection for translations. The article concludes that in many instances translators are able to make the necessary free and creative choices to be granted copyright protection, albeit this is dependent on the specific translation at hand.

1. INTRODUCTION

Translations play an important role in European integration, as they allow for the dissemination of science, literature and official documents across the 27 official languages of the Union. Furthermore, as noted in a 2022 report by the EU Expert Group on Multilingualism and Translation, they contribute to the cultural diversity of the Union as they allow authors to write in their native languages without having to resort to broader languages in order to access a wider audience.[1] From an economic perspective, translations play an important role as they facilitate the dissemination of a work into new markets that might otherwise have been out of reach. Despite their cultural and economic importance, the question of copyright protection in translations have received relatively little attention in European copyright law. Historically, however, translations have played an important role in the development of international copyright law.[2] During the adoption of the Berne Convention one of the most controversial questions was whether translations should fall within the exclusive rights of the original author or not.[3] The issue of whether translations themselves should be protectable under copyright received less attention. Already in the original text of the Berne Convention from 1886 it was held that '[...] translation shall be protected as original works'.[4]

Unlike international copyright law, EU copyright law provides no regulation on the protectability of translations specifically. However, the Court of Justice of the European Union has fully harmonised the requirements for protection for all subject-matters, meaning that translations are protectable if they fulfil the requirements of being their 'author's own intellectual creation' and constituting 'an expression of such creation'.[5]

This article explores how these general requirements for protection apply to translations, in order to provide guidance on how the protectability of translations should be assessed under EU copyright law. In addition, the article will explore how member states have protected trans-

1 Commission, Directorate-General for Education, Youth, Sport and Culture, 'Translators on the cover – Multilingualism & translation – Report of the Open Method of Coordination (OMC) working group of EU Member State experts' (report) (Publi-cations Office of the European Union 2022) 15.

2 Translations has also been described as 'probably the most important factor that drew states into international copyright agreements in the late nineteenth century' in Paul Goldstein and P. Bernt Hugenholtz, *International Copyright: Principles, Law, and Practice* (4th ed. Oxford University Press 2019) 299 referencing Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (Kluwer 1987) 384.

3 This now follows from Article 8 of the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 (as amended on 28 September 1979) S. Treaty Doc. No. 99-27 (1986); For a detailed history of this question under the Berne Convention see Eva Hemmungs Wirtén, *Cosmopolitan Copyright: Law and Language in the Translation Zone* (Uppsala Universitet 2011).

4 Article 6 (1) of the Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886 (unamended original text).

5 Judgment of the Court (GC) of 13 November 2018, *Levola Hengelo*, C-310/17, EU:C:2018:899 paras 34–36, Judgment of the Court (GC) of 29 July 2019, Judgment of the Court (GC) of 29 July 2019, *Funke Medien*, C-469/17, EU:C:2019:623, para 19, Judgment of the Court of 12 September 2019, *Cofemel*, C-683/17, ECLI:EU:C:2019:721, para 29 and Judgment of the Court of 11 June 2020, *Brompton Bicycle*, C-833/18, EU:C:2020:461, para 22.

lations in their national case law, in order to illustrate how the protection of translations has been assessed in practice and to consider to what extent this is compatible with EU law. What distinguishes translations, as well as other so-called derivative works, from non-derivative works, is that they build directly on a previous existing work. In addition, the purpose of translation is to 'recreate' the text that is being translated, albeit in a different language. These two factors make the protectability of translations interesting from a copyright perspective.

In order to explore how the requirements for protection apply to translations it is useful to provide a very brief introduction to a few key concepts in translation. Translations of texts involve taking a text in one language, referred to as the source text, and transferring it into another language, the target text.[6] The term *translation* normally refers to written text, while the term *interpretation* refers to oral speech.[7] When translating a written text, the translator is in what has been described as a 'double bind relationship', meaning that the translated text needs to have the same content as the original text, referred to as 'semantic equivalence', while also maintaining the style, level of formality, and way different parts are interlinked, known as 'pragmatic equivalence'.[8] However, since no two languages are the same, the achievement of semantic equivalence cannot be achieved through a word-for-word translation. This was recognized by the Roman statesman, lawyer and translator Marcus Tullius Cicero, who in *De optimo genere oratorum* (the Best Kind of Orator) explained that he did not find it necessary to translate passages word-for-word, but rather to conserve the 'force and flavour of the passage'.[9] Therefore, translation has by some been referred to as the act of 'rewriting'.[10]

This article is divided into three parts. The first part (Section 2.1) explores how translations are protected under the Berne Convention. The second part (Section 2.2) assesses how the general requirements for copyright protection in EU law apply to translations. In the third part (Section 2.3) the article explores how national courts in different European countries have assessed the protectability of translations in different factual scenarios and discusses to what extent this case-law is compatible with the requirements set by EU law.

2. COPYRIGHT PROTECTION OF TRANSLATIONS

2.1 Protection of translations under the Berne Convention

In international copyright law the Berne Convention sets a minimum substantive standard of rights, which the members of the Union are required to grant nationals of other member states, regardless of whether they are afforded to their own nationals.[11] The subject matter protected under these minimum rights includes 'literary and artistic works',[12] which according to Article 2 (1) of the Convention covers 'every production in the literary, scientific and artistic domain'. Article 2 (3) further specifies that this includes 'translations'. While the EU is not party to the Berne Convention, it is party to the WIPO Copyright Treaty (WCT) and the TRIPS agreement, both of which require compliance with Articles 1–21 of the Convention.[13] As a result, the Berne Convention sets the outer boundaries for when EU law is required to grant copyright protection to translations.

The regulation of translations has a long history in international copyright law, and was one of

most controversial questions under the adoption of the Berne Convention. The debate mainly centred around whether translations should fall within the exclusive rights of the original author, and not whether they should themselves be protected by copyright.[14]

Already in Article 6 (1) of the original text of the Berne Convention from 1886 it was held that '[...] translations shall be protected as original works'. After amendments in the subsequent Berlin and Brussels revisions, Article 2 (3) of the Convention now specifies that 'translations', as well as 'adaptations, arrangements of music and other alterations of a literary or artistic work', are protectable 'as original works without prejudice to the copyright in the original work'.

The provision entails that translations are protectable under the same conditions as other non-derivative literary or artistic works. However, there is an exception for 'official translations' of 'official texts of a legislative, administrative and legal nature' which member states

6 Juliane House, *Translation: The Basics* (2nd edn. Routledge 2023) 2.

7 Ibid 9.

8 Ibid. 3.

9 Reproduced and translated in Daniel Weissbort and Astradur Eysteinsson, *Translation – Theory and Practice: A Historical Reader* (Oxford University Press 2006) 21.

10 Susan Bassnett, *Translation* (Routledge 2013) 3.

11 The states are not required to afford these minimum rights to their own authors; however, it seems unlikely that members would afford a lower level of protection to its own nationals than others, as pointed out in Sam Ricketson, 'The International Framework for the Protection of Authors: Bendable Boundaries and Immovable Obstacles' (2018) 41 Colum JL & Arts 341, 345.

12 Article 1 of the Convention.

13 Article 1 (2) of the WIPO Copyright Treaty, 20 December 1996, 2186 U.N.T.S. 121, and Article 9 (1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994 (as amended on 23 January 2017) 1869 U.N.T.S. 3; It should also be noted that all 27 EU members are also members of the Berne Union.

14 This now follows from Article 8 of the Convention.

are free to decide whether to protect or not in accordance with Article 2 (4).

Under the original text of the Convention only 'lawful' translations were protected. However, the wording of the current Article 2 (3) specifies that translations can be protected regardless of whether they infringe copyright in the translated work. At the same time, the fact that a translation is protectable under copyright does not entail that said translation does not as such infringe the copyright in the translated work. This can be inferred from the reference to protection being 'without prejudice to the copyright in the original work'.[15] This also entails that the translator does not get any rights over elements stemming from the source text, and *vice versa*.[16]

The fact that the Convention requires its members to protect translations under the same requirements as other literary or artistic works does not entail that the members are required to protect all translations. Rather, they are obliged to protect those that fulfil the substantive requirements for protection that apply to other literary and artistic works.

The presence of an 'artistic or literary' work presupposes that several substantive requirements are fulfilled.[17] A precondition for the creation to be considered a literary or artistic work under Article 2 (1) is that it is a 'production'. The 'production' requirement entails that the subject-matter must have been manifested in some way.[18] This so-called 'idea-expression dichotomy' is explicitly stated in Article 9 (2) of the TRIPS Agreement and Article 2 of the WCT. Furthermore, the 'production' requirement implicitly reflects that the Convention does not protect mere facts.[19] This can be more directly inferred from Article 2 (8) which states that '[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information'. The reasoning behind this according to a working group report from the Stockholm revision, was that facts do not have the attributes needed to constitute a work.[20] As the provision only excludes facts themselves, facts selected and arranged in a way making them a literary or artistic work are protected.[21]

The Berne Convention does not directly refer to originality as a requirement for the subject-matter to be considered a literary or artistic work, however, this can be inferred from several of the Convention's provisions.[22]

In relation to translations and other derivative works the term 'original' is mentioned twice in Article 2 (3), which states that '[t]ranslations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work'. The second 'original' should here be understood as a reference to the work that the derivative work is derived from – for translations this is the source text.[23] The first reference to 'original works' is ambiguous and can be understood in two ways. One alternative, is to understand it as a reference to the fact that translations and other derivative works should be protected on the same basis as non-derivative works.[24] Another possible understanding is that this is a reference to a qualitative threshold of originality.[25]

While Article 2 (3) does not give any answers as to what is meant by 'original works', the background of Article 14*bis* (1) can shed some light on this. Similarly to Article 2 (3), Article 14*bis* (1) reads '[w]ithout prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work'. While both provisions express the same ambiguity with regard to the meaning of 'original work',[26] the history of Article 14*bis* provides clearer indications to how the term is to be understood. In the Berlin Act the provision corresponding to Article 14*bis* (1), Article 14 (2), stated that '[c]inematographic productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.' This wording provides a qualitative threshold, which is premised on the creative and personal efforts of the author. Furthermore, when the text was revised to only require that 'author has given the work an original character' with the Rome Act, the General Report from the meeting stated that the only require-

15 This would arguably be incompatible with the exclusive right of translation in Articles 8 of the Convention.

16 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (3rd edn, Oxford University Press 2022) 485.

17 Mihály Ficsor, *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (WIPO 2003) 24–25 and Justine Pila, 'Authorial works protectable by copyright' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 65–66.

18 Some legal scholars have understood the need for a 'production' to presuppose the existence of some creative activity by the author, see Ricketson and Ginsburg (n 16) 406 and Eleonora Rosati, 'Copyright at the CJEU: Back to the Start (of Copyright Protection)', in Hayleigh Bosher and Eleonora Rosati (eds.), *Developments and Directions in Intellectual Property Law: 20 Years of The IPKat* (Oxford University Press 2023) 217; In the view of this author the need for some creative process to have taken place is to a greater extent communicated through other provisions of the Convention.

19 This is also explicitly stated in Article 2 of the WCT.

20 Report of Svante Bergström on the Work of Main Committee I, as reproduced and translated in Arpad Bogsch, *Berne Convention, for the Protection of Literary and Artistic Works from 1886 to 1986* (International Bureau of Intellectual Property 1986) 200.

21 Ficsor, (n 17) 33.

22 Thomas Margoni, 'The Harmonisation of EU Copyright Law: The Originality Standard' in Mark Perry (ed.), *Global Governance of Intellectual Property in the 21 st Century: Reflecting Policy Through Change* (Springer International 2016) 87 and Sam Ricketson 'Threshold requirements for copyright protection under the international conventions' (2009) 1 (1) W.I.P.O.J. 51, 54.

23 Ficsor, (n 17) 28.

24 Ibid.

25 Ricketson 'Threshold requirements for copyright protection under the international conventions' (n 22) 54.

26 Daniel J. Gervais, 'The compatibility of the skill and labour originality standard with the Berne Convention and the TRIPs Agreement' (2004) 26 (2) E.I.P.R. 75, 77.

ment for protection was that of originality.[27] This shows that 'original work' has been understood as a requirement covering the author's creativity.[28]

Therefore, the most plausible interpretation is that 'original works' in Article 2 (3) should be understood as a qualitative threshold for protection.[29] It is difficult to ascertain anything further about the exact threshold for a translation to be considered 'original' on the basis of the Convention. This suggests that it is up to the member states to decide on the exact understanding of 'originality'.[30] In this regard, one should keep in mind that the Berne Convention only provides minimum standards of protection, meaning that member states are free to protect translations, and other subject-matter, that does not fulfil the threshold of originality. On the other hand, it could be problematic if a member state applies a stricter threshold for protection than that prescribed by the Convention. A possible rule of thumb in this regard is that the member states' threshold for protection will be problematic if it excludes protection for all or for a considerable portion of works within a category listed by the Convention.[31] In relation to translations, this entails that member states have a high degree of freedom with regard to which translations to grant protection, however, they should not set the threshold so high that they exclude the majority of translations from protection.

2.2 Protection of translations under EU copyright law

2.2.1 The general requirements for copyright protection for translations

As explained in the previous chapter international copyright law requires that translations are granted certain minimum rights, provided that they fulfil a certain qualitative threshold of protection. However, international copyright law does not further define the scope of this threshold. In EU copyright law on the other hand, the Court of Justice of the European Union (CJEU) has fully harmonised the requirements for protection for all subject-matters, and at least with a certain degree of specificity defined the threshold of protection.

In the EU copyright *acquis* the protectability of translations is not specifically regulated. However, it should be noted that both the Database Directive and Software Directive grant the author *inter alia* the exclusive right to the 'translation'.[32] This does not as such confirm that translations are protected under EU law.[33]

While there is no regulation of the protectability of translations as such, the general requirements for copyright protection harmonised by the CJEU apply to translations as well. Starting with the decision in *Infopaq* the Court has held that a subject matter constitutes a copyright protectable 'work' when it constitutes its 'author's own intellectual creation'.[34] The Court has in its subsequent case law elaborated that the notion of work requires the subject matter to be the 'author's own intellectual creation' and 'an expression of such creation'.[35] These are the sole requirements for protection, meaning that member states cannot exclude any subject-matter provided that these requirements are fulfilled.[36] Furthermore, the member states are obliged to apply the criteria uniformly, which in its turn entails that they cannot apply different or additional criteria for protection depending on the subject-matter at hand.[37] As a consequence, member states are required to protect translations when these two criteria are met.

Since a translation ordinarily will fulfil the requirement of constituting an 'expression', the protectability of a translation will in most cases depend on whether it can be considered its 'author's own intellectual creation'.[38] According to the CJEU the subject matter will be considered the 'author's own intellectual creation' if it 'reflects the personality of its author, as an expression of his free and creative choices'.[39] This understanding builds on the notion that originality is linked to the author's personality. However, the CJEU does not seem to operate with the expression of personality as an independent requirement for originality,[40] rather the creation will be considered to reflect the author's

27 General report of Rapporteur-General Eduardo Piola Caselli of 1st June 1928, as reproduced and translated in Bogsch, (n 20) 174.

28 Gervais (n 26) 77.

29 Gervais (n 26) 77 and Ricketson 'Threshold requirements for copyright protection under the international conventions' (n 22) 55–56.

30 As pointed out in Sam Ricketson and Jane Ginsburg, 'The Berne Convention: Historical and institutional aspects' in Daniel J. Gervais (ed.), *International Intellectual Property* (Edward Elgar Publishing 2015) 25, state practice has established that the members have a high degree of flexibility in how the substantive norms in the Convention should be given effect.

31 Similarly, Ricketson and Ginsburg, (n 16) 408–409.

32 Article 5 (b) of the Database Directive and Article 4 (b) of the Software Directive.

33 For a different understanding, see Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 36; This does, however, follow from Article 2 (3) of the Berne Convention.

34 Judgment of the Court of 16 July 2009, *Infopaq*, C-5/08, EU:C:2009:465 para 37.

35 *Levola Hengelo*, (n 5) paras 34–36, *Funke Medien*, (n 5) para 19, *Cofemel*, (n 5) para 29 and *Brompton Bicycle*, (n 5) para 22.

36 Caterina Sganga, 'The notion of "work" in EU copyright law after Levola Hengelo: one answer given, three question marks ahead' (2019) 41 (7) E.I.P.R. 415, 420 and Jens Schovsbo, 'Copyright and design law: What is left after all and Cofemel? – or: Design law in a "double whammy" (2020) 2 NIR 280, 286.

37 This has especially been discussed in relation to works of applied art, where some member states have required 'aesthetic effect' for copyright protection to arise. In *Cofemel* the Court confirmed that member states cannot apply other or additional requirements for copyright protection depending on the subject-matter at hand. See *Cofemel*, (n 5) paras 29 and 48; For a discussion of the *Cofemel* decision and copyright protection for works of applied art see Marianne Levin, 'The Cofemel revolution – originality, equality and neutrality' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 82ff.

38 In *Brompton Bicycle* (n 5) para 40, the CJEU held that the 'expression' criterion requires that the subject matter is 'identifiable with sufficient precision and objectivity'.

39 Most recently in *Brompton Bicycle*, (n 5) para 23.

40 E.g. in Judgment of the Court of 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, para 92, the Court stated that '[b]y making [...] various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'.

personality to the extent that the author has made free and creative choices.[41] Thus, it seems sufficient that the author has made free and creative choices for copyright protection to arise. In addition, it is not necessary that the work has any aesthetic quality or merit.[42] The question of how the existence of free and creative choices should be assessed has been touched upon by the CJEU in several of its rulings.[43] The Court's decision in *Painer*, is particularly interesting for shedding some light on the Court's understanding of creative choices. The decision related to works of portrait photography, and in this context the CJEU held that the photographer can make free and creative choices in several ways:

> In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.[44]

This suggests that all choices that affect the expression of the work are relevant, regardless of in which phase of the creative process these choices are made. However, the fact that producing the subject-matter takes skill and effort does not infer originality.[45] With regards to written works, the CJEU has specified that free and creative choices are made through 'the choice, sequence and combination of [...] words'.[46]

The assessment of the 'author's own intellectual creation' criterion can be understood to involve two distinct aspects. Firstly, the subject-matter must be an 'intellectual creation' which has been understood to entail that it must be the result of free and creative choices. Secondly, these choices have to be the author's *own*. The latter requirement can be understood as a requirement of causation between the choices made by the author and the end-result.[47] For translations, this causation requirement is important because it entails that the parts of the translations that originate in the source text cannot be considered the translator's *own* intellectual creation.[48] In other words, elements that 'remain' from the source text cannot confer originality. Therefore, one must assess whether the translator has made free and creative choices in his or her processing of the primary work. This assessment can be understood as mirroring the assessment of whether there has been an act of reproduction, where the focus is on whether what has been taken expresses the intellectual creation of the author of the primary work.[49] It is, however, important not to conflate these two assessments, as a translation can be an infringement of the original work, while still fulfilling the originality requirement in accordance with Article 2 (3) of the Berne Convention.

One type of translations that can pose specific challenges in this regard, these are the so-called 'retranslations'. These are new translations of works that have previously been translated in the same language.[50] The typical motive for such retranslations is to create an improved version of the previous translation, meaning that the original translation will typically be used as a reference work.[51] For example, Janet Garton explains that when making a new English translation of Henrik Ibsen's play *Lille Eyolf* (Little Eyolf) she and the other translators used no less than five previous translations for inspiration and as a standard for comparison.[52] The mere use of a previous translation is as such sufficient to preclude the translator of retranslation from making free and creative choices. If the translator uses a previous translation as the basis for the retranslation, the parts of it originating in the previous translation will not confer originality, in the same way as the elements stemming from the source text. The distinction between the retranslation and the previous translation would likely be hard to draw in practice. It is however important to keep in mind that the mere fact that a previous translation exists does not affect originality in a new translation. Even if elements in the new translations are identical to those of a previous translation this will only rule out originality if the elements are 'taken' from the previous translation. This reflects the fact that novelty is neither necessary nor sufficient to fulfil the EU requirement of originality.[53]

Another situation related to retranslation is when the translation in question is not based directly on the original

41 P. Bernt Hugenholtz and João Pedro Quintais, 'Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?' (2021) 52 IIC 1190, 1198.

42 E.g., Recital 16 to the Term Directive; See further Stef van Gompel, 'Creativity, autonomy and personal touch: A critical appraisal of the CJEU's originality test for copyright' in Mireille Eechoud (ed.), *The Work of Authorship* (Amsterdam University Press 2014) 100 and Levin (n 37) 88.

43 There are, however, still many questions regarding how the presence of free and creative choices should be assessed that remain to be answered as illustrated by the recent request for preliminary rulings in *Mio*, C-580/23 and *konektra*, C-795/23.

44 *Painer*, (n 41) paras 90–91.

45 *Funke Medien* (n 5) para 23.

46 *Infopaq* (n 34) para 45 and *Funke Medien* (n 5 para 23.

47 Ole-Andreas Rognstad, 'Creations caused by humans (or robots)? Artificial intelligence and causation requirements for copyright protection in EU law' in Taina Pihlajarinne and Anette Alén-Savikko (eds.), *Artificial Intelligence and the Media* (Edward Elgar 2022) 177–78.

48 Hugenholtz and Quintais, (n 42), 1196; For a different understanding see Burton Ong, 'Originality from copying: fitting recreative works into the copyright universe' (2010) 2 Intellectual Property Quarterly 165, 170–171.

49 Richard Arnold, 'Paintings from Photographs: A Copyright Conundrum' (2019) 50 IIC 860, 875.

50 Kaisa Koskinen, 'Revising and retranslating' in Kelly Washbourne and Ben van Wyke, *The Routledge Handbook of Literary Translation* (Routledge 2018) 317.

51 Piet Van Poucke, 'The Effect of Previous Translations on Retranslation: A Case Study of Russian-Dutch Literary Translation' (2020) 12 (1) TranscUlturAl 10, 10.

52 Janet Garton 'Ibsen for the Twenty-First Century' in Jean Boase-Beier, Lina Fisher and Hiroko Furukawa (eds.), *The Palgrave Handbook of Literary Translation* (Palgrave Macmillan 2018) 294–295.

53 E.g. Van Gompel, (n 43) 99 and. Hugenholtz and Quintais, (n 42) 1198.

literary work, but rather on a previous translation of it in a different language. In translation studies these are often described as 'indirect translations' or 'relay translations.'[54] Indirect translation is often used in instances where few translators are proficient in both the source and target language, thereby necessitating the need for a mediating translation.[55] In a copyright sense indirect translations are derivative works of the translation that they are based on, rather than of the first source text. Just like retranslations it is necessary to 'deduct' elements stemming from the previous translation when assessing the originality of an indirect translation.

When assessing whether the translation is the result of the translator's free and creative choices it is necessary to keep in mind that the CJEU has consistently held that originality is precluded where the author had no creative freedom, because the creation of the work is dictated by 'technical considerations, rules or constraints'.[56] The creative freedom of the author can also be constrained by the purpose of the work. An example of this can be found in the CJEU's decision in *Funke Medien*.[57] The background for the case was that the German government had brought proceedings against the operator of a newspaper for copyright infringement for publishing classified documents concerning the deployment of German armed forces in Afghanistan, known as the 'Afghanistan papers'. Although, the questions referred to the CJEU by the Federal Court of Justice (Bundesgerichtshof) concerned exceptions and limitations, the CJEU also made a preliminary observation concerning the requirements for copyright protection with regard to such documents. The Court held that if the content of the report is essentially determined by the information it conveys, those reports are entirely characterised by their 'technical function'.[58] This, according to the Court, entails that it is impossible for the author drafting the document to express his or her creativity in a sufficiently original manner for the document to be considered the author's own intellectual creation.[59] While the Court characterises the limitation as being one of 'technical function', it seems more appropriate to consider the limitation to lie in the informative purpose of the subject matter. The decision should be understood in light of the principle that information in itself cannot be subject to copyright protection.[60]

For translations the most relevant constraint posed lies in its relation to the source text. If the aim is to faithfully convey the source text there is no room left for the translator to make free and creative choices through 'the choice, sequence and combination of words', and thus protection will be precluded.[61]

One factor that can play a role in assessing the existence of free and creative choices from the part of the translator is the length of the text. The translator of a longer text might statistically have a greater opportunity to make free and creative choices, however, the length of the work alone cannot confer the existence of free and creative choices by the translator.[62] Furthermore, there is no lower limit to how short the translation can be for it to be protectable under copyright.[63] The exception to this is likely when the translation consists of a single word. In its decision in *Infopaq* the CJEU held that a single word is not protectable under copyright, because it could not express the author's creativity, as this could only be done through 'choice, sequence and combination' of words.[64] This should also be the case for translations of single words, because translators will have to choose the translation that best conveys the meaning of the original word in its context. Therefore, the translator arguably has no possibility to express his or her creativity in the translation of a single word.

Whether the source text is protectable by copyright or not is in principle not decisive for the protectability of its translation.[65] This can for example be the case if the term of protection has lapsed or if the work was written before the state in question implemented a copyright system. In principle, the same also applies if the source text is not protectable due to lack of originality. Therefore, one must assess whether the translation is an expression of the author's own free and creative choices independently. However, in practice there might be instances where the obstacle for originality in the primary work indirectly contributes to the lack of originality in the translation. For example, a report seeking to plainly describe factual

54 Laura Ivaska, Hanna Pięta and Yves Gambier, 'Past, present and future trends in (research on) indirect literary translation' (2023) 31 (5) Perspectives 775, 778.

55 This is for example not uncommon in Scandinavian translations as further exemplified in Cecilia Alvstad, 'Arguing for indirect translations in twenty-first-century Scandinavia' (2017) 10 (2) Translation Studies 150, 152ff; Further discussed in European Commission, Directorate-General for Education, Youth, Sport and Culture, 'Translators on the cover – Multilingualism & translation – Report of the Open Method of Coordination (OMC) working group of EU Member State experts' (Publications Office of the European Union 2022) 64.

56 E.g., Judgment of the Court of 1 March 2012, *Football Dataco*, C-604/10, EU:C:2012:115, para 39, Judgment of the Court (GC) of 2 May 2012, *SAS Institute*, C-406/10, EU:C:2012:259, para 40 and *Brompton Bicycle*, (n 5) para 27.

57 *Funke Medien* (n 5).

58 Ibid. para 24.

59 *Funke Medien* (n 5) para 24; AG Szpunar went further holding that it seemed 'rather unlikely' that the drafting of such informative documents would allow for free and creative choices, Opinion of AG Szpunar, *Funke Medien*, C-469/17, EU:C:2018:870, para 19; Similarly, In AG Medina, *Public.Resource.Org.Inc*, C-588/21 P, EU:C:2023:509, paras 92–95, the AG concluded that the General Court had erred when taking the existence of free and creative choices in the drafting of harmonised technical standards at 'face-value'.

60 This is in line with Article 2 (8) of the Berne Convention, which excludes 'news of the day or to miscellaneous facts having the character of mere items of press information' from the minimum rights of protection.

61 *Infopaq* (n 34) para 45 and *Funke Medien* (n 5) para 23.

62 AG Medina, *Public.Resource.Org, Inc.*, (n 60) paras 92–95.

63 See e.g. *Pasternak v Prescott* [2022] EWHC 2695 (Ch), [2022] 10 WLUK 305, para 431.

64 *Infopaq* (n 34) paras 45; See also *SAS Institute* (n 57) para 66; A possible exception to this is imaginary words as it cannot be ruled out that the author can make free and creative choices when constructing such a word.

65 Thomas Margoni and Mark Perry, 'Scientific and Critical Editions of Public Domain Works: An Example of European Copyright Law (Dis) Harmonization' (2011) 27 Canadian Intellectual Property Review 157, 160.

events is likely to be deemed non-original due to a lack of free and creative choices.[66] The same will likely also be the case for the translation of such a report, as the purpose of accurately conveying the factual meaning of the report in the target language can preclude the translator's opportunity to make free and creative choices.

While translators make choices when translating all types of texts, the degree of creative freedom will vary depending on the type of text. In translation studies a distinction is often made between the translation of literary text and non-literary text.[67] Generally, literary translations have a greater focus on style,[68] and allow for more creative freedom on part of the author than non-literary texts. Therefore, this division will also be useful in the following sections; first it will be assessed to what degree the translator of literary works can make free and creative choices (Section 2.2.2), thereafter it will assess to what extent free and creative choices can be made in the translation of non-literary texts (Section 2.2.3). Lastly, copyright protection in translations using translation technologies will be explored (Section 2.2.4).

2.2.2 Translations of literary texts

Literary works is a broad category that encompasses everything from novels, poems and screenplays. They have the common feature that the source is based on the imagination of the author while very often the emphasis is on style and expression. While the translation of a literary work requires great skill and labour by the translator, this is not itself sufficient for protection under EU copyright law.[69] The crucial element is whether the translator is able to make free and creative choices in the translation. When translating a literary text, the translator is faced with a plethora of choices. As noted by Landers this includes the choice of 'words, fidelity, emphasis, punctuation, register, sometimes even of spelling.'[70] However, the literary translator's choices are also bound by certain constraints, particularly the purpose of accurately conveying the meaning of the source text. Since the constraint is primarily on communicating the meaning of the source text in the target text, the translator of literary text still retains some freedom with regard to the form of the translation.[71] This is for example through the translator's choice between synonymous words, punctuation and sentence length. Therefore, there are likely few instances where there is no room for creative freedom left, thereby ruling out the presence originality altogether.[72]

Translators of poetry are considered to have a particularly large degree of freedom with regard to form, as the focus is 'inward' on the effect that the text has on the reader.[73] The translation therefore becomes strongly connected to the translator's own interpretation of the poem, which arguably can entail that the translation to a greater extent will also reflect the personality of the translator.[74] Yet, there are some constraints in the translation of poetry, in particular with regard to preserving the rhythm and rhyme.[75] When the translator needs to balance this with the need to convey the content of the poem, the result can be that there in practice are few choices that will fulfil this balance. However, while this might be the case for single lines, it is hard to see that the constraint of preserving rhythm and the original meaning will preclude the translator from making any free and creative choices in the poem as a whole, thereby ruling out originality.

A few particular difficulties can arise when assessing originality of titles of literary texts. Translations of titles, like the titles themselves, are protectable under copyright provided that they are the author's own intellectual creation.[76] There are however two aspects with regard to titles that can hinder copyright protection. First, they tend to be quite short. While this does not preclude originality, it can reduce the translator's opportunity to make free and creative choices. Second, titles often aim to reflect the content of the work, which can restrict the translator's creative freedom. This does, however, not mean that the author has no choice or creative freedom when translating titles. It is illustrative that different translations of the same work often have widely different titles. An example of this is Boris Vian's novel *L'Écume des jours*. The novel has been translated to English three times, first by Stanley Chapman under the title *Froth on the Daydream*, then as *Mood Indigo* by John Sturrock and lastly by Brian Harper as *Foam of the Daze*. These translations have all in different ways utilized some creative freedom, as the verbatim translation of *L'Écume des jours* would be 'the foam of days'. Both Chapman's and Harper's are somewhat based on the original title as they reference froth or foam, but add their own touch by referring to concepts absent in the original title. On the other hand, Sturrock's translation is seemingly unrelated to the original title. Although, closeness to the original title will be an element in assessing originality, as a word-for-word transla-

66 AG Szpunar, *Funke Medien* (n 60) para 19.

67 House (n 6) 8.

68 Cees Koster, 'Literary Translation' in Juliane House (ed.), *Translation: A Multidisciplinary Approach* (Palgrave Macmillan 2014) 151.

69 E.g. *Football Dataco* (n 57) para 42; Therefore translations of literary work are easily protected in jurisdictions applying 'skill and labour' as the requirement for protection, see e.g. David Vaver, 'Translation and copyright: a Canadian focus' (1994) 16 (4) E.I.P.R. 159, 160.

70 Clifford E. Landers, *Literary Translation: A Practical Guide* (Multilingual Matters 2001).

71 Marianne Lederer, *Translation* (Routledge 2014) 84.

72 *Brompton Bicycle*, (n 5) para 31.

73 Lederer, (n 72) 84.

74 Paschalis Nikolaou and Cecilia Rossi, 'Translating Poetry' in Kirsten Malmkjær (eds.), *The Cambridge Handbook of Translation* (Cambridge University Press 2022) 487 citing Douglas Robinson, *The Translator's Turn* (Johns Hopkins University Press 1991) 260.

75 There are, however, some instances where the translator chooses to not preserve the rhythm and rhyme, for example Christopher Fry's translation of Henrik Ibsen's play 'Per Gynt' in James Kirkup and James McFarlane Walter (ed.), Oxford Ibsen: Brand, Peer Gynt vol III (Oxford University Press 1960).

76 Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen, *Immaterialret* (7th edn. Djøf Forlag 2024) 84.

tion would not express the translator's own free and creative choices, some relation to the original title does not exclude creative freedom. For example, Haper's clever use of the homophone 'Daze' does arguably to a greater extent express creativity than Sturrock's *Mood Indigo*, despite it not having any relation to the original title. In this regard it should be noted that while alternative titles can show that the translator had a choice, it cannot itself be considered decisive in concluding that the choice was in fact of a creative nature.[77]

2.2.3 Translations of non-literary texts

Non-literary texts is a negatively defined category which covers a wide range of different types of texts including news articles, administrative and legal documents and scientific and medical documents. A common thread among these types of texts is their informative nature. For the translator of such texts this entails a greater emphasis on conveying the meaning accurately, than engaging in stylistic considerations.[78] While the translator of a literary text can make some adjustments to retain the style of the source text, the translator of a non-literary text generally has to seek semantic equivalence on all levels, lexical syntactic and textual.[79] This leaves less room for creative freedom. One example of non-literary text where the translator is considered to have a highly limited degree of creative freedom is legal translations.[80] As observed by Joseph '[it] appears to be a universal feature of legal style that the author, together with the translator, disappear'.[81] The reason for this is that the translator of a legal text must give closest semantic meaning to the source text, and not attempt to ascertain the intended meaning of the text as this can affect the substance of the source text.[82]

As was suggested by the CJEU in *Funke Medien* decision, there will be no room for free and creative choices in documents determined by the information that they contain, as the idea and expression in these instances becomes indissociable.[83] This suggests that non-literal texts that are purely informative documents cannot be considered to fulfil the threshold of originality. However, as mentioned in Section 2.2.1. the fact that the source text is non-original does not *per se* preclude fulfilling the requirement of originality in the translation if the translator has made free and creative choices. Yet, while it does not seem questionable that the translator makes choices, it is hard to imagine that the translation of a purely informative document itself would allow for free and creative choices, provided that the goal is to as accurately as possible convey the information in the source text.

One type of non-literary texts that raises particular questions from a copyright perspective are official translations of official texts. Under Article 2 (4) of the Berne Convention its members are not required to protect such translations. EU law does not specify whether EU member states are required to protect such translations and the CJEU has not ruled on the issue. However, in a case regarding public access to harmonized technical standards the General Court concluded that the Commission made no error in law when concluding that a harmonised standard was protectable by copyright,[84] suggesting that the protection of official texts is not principally ruled out. The decision suggests that member states can protect official texts, and probably also their official translations, if they fulfil the requirements for protection, while at the same time, it does not explicitly prohibit member states from excluding them from protection.[85]

From a *de lege ferenda* perspective official texts and their translations should not be protectable under copyright. This is mainly because one of the core rationales for copyright protection, incentivising the creation of literary and artistic works, does not apply to official texts, as well their translations.[86] Furthermore, the right of freedom of information, which is protected under Article 11 (1) of the EU Charter of Fundamental Rights,[87] suggests that such text's and their translations should not be protectable by copyright.[88] It would therefore arguably be preferable for the CJEU, or alternatively the EU legislator, to explicitly apply the leeway given by Article 2 (4) of the Berne Convention and exclude official translations of official text, in addition to the official texts themselves, from copyright protection.[89] For most member states this would not

77 To this effect *Brompton Bicycle*, (n 5) para 35.

78 House, (n 6) 8.

79 Krisztina Károly, 'Translating Academic Texts' in Kirsten Malmkjær (ed.), *The Cambridge Handbook of Translation* (Cambridge University Press 2022) 347.

80 Leon Wolff, 'Legal Translation' in Kirsten Malmkjær and Kevin Windle (eds.), *The Oxford Handbook of Translation Studies* (Oxford University Press 2011) 229.

81 John E. Joseph, 'Indeterminacy, Translation and the Law' in Marshall Morris (ed.), *Translation and the Law* (John Benjamins Publishing Company 1995) 18.

82 Emily Wai Yee Poon, 'The Cultural Transfer in Legal Translation' (2005) 18 Int'l J Semiotics Law 307, 322–323.

83 *Funke Medien* (n 5) para 24.

84 Judgment of the General Court of 14 July 2021, *Public.Resource.Org*, T-185/19, EU:T:2021:445, para 46–48; This decision was appealed to the CJEU, however, the Court did not address whether the documents could be protectable under copyright, Judgment of the Court (GC) of 5 March 2024, *Public.Resource.Org*, C-588/21 P, EU:C:2024:201.

85 In countries where official translations are protected, and rightholder of an official translation is a public institution, the possibility to deny reuse of the work through copyright will be limited by Article 3 (1) of Directive 2019/1024 (EU) of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) (PSI Directive) which lays down a general principle that member states shall ensure that public documents are reusable. More generally on the interplay between copyright and the PSI Directive see Mireille van Eechoud, 'A Serpent Eating Its Tail: The Database Directive Meets the Open Data Directive' (2021) 52 IIC 375 and Frantzeska Papadopoulou, 'Access and Commercial Exploitation of Public Sector Information (PSI) and Copyright protection. Two parallel Universes or simply a Big Bang?' (2016) 5 NIR 505 (the latter is in relation to the previous PSI Directive).

86 R Anthony Reese, 'What should copyright protect?' in Rebecca Giblin and Kimberlee Weatherall (eds.), *What if we could reimagine copyright?* (Australian National University Press 2017) 131 and Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press 2018) 227.

87 Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, 391–407.

88 To this effect, AG Medina, *Public.Resource.Org* (n 60) para 68.

89 This is also in line with Article 1.2 of the Wittem Group's model European Copyright Code, *The Wittem Group European Copyright Code*

represent a major shift, as most of them exclude official texts and their translations from protection already.[90] A possible counterargument is that it appears questionable whether there is a pressing need for legislative intervention in this regard. Firstly, such translations will in many instances not meet the threshold for protection, as discussed previously in this Section. Secondly, insofar as national governments are the rightholders in such text they will be precluded from denying access and reuse of such documents under their obligations under the PSI Directive.[91] However, despite it being of limited practical significance, allowing member states to protect such translations seems problematic from a freedom of information perspective. Furthermore, excluding such documents for protection all together would eradicate any doubt as to whether access to such translations could be denied on the basis of copyright, which can prevent the risk of a 'chilling effect'.

2.2.4 The use of translation technology

The notion of using technology as a tool in translation has existed at least since the 1950s, however, the technology available has drastically improved over the last decades due to the use of statistics-based approaches and machine learning.[92] The use of translation technologies can be classified in two categories: machine translations and computer-aided translation.[93] Machine translations are computer systems that automatically translate a given text from one language to another.[94] A common example of this is the web application Google Translate. Computer-aided translations are translations created with the aid of different computer programs, but where the program does not provide a complete translation.[95]

From an EU copyright perspective, machine translations as such are not protectable when solely created by machines. This is because copyright protection under EU law, albeit not explicitly, presupposes the intervention of a human author.[96] Both Article 2 (1) of the Software Directive and Article 4 (1) of the Database Directive explicitly state that the author of a computer programme or database is a natural person.[97] The CJEU has thus far not had the chance to rule on the notion of 'authorship'. However, since none of the directives refer back to national law with regard to the concept of 'author', it should be considered an autonomous concept of EU law, meaning that the member states are obligated to apply the concept uniformly.[98] Furthermore, the Court has held that as a general principle the same concept has the same meaning in different directives unless the EU legislator has expressed a different intention.[99] This suggests that the requirement for the author to be a natural person applies horizontally even to other works than software and databases.[100] As a result, works produced solely by a computer, such as a machine translation program, will be excluded from protection. The need for a human author is also intertwined with the concept of originality. This is because the EU originality test focuses on the creative process of the author, and not just on the end-product.[101] This means that the fact that a machine, whether based on artificial intelligence or not, can make a machine translation that appears to be just as much the result of free and creative choices as a translation authored by a human, does not entail that the translation fulfils the originality requirement.[102] This is because a text translated by a computer program whether appearing to be so or not, will not actually be the result of the free and creative choices made by any author, rather it will be an expression of the automated operations conducted by the program.

In fact, in most instances where machine translation is used a human person will be involved, either in the preparation stage or after the execution.[103] The question therefore is whether this human involvement entails that the machine translation can be considered his or her own intellectual creation. In the preparation stage the person can make the choice of what text to feed the machine.[104] Such a choice does, however, not confer originality, because the originality standard presupposes causation between the free and creative choices made and the features expressed in the intellectual work created.[105] By

<https://www.ivir.nl/nl/projecten/european-copyright-code/> (accessed 7 October 2024).

90 Some member states including Ireland and Cyprus do, however, have a special type of copyright protection for official texts. See Chapter 19 of the Irish Copyright and Related Rights Act 2000 (No. 28 2000) and Section 4 (c) the Cyprus Copyright Act of 1976 (Law No. 59/1976).

91 Article 3 (1) of the PSI Directive; Furthermore, invoking copyright in public documents would as emphasised by AG Szpunar be a unjustified limitation on the right of freedom of information, AG Szpunar, *Funke Medien* (n 60) paras 53–55.

92 House (n 6) 10–12; On the history of translation technology see Harold Somers, 'Machine Translation: History, Development, and Limitations' in Kirsten Malmkjær and Kevin Windle (eds.), *The Oxford Handbook of Translation Studies* (Oxford University Press 2011) 428ff.

93 Akiko Sakamoto, 'Translation and Technology' in Kirsten Malmkjær (ed.), *The Cambridge Handbook of Translation* (Cambridge University Press 2022) 55.

94 Ibid. 56–57.

95 Ibid. 55.

96 Hugenholtz and Quintais, (n 42) 1195–1196 and Pila, (n 17) 77.

97 See also Article 1 (1) and Recital 14 of the Directive (EC) 2006/116 of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12 which presupposes that the author is a mortal human being.

98 See e.g. Judgment of the Court of 24 March 2022, *Austro-Mechana*, C-433/20, EU:C:2022:217, para 20 and Rosati, 'Copyright at the CJEU' (n 18) 227–228.

99 *Football Dataco*, (n 57) para 188.

100 Anniina Huttunen and Anna Ronkainen, 'Translation Technology and Copyright' (2012) (3) NIR 330, 343 and Hugenholtz and Quintais, (n 42) 1195–1196.

101 Rognstad, 'Creations caused by humans (or robots)?' (n 48) 178.

102 For a different understanding, see Andreas Rahmatian, 'Copyright and artificial intelligence – is there anything new to say?' (2024) 46 (1) E.I.P.R. 25, 28.

103 If the author is involved in the execution stage it is more natural to classify this as a computer-aided translation rather than a machine translation.

104 Hugenholtz and Quintais, (n 42) 1202.

105 Rognstad, 'Creations caused by humans (or robots)?' (n 48) 182; Similarly, Tatiana-Eleni Synodinou, 'EU copyright law, an ancient history, a contemporary challenge' in Andrej Savin and Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law* (Edward Elgar Publishing 2023)

deciding what text to train the machine on, the person has decided on the necessary prerequisites for the translation, but has not controlled the specific choice, sequence and combination of words, meaning that the output cannot be considered a reflection of the person's free and creative choices.[106] The author will, however, also often be involved after the execution stage, as texts produced by machine translations often require further editing by a human translator or editor.[107] With regard to these choices, there is no problem of causation between the choices and the expression, however, it is still necessary that the choices are free and creative. This means that if the post-editing consists of non-creative alterations, for example correcting grammatical mistakes, originality will still be precluded. If the translator on the other hand makes free and creative choices in this post-production stage, this can as such confer originality.[108]

Computer-aided translations are not excluded from copyright protection *per se*, as the use of technical aids does not preclude copyright protection.[109] One way a computer-aided translation can work is that the computer programme provides the translator with different suggestions that the translator can choose from. In this instance the translator will still be able to make creative choices through his or her selections from the predefined suggestions.[110] However, originality will be precluded if there is no room left for creative choices by the translator. This could be the case if the suggestions are so limited that it is necessary for the translator to choose a specific suggestion for the translation to accurately convey the meaning of the source text. One can also assume that the level of creativity is lesser when deciding from predefined suggestions, as opposed to cases where the translator is themselves coming up with alternatives in their own mind and choosing between these.

2.3 Protection of translations under national case law

2.3.1 Introduction

The previous Section has shown how the general requirements for copyright protection under EU law apply equally to translations, meaning that they are protectable insofar as they are their 'author's own intellectual creation' and an 'expression' thereof. The requirement that the translation is the 'author's own intellectual creation' entails that elements stemming directly form the source text cannot confer originality, as these are not the result of the translator's free and creative choices. The previous Section also illustrated that translations in many instances are protectable under EU copyright law. However, an important factor in separating the protectable from the non-protectable translations, is the extent that communicating the meaning of the primary work precludes the translator from making free and creative choices. Generally, the translator of a literary text will have more creative freedom than the author of a non-literary text.

This Section will explore how national courts in Europe have addressed the question of protectability of translations in different factual scenarios by looking at six decisions. The four first decisions concern literary translations, while the two last decisions relate to non-literary translations. Furthermore, the Section will assess to what extent these national decisions would be in accordance with EU law. The aim of looking at these national decisions is to exemplify what challenges arise when considering the protectability of translation and the different approaches that have been taken to solve them. By assessing whether these decisions are in compliance with EU law, the aim is to illustrate how EU requirements for protection would apply in different factual scenarios. Therefore, the article will also look at decisions predating harmonization on the EU level.

2.3.2 Translations of literary texts national case law

The first decision concerning literary translations of interest was one ruled by the German Federal Court of Justice (Bundesgerichtshof).[111] The plaintiff in this case was a translator who had translated 70 volumes of Walt Disney comic books from Italian to German for a publishing company. After the initial publication, several of the volumes were reprinted by the publisher without the explicit consent of the translator, leading to the translator bringing proceedings against the publisher for copyright infringement. The publisher argued that the translations were not original and thus not protected by copyright. Both the first and second instance Courts concluded that the translations were original. The Bundesgerichtshof upheld this conclusion.[112] While the Court recognized that there were limitations on the creative freedom of the translator posed by the simple language typically applied in comic books and the limit space in the 'speech balloon', the Court considered that since translations were literal works a more generous originality standard had to be applied.[113] In the case of such works copyright protection also applied to so-called small change (kleine Münze), for

136–137 and Rahmatian, 'Copyright and artificial intelligence' (n 103) 30.

106 Further disscussed in Rognstad, 'Creations caused by humans (or robots)?' (n 48) 185–189.

107 Sakamoto, (n 199) 57 and Douglas Robinson, 'Creativity and translation' in Rodney H. Jones, *The Routledge Handbook of Language and Creativity* (Routledge 2015) 283.

108 *Painer*, (n 41) para 91; See also European Commission, 'Translation and intellectual property rights' (report) (Publications Office 2014) 103.

109 This is clear from e.g. *Painer*, (n 41) para 91.

110 To this effect Hugenholtz and Quintais, (n 42) 1204.

111 *Comic-Übersetzungen II* [1999] BGH ZR 57/97, [2000] GRUR 144. Reproduced and translated into English in IIC (2001) 32 (7) 865. The case also concerned questions about the interpretation of the contract between the translator and the publisher which was subject to anther decision by the Bundesgerichtshof in *Comic-Übersetzungen III* [2004] BGH ZR 174/01, [2004] GRUR 2004 938. Reproduced and translated into English in IIC (2005) 36 (4) 484.

112 Ibid. 144.

113 Ibid. 145.

which even a small amount of individual creativity was considered sufficient for copyright protection to arise.[114]

Although the decision predates full horizontal harmonisation of the originality criterion in EU law, the decision does not appear directly incompatible with it. The threshold set by the Court requiring only a small amount of individual creativity by the author for the originality criterion to be fulfilled is not necessarily incompatible with the threshold set by the CJEU, as it has refused to apply a *de minimis* threshold for protection. The German doctrine of 'kleine Münze' applied by the Court can however be problematic, because it presupposes that the scope of protection granted is limited for such works,[115] something that has been rejected by the CJEU in *Painer*.[116] Furthermore, the Court also differentiates the originality standard based on different categories of works, which is no longer acceptable in light of subsequent CJEU case law. With regard to the specific assessment of originality, it appears correct that while the translator of a comic book will be under some limitations, there is still generally room to make free and creative choices.

The second decision of interest is a more recent one from 2021, which is a case concerning translation of titles that was decided by the Czech Supreme Court (Nejvyšší soud České republiky).[117] The background of the case was that the translator Adama Nováka had translated the title of Oscar Wilde's play 'The Importance of Being Earnest' to *Jak je důležité míti Filipa* (the importance of having Filip). In the original title there is a wordplay as 'Earnest' is the pseudonym used by the main character of the play, but also refers the characteristic of being sincere. Nováka translated this to *Filipa* which is both a Czech name, which was used as the pseudonym in the Czech translation, but also a Czech idiom which refers to being witty or clever. Later the play was translated by Pavlu Dominikovi under the same title, and Nováka brought proceeding against him for copyright infringement. The question that had to be decided by the Czech Supreme Court was whether the translation of the title was sufficiently original to be protected by copyright. The Court concluded that it was not. Referring to the CJEU's decisions in *inter alia Painer* and *Cofemel* the Court held that the translation could not be original if the author had no creative freedom.[118] In the view of the Court the translator did not have any creative freedom as the choice of idiom was the only possible option if the word- play in the source title was to be preserved.[119] According to the Court it was not relevant that the translation was humorous and unique, as this did not necessarily entail that another translator would not translate the title in the same manner.[120]

The reasoning of the Czech Supreme Court does not appear consistent with the CJEU's case law on originality for two reasons. Firstly, the conclusion that the translator had no creative freedom seems questionable. The Court seems to presuppose that the inclusion of wordplay was necessary to translate the title. This is not the case as the title as translation of the play's title in other languages does not include the wordplay, for example in Swedish the title is translated to *Mister Earnest* and in French *L'Importance d'être Constant* (It's important to be consistent). The Court seems to reach this conclusion based on the assumption that when choosing the translation technique of functional substitution, i.e. preserving the wordplay, there was no other suitable Czech idiom. However, this reasoning neglects the fact that the choice of techniques itself can constitute a creative choice.[121] This was recognized by the CJEU in *Painer*, when it referred to the 'choice of developing techniques' as one of many possible creative choices available to the photographer of a portrait photo.[122] Secondly, the Court seems to emphasise whether another translator could have translated the title the same way independently, which seems contrary to the assessment by the CJEU which has been essentially focused on the creative process of the author and not whether the end product constitutes something unique.

The third decision also concerns copyright protection for titles of literary works. This is an old decision by the Danish Supreme Court (Højesteret) from 1951.[123] The dispute concerned the Danish translation of Ernest Hemingway's novel *For Whom the Bell Tolls* by Ole Restrup. It included a translation of the title to 'Hvem ringer klokkene for'. This can word-for-word be translated back to 'Who rings the bells for'. The original title of the novel is taken from John Donne's poem 'Meditation XVII', and Restrup's Danish translation of the poem was also the basis for the Danish title.[124] When the film adaptation of the novel was distributed in Denmark by Nordisk Films Kompagni under the same title, Restrup brought proceeding against them before the Copenhagen City Court (Københavns Byret). The main question before the City Court was whether the translated title was original and thus protected by copyright. The City Court concluded that the title was distinctive, and therefore original. It was emphasised that the title could have been translated in other ways, which was illustrated by the fact that the Danish press had used different translations when referring to the novel prior to the publication of Restrup's translation. The decision was appealed to the Eastern County Court (Østre Landsret), which concluded that the translation

114 Ibid. 145.

115 Andreas Rahmatian, 'Originality in UK copyright law: the old "skill and labour" doctrine under pressure' (2013) 44 (1) IIC 4, 19.

116 *Painer* (n 41) paras 95–98; See also Morten Rosenmeier, 'Hvor bred er den ophavsretlige beskyttelse efter Painer-dommen?' (2022) 1 NIR 4, 21.

117 *Adama Nováka v Pavlu Dominikovi* [2021] Supreme Court of the Czech Republic, No 27 Cdo 2023/2019-418.

118 Ibid. para 39.

119 Ibid. para 37.

120 Ibid. para 40.

121 On the contrary, the Court seems to suggest that the choice of technique is not an artistic choice at para 37.

122 *Painer*, (n 41) para 91.

123 *For Whom The Bell Tolls* [1951] Højesteret, sag 377/1950, UfR 1951 s. 725/3H.

124 An extract of the poem is found in the novel's epigraph.

was not original on the basis that Restrup's translation was a verbatim translation, with the exception that it was rephrased as a question, and that 'Bell' was changed to the plural 'Bells'. Restrup appealed the decision to the Supreme Court, which confirmed the decision of the Copenhagen City Court, entailing that the work was considered original and therefore protected by copyright.

Had this decision been reached today, it would not have been in compliance with the current EU standard of originality.[125] While the translation is not a verbatim translation, since the Danish translation has been rephrased as a question, all the words are a direct translation. The main difference is that the order of the words is changed, a measure necessary to comply with Danish syntax. The City Court seems to primarily have focused on the fact that there were other possible ways to translate the title. While the CJEU in *Brompton* did recognize that this could be a relevant factor when assessing the possibility of choice, the Court held that it should not be the decisive factor when assessing whether the author had actually made free and creative choices.[126] In conclusion it appears that the translation would not be protectable under the current EU standard of originality.

The fourth decision that is interesting to examine closer is the decision of the High Court of England and Wales from 2022 in *Pasternak v. Prescott*.[127] Although the decision was reached post-Brexit the decision is still of interest, in particular because courts in the United Kingdom still consider themselves bound by the EU standard of originality.[128]

The case concerned a dispute between Anna Pasternak, the author of a biography of poet and author Boris Pasternak and his mistress Olga Ivinskaya, titled *Lara: The Untold Love Story That Inspired Doctor Zhivago*, and Lara Prescott, the author of a fictionalised account of a CIA operation to disseminate Doctor Zhivago in the Soviet Union titled *The Secrets We Kept*. A. Pasternak's biography reproduced parts of a previous biography of Olga Ivinskaya written in Russian originally titled *Legendy Potapovskogo pereulka*, which she had translated into English under the title *The Legends*. The right to the translation were assigned to A. Pasternak, and parts of it reproduced in *Lara*. This included a section referred to as 'the Accusation Act' which recounted a statement of crimes a Soviet court had accused Ivinskaya of having committed. In *The Secrets We Kept* Prescott included the English translation of the 'the Accusation Act' and A. Pasternak brought proceeding against her for copyright infringement before the High Court. A. Pasternak claimed amongst other things that she had infringed the English translation of the 'the Accusation Act' by reproducing it from *Lara*. It was therefore necessary for Johnson J to determine whether the translation in *Lara* was sufficiently original to be protected by copyright. Johnson J started by stating that the fact that 'the Accusation Act' only constituted a minimal part of the total translation of *The Legends* did not preclude originality; citing *Infopaq* Johnson J held that the assessment was qualitative, not quantitative.[129] From a qualitative perspective Johnson J noted that while there was a fairly low level of originality, the translator had to choose which words to use to convey the meaning from the original and how these words should be arranged.[130] An example of this given by the judge was that the translator had written 'the works of Pasternak', when she could have written 'Pasternak's work'.[131] Johnson J therefore concluded that the choices of the translator was not so limited as to disqualify the translation from being the intellectual creation of the translator.[132]

It is rather unclear to what extent the ruling is in compliance with the EU standard of originality. With regards to the question of choice, the conclusion that the translator has made his own choices in the translation of 'the Accusation Act' seems uncontroversial. It also seems likely that the translator would have some freedom with regard to those choices. The main issue with the decision is that the court does not consider whether the choices actually made were of a creative nature – writing 'the works of Pasternak' rather than 'Pasternak's work' hardly seems sufficient. Despite the reference to *Infopaq* one can question whether the decision is more in line with the traditional 'skill, labour and effort' doctrine than the EU standard of originality.

2.3.3 Translations of non-literary texts in national case law

The first non-literary translations decision of interest was decided by the Paris Court of Appeal (Cour d'appel de Paris) in 1989.[133] The plaintiff in the case was the publisher Masson Editeurm, who published an English–French and French–English data-processing dictionary. When another publisher, Harrap Ltd, published an English–French and French– English data-processing dictionary, the plaintiff considered parts of it to be taken from their dictionary and brought proceedings against the defendant for copyright infringement. The Court of first instance found the defendant had infringed Masson Editeur's copyright in the dictionary. This decision was upheld by the Court of Appeal. The Court held that the defendant's claim that the dictionary was not protected by copyright, as the terms were translated word-for-

125 Similarly, in Mads Bryde Andersen, *IT-retten* (2nd edn. Gads Forlag 2005) 293 and Ole-Andreas Rognstad, *Opphavsrett* (2nd edn. Universitetsforlaget 2019) 98.

126 *Brompton Bicycle*, (n 5) para 35.

127 *Pasternak v Prescott* [2022] EWHC 2695 (Ch), [2022] 10 WLUK 305.

128 See the decision of the Court of Appeal of England and Wales in *THJ v Sheridan* [2023] EWCA Civ 1354, [2024] E.C.D.R. 4 paras 16 and 23.

129 *Pasternak v Prescott* (n 129) para 431.

130 Ibid. para 433.

131 Ibid.

132 Ibid. para 434.

133 *Harrap France SA v Masson Editeur SA* [1989] Cour d'Appel Paris, [1991] E.C.C. 322.

word and listed in alphabetical order, to be incorrect.[134] According to the Court the translation of the terms involved making choices, because the author chooses what terms to list as equivalent in the target language and the order they are listed in.[135] The Court elaborated why the dictionary as a whole involved making choices, namely because the author chooses which words to translate and the extensiveness of the dictionary.[136] According to the Court this meant that the dictionary as such was original.[137] The Court concluded further that the dictionary of Harrap Ltd was an infringement.[138]

This decision is not compatible with the current EU standard of originality. This is because the Court does not assess the constraints on the author's ability to make free and creative choices that are posed by the fact that the purpose of a translation is to find equivalent terms that as accurately as possible convey the meaning of the original term. In addition, the Court does only appear to assess whether the author could make free and creative choices, and not whether such choices where actually made. This is not to say that it is necessarily incorrect to conclude that a dictionary can be protected by copyright. However, it is easier to imagine that originality can be inferred from the choices made regarding the selection of terms and layout etc. than from the translations of the terms themselves. It should be noted that under current EU law the dictionary could under the circumstances be protected under the *sui generis* database right.

In relation to translations of non-literary texts the decision of the Irish High Court's in *Electricity Supply Board v Commissioner of Environmental Information* from 2024 is of interest.[139] This case does not concern translations, but rather a transcription. However, the decision is still interesting, as translations have several common characteristics with transcriptions, particularly their purpose of conveying the meaning of the primary speech as accurately as possible. One of the questions before the High Court was whether a 488-page transcript of a hearing regarding compensation to landowners that had an electric line placed on their property, fulfilled the requirement of originality.

The Court started by assessing the contribution made by the stenographer, holding that they made choices based on their own intellectual and creative input by *inter alia* identifying the speaker and order of sounds, as well as by adding punctuation.[140] Furthermore, the Court held that the stenographers' creative choices improved the transcript, noting that the stenographer adds words that are never spoken, for example by writing 'INTERRUPTION' when there is an interruption, and by deciding the lay-out, including by adding page-numbers, headlines and deciding the font.[141] With reference to the CJEU's decision in *Funke Medien*, the Court held that the case at hand was different as it did not consider it impossible for the stenographer to express his or her creativity by making additions and stylistic choices.[142] On that basis the High Court concluded that the transcript was the stenographer's own intellectual creation and therefore original.[143]

This decision is arguably not in accordance with the EU-standard of originality.[144] The Court gives much weight to the fact that the stenographer makes choices and additions and does not simply provide a verbatim record. However, the Court does not adequately consider whether these choices and additions are constrained by the informative purpose of the document. When the purpose of the transcription is to accurately describe what was said in the hearing, this will in effect dictate the choices made by the stenographer in relation to for example punctuation and the addition of headings, thereby leaving no room for creative freedom. While stylistic choices can allow for creative freedom, this will not be the case if they are dictated by the informative purpose of the document. This will for example be the case if they are dictated by the need to guarantee accessibility and readability. The Court's reference to the stenographers improving the quality of the transcription also seems problematic under the EU standard of originality. This is because the merits of the contribution cannot be considered to not confer originality. Overall, the decision arguably appears more in line with the traditional decision of the UK House of Lords in *Walter v Lane* where the transcriptions of speeches were considered protected under copyright on the basis that it had required labour and skill,[145] than the EU-standard of originality.

2.3.4 Conclusion

The overview of national court rulings suggests that the courts apply a modest threshold when assessing the protectability of translations, with the notable exception of the decision from the Czech Republic. A common thread in all the decisions discussed is that the courts considered it sufficient to establish the existence of choice to conclude that the translation was protected by copyright,

134 Ibid. para 13.

135 Ibid. para 10.

136 Ibid. paras 12–13.

137 Ibid. para 13.

138 Ibid. para 17.

139 *Electricity Supply Board v Commissioner of Environmental Information* [2024] High Court of Ireland, [2024] IEHC 17.

140 Ibid. paras 141–153.

141 Ibid. paras 155–162.

142 Ibid. para 180.

143 Ibid.

144 An example of a factually similar decision that appears more in-line with the EU standard of originality is the decision by the Hague Court of Appeal (Hof Den Haag) in *Zonen Endstra v. Nieuw Amsterdam* [2013] Hof Den Haag, AMI 2013 n. 13, ECLI:NL:GHDHA:2013:2477 where the Court held that the transcripts of police records did not fulfil the originality requirement. The decision if referred to in Piter de Weerd, '"Backseat conversations" not protected by copyright' Kluwer Copyright Blog (20. August 2013) <https://copyrightblog.kluweriplaw.com/2013/08/20/backseat-conversations-not-protected-by-copyright/> (accessed 7 October 2024).

145 *Walter v Lane* [1900] UKHL, [1900] A.C. 539.

without exploring whether the translator expressed his or her creativity when making these choices. Furthermore, the national courts rarely seem to assess to what extent the purpose of faithfully conveying the meaning of the source text has constituted a constraint on the translator's creative freedom.

3. CONCLUSION

The CJEU's has fully harmonised the requirements of copyright protection for all types of subject matter. In line with the Court's doctrine of treating all types of subject matter equally, translations are protectable on the same conditions as other works. As a result, they are protectable as long as they are their 'author's own intellectual creation' and an 'expression' of this creation. The need for the creation to be the author's *own* entails that one cannot consider elements taken from the source text in the assessment of originality of the translations. Furthermore, the remaining elements need to be the result of the author's free and creative choices. This can function as an obstacle for the copyright protection of translations, because their aim to 'reconstruct' the source text in a different language will de facto result in the author's creative freedom being constrained. Yet, in accordance with current CJEU case law originality is only excluded when the constraints leave no room for creative freedom. This means that there are many instances where copyright protection will not be excluded for translations, despite this aim of 'recreating' the source text. This is also reflected through national case law concerning translations, where national courts seem to set a low threshold for protection.

To conclude this article, a few observations will be made regarding an element of the assessment of protectability which to a certain degree remains unclear under EU copyright law, namely the role of the author's subjective experience of his or her creative process in the assessment of originality. This question is the subject of the request for preliminary hearing pending before the CJEU in *konektra*.[146] The way the CJEU will choose to answer this question will have significant impact on what is deemed to fulfil the originality criterion, including in which instances translations are deemed protectable. For example, if the intention of creating an artistic work is necessary to enjoy protection, many translations would not be deemed protectable, as they arguably rarely involve any artistic intent, but rather aim to 'recreate' the source text.

The role of subjectivity has most explicitly been addressed by the CJEU in its decisions in *Cofemel* and *Levola Hengelo*. On the basis of these decisions some scholars have argued that subjectivity should not play any role in the assessment of whether the subject matter is original and whether it constitutes an expression.[147] However, looking closer at these decisions, this conclusion seems too far reaching. What the Court actually ruled is that the expression must be objectively identifiable, to avoid that there is any subjectivity in identifying the subject matter.[148] According to the Court this is not the case when 'an identification is essentially based on the sensations, which are intrinsically subjective, of an individual who perceives the subject matter at issue'.[149] What is excluded by the CJEU is relying on criteria that are subjective to the beholder.[150] Since personal experiences differ greatly, relying on the subjective experience of the beholder to determine protectability would be problematic, as it would make achieving even a modest consistency in the threshold of protection difficult.[151] However, what the Court does not do in *Cofemel* and *Levola Hengelo* is exclude the relevance of the author's subjective experience in the assessment of originality.

Some subjectivity on the part of the author is arguably inherent in the CJEU's requirement that the 'subject matter reflects the personality of its author, as an expression of his free and creative choices', as this entails that the focus is on the author's creative process,[152] which is inherently subjective.[153] As a consequence, courts cannot assess originality exclusively on the basis of the final expression.[154] Doing so would turn the test from a test of creativity, to a test of appearance of creativity. However, the final expression still plays a crucial role in the assessment of protectability. Firstly, because of the requirement that the subject matter of protection is an objectively identifiable expression, which entails that the author cannot get protection for any aspects of the work that are not objectively identifiable in the final expression.[155] Secondly, the final expression will inevitably be the starting point for assessing the creative process of the author.[156]

This focus on the creative process, rather than only the final expression, could arguably deem the application of the so-called 'double-creation-criterion' by some national

146 Request for preliminary hearing in C-795/23, *konektra* (question 2.).

147 Estelle Derclaye, 'Doceram, Cofemel and Brompton: How does the Current and Future CJEU Case Law Affect Digital Designs?' (2020) (Research Paper) 14. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507802> (accessed 7 October 2024).

148 *Cofemel* (n 5) paras 32–33 and *Levola Hengelo*, (n 5) para 41.

149 *Cofemel*, (n 5) para 34 and *Levola Hengelo*, (n 5) para 42.

150 Levin, (n 37) 88.

151 As noted by Kur the assessment will always be subjective to some extent, as human being inevitably include their own personal impression the evaluation, Annette Kur, 'Unite' de l'art is here to stay — Cofemel and its consequences' (2020) 15 (4) JIPLP 290, 295.

152 Irina Eidsvold-Tøien, 'Originalitetskriteriet i EU-retten – ny kurs?' (2012) 4 NIR 403. 416.

153 E.g. *Cofemel* (n 5) para 30; Thomas Dreier & Gunnar W. G. Karnell, 'Originality of the Copyrighted Work: A European Perspective' (1992) 39 Journal of the Copyright Society of the USA 289, 291.

154 Rognstad, 'Creations caused by humans (or robots)?' (n 48) 178. Differently, Daniel Inguanez, 'A Refined Approach to Originality in EU Copyright Law in Light of the ECJ's Recent Copyright/Design Cumulation Case Law' (2020) 51 IIC 797, 812.

155 This has by Rognstad been referred to as a need for causation between the author's free and creative choices and the final expression, Rognstad, 'Creations caused by humans (or robots)?' (n 48) 182.

156 Kur, (n 153) 295.

courts problematic.[157] This 'test' entails that the author has exhibited sufficient creativity if one with a reasonable degree of certainty can exclude that someone else could have made something identical or very similar.[158] As a result, the focus shifts away from the author's creative process, primarily focusing on the final expression instead.[159] The CJEU has not explicitly ruled on whether applying such a test is in accordance with EU copyright law.[160] However, one of the risks of applying such a test is that it can indirectly result in introducing a new requirement of novelty or distinctiveness.[161] Furthermore, from a practical perspective such a test seems inappropriate for assessing the originality of works that aim to recreate an existing work in a different format, such as in the case of translations. This is due to the fact that their aim of 'recreating' the source text entails that there are few instances where it would not be plausible that someone else could have created a similar work, even when there was room left for creativity by the translator.

It would arguably be most in line with the 'author's own intellectual creation' criterion if the CJEU in its answer to the *konektra* referral emphasises the need to look at the subjective creative process, and not just the end product, when assessing originality. Such an understanding of the originality requirement would have implications for the protection of AI generated works in instances where the human intervention has been of limited scope. As discussed in relation to translation software in Section 2.2.4 works created with the help of AI are protectable, as long as a human author was able to make free and creative choices that are reflected in the final expression. The problem arises when there is no human intervention or the contribution of the human is not expressed in the final product, meaning that there is no causation between the creative choices of the person and the expression. While the output might seem to be the result of free and creative choices it will not protectable under copyright. This is foremost due to the fact that EU copyright law requires the presence of a human author.[162] Even more so one could argue that a work generated by AI 'alone' would not be a product of a creative process, and therefore should not be considered original, regardless of whether the end-product appears creative or not.[163]

157 Such a test is applied for example by courts in the Scandinavian countries and the Netherlands, see further, Schovsbo, Rosenmeier and Salung Petersen, (n 77) 74 and Bernt Hugenholtz, 'Works of Literature, Science and Art' in Bernt Hugenholtz, Antoon Quaedvlieg and Dirk Visser (eds.), *A century of Dutch copyright law: auteurswet 1912-2012* (deLex 2012) 47, respectively.

158 Gunnar W. G. Karnell, 'European Originality: A Copyright Chimera' (2002) 42 Scandinavian Studies in Law 74, 79.

159 Dreier and Karnell, (n 154), 292 and Van Gompel, (n 43) 128–129.

160 It has been argued that such a test is not contrary to EU copyright law if used only as a thought experiment, see Schovsbo, Rosenmeier and Salung Petersen, (n 77) 74 and Rognstad, *Opphavsrett* (n 127) 102.

161 Van Gompel, (n 43) 129.

162 E.g., Rognstad, 'Creations caused by humans (or robots)?' (n 48) 174 and Hugenholtz and Quintais, (n 42) 1196.

163 Similarly, Rahmatian, 'Copyright and artificial intelligence – is there anything new to say?' (n 103) 28.

Victor Mütter

Victor is a graduate of the LL.M. programme in European Intellectual Property Law at Stockholm University, where he wrote his master's thesis on the protection of derivative works under EU copyright law. He also holds a Master's in Law from the University of Bergen, with a specialization in intellectual property law. Currently, Victor serves as a legal advisor at the Norwegian Industrial Property Office.