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Translation and intellectual property rights

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Translation and Intellectual Property Rights

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ABSTRACT

The purpose of this Study is to provide an overview of the main intellectual property rights issues linked to the domain of translations. In that context, a specific attention is given to the impact of new technologies and new business models in the global translation industry.

This Study will be focusing on the international, European and national legal frameworks (i.e. Belgium, France, Germany and the United-Kingdom).

More particularly, this Study aims at answering the three following questions:

(i) Are source documents protected by copyright and how does that effect the right to translate them?

(ii) Are translations protected by copyright and how?

(iii) Are databases which contain source documents and translations protected and how?

These three questions will be reflected through the core Chapters of the Study.

KEY WORDS

Intellectual property, copyright, database rights, translations, derivative works, translation memory, machine translation

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Abbreviations

Belgian Copyright Act	Loi relative au droit d'auteur et aux droits voisins, 30 Jaune 1994
Belgian Database Act	Loi transposant en droit belge la directive européenne du 11 March 1996 concernant la protection juridique des bases de données, 31 August 1998
Belgian Enforcement Act	Loi relative aux aspects de droit judiciaire de la protection des droits de propriété intellectuelle, 10 May 2007
Berne Convention	The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886
CJEU	Court of Justice of the European Union
Copyright Designs and Patent Act	Copyright, Designs and Patents Act 1988 (United Kingdom)
Database Directive / Directive 96/9	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
Enforcement Directive / Directive 2004/48	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights
French Code of Intellectual Property	Code de la propriété intellectuelle, last consolidated version of 1 July 2014
German Copyright Act	Gesetz über Urheberrechte und verwandte Schutzrechte, 9 September 1965
InfoSoc Directive / Directive 2001/29	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
Orphan Directive / Directive 2012/29	Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works
TDM	Text and data mining

Term Directive / Directive 2006/116	Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights
TRIPS Agreement	The Agreement on Trade-Related Aspects of Intellectual Property Rights, Annexe 1C of the Marrakesh Agreement Establishing the World Trade Organisation, signed on 15 April 1994
Rental and Lending Directive / Directive 2006/115	Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
Software Directive / Directive 2009/24	Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs
Universal Copyright Convention	The Universal Copyright Convention as revised in Paris on 24 July 1971
UNESCO	United Nations Educational, Scientific and Cultural Organization
UK	United Kingdom
WIPO	World Intellectual Property Organization
World Copyright Treaty	The World Intellectual Property Organization Copyright Treaty
WTO	World Trade Organization

Introduction to the Study

This Study ("Study on Translation and Intellectual Property Rights") was commissioned to the law firm Bird & Bird LLP[1] (www.twobirds.com) by the European Commission (DG Translation) in the context of Framework Contract N° JRC.PSR.C181822.X0 and the Specific Contract N° DGT/2013/TIPRs.

The team of authors was led by **Jean-Christophe Troussel** and **Julien Debussche**, lawyers at the Brussels office of Bird & Bird LLP, who coordinated the Study.

The main goal of this Study is to provide an overview **of some of the main intellectual property right issues relevant to the domain of translation, including in the field of machine-aided translations**.

This Study is a report on the current state of the law and not a prospective study (although it may include some critical view and prospective ideas). Accordingly, this Study does not represent a final state of mind of its authors; it only intends to encourage discussion on the topics covered.

A choice has been made to focus on aspects related to copyright and database rights. These two fields are indeed the most relevant ones in the domain of translation. However, such selection does not mean nor imply in any way that the intellectual property rights or issues which are not covered by this Study are not relevant in the translation industry. For instance, issues such as neighbouring rights, software protection, cloud computing, big data, or conflicts of laws are very relevant, but are not within the scope of this Study.

This Study intends to increase awareness within particular target groups. First, within the translation industry and, more particularly, among translators. Past years have indeed shown that it has become of particular importance to make translators more aware of their rights and obligations. Moreover, this Study targets institutions, academics and legal practitioners in the field of translation and machine-aided translations.

A particular approach has been adopted for the purpose of this Study, which we could label as an "upstream" and "downstream" approach.

The "upstream approach" starts from the source document in the original language (the input) and aims to answer the following question: "**Are source documents protected by copyright and how does that affect the right to translate them?**"

The "downstream approach" refers to the translations in the target language (the output) and intends to answer the following question: "**Are translations protected by copyright and how?**"

Between the upstream and the downstream (the input / the output), database rights may come into play, in particular when considering machine-aided translations. In this context, the following main question will be examined: "**Are databases which contain source documents and translations protected and how?**"

This Study was carried out mainly as a desk research of accessible sources and verified by national experts of Bird & Bird LLP in the countries under examination. It focuses on the law of the European Union and on the national law of four countries, i.e., Belgium,

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France, Germany, and the UK. These countries have been selected in order to provide a first overview of the current legal situation in certain Member States of the European Union. Selection was not easy and can always be challenged. As part of the selection of the countries to examine, the legal and/or copyright tradition was taken into consideration. It was therefore decided to cover one country of common-law tradition (the United Kingdom) and one country with an old and vivid copyright tradition (France).We appreciate that the Study does not provide a full review of the current state of mind on the topic within the European Union and that certain European Union countries would have provided for more recent legal frameworks worth analysing. Again, this Study should be seen as a first step.

We wish to thank the persons who provided critical insights and guidance for various parts of the Study, in particular (in alphabetical order): Mrs Valérie Budd (Bird & Bird, France); Mrs Ulrike Gruebler (Bird & Bird, Germany); Mrs Rebecca O'Kelly (Bird & Bird, UK); Mr Michael Schidler (Bird & Bird Germany); Mr Marc Schuler (Bird & Bird, France); Mr Phil Sherrell (Bird & Bird, UK); Ms Charline Van Hoeck (Trainee from Liège University, Belgium).

Chapter 1. Scope of the Study

May an original literary work be translated? Are translations protected? Can court decisions and official documents, works in the public domain be translated? Are databases containing original works and their translations protected? How is the respective ownership of original works, translations and databases resolved? **All these questions are at the core of this Study which focuses on intellectual property rights.**

The notion of "intellectual property" is defined by the World Intellectual Property Organisation Convention (article 2(viii)) as follows: *"Intellectual property" shall include the rights relating to: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."*

The term 'intellectual property' refers therefore broadly to the creations of the human mind. Creators are granted exclusive rights over their creations under international, European and national legal instruments.

This Study concentrates on **copyright** and **database rights**, which are intrinsically linked and of particular importance when addressing issues related to human and machine-aided translations. .

The Study also provides a specific attention to the impact of new technologies and new business models in the global translation industry.

In a synthetic form, this Study aims at providing legal information and clarification with a view to answer the following three key questions:

Excluding this chapter, this Study is divided into seven main chapters.

- **Chapter 2** ("*The development of machine-aided translations*") aims at explaining the basic technical aspects of machine aided-translations. It is a necessary step in order to grasp some of the legal issues which will be examined in the following chapters and sections. Chapter 2 will also be the first occasion to describe the upstream-downstream approach we adopted for the purpose of this Study.

- **Chapter 3** ("*General legal framework: copyright and database rights*") ambitions to present the relevant legal background with regard to copyright and database protections at international, European Union and national levels. Principles of territoriality, national treatment and reciprocity will also be briefly discussed.

Chapter 3 will notably shed some light on the complexity of copyright systems within the European Union and the disparities between Member States.

- **Chapter 4** ("*Copyright protection of source documents (upstream approach)*") is a **core chapter** of this Study. It aims at answering the underlying and fundamental question as to whether sources or materials to be translated are protected under copyright. The term "upstream" echoes the source materials that pre-exist and are used by individuals and/or into machines/databases in order to generate a new 'work' downstream, i.e., the translation.

  The following copyright issues are covered in chapter 4: works eligible for protection, derivative works, conditions of protection, ownership and transfer of rights, exclusive rights and exceptions to such rights, infringement and remedies. Particular attention will be paid to the notion of "originality", which is the essential requirement for copyright protection.

- **Chapter 5** ("*The right of translation*") intends to provide some essential information regarding the legal status of the right of translation.

- **Chapter 6** ("*Copyright protection of translations per se (downstream approach)*") is the second **core chapter** of this Study. It aims at examining the main intellectual property protection of the translations themselves, including machine-aided translations. This is the so-called "downstream" approach.

  The chapter starts by providing a detailed analysis of the legal status of translations. Afterwards, a distinction is made between translations, on the one side, and other derivative works, on the other side. Translations are then contemplated as possible subject-matters of copyright protection. In that regard, a particular emphasis is put on the "originality" requirement. The chapter pursues by providing specific guidance with respect to machine-aided translations. Finally, translations will be envisaged under another angle, as a possible infringement of the copyright on the source documents.

- **Chapter 7** ("*The protection of translation tools by database rights*") is the third **core chapter** of this Study. It intends to demonstrate that issues related to database are of substantial importance when discussing machine-aided translations. After providing a short view on the general legal framework around databases, the chapter continues with the particular protection of databases under European Union law. Chapter 7 will especially distinguish between protection of a database as such under copyright, and protection of a database under the European Union-specific *Sui Generis* right. At the end of that Chapter we will try to draw preliminary findings regarding the protection of translation tools under database rights.

- **Chapter 8** ("*Translation contracts*") closes this Study. Its aim is to provide a short and practical analysis of basic principles applicable to translation contracts. It does not intend to be exhaustive. More specifically, general provisions applicable to translations contracts as well as provisions related to copyright in these contracts will be examined.

Chapter 2. The development of machine-aided translations

This Study not only analyses traditional translations but also looks at the use of technological means to generate translations. Although we do not aim at analysing the technical aspects related to machine-aided translations, some basic background information is nevertheless required in order to grasp some of the legal issues examined in the following chapters and sections.

Translation is commonly known as "*the process of translating words or text from one language into another*"[2]. More precisely, it refers to the communication of the meaning of a word or text from a source-language into a target-language.

Such process typically requires human intervention.

However, with the rise of technology and due to the increasing need of translations for multiple purposes, engineers have elaborated in the past decades technological tools to either aid human translators or provide fully automated translations (known as "machine translations" – see below). The Internet has further enabled the improvement of technological tools and allowed for the worldwide dissemination of translation tools and databases.

Accordingly, the translation industry is itself progressively relying on machine-aided translations: "*Information technology is playing an ever increasing role in translators' daily work*"[3]. Some even say that "*we should look at translation data in the same way as the medical industry treat human genome data*"[4].

Terminology databases

Among the various translation tools available worldwide, we first note the existence of "*terminology databases*". These are typically terms or phrases banks with correspondences in one or more languages, very much like a dictionary. At European Union level, the IATE database (Interactive Terminology for Europe) is a perfect example of such banks. It exists and is shared by all the European Union institutions since 2005. It is available to the public since 2007.

Translation memory

A more complex translation tool, and particularly relevant in the framework of this Study, is the "*translation memory*", also known as "*TM*". A basic translation memory process can be represented as follows:

[2] *The Oxford English Dictionary*.
[3] European Commission, 'Translation tools and workflow' [2012] Publications Office of the European Union 3.
[4] J. van der Meer, 'Choose your own translation future' (TAUS 2013) <https://www.taus.net/articles/choose-your-own-translation-future> accessed April 2014.

In short, translation memories are linguistic collections of 'small' pieces of text and their manually produced translations. Translation memories are typically used to support human translators and continually capture translations for future uses.

Typically, a computer program will first cut the source text into 'segments' of two words or more, based on different rules for each language. Segmentation rules vary from one computer program to the other and specific segmentation rules are created internally by the maker of the translation memory. As a second step, the translated text is also cut into segments and aligned at sentence level with the source text.

When using translation memories, the computer program will cut the source text to be translated and look for matches in the database of previously translated source-target pairs. Such matches will be presented to the human translator who can then accept, modify or replace the proposed translation(s). Once the text is finally translated, both the source and the newly translated texts are inputted into the system in order to feed it further and improve future translations.

With certain translation memories, only matches with a high percentage will be suggested to the translator. Other translation memories systems will also suggest so-called 'fuzzy matches' which are similar to a certain degree only, the translator being informed at the same time about the degree of relevancy of the match.

Two main features of translation memories should be kept in mind at this stage: they require a human intervention and the creation of a database of segment matches, which continuously evolves.

Machine translation

A third translation tool is the "*machine translation*", also known as "*MT*". It is a different technology, not to be confused with translation memories. It analyses a source text in one language and outputs an equivalent text into the target language. In such case, "*a document is roughly translated from a source language into a target language on the basis of a system of dictionaries and linguistic rules or by using statistical techniques*"[5].

Fundamentally, machine translations perform simple substitution of words or phrases from the source language into the target language. However, the complexity of language makes that such basic word-by-word, or even phrase-by-phrase, automated process shall not produce a quality translation. Hence, in order to handle linguistic differences and complexities, machine translations rely on statistical data and thereby identify more sophisticated and more accurate patterns in existing texts which have already been translated by humans. Statistical machine translations are thus not based on mere linguistic rules and exceptions but on the frequency of a given translation for a given word or phrase.

[5] European Commission, 'Translation tools and workflow' [2012] Publications Office of the European Union 12.

Machine translations therefore require the availability and analysis of massive amounts of texts and of their translations. The accuracy of a translation made by machine depends indeed very much on the size of the database containing pre-existing translations. In order to reach that critical size of such database and increase it, some machine translation providers rely on existing translations of international organisations (including the European Union) or on the texts available on the websites which are available in various languages.

Translations made by machine translations differ therefore from translations made using translation memories. **While in machine translations the system makes an 'educated-guess' of what the best translation should be, in translation memories, the human translator is provided with multiple suggestions to choose from.** However, in some cases, machine translations also rely on the users' input, i.e., the users are sometimes given the opportunity to modify the machine translation and thus improve the system.

Concluding remarks on machine-aided translations

In light of the above considerations, it appears that machine-aided translations always require a database with correspondences between a source document (in the source language) and an existing translation (in the target language), which have been verified by human translators.

As explained in the Introduction to the Study, this configuration can best be apprehended through an **upstream approach** (the rights on the translation data collected in the database) and **downstream approach** (the rights on the translation made through machine-aided translation).

Chapter 3. General legal framework: copyright and database rights

In order to apprehend some of the main intellectual property right issues around translations, it is necessary to take into account the multiple legal sources of protection of literary and artistic works[6] under copyright and database rights at international, European Union and national levels.

These rights have a common basic framework and harmonisation efforts have been made on major aspects of copyright and database laws. Nevertheless, the national discrepancies remain material. They impose examining and taking into account national legislations and their interpretation laid down in case-law and the legal literature.

In this Chapter, we aim at providing a general overview of the legal framework at these various levels (international, European Union and national), and at highlighting the important instruments that are to be taken into consideration when addressing copyright and database rights, and when considering works of translation in general.

It shall therefore be borne in mind that when considering the protection of source documents and translations in the European Union, one shall take into account:

- norms at international level, including copyright treaties and trade agreements;
- norms at regional level, and in particular of the European Union; and
- norms at national level.

This Study does not aim at analysing issues in relation to territoriality, national treatment, jurisdiction and conflicts of laws. The following fundamental principles shall nevertheless be reminded in that respect:

- The **territoriality** principle refers to the fact that copyright is of a territorial nature and that national laws can only rule on conducts occurring within national borders. This has been confirmed by the Court of Justice of the European Union in *Lagardère*, wherein it states that "*it must be emphasised that it is clear from its wording and scheme that* [the Rental and Lending Directive] *provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory*"[7].
- The **national treatment** is a basic principle under international copyright norms according to which a country must accord to the nationals of other countries, party to the same international instruments, treatment no less favourable than

[6] "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." Although the Berne Convention does not provide for the protection of databases, the list of works mentioned under this article 2 is not exhaustive. [Berne Convention 1886 s 2(1)].

[7] CJEU 14 July 2005, case C-192/04, *Lagardère Active Broadcast v SPRE, GVL and CERT* ("Lagardère"), para. 46.

that it accords to its own nationals with regard to such rights[8]. There are however certain exceptions to this principle.

Also, it shall be noted that "*national treatment under the copyright treaties, although not strictly speaking a choice of law rule, often operates as a choice of law rule in practice, subjecting foreigners and national alike to the law of the protecting country*"[9].

- **Reciprocity** is the negation of the national treatment principle as it refers to making protection, or the extent of protection, in a given country (A) of copyright or related rights of nationals of another country (B) conditional on the existence of the same (or at least similar) extent of protection granted in that other country (B), to the nationals of the country concerned (A)[10].

The above principles are necessary in the field of copyright because copyright laws are not identical from country to country. Indeed, international treaties provide for minimum standards only. Member countries of such treaties may therefore provide for additional protection. Also, treaties do not cover some important issues such as ownership and transfer of rights.

Similarly, at European Union level, in spite of the existence of several instruments which aim at harmonising copyright protection, there currently is no common and fully harmonised protection. Copyright laws remain territorial in each Member State.

[8] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 297.
[9] P. Goldstein and B. Hugenholtz, *International Copyright - Principles, Law, and Practice* (3rd, Oxford University Press, New York 2013) 207.
[10] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 306.

Section 1. International legal sources

There exists no uniform international copyright instrument that would automatically confer uniform protection to literary and artistic works worldwide. However, international treaties, conventions and trade agreements were established as from the 19th century in order to ensure a minimal level of legal protection to creators, to authors.

The main international instruments of copyright law are the following.

The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (the "**Berne Convention**") counts 167 contracting parties and is administrated by the World Intellectual Property Organization (the "**WIPO**").

The Berne Convention, influenced by the French *droit d'auteur*[11], is the first instrument of international copyright law. It was established by civil law countries with a view, in substance, to address (i) the lack of international copyright standards; (ii) the diversity of conflicting rules between countries and; (iii) the increasing need to prevent international piracy of literary and artistic works.

Since it entered into force, the Berne Convention has undergone multiple revisions and remains today one of the most – if not the most – important instrument for copyright protection worldwide. This is particularly important for the issues related to derivative works such as translations. As will be demonstrated in the following sections, the legal protection of translations is harmonised in the European Union only to a very limited extent[12].

One of the main provisions of the Berne Convention (article 5) requires the signatories to recognize the copyright on works of authors from other signatory countries in the same way as they recognize copyright protection to their own nationals (principle of "national treatment").

The Berne Convention also requires Countries of the Union to provide robust minimum standards of copyright law and provides that copyright protection under the Berne Convention must be automatic, prohibiting therefore any requirement of formal registration. It further provides that the right holder is the person who created the work and expressed its personality in such work.

The Berne Convention provides for a large number of substantive rules of protection. It serves as the basis for the elaboration of relevant national laws on copyright. It is however a matter for contracting parties to determine their own enforcement measures through the elaboration of their own domestic laws.

Finally, we note already at this stage of the Study that **the Berne Convention refers explicitly to the protection of translations of literary or artistic work and to official translations of official texts of a legislative, administrative and legal nature** (article 2). It therefore represents an important legal source when considering the protection of translations and of derivative works in general.

In the same vein, we already highlight the fact that the Berne Convention provides that collections of literary or artistic works, given the selections and arrangement of their content, which constitute intellectual creations, are to be protected as such. Accordingly, a protection of database is recognised by the Berne Convention.

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[11] In contrast with the Anglo-Saxon concept of "copyright".
[12] See in particular Chapter 6, Section 1.

The Universal Copyright Convention

The Universal Copyright Convention was adopted in Geneva on 6 September 1952, was revised on 24 July 1971, has 40 contracting parties, and is administrated by the United Nations Educational, Scientific and Cultural Organization (the "**UNESCO**").

The Universal Copyright Convention was adopted after a succession of international meetings held under UNESCO auspices and was initially signed by thirty-six states. The basic purpose of the Universal Copyright Convention was to ensure and secure multilateral relations between countries of the Berne Union, on the one hand, and the many countries outside the Berne Union (mainly the United States but also several Latin American countries, the Soviet Union and African and Asian nations), on the other hand.

When drafting the text, the challenge was thus to find a fair compromise to satisfy Berne Union countries as well as non-Berne Union countries. Consequently, in order to accommodate the United States, the text *inter alia* entitles contracting States to impose formalities as a condition of copyright protection. On the other hand, to satisfy Berne members, the text provided that the copyright owner's use of a simple form of copyright notice would suffice for foreign works to comply with all domestic formalities.

Besides, the text of the Universal Copyright Convention expressly determines its relationship with the Berne Convention: it is independent from the Berne Convention but shall not, in any way, affect Berne Convention provisions. In other words, in the event of conflict between the two texts, the terms of the relevant Berne text will govern. Furthermore, in order to avoid Berne Union countries to abandon Berne membership, the 1971 Paris Act (revising the initial text) provides that the Universal Copyright Convention will not be applicable among Berne countries[13].

Regarding its content, the Universal Copyright Convention provides for similar principles as the Berne Convention, such as the national treatment obligation. Moreover, contracting States must as a minimum give these works "*adequate and effective*" protection and grant four exclusive rights: reproduction by any means, public performance, broadcast, and translation. **The exclusive right of the author to translate its work is therefore also explicitly provided for in the Universal Copyright Convention.**

The TRIPS Agreement

The Agreement on Trade-Related Aspects of Intellectual Property Rights (the "**TRIPS Agreement**") was adopted in Marrakech on 15 April 1994, has 159 contracting parties[14], and is administrated by the World Trade Organization (the "**WTO**")[15].

The TRIPS Agreement was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade ("**GATT**"). It introduced intellectual property rights into the international trade system. It sets down minimum standards for many forms of intellectual property rights, including for copyright. The TRIPS Agreement has led to an effort towards the extension of copyright protection on a uniformed basis throughout the world and of the enforcement of intellectual property rights.

It builds on the Berne Convention, where article 9 of the TRIPS Agreement explicitly provides that its member countries are required to comply with articles 1 through 21 of the Berne Convention and the Appendix thereto (with the exception of article 6*bis* related to moral rights).

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[13] Universal Copyright Convention, 1971 Paris Text, Appendix Declaration Relation to Article XVII.

[14] Including the European Union (Council Decision (of 22 December 1994) concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994)).

[15] The TRIPS Agreement corresponds to Annex 1C to the Agreement establishing the World Trade Organization.

The TRIPS Agreement was the first international treaty that explicitly included computer programs among literary and artistic works. Also, the TRIPS Agreement explicitly refers to the protection of "databases", where, pursuant to article 10, a database will have intellectual property protection provided that it has creative aspects in the selection and arrangement of its contents.

The World Copyright Treaty

The World Intellectual Property Organization Copyright Treaty (the "**World Copyright Treaty**") was adopted in Geneva on 20 December 1996, has 91 contracting parties[16] and is administrated by the World Intellectual Property Organization[17].

The World Copyright Treaty provides for additional protections that proved necessary due to the technological evolution since the adoption of the previous international treaties. However, similarly to what was provided for in the TRIPS Agreement, nothing in the World Copyright Treaty shall derogate from existing obligations under the Berne Convention and contracting parties shall comply with articles 1 to 21 and the Appendix of the Berne Convention.

The World Copyright Treaty includes provisions related to computer programs, databases and technological measures.

The scope of protection for databases under article 5 of the World Copyright Treaty is consistent with article 2 of the Berne Convention and, partially, with the provisions of the TRIPS Agreement.

The World Copyright Treaty also requires its contracting parties to ensure that enforcement procedures are available under their national law so as to permit effective action against any infringement upon the rights covered by the treaty, including remedies to prevent further infringements.

[16] Including the European Union (Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).
[17] On the same day was adopted the WIPO Performances and Phonograms Treaty.

Section 2. European legal sources

In addition to the international treaties of which the European Union and the 28 Member States are contracting parties, a series of Directives were adopted at European Union level with the aim to harmonize the various disparate copyright laws in its Members States, notably among civil law and common law jurisdictions.

In spite of the existence of such European Union instruments in the field of copyright and database rights, **there exists at present no instrument that fully harmonises the field of copyright, nor that addresses the specific copyright issues related to translations in the European Union.** As a result, international treaties and national legislations remain important sources for Member States.

The relevant European Union instruments related to copyright and database rights are the following (in chronological order).

The Database Directive

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases[18] (the "**Database Directive**" or "**Directive 96/9**").

The Database Directive is one of the first European Union directives related to copyright. Its adoption has been driven by the need to ensure investment in the creation of databases and to create a level playing field between the creators and the makers of databases. Directive 96/9 has a relatively broad scope of application as it applies to both electronic and non-electronic databases, while it however excludes computer programs and moral rights from its scope.

Directive 96/9 establishes in substance a dual system of protection of databases (see Chapter 7 for further details):

- Database protection by an exclusive "sui generis" right recognized to database makers, valid for 15 years[19], to protect their investment of time, money and effort, irrespective of whether the database is in itself innovative ("non-original" databases). Hence, such protection applies if a substantial investment (financial, technical and/or human) was made in obtaining, verifying and presenting the contents of the database.

  We refer in this Study to the "***Sui Generis***" protection or right when addressing this particular protection.

- Database protection by (general) harmonised copyright law may apply to the structure of databases and with regard to the selection/arrangement of the contents ("original" databases).

The InfoSoc Directive

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[20], (the "**InfoSoc Directive**" or "**Directive 2001/29**").

The objectives of the InfoSoc Directive are, in substance, (i) to adapt the legislations on copyright and related rights to reflect the technological developments and (ii) to

[18] OJ L 077, 27/03/1996, p. 20–28.
[19] Although the *Sui Generis* right has a term of protection for 15 years, each substantial change to the contents of a database extends its term of protection.
[20] OJ L 167, 22.6.2001, p. 10–19.

transpose into European Union law the main international obligations arising notably from the World Copyright Treaty.

Directive 2001/29 aims primarily at harmonising certain aspects of copyright "*in the information society*", but its impact on national laws goes beyond the mere information society. Indeed, in accordance with articles 2 to 4 of Directive 2001/29, Member States are required to implement a set of exclusive rights, which are granted to specific persons (see Chapter 4, Section 6 for further details), i.e.:

- reproduction right: exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part

- right of communication to the public: exclusive right to authorise or prohibit any communication of works to the public, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them

- distribution right: the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

The InfoSoc Directive provides also for certain exceptions (or limitations) to such exclusive rights. Article 5 contains an exhaustive list of optional exceptions that Member States may implement into their national law (with the exception of temporary copying, which is a mandatory exception). Discretion is left to the Member States with regard to the transposition of such exceptions (such as with regard to the conditions and practical arrangements of such exceptions). Consequently, their transposition in the Member States differs largely. That being said, article 5(5) of the InfoSoc Directive inscribes the "three-step test", which was already known in the Berne Convention and in the TRIPS Agreement, within the *acquis communautaire*[21].

The InfoSoc Directive dates from 2001 already. Technology has in the meantime changed the ways in which content is created, distributed, and accessed. Therefore, **a revision of the European Union copyright legal framework is necessary**. The Commission[22] has accordingly decided to complete its on-going effort to review and to modernise the European Union copyright legislative framework[23]. **Such revision should be of particular interest for the translation industry, which is currently facing issues related to machine translations.**

The Enforcement Directive

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights[24] (the "**Enforcement Directive**" or "**Directive 2004/48**").

The Enforcement Directive notably implements the TRIPS Agreement at the level of the European Union. It constitutes an important instrument for the protection of intellectual property rights (such as copyright and related rights, trademarks, designs and patents) throughout the European Union.

In a nutshell, Directive 2004/48 requires all Member States to apply effective, dissuasive and proportionate remedies and penalties against those engaged in counterfeiting and piracy and so creates a level playing field for right holders in the European Union. The

[21] See Chapter 4, Section 8 for further details.
[22] European Commission'Communication on Content in the Digital Single Market' [COM (2012)789 final, 18/12/2012].
[23] As announced in the Intellectual Property Strategy: European Commission, ' A single market for Intellectual Property Rights: COM (2011)287 final, 24/05/2011.
[24] OJ L 157, 30 April 2004, p. 45–86.

aim is to have a similar set of measures, procedures and remedies, across all Member States, available for right holders to defend their infringed intellectual property rights.

In this context, it shall be noted that, as far as infringements of copyright and related rights are concerned, a comprehensive level of harmonisation is already provided for in the InfoSoc Directive (article 8(3)), which should therefore not be affected by the Enforcement Directive[25].

The Rental and Lending Directive

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[26] (the "**Rental and Lending Directive**" or "**Directive 2006/115**").

The Rental and Lending Directive was one of the first European Union directives on the issues related to copyright (before being revised in 2006). It harmonises the provisions relating to rental and lending rights as well as on certain rights related to copyright. It provides for exclusive rights to authorise or prohibit the rental and lending of works subject to copyright and neighbouring rights.

The Term Directive

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights[27] (the "**Term Directive**" or "**Directive 2006/116**").

The Term Directive harmonises the duration of protection of copyright and neighbouring rights. It establishes a total harmonisation of the period of protection for each type of work and each related right in the Member States (70 years after the death of the author for works; 50 years after the event setting the time running for neighbouring rights). Directive 2006/116 also deals with other aspects, including the protection of previously unpublished works.

The Software Directive

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs[28] (the "**Software Directive**" or "**Directive 2009/24**").

Directive 2009/24 repeals the Directive 91/250/EEC which was the first copyright instrument to be adopted following the publication of the White Paper on completing the Single Market by 1992. In view of the growing role of computer programs in a broad range of industrial sectors, adequate legal protection needed to be developed.

The Directive consequently created a harmonised framework for the protection of computer programs as literary works, including economic rights and limitations. It thus clarifies and removes existing differences between various types of legal protection in order to contribute to the proper functioning of the internal market. During the adoption process, the 'decompilation' exception has been the subject of intense discussion.

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[25] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights Recital 23 .
[26] OJ L 376, 27/12/2006 P. 0028 – 0035 (codified version – replacing Directive 92/100/EEC).
[27] OJ L 372, 27 December 2006, p. 12–18 (codified version – replacing Directive 93/98/EEC; amended by Directive 2011/77/EU).
[28] OJ L 111, 5 May 2009, p. 16–22.

The Orphan Works Directive

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works[29] (the "**Orphan Directive**" or "**Directive 2012/29**").

Orphan works are works like books, newspaper, magazine articles and films that are still protected by copyright but whose authors or other right holders are not known or cannot be located or contacted to obtain copyright permissions.

The purpose of the Directive 2012/28 is to provide Europe's libraries, archives, film heritage institutions, public broadcasters and other organisations acting in the public interest with the appropriate legal framework to provide online cross-border access to orphan works contained in their collections.

Case-law of the Court of Justice of the European Union

The Court of Justice of the European Union (the "**CJEU**") has played an important role in the harmonization of copyright and database rights by interpreting the various directives listed above, and in particular Directive 2001/29 and Directive 96/9.

Some of the most relevant judgments of the Court of Justice of the European Union, on which we rely in this Study, are listed in **Annex 1**.

[29] OJ L 299/5, 27 October 2012, p. 5–12.

Section 3. National legal sources

As we have seen in Section 1 and Section 2 above, international treaties lay down the core principles of copyright and database protection. Various European Union Directives, as interpreted by the Court of Justice of the European Union, provide for a certain degree of further harmonization in the European Union.

However, although the copyright and database concepts applicable in Member States are similar, the threshold of protection, the exceptions, the practical implementation and the enforcement proceedings and remedies differ substantially between Member States. It is therefore **of utmost importance to take into consideration the national legal traditions, examining therefore both the applicable national legislation and its interpretation by national courts**.

As already mentioned in the Introduction, this Study focuses on the national law of four countries which have been selected in order to provide a first overview of the current legal situation in certain Member States of the European Union.

Belgium

Copyright

In Belgium, the Copyright Act of 22 March 1886 was the first legislative instrument for the protection of copyright. It regulated for over a century the copyright-related issues in Belgium, leaving its interpretation, in light of technical evolution and particular cases, up to courts.

With the evolution of technology and social practices, a need for change had arisen. The Act of 30 June 1994 related to copyright and neighbouring rights (the "**Belgian Copyright Act**")[30] was therefore adopted in order to incorporate the principles established by case-law on the basis of the previous law and, at the same time, implement the international treaties of which Belgium is a contracting party[31].

Very soon after it came into force, and contrary to the Act of 22 March 1886 which had remained in force for almost 100 years without any major change, the Belgian Copyright Act was amended on several occasions. We highlight the following two major occurrences. First, the Acts of 10 August 1998[32] and 31 August 1998[33], adopted in order to implement Directive 96/9 related to database protection. Second, the Act of 22 May 2005, adopted in order to implement Directive 2001/29[34].

In addition, Royal Decrees were adopted by the government with a view to implement various provisions of the Belgian Copyright Act.

Database rights

At the time of its adoption, the Belgian Copyright Act did not organise any database protection. Such protection has been recognised later under Belgian law with the

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[30] Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins (Wet betreffende het auteursrecht en de naburige rechten), *M.B.*, p. 19297.

[31] The Belgian Copyright Act is expected to be integrated in the Code of Economic Rights in the course of 2014 and undergo modifications.

[32] Loi du 10 août 1998 transposant en droit judiciaire belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données, *M.B.*, p. 36913.
This Law has however been repealed by the law of 10 May 2007 which transposes Directive 2004/48 (Loi relative aux aspects de droit judiciaire de la protection des droits de propriété intellectuelle, *M.B.*, p. 25694).

[33] Loi du 31 août 1998 transposant en droit belge la directive européenne du 11 mars 1996 concernant la protection juridique des bases de données, *M.B.*, p. 36914.

[34] It must however be noted that certain provisions of the law of 22 May 2005 are not yet into force, and some provisions have been replaced by subsequent Acts.

implementation of Directive 96/9, which was incorporated in Belgian law by the Acts of 10 and 31 August 1998.

Accordingly, the rights related to databases are currently enacted under:

- The Act of 31 August 1998 transposing the Database Directive and in particular the *Sui Generis* right (the "**Belgian Database Act**")[35].

- The Belgian Copyright Act, Chapter I, Section 4*bis* (articles 20*bis* to 20*quater*), with respect to the copyright protection of databases.

Enforcement and case-law

Belgian courts have the power to interpret and enforce the above-mentioned legal instruments. More particularly, the Belgian legislator adopted the Act of 10 May 2007 concerning aspects of judicial procedural law for the protection of intellectual property rights (the "**Belgian Enforcement Act**"), which notably implements the Enforcement Directive (2004/48).

The Belgian Enforcement Act contains under its Chapter V (articles 5 and 6) provisions that amend the Belgian Copyright Act, while its Chapter VI (articles 7 and 8) provides for amendments to the Belgian Database Act.

Consequently, the provisions related to the enforcement are currently enacted under:

- articles 86bis, 86ter and 87 of the Belgian Copyright Act, and articles 12quater to 12sexies of the Belgian Database Act, with regard to the civil enforcement of copyright and database rights respectively[36]

- articles 80 to 86 of the Belgian Copyright Act, and articles 13 to 17 of the Belgian Database Act, with regard to the criminal penalties relating to the infringement of copyright and related rights and to database rights respectively

- articles 79bis and 79ter of the Belgian Copyright Act, and articles 12bis and 12ter of the Belgian Database Act, with regard to the penalties and remedies relating to technological protection measures.

France

Copyright

The Act n°57-298 dated 11 March 1957 on literary and artistic property established a solid protection for authors in France. The French regime of "*droits d'auteur*" is nowadays considered as one of the most protective of authors/creators.

Authors are provided with economic and moral rights for any works of mind upon their mere creation, whatever the kind, form of expression, merit or purpose of such creation.

The Act n° 85-660 of 3 July 1985 on authors' rights and on the rights of performers, producers of phonograms and videograms and audio-visual communication enterprises further completed the existing laws and has taken into account technology evolution.

Several other Acts were and are regularly enacted since then to either implement European Directives such as for example the Act n°98-536 dated 1 July 1998 transposing the Database Directive, or to take into account some necessary evolutions such as for example the Act n°2012-287 dated 1 March 2012 regarding online exploitation of

[35] The Belgian Database Act is expected to be integrated in the Code of Economic Rights in the course of 2014 and undergo modifications.
[36] The provisions under the Belgian Copyright Act and the Belgian Database Act are very similar.

"unavailable books", the Act n°2009-669 dated 12 June 2009 regarding specific regime for authorship rights of journalists, the Act n°2007-1544 dated 29 October 2007 reinforcing civil and criminal penalties and remedies in relation to infringement and the Act n°2014-315 of 11 March 2014, strengthening the fight against counterfeiting.

The **French Code of Intellectual Property** was implemented by Statute Law n°92-957 dated 1 July 1992 and gathers all laws in relation to "*droits d'auteur*" (copyright) and "*droits voisins*" (neighbouring rights).

Database rights

The Act n°98-536 dated 1 July 1998 implemented in France the Database Directive. The legal *Sui Generis* regime applicable to database has been codified in the fourth title of the French Code of Intellectual Property under articles L.341-1 to 343-7.

In accordance with the Database Directive, the current regime of protection of database is dual: (i) the "architecture" or "container" of a database can be protected by the French "droits d'auteur" regime subject to originality, where the creator of the database will therefore enjoy all economic and moral rights of any creator of original works; and (ii) the "content" of the database which does not need to be original will be further protected under the *Sui Generis* and independent regime introduced through the implementation of the Database Directive.

As for copyright, infringement of database rights is subject to civil and criminal remedies (see Chapter 4, Section 10).

Enforcement and case-law

French courts have the power to apply and interpret, if need be, the laws in the light of the relevant decisions of the Court of Justice of the European Union. Consequently, French judges played and still play a major role in the construction of major intellectual property principles and concepts in France.

Any concept that has not been defined or whose definition is left to the national member states' appreciation will be construed by French case-law. Even with respect to concepts that are now concepts of European Union law (for instance, originality) but which were initially developed at a national level, a national flavour might subsist for quite some time. Especially when, as it is the case for "originality", for instance, its assessment in a given matter for a given piece of work is necessarily subjective and made on a case-by-case basis.

Regarding the *Sui Generis* protection for databases, case-law was developed over time by French judges in order to determine exactly the scope of the protection.

Germany

Copyright

In Germany, the first legislation covering certain aspects of copyright protection came into existence in the late 18th century. This legal framework was further extended in the 19th and early 20th century until the adoption of the first comprehensive copyright code in 1965 (*Gesetz über Urheberrechte und verwandte Schutzrechte* (the "**German Copyright Act"**). It consolidated the existing regulations as well as the case-law but also contained some modern concepts relating for example to copyright levies on copiers.

Over the years, the German Copyright Act underwent several amendments including the following:

- in 1985, the German Copyright Act was supplemented by further royalty related regulations as well as an extension of the term of protection for certain works

- directive 91/250/EEC of 14 May 1991 covering the protection of software (the former Software Directive[37] was implemented by the 2nd German Copyright Act 1993

- the Database Directive was implemented by introduction of articles 87a et. seq in the German Copyright Act.

A major amendment was introduced by the Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft 2003 which implemented Directive 2001/29/EEC. It was followed by further amendments resulting from the rapid evolution of the information technology (Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft – "Zweiter Korb").

Database rights

Before the implementation of Directive 96/9, the German Copyright Act covered the protection of databases to a certain extent through the regime of collective works. The protection of collective works by copyright depended on their evaluation as intellectual creations. Databases that do not qualify as intellectual creations could in certain cases be protected by Unfair Competition Law. However, that legal framework of protection of databases through the regime of collective works was regarded as insufficient – a need which was finally met by the Directive.

Today, the rights relating to the protection of databases are the following:

- article 4 of the German Copyright Act – collections and database works

- articles 87a et. seq. of the German Copyright Act.

Additional provisions related to specific limitations of the copyright of databases were also adopted, e.g., article 53 section 5 relating to the permissibility/requirements of reproduction for private and other personal uses; article 55a governing the prerequisites when adapting or reproducing a database; article 137g of the German Copyright Act being a transitional provision related to database works created prior to the implementation of the Directive.

Enforcement and case-law

German courts are entitled to interpret and enforce the legal framework governing copyright whereas the procedural aspects are laid down in the Zivilprozessordnung (German Code of Civil Procedure). Germany also implemented the Enforcement Directive (2004/48) when it introduced the Gesetz zur Verbesserung der Durchsetzung von Rechten des geistigen Eigentums.

The relevant provisions covering intellectual property right enforcement are as follows:

- articles 97 et seq. of the German Copyright Act relating to claims to cease and desist, destruction, recall, damages and information on the scope of the infringement

- articles 106 to 111a of the German Copyright Act relating to criminal penalties relating to the infringement of copyright/database rights

[37] Replaced by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 05 May 2009, p. 16–22.

- articles 111b to 111c of the German Copyright Act on customs proceedings

- articles 95a et seq. of the German Copyright Act relating to the protection of technology measures including labelling obligations and the prohibition of exploitation of copies regarded as illegal under that provisions (e.g., copies created by circumventing technical measures; copies from which information for rights-management has been removed or altered).

United Kingdom

Copyright

As is the case in other Member States, UK copyright legislation has undergone several iterations to ensure it remains fit for purpose in the modern age. Copyright law originated in the United Kingdom from a concept of common law as early as the 18th century in the Statute of Anne 1709. It became codified into statute with the passing of the Copyright Act 1911, which brought provisions on copyright into one act for the first time by revising and repealing most of the earlier acts. The 1911 Act *abolished formalities surrounding copyright*, *including the requirement to register copyright*, and conferred copyright protection on a number of works for the first time, including sound recordings and films. Infringement was also expanded to include translations and adaptations.

The Copyright Designs and Patent Act 1988 is the UK's current copyright act. It has been amended by various European Union Directives and other legislations since it came into force.

Database rights

The content of a database was originally only protectable in the UK by copyright under the Copyright Designs and Patent Act (as a literary work). It was only through following the adoption of the Database Directive that specific and separate legal rights (and limitations) were given to databases, implemented into the UK on 1 January 1998 in the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) . The Database Regulations created the possibility of two separate rights in databases by amending the copyright provisions under the Copyright Designs and Patent Act as they applied to databases, and also introducing a new *Sui Generis* database right.

Enforcement and case-law

Generally, UK courts have power to enforce and have precedential effect. Regarding enforcement, when it came time for the UK to implement the Enforcement Directive, it was thought that few changes were actually required to the Copyright Designs and Patent Act, however, those that were made were incorporated by the Intellectual Property (Enforcement etc.) Regulations 2006. The relevant rights and remedies are located at Chapter VI sections 96-106 in the Copyright Designs and Patent Act.

Chapter 4. Copyright protection of source documents (upstream approach)

This fourth Chapter aims at answering the underlying and core question as to whether sources or materials to be translated are protected under copyright. We refer therefore to an "upstream approach" as we envisage the protection of the pre-existing input document in the source language as original literary works, which pre-existing input document is to be translated in the target language.

The term "upstream" therefore echoes the pre-existing source materials that are used by individuals and/or into machines/databases in order to generate a new 'work' downstream, i.e., the translation.

It is essential to determine how source documents are protected under copyright law(s) as such protection will potentially limit the use of such pre-existing source material and thus limit the right to translate such pre-existing works and/or to store them in a database (such as a translation memory database).

In the following sections we review the main principles of copyright and cover issues such as the works eligible for protection, conditions of protection, ownership and transfer of rights, derivative works, exclusive rights and exception to such rights, infringement and remedies.

As it will be developed in Chapter 6 of this Study, which is dedicated to the protection of the translations as such, translations may be protected as 'original works' under copyright. Consequently, although the following sections in this Chapter 4 primarily concern pre-existing source documents (input), the principles explained here also apply mutatis mutandis to a large extent to works of translation (output).

Section 1. Protected works and works excluded from protection

General overview of protected works

As to the question of "what can be protected", article 2 of the **Berne Convention** presents a broad non-exhaustive list of protected works under copyright (article 2(1)):

> *"The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."*

It derives from that list that copyright protection has a broad scope but that it requires the intellectual human intervention and the consciousness of achieving a result, and thus, excluding raw data such as weather forecasts, stock quotations or sports scores.

For the purpose of this Study, among the different categories of protected works, literary works will particularly be under high scrutiny.

Literary works can take several forms. The notion covers both written and oral works, as long as an intellectual effort has been made. Literary productions in their traditional sense are protected, but protection can also apply to shorter works, such as slogans, brochures, catalogues, nomenclatures, forms, etc. Encyclopaedias and anthologies will also be covered by copyright if, by reason of the selection and arrangements of their contents, they constitute intellectual creations as such.

The **European Union** legal framework does not provide for a list of protected works like the Berne Convention does. Consequently, Member States have implemented article 2(1) of the Berne Convention in their national frameworks. The countries covered by this Study, (namely Belgium, France, Germany and the UK) have kept the same approach as in said article 2(1). Each of them indeed provides for a non-exhaustive and non-limitative list of some of the works that may be protected by copyright[38]. This approach implies that as a matter of principle, any work can enjoy copyright protection as long as it meets the further legal requirements for such protection (see sections below).

Works excluded from protection

Because they do not meet the fundamental requirements for copyright protection, copyright statutes and treaties (particularly **TRIPS Agreement** (article 9.2) and the **World Copyright Treaty** (article 2)) exclude from copyright protection mere ideas. However, the expression of such ideas may be protected.

UK law places particular emphasis on the formal expression of an idea as being at the heart of copyright protection. Hence certain forms may not be protected by copyright, e.g., technical features such as the functionality, programming language and interfaces

[38] See in particular article 1 of the Belgian Copyright Act; article L.112-2 of the French Code of Intellectual Property; articles 2 to 4 of the German Copyright Act; and sec. 1 of the Copyright Designs and Patent Act.

(such as data file formats) of computer programs are not themselves protected by copyright although the software's source code which creates them is.[39]

In the same vein, because their subject matter is considered as being outside the scope of copyright protection, mathematical concepts, methods of operation, gambling procedures and other intellectual tools are also excluded from copyright protection.

Works which are in the public domain

Authors of protected works benefit from copyright during their entire life, and these rights are maintained for a period of 70 years after their death (or the death of the last author), before falling into the public domain. In European Union Member States, the initial length of protection was of 50 years after the author's death (as it is still prescribed by article 7(1) of the Berne Convention) but Directive 2006/116/EC increased the protection term to 70 years.

Once a work falls into the public domain, it means that it can be freely exploited, reproduced or executed. No authorisation is needed and no royalties must be paid. However, some Member States have established a system of "*domaine public payant*". It is the case in Italy and the question is currently highly debated in France. Such system implies the payment of a royalty, for the use of a work comprised within the public domain, which will be bestowed to cultural purposes.

Special categories of works: official texts

With respect to official texts of a legislative, administrative and legal nature (and to official translations of such texts), the Berne Convention leaves it to national legislators to determine the protection granted to such works (article 2(4)). Similarly, it is a matter for national legislation to exclude from copyright protection, wholly or partially, political speeches or speeches delivered in the course of legal proceedings (article 2*bis*(1)).

The situation in the four countries under scrutiny in this Study is examined more in details in Chapter 6, Section 8 dedicated to 'Translation of official texts and unofficial translations'.

In this respect, the status of European Union publications is not very clearly regulated. On the one hand, there is no legal provision at the European Union level, as it is the case under national laws, which stipulates that legal texts such as Regulations or Directives fall within a category of works are deprived of copyright protection. The "Legal notices and copyright" contained within the "Information Provider's Guide"[40] and the section related to copyright in the "Interinstitutionnal style guide"[41] (these two documents emanate from the European Union institutions) both tend to go in the opposite direction: they provide for that the European Union owns a copyright on all official publications of the Union institutions or bodies. It does therefore not seem that the official texts of the European Union are legally excluded from copyright protection. That being said, the reuse policy of the European Commission[42] aims at increasing the use and the spread of the European Union information, also to foster innovation. Hence we believe that the official texts of the European Union fall under that policy and should be easily and freely reused despite their possible copyright protection, in accordance with the provisions laid down under Decision 2011/833/EU, hence, among other things, under reservation of the exclusive rights of third parties.

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[39] In *SAS Institute Inc v World Programming Limited* [2013] EWCA Civ 1482 Lewison LJ found that both the Software and the InfoSoc Directives incorporated the underlying principle from the Berne Convention that it was the form of expression rather than the underlying idea which was protected. The Court of Justice of the European Union found that whether it applied the Software Directive or the InfoSoc Directive, the functionality of the software in issue was not protected given that the functionality was the idea, but the source code was the expression in which that idea was embodied.

[40] Available at <http://ec.europa.eu/ipg/basics/legal/notice_copyright/index_en.htm>.

[41] Available at <http://publications.europa.eu/code/en/en-250302.htm>.

[42] The reuse of Commission documents is regulated by Decision 2011/833/EU of 12 December 2011, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:330:0039:0042:EN:PDF>.

Section 2. Formal requirements

Fixation of the work

An author has copyright over his work by the mere fact of its creation, whether that work has been published or not.

A work is therefore protected even if it is incomplete and regardless of its commercialization and disclosure[43].

However, there is a fundamental limit in that respect, i.e., that works (or categories of works) shall not be protected unless they have been (or are capable to be) fixed in some material form. This requirement derives from the Berne Convention.

The situation regarding the fixation of the work in some kind of material form in the four countries under scrutiny in this Study may be summarised as follows:

	 Belgium	 France	 Germany	 UK
The creation must be capable of representation (concrete form). The protection of mere ideas or concepts is thus excluded	✓(1)	✓	✓(1)	✓
The creation must be fixed in some kind of material form to be protected.	×	×	×	✓

(1) This requirement does not expressly appear in the Belgian and German statutes. However, it is settled case-law in these countries that this condition must be fulfilled.

Absence of formality

Copyright protection is granted to all literary and artistic works as from their creation, without any formality requirement (article 5(2) of the Berne Convention). This absence of any formality requirement contrasts with other types of intellectual property rights such as trademarks, patents and designs which require, as a general rule, some formal registration process. It makes it particularly difficult sometimes to determine who the author(s) of a work is/are or simply conclude whether a work is protected by copyright.

The situation regarding the absence of formality in the four countries under scrutiny in this Study may be summarised as follows:

	 Belgium	 France	 Germany	 UK
There is no formal requirement (such as registration, deposit or other formality) imposed by national law (copyright arises as soon as the work is created)	✓	✓	✓	✓

[43] The absence of a communication to the public, or more generally the absence of disclosure, raises however problems in terms of proof, e.g., of the date of the creation.

Section 3. Originality

When considering the question as to "what is protected", the fundamental question comes down to the originality of the work. Although it is not always clearly mentioned in all relevant legislative instruments, this criterion represents the most important and fundamental requirement for copyright protection.

Originality at international and European Union levels

At international level, the **Berne Convention** provides for that the author maintains right in his "*original work*". It does however not define such concept. The **World Copyright Treaty** does not provide more guidance: it merely indicates, in the framework of articles 6 (right of distribution) and 7 (right of rental), that the term "original" refers exclusively to fixed copies that can be put into circulation as tangible objects.

At European Union level, the originality has gained clarity over time. The following European Union Directives recognise the criterion and provide some guidance:

- **The Software Directive** provides for that a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation; and that no other criteria shall be applied to determine its eligibility for protection (article 1(3)). Recital 8 further specifies that in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied.

- **The Term Directive** provides for that a photographic work is to be considered original if it is the author's own intellectual creation reflecting his personality, and that no other criteria such as merit or purpose should be taken into account (recital 16 and article 6).

- **The Database Directive** provides for that no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and that in particular no aesthetic or qualitative criteria should be applied (recital 16).

By contrast, the **InfoSoc Directive** does not refer to the originality criterion. Consequently, the concept of originality in the European Union shall be interpreted in light of the other copyright Directives, as interpreted by the Court of Justice of the European Union.

The Court of Justice of the European Union has had the opportunity to clarify the originality requirement in several cases related to the above Directives. The following judgments all concern the interpretation given to the originality criterion in the European Union:

- *Infopaq I*: based on the originality criterion in the Term, Software and Database directives, the Court of Justice of the European Union concluded that a work which is original in the sense that it is the author's own intellectual creation, is protected as work in the meaning of the InfoSoc Directive (paragraph 37)[44].

  More importantly for this Study, the *Infopaq I* judgment brings a certain guidance with respect to certain types of works that can be protected by copyright.

  In *Infopaq I*, the Court of Justice of the European Union defines indeed *en passant* the condition for newspaper articles, and parts of such works, to be protected by

[44] To generalize the existing definition of originality contained in some European Union Directives, the Court of Justice of the European Union relied on the Berne Convention and on the notions of "work" and "intellectual creation".

copyright: the Court concludes that "*regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation […] given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences*[45] *in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article*".

- *BSA*: the Court of Justice of the European Union concluded that a computer program's graphic user interface can be protected by copyright provided it is the author's own intellectual creation. Whether the originality requirement is fulfilled in the actual case is left to the national court to decide (paragraphs 45 and 51).

- *Premier League*: the Court of Justice of the European Union applied its conclusion in *Infopaq I* in this case, which was related to football matches, and concluded that such sporting events, as such, do not constitute a protected work as they are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright (paragraphs 97 to 99). The Court of Justice of the European Union nonetheless indicates that sporting events, as such, have a unique and, to that extent, original character which can transform them into subject-matter that is worth a protection comparable to the protection of works, and that such protection can be granted, where appropriate, under the various domestic legal regimes of the Member States (paragraph 100).

- *Painer*: building on its previous judgments, the Court of Justice of the European Union clarified the harmonized originality criterion by deciding that (i) copyright is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation; and that (ii) the creation is the author's own when the author has been able to express his creative ability by making free and creative choices (paragraphs 88 to 93). With regard to photographs, the Court of Justice of the European Union referred to an *a contrario* application of its reasoning in *Premier League* and concluded that the author of photographs, including portrait photographs, can make various choices (e.g.: choose the background, pose of the person being photographed and the lighting) and can therefore stamp the work with his personal touch, and that the degree of freedom which is available to the photographer to exercise his creative abilities will not necessarily be minor, let alone non-existent (paragraphs 91 to 93).

- *Football Dataco II* (database-related case): the Court of Justice of the European Union refers to *Infopaq I*, *BSA* and *Painer* and concludes that the criterion of originality is not satisfied when the construction of the database is dictated by technical considerations, rules or constraints which leave no room for creative freedom.

A first lesson from the above case-law of the Court of Justice of the European Union is that a harmonised European Union originality criterion applies to a very broad range of works, and not only to those works that are specifically comprised in the Software, Database and Term Directives. Consequently, **the originality criterion as interpreted by the Court of Justice of the European Union applies for instance to all "works" falling under the InfoSoc Directive**, in spite of the absence of recognition of the originality criterion in such Directive.

[45] The facts of the *Infopaq I* case show that the reproduction concerned the 11 first consecutive words of newspaper articles.

The second lesson is that a creation qualifies as a "work" if the following three conditions are fulfilled:

- the creation is the author's own original creation
- the creation reflects his or her personality
- the author, in conjunction with the creation of his/her work, has been able to express his/her creative ability by making free and creative choices and thus stamping his/her personal touch on the work.

Source documents to be translated will therefore generally be protected under copyright in the European Union. Similarly, short segments (bits and pieces of such source documents and translations) may also be protected by copyright. The length of a work is indeed not *per se* a pertinent criterion to assess originality.

The length of a work is however not completely irrelevant for the purpose of copyright protection: it will indeed have an impact on the fulfilment of the other criteria for copyright protection.

In spite of an increasing harmonisation at European Union level of the various conditions for the copyright protection of literary and artistic works, and in particular with regard to the originality criterion, **it remains for national courts to assess whether the conditions are met on a case-by-case basis**.

Consequently, the criteria remain, to a certain extent, variable concepts the concrete application of which can vary from one Member State to the other. Hence, a source document may very well be protected in one Member State but not in another, depending on the concrete threshold applied by national courts in the framework of the above conditions and criteria.

As it follows from the table below, all four countries examined in this Study require the work to be original. However, as detailed below, there are some discrepancies in the way such condition is actually incorporated under national law.

	 Belgium	 France	 Germany	 UK
The creation must be original on its own	✓	✓	✓	✓
The originality requirement is expressly provided in the statute	x	x	✓	✓

Originality in Belgium

Even though the provisions of the Belgian Copyright Act do not explicitly spell out the condition of originality, it is commonly accepted by courts and scholars that originality is the main criterion to be appreciated.

Originality in Belgium does not require novelty or any assessment on the quality of the work. Also, the length of a work is irrelevant when assessing its originality for copyright purposes under Belgian law. Nonetheless, fulfilling the originality criterion with a (very) short literary work will be more difficult as it will be harder to establish the author's stamp in a work comprising only a few words.

In that context, everybody was extremely surprised when the Belgian Supreme Court decided in a judgment of 26 January 2012[46], without stating reasons and in contradiction with its own well-established case-law, that for a work to be protected by copyright "*it is not required that the work bears the imprint of the personality of the author*" (our own translation). That decision has been immediately criticised. And heavily so. It was indeed in blatant contradiction with the subsequent case-law of the Court of Justice of the European Union (notably the *Painer* and *Football Dataco II* judgments). The Supreme Court revisited its conclusion in a decision of 31 October 2013[47], where it concluded that copyright may apply only in relation to an object which is original in the sense that it is the author's own intellectual creation; that an intellectual creation is the author's own when it reflects his personality; that this is the case when the author has been able to express his creative abilities when making the work by making free and creative choices.

It derives from the foregoing, and in light of case-law, that under Belgian law a literary work will be rather easily protected by copyright and thus allow the author(s) benefiting from exclusive rights, including the right to have such work translated.

More specifically, the *Infopaq I* judgment of the Court of Justice of the European Union has influenced several important Belgian court decisions, in particular in a case involving the reuse of press articles – i.e., the Copiepresse *v.* Google case[48]. In that matter, the Brussels Court of appeal had to consider whether the reproduction of the titles and the first three lines of the articles posted on the websites of the Belgian newspapers were infringing copyright. In addition to asserting that articles of daily newspapers benefit from copyright protection, the Court stated that "*as regards the sections of a work, it should be borne in mind that there is nothing in the Directive or in any other relevant directive to indicate that these sections should be treated differently than the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work and they contain elements which are the expression of the intellectual creation of the author of the work*"[49] (our own translation).

We can therefore reasonably consider that under Belgian law, data consisting of short samples of literary works, such as news article titles, associated (or not) with the first sentence of each article will be, at least for a large number of them, protected by copyright.

Originality in France

French courts have defined and construed the concept of "originality" as being an expression of the author's personality. In this respect, an original piece of work will reflect, or be stamped by, its author's personality ("*l'oeuvre doit être empreinte de la personnalité de son auteur*")[50].

Depending on the piece of work, judges may further refer to other concepts. For example in relation to software, it is not seldom that the French Courts refer to concepts such as the "intellectual contribution of an author"[51].

The assessment of originality is made at the date of the creation of the work concerned and will not require taking into account other considerations such as novelty or quality. Accordingly, originality may result from the transformation and combination of different elements that already exist wherever such transformation or combination creates

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[46] Cass., 26 January 2012, (*Artessuto vs. B&T Textilia)*, role number C.11.0108.N; F. Brison, 'Copyright Harmonisation and Belgian Copyright' in *Harmonisation of European Law – From European rules to Belgian law and practice* (Bruylant-Larcier, Brussels 2012)53.
[47] Cass., 31 October 2013, *(M-Designe Benelux vs. Geoffrey Bontemp, Interfire and Desloover)*, role number C.12.0263.N.; H. Vanhees, ' Originaliteit in het auteursrecht: het Hof van Cassatie sluit zich aan bij de rechtspraak van het Hof van Justitie' [2014] RW 1464.
[48] Bruxelles, 5 May 2011 (*Copiepresse v. Google*), *A. & M.*, 2012, p.202.
[49] The Brussels Court of appeal refers explicitly to the *Infopaq I* judgment.
[50] See for instance Paris Appeal Court, November 24, 1988, *Cahier Droit d'auteur*, juin 1989 p.4.
[51] See for instance French Supreme Court, Assemblée plénière, March 7, 1986, *Dalloz* 1986, 405.

something else, no matter what element makes it different. Further, the length of a work is irrelevant when assessing the originality under French law.

Originality in Germany

The German approach towards copyright protection is in line with the regimes adopted in many Continental European countries.

Originality requires the work to be the result of an individual, intellectual process[52]. The personal expression of the author has to appear in the work. In general, the work has to differ from the routine. Ordinary handicraft work is not regarded as being original even if it was carried out solid. The courts have also established the concept of "Kleine Münze"[53] which describes the lower range of originality necessary to gain copyright protection.

Under German Copyright Law there was a tendency to require a high level of individuality although the jurisdiction differed between the various types of work. This applied in particular for literary works not being belletristic[54]. This distinction has been widely criticized and in particular for scientific and technical texts the jurisdiction does apply common standards[55]. Further to that, the German Federal Supreme Court ruled in 2013 that the established standards in place for the evaluation of the originality of works of applied arts need to be lowered[56].

Originality in the United Kingdom

Literary, dramatic, musical and artistic works must comply with the criterion of originality, i.e., the work must originate from its author and must not be copied from another work. This does not mean that the work must be the expression of original or inventive thought; the originality required relates to the expression of the thought and is not a subjective test regarding the 'artistic' originality or novelty. The standard of originality is low and depends on the author having created the work through his own skill, judgement and individual effort and not having copied from other works. Since the Court of Justice of the European Union's decision in *Infopaq* there is an open question as to the extent to which the UK courts will seek to import the intellectual creation test, but initial suggestions are that they will seek to avoid doing so.

[52] Dreier/Schulze, UrhG, Kommentar, 4th edition 2013, § 2, 23; Schricker/Löwenheim, UrhG Kommentar, 4th edition, 2010, § 2, 23.
[53] Dreier/Schulze, UrhG Kommentar, 4th edition 2013, § 2, 4.
[54] Schricker/Löwenheim, UrhG Kommentar, 4th edition, 2010, § 2, 32.
[55] BGH GRUR 2002, 958/959 – Technische Lieferbedingungen, Dreier/Schulze, UrhG, Kommentar, 4th edition 2013, § 2, 27.
[56] BGH GRUR 2014, 175.

Section 4. Ownership and transfer of rights

When a literary work such as a source document fulfils the (national) criteria examined here above, the "author" will enjoy certain exclusive rights (including the right to have the work translated). Before analysing such exclusive rights, their scope and their relevance to translations, we must first analyse the issues related to the ownership of such rights. Such ownership issues are indeed relevant in the process of identifying whose authorisation is required in order to translate documents or create translation memories and other tools. In that context, said analysis covers both the question of the initial ownership (the "authorship") and the question related to the transfer of such rights.

These issues are mainly regulated at national level. Only few aspects are harmonised at international and European Union levels. Indeed, the Berne Convention leaves the determination of ownership to national legislations, and the questions as to who benefits from copyright is one of the least harmonised aspects in this field at European Union level.

Sub-section 1. Authorship

The creator doctrine

Who is (or are) by law the original author(s) of a work protected by copyright?

At **European Union level**, the general question of copyright authorship is not harmonised. However, certain directives regulate this question with regard to certain types of works, such as for instance audio-visual works, computer programs and databases.

At the international level, the **Berne Convention** does not contain an explicit authorship rule. However, in application of the "*creator doctrine*", it is presumed that the author shall be the person to whom the intellectual and creative effort can be attributed[57]. Such principle is in line with the originality criterion as interpreted by the Court of Justice of the European Union and analysed in Chapter 4, Section 3).

All **European Union national legislations** refer to the creator doctrine, but in ways that differ from one Member State to the other. The situation in the four countries under scrutiny may be summarised as follows.

	 Belgium	 France	 Germany	 UK
The initial owner is the natural person who created the work	✓	✓	✓	✓(1)
In case the name appears on the work, there is a rebuttable presumption of ownership in favour of such person	✓	✓	✓	✓(2)
In case of pseudonymous or anonymous works, it is presumed in relation to third parties that the author is the publisher	✓	✓	N/A	✓

[57] J-P. Triaille, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "InfoSoc Directive")'(2013) 99.

(1) The Copyright Designs and Patent Act provides for several exceptions (e.g., in favour of the publisher in case of typographical arrangement of a published edition or in favour of the person making arrangements in case the work is computer-generated).
(2) Sections 104 and 105 of the Copyright Designs and Patent Act deal with the UK statutory presumptions regarding authorship of copyright works.

More specifically:

- In **Belgium**, the Belgian Copyright Act (article 6) expressly refers to the creator doctrine. It provides for that copyright shall belong as of its origin to the natural person who has created the work. Only a natural person can be considered as the creator of a work under Belgian law[58]. This rule is equally valid for the creation of copyright works by employees in the course of their employment (see hereunder). Pursuant to article 6 subparagraph 2 of the Belgian Copyright Act, the person whose name appears on the work benefits from a, yet rebuttable, presumption of authorship of that work. The copyright in an anonymous work, or in a work that is created under a pseudonym, is, in as far as the relationship with third parties is concerned, deemed to be owned by its publisher.

- In **France**, the French Code of Intellectual Property (article L. 113-1) establishes a rebuttable presumption of ownership: the author of a work is the person(s) under whose name the work has been disclosed. This rule is of public order. Therefore, the determination of any author status cannot be settled by agreement. Only judges will be entitled to decide who is an author or who is not. In this respect, judges will consider the original intervention of the individual or the entity involved. French case-law requires a clear involvement and will deny the status of author to mere material executants. The French Supreme Court further held that for the above presumption to apply, references to the authors' names must be clear and unambiguous[59]. For example, it was held that "with the support of" was not sufficient[60].

  The presumption will apply notwithstanding the existence of an employment agreement or services agreement. Pursuant to L. 111-1 of the French Code of Intellectual Property, a contract for hire or service by the author does not affect the author's right to authorship: all the rights of a work vest in the author of a work. Under French case-law, an employment or commissioning agreement that transfers the rights is necessary in order to transfer ownership rights from the original author to employers or commissioning parties.

  Authors of pseudonymous and anonymous works enjoy the same rights as authors, it being understood that they must be "represented in the exercise of those rights by the original editor or publisher, until such time as they reveal their true identity and prove their authorship"(article L. 113-6 of the French Code of Intellectual Property).

- In **Germany**, article 7 of the German Copyright Act stipulates that "*the author is the creator of the work*"[61] while article 1 of the German Copyright Act ensures that authors enjoy protection for their works. Thus, the German legislator also refers to the creation of a work; the mere contribution of an idea or commission of a work is generally not relevant when determining the authorship. For instance also a ghost writer is deemed copyright owner. But pursuant to article 10 presumption of authorship applies to the person designated as the author on a published work. Furthermore, only natural persons may be considered author in the meaning of the German Copyright Act[62]. Under German copyright law, the copyright itself as

[58] According to the Belgian Supreme Court, the original copyright owner is necessarily an individual, but the assignee of the right may be a legal person (Cass., 12 June 1998).
[59] Cass civ, 12 July 2007, n° 06-15134, *D*. 2007. 2170, accessible at <www.legifrance.gouv.fr>.
[60] Cass civ, 28 October 2003, n° 01-03711, JCP, 2004 II 10 053, note A. F. Eyraud, accessible at <www.legifrance.gouv.fr>.
[61] translation provided by the German Ministry of Justice and Consumer Protection.
[62] BGH GRUR 1991, 523, 525 – Grabungsmaterialien.

well as exploitation rights are not transferrable (article 29 of the German Copyright Act). These general rules also apply where the author has created the work in the fulfilment of obligations resulting from an employment or service relationship.

- In the **United Kingdom**, the creator doctrine is also referred to (sec. 9(1) of the Copyright Designs and Patent Act): the "author" of a work means the person who creates it.

It follows from such quick overview of certain particularities in four Member States that although there exists a general rule according to which the natural person creating the work is deemed the author, several statutory (or case-law) particularities must be carefully taken into account. Accordingly, **when determining the author of a source document (or a translation), national laws and specificities must be taken into account. Dealing with the wrong person will necessarily impact on the translation project, and possible jeopardise it**.

Works created by several authors

Source documents (and their respective translations) are not necessarily created by just one author. In many instances several persons will participate in the creation and finalisation process of such works. Authorship on works created by several authors may therefore be important to consider. It is regulated differently across the European Union.

The situation in the four countries under scrutiny may be summarised as follows, with a special emphasis on French law which, contrary to the other three countries, knows the concept of "collective works":

	 Belgium	 France	 Germany	 UK
The legal framework relating to copyright provides for specific ownership rules in case of works of collaboration	✓	✓	✓	✓
The legal framework relating to copyright provides for specific ownership rules in case of collective works	×	✓	×	×

More specifically:

- **Belgian law** only knows the concept of "works of collaboration". The Belgian Copyright Act provides for that where a work is the result of a collaboration, the copyright shall subsist to the benefit of all successors in title for 70 years after the death of the last surviving joint author.

- Under **French law**, a distinction is made between works of collaboration and collective works.

  A collaboration work is defined as "*a work in the creation of which more than one natural person has participated*" (article L.113-2 of the French Code of Intellectual Property, translation provided by *Legifrance*). It is the joint property of its authors (article L.113-3 of the French Code of Intellectual Property).

  A collective work is defined as a "*work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its*

production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created" (article L.113-2 of the French Code of Intellectual Property, translation provided by *Legifrance*). It is, unless otherwise proved, the property of the natural or legal person under whose name it is disclosed (article L.113-5 of the French Code of Intellectual Property).

French law further provides for some other attribution rules of authorship rights with respect to certain kinds of works where several authors are involved (see below)[63].

- In **Germany**, a distinction between joint works and compound works applies.

  A joint work is a (new) work that is created by two or more authors. Joint authors shall have the rights to exploit their individual shares in the work (article 8 of the German Copyright Act). When it comes to a publication or exploitation of a joint work, the consent of every author is required, but a single author may not deny his consent unreasonably. No author may transfer his copyright, but a joint author may waive his exploitation rights (article 8 subsection 4 of the German Copyright Act).

  Compound works are considered as a joint exploitation of existing works (e.g., the music and the lyrics of a musical) (article 9 of the German Copyright Act). In this case, the exploitation requires the consent of every author, who again may not refuse their consent unreasonably.

- In the **United Kingdom**, a work will be of joint authorship if it is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors (sec. 10 Copyright Designs and Patent Act). If the contribution is distinct then separate copyright will exist in each author's respective parts of the work. A joint author will have individual rights that can be assigned independently of the other author or authors. However, a joint owner cannot grant a license which is binding on the other co-owners, nor can a joint owner grant an exclusive licence.

In the countries that do not provide for specific rules related to collective works, the exploitation (use) of such works is generally dealt with by applying general rules related to joint authorship and transfer of rights.

Sub-section 2. Transfer of rights

Whenever the author has copyright ownership, any person who wants to exploit (use) the work – e.g., to translate or reproduce it – will have to acquire the necessary rights. Such transfer may in certain circumstances be provided for by law – such as it can be the case for employment relationships –, or by contract (through an assignment or license).

Allocation of rights on works created under employment

Except for the specific cases of database[64] and computer programs[65], general copyright ownership on works created in the framework of an employment relationship is not harmonised at European Union level. National legislations provide for highly diverging rules regarding the transfer of rights from the employee to his employer.

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[63] For software for instance, article L.113-9 of the French Code of Intellectual Property states that "Unless otherwise provided by statutory provision or stipulation, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer and he exclusively shall be entitled to exercise them"(translation provided by *Legifrance*).

[64] Article 4(1) of the Database Directive.

[65] Article 2(1) of the Software Directive.

It is not unusual to find statutory provisions providing for a presumption of transfer of rights in favour of a natural or legal person other than the creator of the work. Such regime is not counterintuitive as the employer is the person who makes the investment and takes the risks, and who should therefore be entitled to rights[66].

Although such approach is economically founded, it faces resistance in some countries.

	 Belgium	 France	 Germany	 UK
The employee-creator is the initial copyright owner on the work (no presumption of transfer in favour of the employer)	✓	✓	✓	×
The transfer of rights to the employer is imposed (by copyright or employment law, or by courts)	×	×(1)	✓(2)	✓
The transfer of right by contract to the employer is permitted (employment or *ad hoc* contract)	✓	✓	N/A(3)	N/A(4)
A strict formalism applies to employee-employer relationship	×	✓	×	N/A
The transfer of rights on future works is permitted	✓(5)	×(6)	✓	✓

(1) The French Supreme Court has softened the application of article L. 111-1 of the French Code of Intellectual Property with respect to employment relationships, finding in certain cases an implicit transfer of rights in favour of the employer (to the extent needed to conduct its business).

(2) In Germany article 43 German Copyright Act applies. German courts also rule systematically that employees must grant their employer a license of exploitation (to the extent needed to conduct its business).

(3) Under German law, transfer of copyright (or economic rights) is not admissible *per se*. However, it is possible for an author to grant a right to use the work (license to use).

(4) In the UK, employers and employees can contract *out* of the statutory presumption that copyright works made by an employee during the course of his/her employment is owned by the employer.

(5) Under Belgian law, transfer of rights on future works in an employment relationship must be express and must provide for the employee's participation in the profits generated by the exploitation of the work.

(6) Pursuant to article L. 131-1 of FIPC, global transfer of copyright on future works is considered as null and void. However, the transfer of rights on specific and determined future translations is permitted.

More specifically:

- Under **Belgian law**, when an employee creates works in the scope of an employment contract, the employee is regarded as the author. An employee's copyright can however be assigned to his employer "*provided that assignment of such rights is explicitly laid down and that the creation of the work falls within the scope of the contract or service relationship*" (Belgian Copyright Act, article 3(3), our own translation). The strict rules related to contracts with authors (see below) are therefore not applicable to works created by an employee in the framework of an employee-employer relationship. With respect to future works of the employee "*in a form that is unknown at the date of the contract or of appointment to the service relationship*" (our own translation), the regime is more demanding: to be

[66] Such approach is for instance expressly recognised in the Software Directive, where article 2 provides for specific rules relating to computer programs authorship.

valid, such transfer clause must be explicit and must lay down the employee's participation in the profits obtained from such exploitation (Belgian Copyright Act, article 3(3)(4)).

In practice, companies – including translation companies or agencies – find it burdensome to negotiate such transfer of rights for every work created in the course of each worker's employment and to comply with the formalism imposed by the Belgian Copyright Act. Also, as highlighted by the legal literature, uncertainty remains with respect to the ownership and the exploitation of works after the employee has left the company[67].

- In **France**, all the rights on a work vest in its author, regardless of the existence of any employment contract (contract for hire or service) (French Code of Intellectual Property, L. 111-1). French case-law requires a written instrument to formalise a valid assignment of rights, including between an employee and his/her employer. Moreover, the French Code of Intellectual Property requires a very specific formalism to be complied with for the assignment to be valid under French law. The following three examples are illustrative of that formalism.

  First, the rights which are to be assigned must be "*separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration*" (French Code of Intellectual Property, article L. 131-3, translation provided by *Legifrance*).

  Second, the type of medium for which a transfer of right is agreed upon shall also have to be clearly specified. Moreover, an employment contract cannot provide for the assignment of all future works that may be created by the employee. Indeed, under French law, the full assignment of intellectual property rights in future works shall be null and void (French Code of Intellectual Property, article L. 131-1).

  Finally, the agreement must provide for a distinct remuneration in consideration for the assignment of rights. That remuneration cannot be considered as included in the salary, for example (French Code of Intellectual Property, article L.131-4). The remuneration itself follows strict rules that are very protective of authors: an assignment must for instance comprise a proportional participation by the author in the revenues generated by the sale or exploitation of the assigned work. Lump-sum payments are possible subject to certain predefined and limited conditions.

- Under **German law**, the interference between employment laws and copyright laws result in a specific regime.

  Under German copyright law, irrespective of what is provided for in the employment contract, the employee is by law deemed to be the author of a work. There is no copyright statute that provides for that the employer is the copyright owner of the works created by its employees. Nor may the copyright on such works be transferred (assigned) to the employer by contract.

  Accordingly, under copyright law, the employer is dependent on rights to use (by contrast with an assignment/transfer) to be granted by the author, i.e., its employee.

  That is where German employment law interferes. Indeed, under German employment law the employer has the right to all work results of its employees[68]. The combination of the copyright rules (no transfer of copyright) and the employment law (right of the employer on the results) induces the rule that the

[67] L. GUIBAULT and B. HUGENHOLTZ, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union' (2002) 44.
[68] T. Dreier andG. Schulze, *UrhG Kommentar* (4th.,C.H. Beck 2013) § 43, 18.

employee has an obligation to grant its employer the rights necessary for the employer to exploit the work commercially. The scope of these rights to use may either be determined by the relevant employment contract or are to be interpreted by the nature of the employment relationship. In the latter case the scope usually does not exceed what is needed by the employer for the object of its business.

The grant of use rights by the employee to his/her employer is not subject to special rules of copyright law: the general rules regarding the grant of use rights apply to "authors in employment or service" (German Copyright Act, article 43). Licenses to use future works are valid, but must be in writing (German Copyright Act, article 40). In any case, an equitable remuneration is mandatorily due to the author (German Copyright Act, article 32), even when the author is an employee[69]. Thus, an employee may claim additional remuneration whenever the remuneration agreed upon in his/her employment contract is disproportionate to the benefits the employer derived from the exploitation of the work according to article 32a of the German Copyright Act.

- In the **United Kingdom**, if a work is produced as part of an employee's employment the first owner will automatically be the company that employs the individual who created the work, unless the employee and employer agree otherwise in writing (sec. 11(2) of the Copyright Designs and Patent Act). No further formalities are required and the employee has no rights to subsequent compensation.

Allocation of rights on works created in the context of the statute of civil servants

In certain cases, the legal situation is close to the one of an employment relationship. This is typically the case for staffs governed by service regulations (commonly known as 'civil servants'). Such situation is expressly governed by copyright legislation in some countries. Under Belgian law for instance, the provisions governing the questions related to employees also apply to civil servants ("*Where works are created by an author under an employment contract or a service regulation, the economic rights may be assigned to the employer on condition that assignment of such rights is explicitly laid down and that the creation of the work falls within the scope of the contract or service regulation*" – article 3, paragraph 3 of the Belgian Copyright Act, our own translation).

In this context, the situation of the staffs of the institutions of the European Union is illustrative of how service regulations explicitly provide for the transfer of rights in favour of the employer, i.e., the European Union institutions. More precisely, article 18 of the Staff Regulations of Officials of the European Communities stipulates as follows:

> "*All rights in any writings or other work done by any official in the performance of his duties shall be the property of the European Union where such writings or work relate to its activities or, where such writings or work relate to activities of the European Atomic Energy Community, the property of that Community. The Union or, where applicable, the European Atomic Energy Community shall have the right to acquire compulsorily the copyright in such works*"[70].

Consequently, any copyright on literary or artistic work created by the European Union statutory personnel within the context of their work for the European Union institutions or agencies is transferred to the European Union. Remains however the difficulty, which

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[69] T. Dreier andG. Schulze, *UrhG Kommentar* (4th.C.H Beck 2013) § 32, 13.

[70] European Union Regulation No 31 (EEC), 11 (EAEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 45, 14 June 1962, p. 1385, as amended.

is common to all situation of employment or civil servant statute, of determining what enters into the duties of an official of the European Union and what does not.

Such regulation only applies to officials of the European Union, i.e., any person who has been appointed to an established post on the staff of one of the institutions/agencies of the European Union by an instrument issued by the Appointing Authority of that institution/agency.

More concretely, any staff (such as a translator) working as a statutory personnel for the European Union will according to the above Regulation transfer property of all rights, including copyright, on any work made in the performance of his/her duties.

This does however not cover the copyright issues relating to third parties as they do not fall within the scope of the Staff Regulation and require the European Union institutions/agencies abiding by the applicable copyright laws. It is therefore necessary, for instance for the European Union institutions, to ensure that any work delivered by a person not falling under the Staff Regulation or the use of any work of a third party, for instance by the European Union personnel, is sufficiently transferred through proper contractual provisions.

Allocation of rights in the framework of works created on commission

The commissioner of a work is also, somehow like the employer, the person who makes the investment and takes the risks. According to certain scholars, the commissioner should therefore also have the control, and thus be entitled to recognition of rights on the work. Other scholars argue the opposite view, based on the fact that the relationship between the commissioner and the creator only lasts until the delivery of the commissioned work, and thus the relationship of dependence is not identical as that of an employee-employer[71].

We observe again that the legal regime relating to works created on commission differs throughout the European Union. Most Member States do not provide for specific rules in that respect and apply therefore by default the creator doctrine. In other countries, the statutes provide for a specific legal regime relating to works created on commission. In that case, these regimes are usually structured in favour of the creator doctrine. Therefore, in either case, contractual provisions are required to settle the issues relating to copyright transfer to the commissioner.

	 Belgium	 France	 Germany	 UK
As a general rule the legal framework relating to copyright applies the creator doctrine for works created on commission	✓	✓	✓	✓(1)
The legal framework relating to copyright contains specific provisions for works created on commission	✓	✓	×	×(2)
The legal framework relating to copyright provides for exceptions to the creator doctrine for works created on commission	✓(3)	✓(4)	×	×

(1) Copyright will belong to the author of the work (i.e., the person commissioned), unless there is an agreement to the contrary assigning the copyright and which is signed by the commissioned party, e.g., in a services contract. However, where a work has been

[71] L. GUIBAULT and B. HUGENHOLTZ, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union' (2002) 25.

commissioned and there is no express assignment of the copyright to the commissioner or licence to the commissioner to use the work, the courts have often been willing to imply a contractual term that copyright should be assigned or licensed to the commissioner for the use that was envisaged when the work was commissioned. The extent of the licence that will be implied will depend on the facts of any given case, but generally the licence will be only that necessary to meet the needs of the commissioner.

(2) Under the doctrine of ownership in equity, the commissioner may acquire certain exploitation rights by way of implied licence (and in very limited cases, transfer) of rights [72].

(3) Pursuant to article 3, paragraph 3, sub-paragraph 2 of the Belgian Copyright Act, "*Where works are created by an author on a commission, the economic rights may be assigned to the person who has given the commission on condition that the latter's activity is in a non-cultural field or in advertising, that the work is intended for such activity and that assignment of the rights is explicitly laid down*" (our own translation). Consequently, if the commissioned work falls within the cultural field, then the creator doctrine fully applies.

(4) Article L. 132-31 of the French Code of Intellectual Property provides for an exception for works made on commission for use in advertising.

Allocation of rights by contract: forms and restrictions

Whenever the transfer of rights is not organised as taking place by virtue of a statute, a contractual transfer is necessary in order for anyone to exploit (use) the work(s). Such contract can either be in the form of an assignment (when permitted) or in the form of a licence.

In most cases, assignments or licences may be partial (for instance, relating only to certain acts, or for a determined period of time; exclusive or not, etc…). Consequently, not only can the transfer be limited to the right of reproduction or to the right of communication to the public, or to one of their corollary as the right to make a translation or adaptation, but the parties may also limit the scope of the transfer (e.g., translation in one given language, for a specific use, under specific other conditions)[73].

There is no specific provision regulating such contracts at the international and the European Union levels. National legislations govern therefore all the aspects related to the formal requirements, the permitted scope of the transfer, the permitted duration, etc.[74] As a result, there exist many discrepancies between Member States in that regard, which are highlighted in the tables below.

Assignment and licensing of economic and moral rights[75]

A dualist approach is adopted under most national legislations, which requires that a distinction be made between economic rights and moral rights (see Sections 6 and 7 below for further details). Broadly speaking, moral rights are granted a higher degree of protection against transfer or assignment. This is due to their intrinsic link to the personality of the creator. For instance, under the law of certain countries, they may therefore not be transferred but only waived. In other countries, moral rights may neither be assigned, nor waived; they simply stay with their author.

Germany is a special country in this respect. The legal regime of transfer of rights is very different there than, for instance, in Belgium, France and the UK. Under German law,

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[72] L. GUIBAULT and B. HUGENHOLTZ, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union' (2002) 125 and references.

[73] Certain national laws aim to protect authors who are considered to be the weak party in the relationship. For instance, in France, the assignment of economic rights can be partial or total and shall comprise a proportional participation, for the author, to the revenue obtained from sale or exploitation of the work (although a lump sum is possible in certain limited instances) (French Code of Intellectual Property, article L. 131-4). This provision therefore aims at protecting the authors who are considered as being in a weak bargaining position and are at risk of not receiving a fair compensation for the transfer of their rights. It provides the authors with a weapon to challenge an assignment of rights a posteriori and seek its cancellation or for a revision of the financial compensation previously agreed upon if he/she can establish that he/she suffered damage of more seven-twelfths as a result of a burdensome contract or of insufficient advance estimate of the proceeds from the work (French Code of Intellectual Property, article L.L.131-5).

[74] European Union competition law issues may have a bearing, but are not dealt with in this Study.

[75] Refer to sections 6 and 7 below for the concepts of economic and moral rights.

copyright authors (contrary to performers) may indeed simply not transfer (assign) their rights (be it economic or moral) but may only grant licenses. In that sense, the German law regime is known as being monist, i.e., it brings both economic and moral rights under the same and unique regime in terms of their contractual transfer.

The situation in the four countries under scrutiny may be summarised as follows:

	 Belgium	 France	 Germany	 UK
Economic rights may be assigned	✓(1)	✓(2)	×(4)	✓(6)
Economic rights may be licensed (exclusive or non-exclusive licenses)	✓	✓	✓(5)	✓
Moral rights may be assigned	×	×(3)	×	×
As a general rule, moral rights may be waived	✓	×	×	✓
Moral rights may be waived only under strict conditions (e.g., partial waiver)	✓	×	N/A	×

(1) Economic rights are by statute characterised as being movable, assignable and transferable, in whole or in part, "*in accordance with the provisions of the Civil Code*" (principle of freedom of contract) (Belgian Copyright Act, article 3, our own translation). Accordingly, economic rights can be assigned or licenced.

(2) Economic rights can be assigned or licensed in whole or part, for consideration or for free provided however the intention of the author is clearly stated.

(3) Moral rights are inalienable and the author cannot assign them or waive rights thereon.

(4) Although neither a transfer of (economic) exploitation rights nor a transfer of the copyright as such is admissible under the German Copyright Act, it is possible for an author to grant use rights with respect to the exploitation of a work. These rights to use may be granted on a non-exclusive or an exclusive basis, and may be limited in respect of territory, duration or scope. Rights to use may also reflect all (known) exploitation rights and therefore, usage rights and exploitation rights may be identical as regards to their content. Accordingly, the licensee of extensive usage rights may be in a quasi-copyright owner position when it comes to the commercial exploitation of a work.

(5) The extent of granted usage rights is – in case of dispute – interpreted in light of the contract's intention (so called "Zweckübertragungslehre", German Copyright Act, article 31 subsection 5). A copyright license may never cover rights to use a work that are contrary or not in line with the contract's intention.

(6) Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.

Formalism of transfer of rights

Aiming at protecting authors, most national legislations provide for more or less strict requirements of form in case of transfer of copyright. Not only is the obligation of having a written agreement imposed in most Member States, but the national legislations also provide sometimes for binding rules as to the mandatory content of such agreements.

	 Belgium	 France	 Germany	 UK
The applicable copyright law includes requirements of form	✓	✓	×	✓ (limited)
The requirements of form apply to works created under employment	×(1)	✓	N/A	×(2)
The requirements of form apply to works created on commission	✓(3)	✓	N/A	✓
The transfer of rights must be provided in writing (irrespective of the requirements under labour law, if applicable)	✓	✓(4)	×(5)	✓
The written form requirement is a condition of validity (as opposed to a condition for evidentiary purposes)	×	×(6)	N/A	✓(7)
The agreement with the author must include the scope of the transfer	✓(8)	✓	×(9)	×
The agreement with the author must include the geographical scope	✓(8)	✓	×(9)	×
The agreement with the author must include the duration	✓(8)	✓	×	×
The agreement may provide for the transfer of economic rights in respect of future forms of exploitation	×(10)	✓(11)	✓(12)	✓
The agreement may provide for the transfer of economic rights in respect of future works	✓(13)	×	✓(5)	✓(14)
The national legislation provide rules relating to the remuneration of the author[76]	✓	✓	✓	×

(1) A softened regime applies to employee-employer relationships (article 3, paragraph 3 of the Belgian Copyright Act). The Belgian Copyright Act also further stipulates that the clause that grants to the copyright assignee the right to exploit a work in a form that is unknown at the date of the contract or of appointment to the service relationship shall be explicit and shall lay down participation in the profits obtained from such exploitation.

(2) Pursuant to Section 11 of the Copyright Designs and Patent Act, copyright created by an employee during the course of his employment is owned by the employer and there is no requirement to have a contract to reflect that position. While it is a requirement of English employment law to have an employment contract in place with employees, if the contract is silent on IP ownership, section 11 of the Copyright Designs and Patent Act will apply. If employers and employees wish to contract out of section 11 it must be specifically provided for in a written agreement.

[76] This Study does not examine in-depth the strict requirements of each Member States regarding the remuneration of authors.

(3) Where works are created by an author on a commission, the economic rights may be assigned to the person who has given the commission on condition that the latter's activity is in a non-cultural field or in advertising, that the work is intended for such activity and that assignment of the rights is explicitly laid down (article 3, paragraph 3 of the Belgian Copyright Act).

(4) Performance, publishing and audiovisual production contracts must be in writing. The form of all other types of works is governed by articles 1341 to 1348 of the French Civil Code (article L. 131-2 of the French Code of Intellectual Property)[77]. A written contract is also required for an assignment of rights (French Code of Intellectual Property, article L. 131-3: "*Transfer of authors' rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration*", translation provided by *Legifrance*). Specific provisions on scope, purpose, territory and duration are required for transfer of economic rights.

(5) A contract in which the author undertakes to grant exploitation rights in future works which are not specified in any way or are only referred to by type shall be made in writing (article 40 of the German Copyright Act). This is a condition of validity of the contract. The contract may be terminated by either party after a period of five years following its conclusion. The term of notice shall be six months, unless a shorter term is agreed upon. The right of termination may not be waived in advance. Other contractual or statutory rights of termination shall remain unaffected (article 40 of the German Copyright Act).

(6) By exception to this principle, the written form is a condition of validity for specific contracts (representation contracts, publishing contracts and audio-visual production contracts).

(7) However, a court may be willing to imply a limited copyright licence where it is necessary to give the agreement its intended result.

(8) The author's remuneration, the scope and duration of the assignment shall be set out explicitly for each mode of exploitation (article 3, paragraph 1 of the Belgian Copyright Act).

(9) Under German law, it must not be expressly provided but the agreement should allow parties to determine the scope of transfer/geographical scope.

(10) Notwithstanding any provision to the contrary, the assignment of rights in respect of as yet unknown forms of exploitation shall be null and void (article 3, paragraph 1 of the Belgian Copyright Act).

(11) The transfer of right to exploit the work in a form unforeseeable and not foreseen on the date of the contract must be express and provide for a participation correlated to the profits of the exploitation.

(12) Contracts with respect to the right to use a work for unknown types of exploitation must be concluded in writing and the author may revoke this grant of a right (German Copyright Act, article 31a).

(13) The assignment of economic rights relating to future works shall be valid only for a limited period of time and only if the types of works to which the assignment applies are specified (article 3, paragraph 2 of the Belgian Copyright Act).

(14) It is also possible for someone who would ordinarily be deemed to be the copyright owner to assign the benefit of future copyright to a person other than himself before the work is created. The purpose of Section 91 of the Copyright Designs and Patent Act is to enable legal title in a work to vest in an assignee as soon as that work was created without the need for either the author of the work or the assignee to enter into a further assignment[78].

[77] Even though articles L. 122-7 and L. 131-3 of the French Code of Intellectual Property provide for that a written agreement is required for any kind of agreements, case-law confirmed that a written agreement is required only for the four types of agreements mentioned in article L. 131-2 of the French Code of Intellectual Property; see CA, February 15, 1994, *Barriol c. Rudy's, Gaz, Pal*. January 28, 1995, somm. 10 – Cass civ, March 23, 1993, n°91-10513.

[78] This point was recently upheld in England in *B4U Network (Europe) Ltd v Performing Rights Society Ltd* [2013] EWCA Civ 1236.

Section 5. Derivative works

Derivative works are literary and artistic works which are based on pre-existing works that are altered. **Translations are one type of derivative works.**

It is therefore sensible to examine that concept in this Study.

"Derivative work" is not *per se* a recognised statutory concept[79]. It refers to multiple legal situations in the various Member States.

Sub-section 1. Types of derivative works

The concept of derivative works generally refers in copyright law to translations, adaptations, arrangements and similar alterations of pre-existing works.

Such derivative works are protected as such under article 2(3) of the Berne Convention, without prejudice to the copyright in the pre-existing works.

In certain cases, derivative works also include compilations and collections of works, which are protected under articles 2(5) of the Berne Convention, 10(2) of the TRIPS Agreement and 5 of the World Copyright Treaty[80].

Therefore, derivative works can be seen in a strict sense (*sensu stricto*), or in a broader meaning (*sensu lato*). The main categories of derivative works are listed below[81].

Derivative works *sensu stricto*

- **Translations**: as an act, translation is generally considered as the transformation of a text written or spoken in one language, into another language. Under article 8 of the Berne Convention, copyright owners shall have the exclusive right to authorize, or not, the translation of their works (see Chapter 5).

- **Adaptations** (incl. audiovisual adaptations): adapting is the act of altering a pre-existing work (either protected or in the public domain) or an expression of folklore, for a purpose other than that for which it originally served, in such a way that a new work comes into being in which the elements of the pre-existing work and the new elements – added as a result of the alteration – merge together. The purpose of the alteration may be to (i) produce the work in the form of a new genre (e.g., a novel in the form of a dramatic work; a folk song into a symphonic work); or to (ii) make the work suitable to use in another context (e.g., creating a shorter and/or a simpler version for teaching purposes).

- **Arrangements:** arranging refers to the act of altering a musical work (either protected or in the public domain) towards a new way or form of performing it (e.g., the transcription to piano of a work originally composed for orchestra).

- **Alterations** (incl. modifications[82]): alteration is a generic term. It covers on the one hand those modifications which, due to their original nature, may enjoy copyright protection. In that meaning, "alteration" includes adaptations and arrangements. Caricatures and parodies are sometimes also considered as such

[79] Although it is mentioned in the heading of article 2 of the Berne Convention. The headings were however added at the end of the 20th century.
[80] WIPO, 'Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions', WIPO/GRTKF/IC/22/INF/8, 12.
[81] The definitions are inspired by the WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 263. Certain categories overlap.
[82] "Modification" is a synonym of "alteration". Sometimes, the concept is extended to the transformation of a computer program from one programming language into another one.

"alterations"[83]. But the concept of "alterations" covers also those modifications which do not reach the level of new creative contributions.

- **Transformations:** transformation is a broad concept that covers any transformation of pre-existing works in a way that new derivative works are created as a result of the transformation; it encompasses the right of translation and the right of adaptation.

Derivative works *sensu lato*

In some countries, the term "derivative works" extends to compilations/collections of works protected under article 2(5) of the Berne Convention (as well as under article 10.2 of the TRIPS Agreement and article 5 of the World Copyright Treaty).

- **Collections / compilations (incl. multimedia)**: the two terms are used as synonyms in the international legal provisions on copyright. A collection or compilation of works, data or other material, in any form, is protected as a work if, by reason of the selection or arrangement of its contents, it constitutes an intellectual creation[84]. See Chapter 7 for the legal analysis of "databases".

- **Databases -** See Chapter 7 for the legal analysis of "databases".

Translations *versus* adaptations

Beyond the foregoing distinctions, it is important to clearly distinguish the notions of translation and of adaptation. On the one hand, "translation" legally refers to the act of translating a given work from one given language into another language. On the other hand, "adaptation" is the legal act of altering a pre-existing work (either protected or in the public domain) or a traditional cultural expression, for a purpose other than the purpose which it originally served, in a way that a new work comes into being, in which the elements of the pre-existing work and the new elements—added as a result of the alteration—merge together[85].

Consequently, as developed more in details in Chapter 6, Section 3, the fundamental idea behind such derivative works is different.

Sub-section 2. Derivative works under national laws

The **Belgian Copyright Act** does not refer to the concept of "derivative works". That concept is however not unknown and is understood within the meaning of the Berne Convention[86]. The legal scholars also refer to "composite works" in order to refer to (i) the act of creating a work on the basis of pre-existing works and to (ii) works that multiple authors contributed to the creation of, without however coordination between them (contrary to so-called "*oeuvres indivises*").

Under **French law**, article L.113-3 of the French Code of Intellectual Property grants copyright protection to derivative works of which it provides examples: "*The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work*"(translation provided by *Legifrance*).

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[83] It is used in article 6bis of the Berne Convention (related to moral rights), which provides, inter alia, for a right of the author to object to any distortion, mutilation or other modification of his work which would be harmful to his honour or reputation.

[84] In the UK, compilations are included in the definition of "literary works" in section 3(1)(a) of the Copyright Designs and Patent Act; therefore not only can they be treated as derivative works of other original works in which copyright subsists, but (if the compilations are literary in character) they can be original works in and by themselves.

[85] Ibid. 3; WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 264.

[86] A. Berenboom, *Le nouveau droit d'auteur* (Larcier, Brussels 2008) 130.

In other words a piece of work can be protected even if it borrows original features from a pre-existing work, provided however it bears its own originality, i.e., reflects the personality of the second author/creator.

Article L. 113-4 of the French Code of Intellectual Property further provides for that "*a composite work shall be the property of the author who has produced it, subject to the rights of the author of the pre-existing work*" (translation provided by *Legifrance*). This provision clearly expresses the idea that the author of a new original piece of work arising out of a pre-existing one shall be the sole author of that new work, subject to compliance with the first right holder's rights. In this respect, the author of the derivative work must seek the authorisation of the first author. Otherwise, the creation and use of the derivative work would constitute an act of infringement[87]. Also, moral rights must be respected. For example, the French Supreme Court held that the sequel of a literary work relates to the right of adaptation; provided the right to claim authorship and the right to the integrity of the work are respected, creative freedom prevents the author of the work or his heirs from prohibiting sequels after the protected work has fallen into the public domain[88].

Although **German law** does not use the expression "derivative works", certain provisions in the copyright act use the concept itself. For instance, article 3 of the German Copyright Act names "adaptations" (Bearbeitungen) as a type of work being subject to copyright protection. Similarly, articles 23 and 24 of the German Copyright Act refer to "adaptations and transformations" as well as "free use" of pre-existing works. Only the first requires the prior consent of the copyright owner under German law.

Similarly, **UK law** does not specifically refer to "derivative" works, however one of the exclusive rights of the owner of copyright in literary, dramatic or musical works is the right to make adaptations of it and to control dealings of that adaptation, e.g., copying of the adaptation, making the adaptation available to the public, etc. (sec. 16 of the Copyright Designs and Patent Act). The Copyright Designs and Patent Act goes on to explain what might comprise an "adaptation" and specifically states that translations (whether of a literary work, a computer program, or a database) are adaptations, as are arrangements or altered versions of computer programs and databases (sec. 21 of the Copyright Designs and Patent Act).

[87] See for instance Cour de cassation, 9 November 1993, *RTD civ.*, 1994. 373 (software transformed without its author's authorisation)

[88] Cass civ, 30 January 2007 (regarding a sequel of "Les Misérables" from Victor Hugo that has not been authorised) accessible at <www.legifrance.gouv.fr>.

Section 6. Economic rights

If a work, such as a literary work, is eligible for copyright protection, the right owner (or the right holder in case of transfer of rights) will enjoy various economic rights (known in French as "droits patrimoniaux"), which find their legal ground in various international, European Union and national instruments.

Any use of a source document for purposes such as translation or inclusion in a database (e.g., a translation memory) shall take the following considerations into account.

Sub-section 1. Economic rights at international and European Union levels

Economic rights in international conventions and treaties

The Berne Convention recognises certain core economic rights. Such recognition is reaffirmed and completed by the World Copyright Treaty.

- *Reproduction right:* authors of literary and artistic works have the exclusive right of authorising (and thus also prohibiting) the reproduction of their works, in any manner or form (Berne Convention, article 9(1)) [89].

  In practice, this means that anyone who wishes to reproduce a literary work such as a book, a newspaper article or a website, in whole or in part, shall be required to obtain the prior authorisation of the right owner/right holder.

- *Translation right:* the Berne Convention contains various provisions related to translations and the rights related thereto. It also addresses the issues of translations in the particular cases of dramatic, musical and literary works (articles 11 and 11*ter*). In short, **the act of translating a copyright-protected work requires the prior authorisation from the right owner/right holder**. Article 8 of the Berne Convention: "*authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works*"[90] (see Chapter 5 for further details on the right of translation).

  This is without prejudice to the copyright protection on the translation itself[91]. As a result, in order to exploit any translation, authorisation must be obtained from (i) the original owner of the rights on and to the source document in the source language and from (ii) the owner of the rights on and to the translation in the other language.

- *Adaptation, arrangement and other alteration rights:* authors of literary or artistic works enjoy the exclusive right of authorizing adaptations[92], arrangements and other alterations of their works (Berne Convention, article 12).

- *Distribution right:* the Berne Convention only referred to the distribution right in relation to cinematographic and related rights, but the World Copyright Treaty (article 6) has broadened such right. It provides for the exclusive right of authorising the making available to the public of the original and copies of works

[89] Article III of the Appendix to the Berne Convention provides for certain limitations on the right of reproduction.
[90] Article 30 and the Appendix to the Berne Convention allow certain reservations with regard to the translation right of article 8.
[91] Article 2(3) of the Berne Convention: "Translations, 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".
[92] It shall be reminded that "adaptation" is generally understood as the modification of a work in order to create a new one, such as for instance adapting a literary work targeted to a specific audience and adapt it for another type of audience.

through sale or other transfer of ownership. This right is exhausted, in most cases, upon first sale or transfer of ownership of a copy (WTC, article 6(2)).

- *Rental right:* the World Copyright Treaty recognises the right to authorise commercial rental to the public for certain categories of works (computer programs, cinematographic works and works embodied in phonograms).

- *Right of communication to the public:* article 8 of the World Copyright Treaty provides for the exclusive right of authorizing any communication to the public of works, by wire or wireless means, including the making available to the public of works in such a way that members of the public may access these works from a place and at a time individually chosen by them. Such right echoes the broadcasting right recognised by the Berne Convention.

- *Rights relating to cinematographic works*: articles 14 and 14*bis* of the Berne Convention provide for specific economic rights with respect to audiovisual works (cinematographic productions and works). Such provisions may be of importance and relevant for the translation industry involved, for instance, in the production of subtitles. Such rights are however only mentioned in this Study and not further examined.

Economic rights in European Union Directives

At the European Union level, Directive 2006/115 harmonises the rental and lending rights, while Directive 2001/29 harmonises, to a certain extent, three economic rights, which have been later interpreted and clarified by the Court of Justice of the European Union.

The rights of reproduction and communication to the public are of particular interest for this Study[93].

Indeed, **the translation of a source document and the inclusion of such document and its corresponding translation (even in segment forms) into a database for translation memory or machine translation purposes shall touch on such exclusive rights, and thus have to take such rights into consideration. Also, given that a translation gives rise to general copyright protection, the author (or right holder) of such translation will also benefit from copyright protection, and consequently from the following exclusive rights.**

Right of reproduction

The reproduction right, as such, is harmonised in the European Union and considered as an autonomous concept of European Union law, requiring uniform interpretation in all Member States[94]. It consists in the **exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part**. Such exclusive right has therefore a very broad scope, as confirmed by Recital 21 of the InfoSoc Directive and by the Court of Justice of the European Union in the *Infopaq I* judgment[95]. Such view is consistent with Directive 2001/29, which notably aims at organising an appropriate reward for authors when their works are reproduced.

[93] The distribution right recognised by article 4 of the InfoSoc Directive is very similar to article 6 of the World Copyright Treaty.
[94] *Premier League*, para. 154.
[95] *Infopaq I*, para. 41 and seq.

The right of reproduction protects the material act of copying, including transient copies in cache memories, satellite decoders or television screens (*cf.* the InfoSoc Directive, its preparatory works and the judgments of the Court of Justice of the European Union)[96].

Even a **partial reproduction** of a work may amount to copyright infringement if the elements that are reproduced constitute the own intellectual creation of the author (see *Infopaq I* and the court decisions at national level such as the Copiepresse *v.* Google case in Belgium – see also section Chapter 4, Section 3 above)[97].

Right of communication to the public

The right of communication consists in the exclusive right to authorise or prohibit any communication to the public of copies of works, including the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them[98].

Consequently, **any communication of a work in any form whatsoever requires prior authorisation of the right owner/right holder, provided such communication is indeed public.**

The Court of Justice of the European Union has had the opportunity of issuing several judgments on this particular right. It held that the concepts of "communication" and "public" are autonomous concepts of European Union law, which are to be interpreted uniformly throughout the European Union. Consequently, similarly to the reproduction right, all national case-law must be assessed in light of the judgments of the Court of Justice of the European Union.

According to the Court of Justice of the European Union, a case-by-case evaluation (an individual approach) is necessary in order to assess whether given forms of exploitation fall or not within the scope of the right of communication to the public. When assessing *in concreto* whether an act infringes the author's right of communication to the public, the courts will essentially consider whether two cumulative conditions are met: (i) an "act of communication" of a work and (ii) the communication of that work to a "public"[99].

As regards the first condition, the existence of an "act of communication" must be construed broadly[100], in order to ensure a high level of protection for copyright holders[101].

Furthermore, for there to be an 'act of communication', it is sufficient that a work is made available to a public in such a way that the persons forming that public may access that work, irrespective of whether they avail themselves of that opportunity[102].

With respect to the second criterion, that is, that the protected work must be communicated to a "public", the term "public" refers to an indeterminate number of potential recipients and implies a fairly large number of persons[103].

In addition, following settled case-law of the Court of Justice of the European Union, in order to be covered by the concept of "communication to the public", a subsequent communication must be directed at a "new" public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial

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[96] See for instance *Premier League*, para. 157.
[97] Bruxelles, 5 May 2011 (*Copiepresse v. Google*), *A. & M.*, 2012, pp. 202 à 216.
[98] The InfoSoc Directive also provides under article 3(2) the exclusive right to authorise or prohibit the making available to the public (…) for certain categories of persons (i.e.: for performers; for phonogram producers; for the producers of the first fixations of films; for broadcasting organisations).
[99] *ITV Broadcasting*, para. 21 and 31.
[100] *Premier League,* para. 193.
[101] See in particular in that respect Recitals 4 and 9 in the preamble to Directive 2001/29.
[102] *Svensson*, para. 19; by analogy *SGAE* para. 43.
[103] *SGAE*, para. 37 and 38.

communication to the public[104]. In *Svensson*, the Court of Justice of the European Union found that when a work has been made available on the Internet (on website A), without any restrictions, such initial communication is considered to be targeting all potential visitors, including users of website B. The Court of Justice of the European Union therefore concluded that there was no new public as the works offered on website A website were freely accessible[105], and that users of website B must be deemed to be part of the public already taken into account by the right holder at the time the publication of the works on website A was authorised.

It is unclear how such right of communication to the public applies to the specific cases of translation memories and machine translations. However, we can sensibly sustain that making source documents and their corresponding translations, both benefiting from their own copyright protection, available to translators (even in segment forms) amounts to a new communication to a new public, requiring prior authorisation from the author (or right holder). However, in light of the *Svensson* judgment, such conclusion could in certain circumstances not apply when the source documents and their corresponding translations have been made freely available on the internet, without restrictions.

Rights of translation and adaptation

Translation/adaptation rights are provided for in many national laws throughout the European Union, either as part of the reproduction right or as a standalone right.

But there currently exists **no harmonisation** in the European Union in that regard. Neither the InfoSoc Directive nor any other copyright-related Directive refers to such rights despite their recognition at the international level.

Such absence of recognition of adaptation and translation rights in European Union instruments, and more specifically in the InfoSoc Directive is not optimal. Indeed, as highlighted by scholars, the technical possibilities for adapting and transforming works which are embodied in digital format have increased dramatically. With digital technology, manipulation of text, sound and images by the user is quick and easy[106]. This development triggers the necessity to regulate this field. Regarding translation right more in particular, the use of source documents (and corresponding translations) is not always for commercial purposes. Take the example of the various tools offered by the European Union to the public, for the general interest. **We therefore believe that it would be opportune to include translation rights in the European Union copyright legal framework. This would provide among other things the opportunity of creating more legal certainty around the adequate legal exceptions enabling the use of source documents and corresponding translations for further use in machine-aided translations.**

Sub-section 2. Economic rights at national levels

Each national country examined in this Study includes under its national law the various economic rights provided for in the international treaties and conventions, as well as those included in the European Union Directives. However, the way such rights have been transposed vary in a substantial way.

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[104] *SGAE*, para. 40 and 42; *ITV Broadcasting*, para. 39; *Svensson*, para. 24.

[105] According to the Court of Justice of the European Union, the owner of a website may, without the authorisation of the copyright holders, redirect internet users, via hyperlinks, to protected works available on a freely accessible basis on another site. However, the Court of Justice of the European Union highlights that the conclusion would be different if the hyperlinks permit users to circumvent restrictions put in place by the site on which the protected works appears in order to restrict public access to that work to the latter site's subscribers only.

[106] WIPO, 'Understanding copyright and related rights', WIPO Publication No 909(E) 12.

We will focus in particular on the rights of reproduction, communication to the public, distribution and translation/adaptation.

Economic rights in Belgium

The Belgian Copyright Act provides for a very broad **right of reproduction**: "*only the author of a literary or artistic work shall have the right to reproduce his work or to have it reproduced in any manner or form whatsoever, directly or indirectly, temporary or permanent, completely or partially. This right shall also comprise the exclusive right to authorize adaptation or translation of the work. This right shall further comprise the exclusive right to authorize rental or lending of the work*" (our own translation). Although this statutory provision refers explicitly to authors of literary or artistic works, it applies to all types of works that meet the conditions for copyright protection.

Translation and adaptation rights are considered as parts of the broader reproduction right. Belgian law does not contain any specific provision that regulates such translation and adaptation rights and defines their boundaries. According to the legal literature, the test for assessing whether the translation or adaptation right has been infringed is to consider whether the allegedly infringing adapted or translated work still contains original elements from the source work. In this regard, the Belgian Supreme Court has held that a summary, which reproduces those elements which confer originality to the source work, infringes the copyright in the source work, even though the copying was not done literally and parts had been added to, or deleted from, the original text.

When the translation or adaptation meets itself the requirement of originality, the adaptor or translator will acquire a separate copyright in this adaptation or translation.

As regards the **right of communication to the public**, article 1 of the Belgian Copyright Act also governs and provides for that authors have the exclusive right "*to authorize or prohibit any communication to the public of their works, by any means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*" (our own translation).

Belgian law also provides for a **distribution right**[107].

Economic rights in France

The author's exclusive right includes wide and extensive economic rights, notably the right to control marketing conditions of a protected work (French Code of Intellectual Property, article L. 111-1, para. 2). Their definition is broad. Judges are therefore granted significant power of interpretation and can take into consideration the advent of new technologies.

More specifically, under French law, two major economic rights can be claimed by the author[108].

First, the **right of reproduction**. It consists in the exclusive right to authorise and prohibit direct or indirect, temporary or permanent reproduction by any means and in

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[107] Traditionally, Belgian legal scholars considered such right to be incorporated in the broad wording of the reproduction right. However, following the adoption of Directive 2001/29, the Belgian legislator has opted to explicitly insert a new paragraph into article 1, under which "*only the author of a literary or artistic work has the right to allow distribution of the original of his works or of copies thereof to the public, by sale or in any other way*"(our own translation). This distribution right is however limited. Article 1 of the Copyright Act explicitly provides for that the doctrine of exhaustion of right is applicable to the distribution right. This implies that the author's exclusive distribution right is "exhausted" after the first sale or other transfer of ownership of the work in the European Union, by the right holder himself or with his consent. Any further distribution of that specific work after its first transfer cannot anymore be controlled by the author of the work. It should be noted that the distribution right will only be exhausted in the concrete copies that have actually been sold, and not in the other copies of the same work: the exhaustion is not an 'abstract' exhaustion.

[108] Article L. 122-1 of the French Code of Intellectual Property provides that "the right of exploitation belonging to the author shall comprise the right of representation and the right of reproduction"

any form, in whole or in part, of a copyright work. It allows the author to control the copying of his work but also the secondary use of his creation, which is sometimes called "right of destination" (French Code of Intellectual Property article L. 122-3).

Under French law, the right of reproduction covers tangible and intangible reproduction, **translation and adaptation** of the work such as rental and public lending of works.

Second, the **right of representation or communication to the public**. The right of communication to the public consists in the exclusive right to authorise and prohibit any communication to the public of copies of copyright works. Communication can be direct (public performance, etc.) or indirect (television, radio, etc.). French case-law is especially focused on the interpretation of the concept of "public place". For example, the French Supreme Court decided that a hotel in which a television allows the transmission of broadcasted works is a public place where works protected under copyright law are communicated[109].

Economic rights in Germany

German law uses the concept of exploitation right rather than of economic rights. Under the German Copyright Act, article 15, an author has the exclusive right to exploit his work in (i) material form as well to (ii) communicate his work to the public in non-material form. As already mentioned above, the exploitation rights remain with the author but the grant of rights to exercise them is admissible.

Articles 16 to 22 of the German Copyright Act provide for a non-comprehensive catalogue of exploitation rights, namely, the **right of reproduction** (article 16); the **right of distribution** (article 17); the right of exhibition (article 18); the right of recitation, performance and presentation (article 19); the right of **making the work available to the public** (article 19a); the right of broadcasting (article 20); the right of communication by video or audio recordings (article 21); and the right of communication of broadcasts and of works made available to the public (article 22). Each exploitation right is further specified in the respective articles. An author is not bound to that catalogue of rights when granting usage right. In particular the different rights may be further split, e.g., the author of literary works may grant the right of reproduction with respect to hard-copies to a traditional publisher, while the reproduction right as to e-books is granted to another entity.

Pursuant to article 24 of the German Copyright Act, **adaptations or other transformations** may be published or exploited only with the consent of the author of the adapted or transformed work. **Translations** are considered transformations and may therefore only be exploited with the consent of the author of the source work.

Economic rights in the United Kingdom

The UK also recognises each of the core economic rights set out in supra-national instruments. More particularly, sec. 16 of the Copyright Designs and Patent Act expressly grants copyright holders the exclusive right to do or authorise the following: copy the work (i.e., the reproduction right), adapt the work, issue copies of the work to the public (i.e., the distribution right), rent or lend the work to the public, perform, show or play musical, literary and dramatic works in public[110], and communicate the work to the public.

Mora particularly, sec. 21 of the Copyright Designs and Patent Act states that "adaptations" shall include translations of literary, dramatic and musical works, and

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[109] Cass civ, April 6, 1994, RIDA July 1994, p 367.

[110] Section 19 of the Copyright Designs and Patent Act goes on to state that this is intended to cover the performance of lectures, speeches, etc. and includes any visual or acoustic performance which extends to the showing/playing of copyright works such as broadcasts, films and sound recordings.

arrangements and altered versions of databases and computer programs. Therefore, while there is no separate "**translation right**" it is within the scope of the adaptation right.

Summary of some economic rights under national laws

Based on the above analysis, we can summarise the particular situation of the right of reproduction and how the translation (or adaptation) right is provided for in Belgium, France, Germany the United Kingdom.

	 Belgium	 France	 Germany	 UK
Under national law, a right of reproduction is expressly provided	✓	✓	✓	✓(1)
The right of reproduction further comprises the exclusive right to authorise adaptation or translation of the work	✓	✓	×	×
Under national law, a right of adaptation is expressly provided	×	×	✓(2)	✓
The right of adaptation further comprises the exclusive right to authorise translation of the work	N/A	N/A	✓	✓

(1) Right to copy the work.
(2) In Germany, the right of adaption is expressly provided but is subject to certain conditions.

Section 7. Moral rights

In addition to the various rights examined in the previous section, authors are also granted so-called "moral rights".

The concept of 'moral rights' is the consequence of the predominant view in (continental) European copyright law that a work is not a mere staple commercial object, but also the expression of the personality of the author. Therefore, moral rights of authors are so-called "**personality right**" recognised to authors in relation to a work. Moral rights are necessarily related to the person, who is in a certain way personally protected through such rights. Consequently, moral rights enable an author to control the relationship between his personality and the work in which he expressed himself. Consequently, moral rights of authors have in substance the particular aim of preserving and safeguarding a link between the author and his work.

Sub-section 1. Moral rights at international and European Union levels

Moral rights are recognised by the **Berne Convention**[111]. Its article 6*bis* provides for minimum standards in this respect: the author has the right, even after the transfer of the economic rights, to claim authorship of the work and to object to derogatory action (distortion, mutilation or other modification) to the works which would be harmful to the author's honour or reputation. Moral rights shall be maintained after the author's death, at least until the expiry of the economic rights.

By contrast, the **European Union Directives** explicitly exclude moral rights from their scope. More particularly, Recital 19 of the InfoSoc Directive stipulates that moral rights remain outside the scope of the Directive and that they should be exercised according to the legislation of the Member States and the provisions of the international treaties.

Nonetheless, moral rights are not entirely disregarded at the European Union level: the InfoSoc Directive does refer, under certain circumstances, to the obligation to indicate the source, including the author's name[112]. This echoes the 'paternity' right examined below.

It follows from such situation that moral rights suffer many discrepancies between Member States, where some countries organise a high level of protection of moral rights, while others recognise moral rights only within the minimum protection imposed by the Berne Convention. Some Member States provide for additional moral rights, such as the "*droit de repentir*" in France.

Despite these discrepancies, and as will be demonstrated hereunder, **moral rights are recognised in various Member States to a certain similar extent**.

Given such recognition, **one may wonder whether the use of source documents for tools such as translation memories and machine translations, which require 'cutting' the original texts (and the translations) into segments in order to suggest one or more possible translations, without however mentioning the author(s) of such works, amounts to a violation of moral rights on such source documents, and more particularly the rights of integrity and authorship.**

Such characterisation can certainly not be excluded. However, the possibilities of waiving moral rights under certain national laws, and the doctrine of 'abuse of right' on the part of the author to exercise his/her moral rights, can prove to be useful means to mitigate

[111] At international level, moral rights are also recognised by article 5 of the WIPO Performances and Phonograms Treaty of 1996 and article 5 of the Beijing Treaty on Audiovisual Performances adopted in 2012.
[112] See for instance articles 5(3) (a), (c), (d) and (f).

risks related to moral rights claims in the field of translation memories and machine translations.

Accordingly, flexibility in applying moral rights is necessary, and even more so in relation to information society tools such as translation memories and machine translations. Such flexibility, which should nonetheless be well regulated, derives also from the fact that moral rights shall be interpreted with the required pragmatism, also in consideration of the nature of the work and the context in which it has been created, and without nevertheless affecting the essence of such rights[113] (being a personality right).

Sub-section 2. Moral rights at national levels

Moral rights in Belgium and in France

France offers probably the highest protection in the world for moral rights. Such protection has very much influenced Belgian law. Consequently, we examine both national regimes together.

Both in France and in Belgium, moral rights find their origin in founding copyright laws and principles. In Belgium, the existence of moral rights was already broadly accepted by case-law and legal scholars under the old copyright act of 22 March 1886, even though that statute did not expressly mention them. In France, "moral right" was mentioned in the legislation even before the codification of Intellectual Property laws.

Today, the Belgian Copyright Act and the French Code of Intellectual Property include express provisions regarding the following three moral rights[114].

- **Right to disclose** ("*divulgation*"): the author of a copyright protected work is the sole person who may decide when such work is finished and when and how it may be disclosed (communicated) to the public. It is therefore the author's right to determine the time and conditions for the first disclosure of his work. The right to disclose entails the obligation for third parties not to reveal the work without prior authorisation of the author. Logically, if such right to disclose is not exercised, there are no economic rights that may arise given that economic rights depend on the disclosure of the work.

- **Right of authorship / Right of paternity** ("paternité"): such right allows the author to claim authorship on his work and therefore to require that third parties disclose the work under the author's name. Belgian law also provides for a negative application of such right, where the author may in some instances prefer to remain anonymous or be known under a pseudonym.

- **Right of integrity of the work** ("intégrité"): the third characteristic of moral rights is undoubtedly the most important one, in light of the aim of moral rights. In substance, it prevents the work, as it was disclosed, to be altered without the author's authorisation. Thus, the author may oppose to any breach to the integrity of the work, whether or not the alteration damages his honour or reputation (in that sense, it goes therefore beyond the Berne Convention's minimum protection).

  Under Belgian law, the right of integrity of the work explicitly encompasses two layers: (i) first, the author shall in any event have the right to oppose any act to his work that may "damage his honour or reputation", provided the author proves the existence of such damage; (ii) second, the author may oppose any alteration to his work.

[113] M-Ch. Janssens, 'Le droit moral en Belgique' (2013) 25 Les Cahiers de propriété intellectuelle 105.
[114] Article 1 of the Belgian Copyright Act and article L. 121-1 of the French Code of Intellectual Property.

In France, the right of integrity comprises the right to object and to prevent any alteration, distortion or mutilation of the work and any part of it. For instance, removing some parts of a literary work, such as a book, was held as being a violation of the right of integrity of the writer[115]. This right also includes the protection of the author's reputation.

French IP law recognises a fourth moral right: the **revocation right** ("*droit de retrait ou de repentir*"). Accordingly, under French law and notwithstanding the assignment of his economic rights, the author enjoys the right to reconsider the assignment or withdraw his consent, even after publication of his work. However, the author may only exercise this right provided that he indemnifies the assignee for any damages caused by such revocation/withdrawal.

Belgian and French laws further provide specific characteristics attached to moral rights.

- In **Belgium**, moral rights are "inalienable" (Belgian Copyright Act, article 1(2)). The author can therefore not assign them, whether against payment or free of charge, nor can the right to exercise them in the future be waived globally. As a result, any clause assigning a moral right in general and for the future will be considered as null and void. The inalienability rule therefore extends to a renunciation that would be granted permanently, globally, in an unspecified manner and/or *ex ante* (before the creation of the work). Conversely, in the case of a waiver that is not global, such prohibition does not apply[116]. Thus, it is accepted that authors renounce, to a certain extent, from exercising their moral rights, provided such renunciation is express[117].

- In **France**, moral rights are perpetual, inalienable and imprescriptible (French Code of Intellectual Property, article L. 121-1). They may be transmitted *mortis causa* to the heirs of the author, but the author cannot otherwise assign moral rights whether against payment or free of charge, nor can the right to claim them in the future be waived globally. Moral rights are also perpetual and imprescriptible: the author can claim his moral rights whenever he wishes.

The prohibition of the **abuse of right** provides some limitation to these far-reaching moral rights: Belgian and French courts tend to always carefully assess whether, under the pretext of a violation of moral rights, the legal action initiated by an author does not pursue another purpose[118]. Belgian courts have held that an author is abusing his right when relying on a moral right in a manner exceeding the limits of the exercise of such right by a prudent and diligent person[119].

Moral rights in Germany

Similarly to Belgium and France, a German author enjoys a broad protection of his moral rights in a work. The rationale for the existence of such moral rights is the same (German Copyright Act, article 11 of the German Copyright Act, translation provided by the German Ministry of Justice and Consumer Protection): "*copyright protects the author in his intellectual and personal relationships to the work and in respect of the use of the work*". Articles 12 to 14 of the German Copyright Act then further specify the moral rights protected under German copyright law, i.e.:

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[115] CA Paris, June 7, 1982, *Dalloz* 1983 IR 97.

[116] Confirmed by the preparatory works of the Belgian Copyright Act (Parl. works, 473/33 – 91/92, p. 70); see also M-Ch. Janssens, ibid., 105; F. de Visscher and B. Michaux, *Précis du droit d'auteur* (Bruylant , Brussels 2000) 145 and seq.; A. Berenboom, *Le nouveau droit d'auteur* (Larcier, Brussels 2008) 196.

[117] Even though it is not required for such clause to be in writing, it is strongly recommended providing it on a durable medium, at least for evidentiary purposes.

[118] M-Ch. Janssens, ibid, 107.
For instance Cass civ., October 24, 2000, *Malaussena c/ Sté les Editions Gallimard et Mme Thévenin*, *Dalloz* .2001.918

[119] Liège, 27 February 2009, (2009) *Auteurs & Media*, 629.

- **Right to disclose**: according to the right of publication as laid down in article 12 of the German Copyright Act the author has the right to determine whether and how his work shall be published. Furthermore, the author reserves the right to communicate or describe the content of his work to the public.

- **Right of authorship / Right of paternity**: the recognition of authorship pursuant to article 13 of the German Copyright Act guarantees the author's right to be identified as the author of the work (if he legally qualifies as such). Thus, the author has also the right to remain anonymous.

  In addition, no confusion of the public as regards the author can occur. This point is in particular relevant when it comes to translations as the author of the source work as well as the translator must be – if they both qualify as such – adequately identifiable on a translated work[120].

- **Right of integrity of the work**: article 14 of the German Copyright Act contains a protection against distortion of the work. The author has the right to prohibit any distortion of his work which is capable of causing harm to his legitimate intellectual or personal interests in the work.

  In general, the publication of alterations and transformations of a work require the author's consent, irrespective of the question whether moral rights in the work are concerned. Article 14 of the German Copyright Act further protects the author against a work used in a context that is not desired. These moral rights in a work may even prevail upon economic usage rights, e.g., the use of music in connection with political purposes may be inadmissible even if the use would be justified from the angle of the mere economic right to use[121].

Similarly to France, German law includes an additional moral right known as the "right of revocation for changed conviction". Pursuant to article 42 of the German Copyright Act, *"the author may revoke an exploitation right vis-à-vis the rightholder if the work no longer reflects his conviction and he can therefore no longer be expected to agree to the exploitation of the work"* (translation provided by the German Ministry of Justice and Consumer Protection).

Moral rights play an important role in copyright protection according to German law. It is not possible to assign moral rights to a third party or to waive them. In particular, a licensee must always respect the right against distortion and derogatory treatment of the work, even when the licensee has been granted exclusive rights to use a work. The infringement of moral rights will also trigger compensation claims of the author.

Moral rights in the United Kingdom

In the UK, the moral rights granted in the Copyright Designs and Patent Act go slightly beyond the attribution and integrity rights provided for in the Berne Convention. As per the Berne Convention, the author or director of a copyright work has the moral right to: (i) be identified as the work's author or director (also known as the "paternity right") (sec. 77 of the Copyright Designs and Patent Act); and (ii) object to derogatory treatment of a work (sec. 80 of the Copyright Designs and Patent Act). Derogatory treatment will include treatment which is a distortion of the work itself or which is detrimental to the reputation of the author.

Authors also have the right not to have the authorship of a third party's work wrongly attributed to him (sec. 84 of the Copyright Designs and Patent Act). A false attribution need not be express, but can be implied and the courts will consider the message from

[120] T. Dreier and G. Schulze, *UrhG Kommentar* (4th., C.H. Beck 2013° § 13, 6.
[121] See for instance OLG Frankfurt GRUR 1995, 215.

which the false attribution has been inferred and apply the single correct meaning rule to that message[122].

In addition, in the UK, a person who, for private purposes, has commissioned the taking of photographs or making of films has the right to privacy in the resulting photographs/films and has the right not to have the work distributed, exhibited or made available to the public (sec. 85 of the Copyright Designs and Patent Act).

These moral rights may be waived by the author or director but cannot be assigned, nor can they be waived by any third party. The right to have a work attributed to the author, to object to derogatory works and to privacy in respect to photos and films have the same duration as copyright in the underlying work. However the right to object to false attribution lasts for the author's or director's lifetime plus 20 years, therefore it is generally shorter than the other three moral rights.

Finally, it shall be noted that in practice, reliance on moral rights in litigation in the UK is very uncommon.

Summary of some aspects of moral rights

	 Belgium	 France	 Germany	 UK
Moral rights are expressly provided by national law	✓	✓	✓	✓
Moral rights play an important aspect in copyright protection	✓	✓	✓	× (1)
National law provides that the author is the sole person who may decide when to first disclose his work	✓	✓	✓	×
The author has a right of authorship/paternity	✓	✓	✓	✓ (2)
National law explicitly provides for a negative application of the right of authorship/paternity, meaning that the author may prefer to remain anonymous or to be known under a pseudonym	✓	×	✓	×
The author has a right of integrity of the work (as provided in the Berne Convention)	✓	✓	✓	✓
National law provides that the author may oppose any breach to the integrity of the work, whether or not the alteration damages his honour or reputation (national law is going beyond what is provided in the Berne Convention)	✓ (3)	✓	× (4)	✓
National law provides that the author has a revocation right (*"droit de retrait ou de*	×	✓	✓ (5)	×

[122] *Harrison v Harrison* [2010] EWPCC 3

repentir")				

(1) Even if they are expressly provided by the CDPA, moral rights do not play a significant role in litigation in the UK.
(2) Note that in addition, in the UK, authors also have the right to not have the authorship of a third party's work wrongly attributed to him and a right to privacy of certain photographs and films.
(3) Belgian law specifically distinguishes two situations: whether the act damages his/her honour/reputation or not.
(4) German law adopts a particular wording: the author has only the right to prohibit any distortion of his work which is capable of prejudicing his legitimate intellectual or personal interests in the work.
(5) Article 42 German Copyright Act provides a right of revocation for changed conviction.

Section 8. Exceptions and limitations

Sub-section 1. The relatively low degree of harmonisation of copyright exceptions at international level

When a work is protected by copyright, the authorisation from the right owner (or right holder) is a requirement in order to reproduce, communicate or make available to the public, distribute, rent, lend, adapt, alter or translate such work.

However, copyright laws include various exceptions (limitations) where, under specified conditions, such authorisation is not required.

Certain of these exceptions may therefore *a priori* be of particular interest when considering the use of source works to create derivatives such as translations and to include such works in databases for translation memory or machine translation purposes.

Exceptions can be divided into two main categories. On the one hand, exceptions of "free use", which refer to the fact that authors are not remunerated for the use made of their work without their authorisation. On the other hand, certain exceptions, as implemented under national laws, provide for a compensation scheme for the damage that derives to the authors from the very existence of such statutory exceptions[123].

The Berne Convention introduces some exceptions to the exclusive rights of authors. More particularly, article 2*bis* provides for that lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, and communicated to the public by wire and made the subject of public communication, when such use is justified by the 'information' purpose. Article 10, on its part, provides for the possibility of "*free uses of works*", under certain conditions, such as making quotations from a work and using works by way of illustration in publications, broadcasts or sound or visual recordings for teaching purposes.

As regards the right of reproduction, the Berne Convention does not contain an explicit limitation but a general rule which allows contracting countries to permit the reproduction of works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably harm the legitimate interests of the author. This is more commonly known as the three-step test, which we will examine more in depth in Sub-section 5 below.

Sub-section 2. Copyright exceptions in the European Union

The harmonisation of copyright exceptions in the European Union

At the European Union level, Directive 2001/29 (article 5) provides for an exhaustive list of exceptions and limitations to the rights of reproduction, communication to the public and distribution[124].

Mandatory exception

Foremost, a mandatory exception to the right of reproduction is introduced with respect to certain temporary acts of reproduction which are integral parts to a technological process. Generally, such exception concerns transient copies with a merely technical function and without any independent economic significance in order to cover issues related to caching and Internet browsing.

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[123] Such exceptions are sometimes referred to as "non-voluntary licenses".
[124] The Software, Database and Rental and Lending Directives also provide exceptions.

That exception does not require further examination in the framework of this Study as its application to translations and machine-aided translations is in our view rather limited or even non-existent[125].

Non-mandatory exceptions

The Directive includes an exhaustive list of non-mandatory exceptions, where for three of these exceptions (i.e., reprography, private use and broadcasts made by social institutions) the authors are to receive a fair compensation. Among such exceptions, we highlight in particular the following[126]:

- reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects
- reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial
- specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage
- use for the sole purpose of illustration for teaching or scientific research, for non-commercial purposes
- reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, or use of works or other subject-matter in connection with the reporting of current events
- quotations for purposes such as criticism or review
- use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the 'information' purpose
- incidental inclusion of a work or other subject-matter in other material
- use for the purpose of caricature, parody or pastiche
- use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community.

The inapplicability of European Union exceptions to the sector of translations

The introduction of the various exceptions and limitations in the InfoSoc Directive were justified by the new digital environment and takes into consideration certain technological evolutions. However, **as far as the sector of translations is concerned, it seems that these exceptions are not really adapted to, and do not cover, some of the most recent technology trends in the sector, such as advanced translations tools (including translation memories and machine translation). In other words, the existing optional exceptions, and their transposition into national legislations, are not very well adapted to the current (let alone, future) technological situation in the field of translation.** For instance, no exception very well fits the specific issues of reproduction and communication to the public of

[125] For a more in-depth analysis, see J-P. Triaille, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "InfoSoc Directive")' (2013) 113. See also see J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)'(2014) 41.

[126] All such exceptions are however allowed under various strict conditions (e.g.: "*in cases where such use is not expressly reserved*", "*and as long as the source, including the author's name, is indicated, unless this turns out to be impossible*", or "*are not for direct or indirect economic or commercial advantage*").

(segments) of literary works for their inclusion in database for translation purposes (be it through translation memories of machine translation tools).

Using the existing European Union exceptions to cover machine-aided translation tools would therefore probably necessitate some creatively broad interpretation of said exceptions, hence an encroachment on the authors' rights. The legal certainty would be better served by the creation of yet another exception that would fit better the need of the sector and foster innovation in machine-aided translation tools.

Those issues will probably be touched upon in the framework of the revision of the European Union copyright legislation system, which will in all likelihood take on board the question of "text and data mining", also known as "TDM", e.g., techniques used for the exploration of texts and data available online (e.g., on websites, databases, online books and journals, etc.). Based on the finding that text and data mining is increasingly becoming a practice in scientific research, it is not excluded that some clarification will be provided in the future at least in the determination of the extent to which text and data mining activities and techniques are covered – or not – by copyright and to which they would fall under the (non-mandatory) research exception of the InfoSoc Directive (article 5(3)(a)[127]). Would remain however the question as to whether a compensation should be provided for or if 'free use' would be more adequate.

The concept of "fair use"

Finally, the laws of some countries recognize the concept known as "fair use", allowing the use of works without the authorization of the right owners. It requires taking into account factors such as the nature and purpose of the use, including whether it is for commercial purposes, the nature of the work used, the amount of the work used in relation to the work as a whole, and the likely effect of the use on the potential commercial value of the work. **The broad concept of "fair use", if adopted in the European Union as it is applied in the U.SA.. or in Canada for instance, could offer an alternative solution to the issues related to machine-aided translations.**

The transposition of European Union copyright exceptions in Member States and the core principles identified by the Court of Justice of the European Union

Most exceptions listed in Directive 2001/29 are optional. They are therefore implemented at the national level at the sole discretion of the concerned Member State. Progressively, Member States introduced, in various ways, the current list of one mandatory exception and twenty optional exceptions in their national legislations and adapted their national legislations accordingly.

The Directive defines the conditions for the application of these exceptions in very general terms, which leave Member States a great deal of flexibility in implementing the exceptions. Apart from the mandatory exception on transient copying, national legislation can be more restrictive than the Directive as to the scope of the exceptions they decide to implement in their own national legal system. The list of exceptions as contained in the Directive has achieved a certain degree of harmonisation but substantial discrepancies exist between Member States. Such differences are strengthened by the interpretation given by national courts to the particular exceptions transposed and included in each Member State's legislative framework.

In that context of discrepancies among Member States, the Court of Justice of the European Union has had the opportunity to however clarify certain aspects related to exceptions and limitations contained in the InfoSoc Directive. Building on the judgments of the Court of Justice of the European Union and the objectives of the Directive, as laid

[127] A similar exception exists in the Database Directive (articles 6(2)(b) and 9(b)).

down in its preamble, some of the core identified principles can be summarised as follows:

- *Consistent application:* the InfoSoc Directive aims at ensuring harmonisation and consistency throughout the European Union of the copyright rules and the functioning of the internal market. It therefore requires Member States to arrive at a coherent application of the exceptions and limitations.

- *High level of protection of copyright:* the discretion enjoyed by Member States cannot be used so as to compromise the principal purpose of Directive 2001/29, which is to establish a high level of protection for, in particular, authors[128].

- *Proportionality:* measures adopted by Member States must be appropriate for attaining their objective and must not go beyond what is necessary to achieve it[129].

- *Legal certainty:* the exercise of their discretion by the Member States must comply with the need for legal certainty for authors with regard to the protection of their works[130].

- *Fair balance of rights and interests:* Member States must ensure such fair balance between the different categories of right holders, as well as between the different categories of right holders and users of protected subject-matter[131].

- *Adapting to technological and economic developments:* Member States must reassess the exceptions and limitations in the light of the new electronic environment[132].

Sub-section 3. The copyright exceptions under national laws

Given the relatively high level of discretion left to national lawmakers in the implementation of the various exceptions, it is important to understand how these exceptions have been transposed in various Member States and determine which exceptions may be relied on – if any – for the purpose of translation memories and machine-aided translations.

As will be made clear hereunder, the exceptions and their wording under national laws do not permit summarising the situation in a comprehensible table. It is therefore necessary to examine each national law individually. We note however that the countries examined in this Study mostly provide exceptions to cover teaching, scientific and information purposes, libraries, museums and archives uses, but also private use, parody and uses for the purposes of criticism and polemic. Nevertheless, the conditions applicable to each particular exception in each country may differ.

Finally, it must be borne in mind that in order for copyright to be infringed at all, the infringing party must do a restricted act in relation to the whole or a substantial part of the work in which copyright subsists. The test for substantiality is qualitative, not quantitative, therefore if only a small, insubstantial part of the copyright work has been copied, there will be no copyright infringement.

Copyright exceptions in Belgium

The Belgian Copyright Act has been amended by the law of 22 May 2005 in order to transpose Directive 2001/29, and in particular the exceptions[133]. The Belgian legislator

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[128] *Painer*, para. 107; Recital 9 of the Preamble of Directive 2001/29.
[129] *Painer*, para. 105 and 106.
[130] *Painer*, para. 108; *Infopaq I*, para. 62.
[131] Recital 31 of the Preamble of Directive 2001/29.
[132] Recitals 32 and 39 of the Preamble of Directive 2001/29.

has adopted an approach with a closed-list of exceptions, wherein about twelve exceptions are described in an exhaustive wording[134]. Consequently, no exception could apply outside that straight-jacket legal framework, which shows in general little (to no) interpretative latitude subject to the general principle that a restrictive interpretation[135] applies to the scope of such exceptions.

The Belgian exceptions (our own translation) may be grouped within the following six general categories (in addition to the mandatory exception related to temporary acts of reproduction which are transient or incidental):

- *exceptions for teaching and scientific purposes*, including for instance quotations for the purpose of criticism or teaching, the compilation of an anthology intended to teaching, the reproduction or communication for teaching or research purposes, or reprography

- *exceptions for libraries, museums and archives*, covering the consultation of works on terminals of a museum or a library or the reprography or photocopy of articles or extracts of works by library visitors

- *exceptions for private uses* such as the reprography or the private copying of audio and audio-visual works

- *parody*

- *exceptions for information purposes*, including the reproduction and communication to the public, for the purposes of information, of short fragments of works in connection with reports on current events or the use for the purpose of caricature, parody or pastiche

- *other exceptions* concern particular categories of beneficiaries such as handicapped people, hospitals, youth centres, etc.

All statutory exceptions contained in the Belgian Copyright Act are subject to a number of general conditions. The first and most important condition is that all exceptions only apply if the work has been lawfully divulged. Finally, an important characteristic of the Belgian regime of copyright exceptions is that *all* exceptions are of a mandatory nature (Belgian Copyright Act, article 23*bis*).

Copyright exceptions in France

Under French law, the exceptions to the exclusive rights (French Code of Intellectual Property, article L. 122-5, translation provided by *Legifrance*) could be grouped under five main categories (in addition to the mandatory exception for technical purposes covering acts needed for the access to an electronic database for the need and within the limits of the use specified in a contract and temporary reproduction of a work for its transmission via a network), i.e.:

- *use of a work "within the family circle"*, which covers private and free of charge performance carried out in private events

- reproduction of a work for the *private use* of the copier

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[133] It must however be noted that for certain exceptions, implementing Royal Decrees have not yet been adopted by the King. As a result, for those exceptions, the old provisions are still applicable.
[134] Articles 21 and seq. Belgian Copyright Act.
[135] B. Michaux, F. Brison and M-Ch. Janssens, *Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sector*, AIPPI, 30 March 2010, p. 1. Also confirmed by case-law, see for instance Bruxelles, 23 March 2001 (*Le Vif Magazine v. Sofam and G. Wibin*), *A. & M.*, 2001, pp. 375 and seq.

- *exceptions for illustrations, examples or demonstration*, including (i) analyses and short quotations justified by the critical, polemic, educational, scientific or informational nature of the work in which they are incorporated, (ii) press reviews, (iii) complete or partial reproduction for the need of public auction catalogues (iv) reproduction and communication of a graphic, plastic or architectural works, trough the print, audio-visual or online press, exclusively in relation with event news, (v) communication of current news or speeches intended for the public

- *exceptions for public interests*, which covers (i) the use of extracts for teaching and scientific purposes, including quotations for the purpose of teaching, (ii) the use of a work by specific institutions for disabled persons and (iii) the reproduction of works by libraries and museums for their preservation and their on-site consultation

- *parody*.

This list is not exhaustive. Other exceptions have been created by case-law, such as the "*fortuitous inclusion exception*", which applies for example when a work is merely swept by the camera and seen only in passing audio-visual work.

Finally, similarly to other Member States, copyright exceptions are narrowly construed by French judges, and always in favour of the author.

Copyright exceptions in Germany

Section VI of the German Copyright Act contains statutory exceptions/limitations on the exclusive rights of a copyright owner. The scope of these limitations is traditionally driven by a balanced approach between the interests of the copyright owner, on the one hand, and the users' interests on the other hand. The constitutional concept of article 14 subsection 2 of the German constitution finds expression in these limitations: "*Property entails obligations. Its use shall also serve the public good*".

Below are representative examples of the exceptions and limitations provided for in Section VI of the Copyright Act (in addition to the mandatory temporary acts of reproduction part of a transmission by an intermediary):

- *exceptions for information purposes* shall, *inter alia*, apply for the distribution of works which become perceivable in the course of reporting about current events (article 50 of the German Copyright Act)

- *exceptions for teaching, scientific or religious purposes*, *inter alia*, apply to school broadcasts (article 47 of the German Copyright Act) or school and church use of limited parts of works (article 46 of the German Copyright Act)

- make individual copies of works for the *use in proceedings before a court* (article 45 of the German Copyright Act)

- *exceptions for libraries, museums and archives* (article 52b of the German Copyright Act): it is permissible to make published works available from the stocks of publicly accessible libraries, museums or archives as long as they serve no commercial purpose

- *exceptions for reproduction for private and other personal uses* (article 53 of the German Copyright Act): especially against the background of file sharing, it was implemented in 2008 that such reproduction shall only be admissible "*as long as no obviously unlawfully-produced model or a model which has been unlawfully made available to the public is used for copying*".

- *further exceptions* may apply for instance for persons with disabilities (article 45a of the German Copyright Act), for the reproduction by broadcasting organisations (article 55 of the German Copyright Act) or the order for dispatch of copies (article 53a of the German Copyright Act).

Copyright owners can be entitled to the payment of an equitable remuneration with respect to use of their works in line with the statutory copyright limitations[136]. Thus, the German Copyright Act contains statutory licence fees for some of the copyright exceptions provided under German law.

Copyright exceptions in the United Kingdom

Apart from the mandatory exception for temporary copies required by the InfoSoc Directive and which was implemented by way of the Copyright and Related Rights Regulations 2003 (introducing sec. 28A of the Copyright Designs and Patent Act), the UK has to date adopted a light-touch approach to the introduction of "permitted acts" which will not constitute copyright infringements.

The main exceptions to copyright are for the following purposes:

- ***"fair dealing"*** this covers limited uses of copyright works, for private research and study, and for criticism, review and news reporting; in each case overriding requirements are that the extent of the use is "fair", and that a sufficient acknowledgement of the author is made

- *incidental inclusion*, where the inclusion must be merely incidental, for example if a live event is being broadcast and sound recordings in which copyright subsists are played at the event the continued broadcast will not be an infringement of the copyright in that sound recording; however if a work is deliberately selected for inclusion, it will not be held to be incidental

- copies for people with *visual impairment*

- *educational use*, i.e., where works are used for instruction or examination purposes, provided it is not done for commercial gain

- *libraries and archives* – librarians and archivists are allowed to do certain permitted acts such as copying articles and parts of published work and lending copies of works.

It should be noted that **there are no exceptions for parody, quotation or private use exception in the UK at present**. It had been thought that exceptions in relation to these forms of use would come into force on 1 June 2014; the government has now stated that these are to be the subject of further debate in the hope that they can be implemented in October 2014. However, it is not possible to tell if this newly proposed implementation date will be met, or indeed whether the new exceptions will be introduced at all.

Sub-section 4. The copyright exceptions relevant to (machine-aided) translation

The particular exceptions for scientific research

Among the various exceptions that are provided for in the InfoSoc Directive, the one related to scientific research is probably one of the few that is potentially applicable in

[136] For instance, when it comes to the admissibility of reproduction for private and other personal uses according to article 53 of the German Copyright Act, manufacturers of appliances and of storage mediums (e.g. printers, plotters) are obliged to pay a remuneration pursuant to article 54 of the German Copyright Act.

this Study. Indeed, *a priori*, the creation of translation databases including source documents and their corresponding translations is an act that could fall within the exception, provided it is of a scientific research nature and for a non-commercial purpose.

However, as will be demonstrated below, **such exception is rather unfitted in practice to apply to new information society tools such as translation memories and machine translations**.

Article 5(3)(a) of Directive 2001/29 stipulates that Member States may provide for exceptions or limitations to the rights of reproduction and of communication to the public when the protected work is used "*for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved*".

Given its non-mandatory nature, such exception has not been transposed in all Member States. The Netherlands and Spain, for instance, have no such exception in their statutes. Moreover, given the discretion left to Member States, there exist many discrepancies within the European Union.

By way of an illustration, below is a comparative description of the legal regime of that scientific research exception in Belgium, France, Germany and the UK[137]:

- *Scope of the exception:* in many national legislative systems, the exception has been transposed in order to cover both educational and scientific purposes. This is for instance the case in France (French Code of Intellectual Property, article L122-5, 3°) and in Belgium (Belgian Copyright Act, article 22, para. 1, 4*ter*) where the laws refer to illustration for teaching or scientific research. In Germany, two similar paragraphs cover teaching and scientific research (article 53a of the GCA). In the UK, the distinction is even clearer, where section 29 of the Copyright Designs and Patent Act refers to fair dealing with notably literary works for the purposes of research for a non-commercial purpose, without however using the word 'scientific' but "research" is understood by case-law as "scientific research" indeed[138].

  A core question remains: what is meant by "illustration" for "scientific research"? Scholars are unanimous in the view that "scientific" covers both the natural sciences and the human sciences[139]. It is however unclear when a research is "scientific" or not, what qualifies as a research in the framework of this exception, and how "illustration" limits the scope of such exception.

- *Beneficiaries of the exception:* as highlighted by scholars, the approach adopted by the European Union legislator is based on the research activity itself rather than on the person who may benefit from the exception. At national level, the approaches differ, where some Member States followed the wording of the InfoSoc Directive (such as it is the case in the UK which does not include any specific beneficiary) while other Member States were more precise and determined the beneficiaries (for instance in Belgium, France and Germany).

- *Works covered by the exception:* although not imposed by the InfoSoc Directive, most European Union countries that have implemented the exception have limited

[137] Part of the study largely inspired by J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)' (2014) 50 and by S. Dusollier, 'The Limitations and Exceptions to Copyright and Related Rights for Libraries, Research and Teaching Uses' in J-P. Triaille, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "InfoSoc Directive")' (2013).

[138] See in particular *The Controller of Her Majesty's Stationery Office*, Ordnance Survey v Green Amps Limited, Case No: HC07C00249, High Court of Justice, Chancery Division Intellectual Property, 5 November 2007.

[139] See in that sense Recital 36 of the preamble of the Database Directive which served as the legal basis for the inclusion of such exception in the InfoSoc Directive.

its application to certain works. Accordingly, in Belgium, relying on the exception is only possible for "*articles or works of fine art in part or in whole or short fragments of other works*" (article 22, para. 1, 4*ter* and *4quater* of the Belgian Copyright Act), in France to "*extracts of works*" (article L122-5, 3° French IP Code) and in Germany to "*small parts of a work, small-scale works or individual articles released in newspapers or periodicals or made available to the public*"[140] (article 52a and 53 of the German Copyright Act).

- *Acts authorized by the exception:* article 5(3) of the InfoSoc Directive allows for Member States to provide for an exception to the rights of reproduction and (or) of communication to the public[141]. Sub-paragraph (a) however refers broadly to the "use" for the sole purpose of illustration for teaching or scientific research. At national level, legislators have in certain cases indicated which acts are authorized. The reproduction right is covered in all national systems but some, such as Belgium, distinguish between digital and paper reproductions. As for the right of communication to the public, it is explicitly referred to in Belgium and in France; while in Germany the law refers to the making available to the public and to transmission.

  None of the four countries examined in this Study, as the majority of the European Union Member States, refer to the translation right in the framework of the exception for scientific research[142].

- *Non-commercial nature of the authorized act:* following the stipulation of article 5(3)(a) of the InfoSoc Directive, the national laws in Belgium, France, Germany and the UK refer to the non-commercial purpose to be achieved[143].

- *Paternity (acknowledgement):* the last condition imposed in order to benefit from the scientific research exception is that the source, including the author's name, is indicated, unless this turns out to be impossible. Such obligation exists under Belgian, French, German and UK laws.

It follows from such conditions that the exception will unlikely be applicable to translations tools. Indeed, translation memories and machine translation tools are rarely created for scientific research purposes and to illustrate scientific research. Similarly, the commercial purpose generally pursued and the absence of any acknowledgment of the author(s) of the source documents and the corresponding translations lead to the conclusion that the conditions to benefit from the scientific research exception shall in most cases not be fulfilled.

In any event, even when the exception for scientific research would apply, the divergences in the transposition of article 5(3)(a) of the InfoSoc Directive would lead to practical difficulties given that source documents and their corresponding translations used in the context of machine-aided translations originate from many countries, inside and outside the European Union, and made available via the Internet. It would then be necessary, for every single work, to determine whether their specific use falls within the particularities of the exception as transposed in national systems and then apply the particularities of each system to every single work, according to the applicable law which needs to be determined. **This is therefore an area where full compulsory harmonisation would certainly be welcome**.

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[140] See also OLG Stuttgart, 04.04.2012, 4 U 171/11, GRUR 2012, 718.

[141] Article 5(4) of the InfoSoc Directive also allow for the exception for scientific research to apply to the distribution right, to the extent justified by the purpose of the authorised act of reproduction.

[142] The Polish law of 4 February 1994 mentions translation (article 27).

[143] UK courts have clarified the notions of "non-commercial use" in two major cases: *Forensic Telecommunications Services Ltd v Chief Constable of West Yorkshire Police*, High Court of Justice, Chancery Division, 9 November 2011, [2011] EWHC 2892 (Ch), [2012] F.S.R. 15, §110; and *Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142; [2002] Ch.149.*
For more details, see J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)' (2014) 57-58.

The particular exception for quotation

The exception for quotation was first enacted in the Berne Convention, article 10, which reads as follows:

> *(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspapers articles and periodicals in the form of press summaries.*
>
> *(...)*
>
> *(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon."*

The exception for quotation existed therefore under most national copyright legal systems before the InfoSoc Directive came into force. It existed, but the conditions related to its applicability were (and still are) varying.

The implementation of the InfoSoc Directive gave nonetheless the opportunity to several Member States to introduce some changes. Some countries enlarged the pre-existing exception, while others added new conditions to it.

Article 5(3)(d) of the InfoSoc Directive states that exceptions to the rights of reproduction and communication may be provided for *"quotations for the purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose."*

The wording of this exception is particular. On the one side, it is broad as it covers purposes "*such as criticism or review*". On the other side, it is rather narrow as it provides for several cumulative conditions.

The following considerations summarise the main features of such exception, and the existing dissimilarities (though quite limited), under the legal regime of the four countries examined in this Study[144]:

- *Scope of the exception and purpose of the quotation:* Belgian law provides an exception to cover "*short quotations taken from a lawfully published work for the purpose of criticism, polemic or teaching or in scientific works*" (Belgian Copyright Act, article 21 § 1[145]). In France article L. 122-5 of the French Code of Intellectual Property explicitly allows "*analyses and short quotations"* justified by the critical, polemical, educational, scientific or informational nature of the work in which the quotation is incorporated. Article 51 of the German Copyright Act provides an exception for "*the purpose of quotation so far as such exploitation is justified to that extent by the particular purpose*"[146]. In the UK, there is no explicit exception for quotation. However, it is generally recognised that quotation may fall under the broader notion of "fair dealing".

[144] Part of the study largely inspired by J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)'(2014) 464-475

[145] Note that the wording of that provision is almost exactly the same as article 5(3)(d) of the InfoSoc Directive.

[146] Article 51 of the German Copyright Act further specifies that the quotation exceptions "shall be permissible in particular where (i) subsequent to publication individual works are included in an independent scientific work for the purpose of explaining the contents, (ii) subsequent to publication passages from a work are quoted in an independent work of language, and (iii) individual passages from a released musical work are quoted in an independent musical work.

Even if the wording of the national provisions slightly varies from a country to another, we note in particular that quotations must be done in most cases for criticism or review. Also, some countries further limit the scope of the exception, such as it is the case in Belgium which provides that quotations shall be made in accordance with the fair practice of the profession and to the extent justified by the purpose.

- *Works covered by the exception:* all national provisions require that the original work from which the quotation is taken must have been lawfully made available to the public. Moreover, the exception is not limited to literary works and thus may also apply, *inter alia*, to musical or artistic works.

- *Extent of the quotation:* it is generally acknowledged (by way of legislation or case law) that the quotation must stay short[147] and that it must remain a part of a broader work. However, the meaning given to the term "short" can vary from a country to another. Belgian and French laws particularly insist on the short character of the quotation while other countries are more liberal[148]. For instance, it is often understood in France that quotations do not apply to works of visual arts. There is nonetheless some case law applying the exception to works of visual art.

- *Paternity (acknowledgement):* the last condition imposed by national laws to benefit from the quotation exception is that mention of the source, including the author's name, must be made, unless this proves impossible. The four countries covered by this Study provides for such condition.

We did not identify any reported court decision in these four countries where the application of that exception to translation tools was discussed. The only judgment of the Court of Justice of the European Union relating to the quotation exception is the *Painer* case[149]. The question at stake in this judgment was in substance about the possibility to apply the quotation exception in cases where the work that incorporates the quotation is not itself protected by copyright. The Court of Justice of the European Union concludes that the exception may be applied in such situations. The only lesson for the purpose of this Study is therefore that even if they were not protected by copyright, translation tools could rely on the quotation exception, as a matter of principle. This principle does however leave completely open the question whether, with respect to the use of segments of source documents and their translations in translation tools, the substantive conditions of the quotation exception can possibly be met.

Taking into account the restrictive interpretation which is generally given to the copyright exceptions, we are of opinion that the conditions for such quotation exception are not likely to be fulfilled in the case of translation tools. More particularly, in our view, the required purpose of criticism or review will particularly cause insurmountable difficulties and will set aside any application of such exception, as it currently stands.

Sub-section 5. The three-step test limiting all exceptions

In addition to the specific conditions of each exception, relying on any of the above exceptions is further limited by a general principle known as the "three-step test". Such test curtails the application of exceptions, their potential broad interpretation and their application to emerging new technologies.

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[147] Even if the text of article 5.3. (d) of InfoSoc Directive does not establish the short character of the citation as a condition.
[148] In Ireland, for example, it is debatable whether the size of the quotation matters or not.
[149] CJEU 1 December 2011, case C-145/10, *Eva-Maria Painer v. Standard Verlags GmbH* &Others ("Painer"), para. 130 and seq.

The three-step test is recognised by international treaties such as the Berne Convention (article 9(2)), the TRIPS Agreement (article 13) and the World Intellectual Property Organization Treaties, including the World Copyright Treaty (article 10).

The InfoSoc Directive has also explicitly included the three-step test under its article 5(5), where it provides for that the exceptions and limitations permitted by the Directive are to be applied (i) in certain special cases, (ii) which do not conflict with the normal exploitation of the work or other subject matter and (iii) which do not unreasonably prejudice the legitimate interests of the right holder (or other right holders).

The Court of Justice of the European Union has had the opportunity of relying on such test in cases related to the private copying exception of article 5(2) of the InfoSoc Directive. In *ACI Adam*[150], the Court of Justice of the European Union concluded that article 5(5) does not define the substantive content of the different exceptions and limitations set out in article 5(2), but takes effect only at the time when they are applied by the Member States. Consequently, article 5(5) is not intended either to affect the substantive content of exceptions or, *inter alia*, to extend the scope of the different exceptions. Furthermore, the Court of Justice of the European Union confirmed that the European Union legislature meant to envisage, when Member States provide for the exceptions, that the scope of those exceptions could be limited even more when it comes to certain new uses of copyright works and other subject-matter[151]. By contrast, neither Recital 44 nor any other provision of the InfoSoc Directive envisages the possibility of the scope of such exceptions or limitations being extended by the Member States[152].

In this context, we note that Advocate General Villalón concluded in *ACI Adam* that the three-step test applies equally to the application by national courts of the private copying exception and thus that the provisions of article 5(5) are not addressed solely to national legislatures, but also to national courts.

As we saw, there are discrepancies between Member States with respect to the implementation of the various exceptions. In the same vein, the three-step test is also implemented and taken into account differently across the European Union. We note however that among the four countries studied here, none has explicitly included a reference to the three-step test in its legislation.

The situation regarding the three step test can be summarised as follows:

	 Belgium	 France	 Germany	 UK
The text of article 5(5) of Directive 2001/29 is explicitly transposed under national law	×	×	×(1)	×(2)
The three-step test is generally acknowledged	✓(3)	✓	✓	✓
The text of some of the steps is included in some exceptions provided by national law	✓(4)	×	×(5)	✓
The application of the three-step test initially finds its source in national case-law	×(6)	✓(7)	×(8)	×

[150] CJEU 10 April 2014, case C-435/12, *ACI Adam BV and Others v Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding* ("ACI Adam"), para. 24 and seq.
[151] Recital 44 of the Preamble of Directive 2001/29; *ACI Adam*, para. 27.
[152] *ACI Adam*, para. 27.

(1) According to the explanatory memorandum, the exceptions in article 44a et seq of the German Copyright Act comply with the requirements of the three-step test[153].
(2) The Government Conclusions to the Patent Office's Consultation Paper setting out the government's reasoning for not expressly including the test shows that it believes the Commission had taken the view that the three-step test had already been taken into account when drafting article 5 and therefore by (partially) implementing such provision virtually verbatim at sec. 28A of the Copyright Designs and Patent Act, the three-step test was also incorporated into English law in relation to sec. 28A (but not more generally in relation to other exceptions to copyright).
(3) During the preparatory works of the amendments of the Belgian Copyright Act in May 2005, it has been mentioned that the three-step test remains a guideline for the courts in their application of the Belgian Copyright Act[154].
(4) For instance, the education and research exception (discussed above) or the additional condition with respect to the (absence of) 'commercial purpose' within the framework of the exception for the fortuitous reproduction or communication to the public of a work of display show the partial application of the test.
(5) However, according the explanatory memorandum, the exceptions in article 44a et seq UrhG comply with the requirements of the three-step test.
(6) Even though Belgian scholars[155] do not concur on the question whether Belgian courts should apply the test and if so, how, it can be reasonably advocated that the application of such test is mandatory on national courts.
(7) For instance, in the *Mulholland Drive* case, which concerned the private copying exception, the French Supreme Court focused on the second step of the three-step test, which is the conflict with the normal exploitation of the work or other subject matter[156].
(8) In Germany, the status which should be given to the three-step test is particularly unclear. Some commentators suggest that the three-step test should be used as a complementary rule of interpretation while others believe that an independent examination of the test is necessary. National courts are quite reluctant to apply the test to judge the admissibility of an exception. In one case a higher regional court of Stuttgart made clear that the three-step test can be implemented in the preconditions of the exception regarding education and research which is statured in article 52a of the German Copyright Act [157].

Sub-section 6. Concluding remarks regarding the copyright exceptions

It follows from the above sections that as things stand, **relying on any exception, such as the exception for scientific research or for quotation, and where the three-step test is applied as imposed by legal sources at various levels, would not be an obvious and truly reliable option for the use of source documents and their translations in the framework of machine-aided tools**.

We are therefore of the opinion that a revision is needed of the current European Union legal framework in order to either add a new exception to cover text and data mining in general, and translation tools in particular, or to amend some existing exceptions as to permit, to a certain extent, commercial purposes and abandoning the requirement to indicate the source in some carefully defined cases. Without such evolution, we believe that the authorisation from the authors remains an important prerequisite and that the transfer of ownership through contractual means is a key element to take into account when considering the use of source documents and translations.

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[153] Bundestag - Drs. 15/38, p. 15.
[154] Doc. Parl., Chambre, Sess. 2003-2004, n°51-1137/001, p. 14-15.
[155] See in particular S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique,* (Larcier, Brussels 2005) 440 and its exhaustive list of authors in favour of an application of the three-step-test by Courts.
[156] Cass civ., February 28, 2006, *Dalloz* 2006, AJ 784.
[157] OLG Stuttgart, GRUR 2012, 718, 724.

Section 9. Infringement

Once a work is protected by copyright, authors (or right holders) enjoy exclusive economic rights (including the right to have the work translated) and moral rights. It is only in certain limited cases, where the conditions of exceptions and limitations of such rights are fulfilled that the prior consent of the author (or right holder) is not required in order to use, reproduce or exploit the work. As per our tentative conclusion in the previous section, it is unlikely that under the current legal framework in the European Union, as implemented in the various Member States, translation tools would benefit from such statutory exceptions.

Accordingly, in our view, **authorisation remains a key requirement without which any use of a copyright protected work – be it for reproduction, communication to the public or translation – would amount to copyright infringement and give rise to possible enforcement proceedings, as further examined below**.

Concept of 'infringement' and copyright enforcement

Copyright infringement refers to the violation of exclusive (economic and/or moral) rights granted to authors, such as the right to reproduce, communicate to the public or distribute the protected work[158]. It also covers the making of derivatives from such original work. Accordingly, the use (exploitation) of a work protected under copyright law without the prior authorisation from the right owner/right holder will generally amount to a copyright infringement and may therefore lead to enforcement proceedings[159] against the infringer.

As demonstrated in the previous chapters and sections of this Study, international treaties provide for general rules and principles related to the protection of works under copyright. Said instruments also provide for minimum standards for the enforcement of rights conferred to authors. Nonetheless, with respect to enforcement too, close attention to national legislations, case-law and legal literature is indispensable when it comes to actually enforce copyright[160], and more generally intellectual property rights, or to defend against such infringement legal actions.

The **Berne Convention** contains a general rule under article 5(2) according to which "*the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed*"[161]. The same applies with regard to moral rights (art. 6*bis*(3))[162].

The **TRIPS Agreement** comprises very detailed provisions, under Part III, related to the enforcement of intellectual property rights, including copyright and related rights. Its first article notably provides for that Members of the WTO "*shall ensure that enforcement procedures as specified in [Part III] are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements*"[163]. Enforcement procedures implemented

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[158] The WIPO defines "infringement of copyright and related rights" as "an act carried out in respect of a work protected by copyright or an object of related rights without authorization of the owner of copyright or related rights concerned where such authorization is required. The liability for infringement may exist not only on the basis of direct liability (for performing the unauthorized act itself) but also on the basis of "contributory liability" or "vicarious liability"."
<www.wipo.int/export/sites/www/freepublications/en/copyright/891/wipo_pub_891.pdf>.

[159] The WIPO defines "enforcement of copyright and related rights" as "application of legal procedures, remedies and measures to prevent, stop, sanction and/or punish infringements of copyright and related rights".
<www.wipo.int/export/sites/www/freepublications/en/copyright/891/wipo_pub_891.pdf>.

[160] Applicable law and issues related to conflicts of laws are not examined in this Study.

[161] The Berne Convention also includes rules on seizure of infringing copies (art. 13 and 16).

[162] Also, article 36(1) shall be highlighted as it provides for the following two general requirements: (i) any country party to the Berne Convention undertakes to adopt the measures necessary to ensure its application; and (ii) such country needs to be in a position under its domestic law to give effect to the provisions of the Berne Convention.

[163] Art. 41(1) TRIPS Agreement. Article 41(5) however specifies that "this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor

at national level "*shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays*"[164], and in any case "*shall be fair and equitable*"[165].

More particularly, the TRIPS Agreement includes standards related to civil and administrative procedures and remedies (articles 42 to 49)[166], provisional measures (article 50), special requirements related to border measures (articles 51 to 60) and criminal procedures (article 61).

Similarly to the Berne Convention, the **World Copyright Treaty** does not contain detailed provisions on enforcement of rights. However, its article 14 provides for a general obligation which corresponds to article 41(1) of the TRIPS Agreement, quoted above.

Finally, at the European Union level, as already mentioned under Chapter 3, Section 2, **Directive 2004/48** "*on the enforcement of intellectual property rights*" harmonises to a certain extent remedies and penalties in order to provide similar sets of measures, procedures and remedies throughout the European Union. Although the Enforcement Directive is to a large extent similar to the TRIPS Agreement, it contains nonetheless some additional standards. It must in any case be reminded that the InfoSoc Directive already contains provisions relating to the infringement of copyright and related rights (chapter IV of Directive 2001/29).

It follows from the above that, **although there is some level of harmonisation at international and European Union levels, enforcement procedures in case of copyright infringement, and remedies, are to be analysed on a country-by-country basis**.

Application to translations and machine-aided translations

The issues related to copyright infringement, and to the enforcement of copyright, can be particularly relevant in the framework of derivative works. Such issues are dealt more in depth in Chapter 6, Section 11.

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does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general".

[164] Art. 41(2) TRIPS Agreement.

[165] Ibid. See also Art. 42 TRIPS Agreement.

[166] The TRIPS Agreement requires that local (judicial) authorities have the power to order disclosure of evidence, issue injunctions, assess damages and order seizure and disposition of offending goods.

Section 10. Legal proceedings and remedies

As will be demonstrated briefly in the following tables, Member States provide for strong enforcement proceedings both before civil and criminal courts, which proceedings are often open to a broad range of beneficiaries and can result in injunctive and/or monetary relief. Such proceedings and remedies are not to be underestimated : they can efficiently and quickly stop translation projects that would not have been structured in a way that respect the copyright of third parties.

Enforcement before civil courts

The first and foremost issue when it comes to enforce copyright relates to the possibilities to bring infringement claims and the forms of such actions (**first column**). The second question relates to the person entitled to initiate infringement proceedings before civil courts. It is indeed important to determine whether the author is the sole person entitled to bring infringement proceedings or whether other persons – such as associations or collective management societies – enjoy such rights (**second column**). Depending on the particularities of each national legal (procedural) system, the strategies to initiate court proceedings may vary.

	Available types of claims	Standing to sue
 Belgium	Up to three possibilities provided by the Belgian Judicial Code: (i) preliminary injunction proceedings, (ii) cease-and-desist actions on the merits and (iii) ordinary proceedings on the merits	Proceeding on the merits: "*any aggrieved party*" (Belgian Copyright Act, article 86bis) Cease-and-desist proceedings: "*any interested party, a collective management society or a professional or inter-professional association with legal personality*" (Belgian Copyright Act, article 87, §1 subparagraph 6) These two notions are interpreted broadly by Belgian courts[167]. This is of particular relevance for translation professional (companies) or translator associations who may find legal ground, under Belgian law, to act against infringers.

[167] They are not limited to holders of copyright or related rights or their (exclusive) licensees, but include everyone with a legal interest[167]. This includes everyone who is directly prejudiced by an infringement of copyright or a related right. The Belgian Supreme Court confirmed this position in its judgment of 22 May 1991: not only the author, but also all other parties, purporting to be aggrieved by alleged copyright infringement, have standing to bring proceedings for copyright infringement. The concept of aggrieved party is deemed to be broader than the concept of interested party, and covers also collective management societies or professional or inter-professional associations, which would normally fall outside of the scope of aggrieved party (no direct prejudice)

It shall be noted that such possibilities do not exist with regard to the *Sui Generis* rights related to databases. The Belgian Database Act focuses indeed on the producer of the database, and therefore does not extend the rights to initiate proceedings to other interested or aggrieved parties.

	Available types of claims	Standing to sue
 France	Infringement of copyright entitles the author and his exclusive assignees to claim for civil remedies such as (i) preliminary injunctions, (ii) permanent injunctions, (iii) damages, (iv) destruction, recall of the infringing goods (v) publication of the Court decision (vi) confiscation of all or part of the turnover resulting from the infringement (L. 331-1-4 of FIPC).	Proceedings can only be initiated by the copyright holder(s), i.e., the author, his/her assignees (publisher, producer, etc…) and successors[168]. Collective societies also have standing to sue to defend the interests of their members (French Code of Intellectual Property, articles L. 321-1 and L. 331-1 (2°)).
 Germany	Up to four possibilities provided by the German Code of Civil Procedure: (i) elimination of the infringement, (ii) cease-and-desist, (iii) information, (iv) destruction, recall and release of copies.	The "injured party" may launch an action for copyright infringement (German Copyright Act, section 97). In general the author qualifies as the injured party, but also the holder of exclusive rights to use/exploit a work (licensees) may claim remedies in case these rights are infringed.
 UK	Civil remedies are available to any copyright owner whose exclusive rights have been infringed. All remedies otherwise available in respect of the infringement of a property right are available to the copyright owner, e.g., damages or an account of profits (at the copyright owner's sole discretion) and injunctions.	Claims are available for copyright owners, exclusive licensee and non-exclusive licensee under limited circumstances[169] (Sec. 101 of the Copyright Designs and Patent Act).

Remedies before civil courts

Under the four national legal systems under review in this Study, copyright infringement actions may lead to preliminary injunctions or permanent injunctions on the merits (**first column**). Consequently, swift decisions can generally speaking be obtained in case of copyright infringement in these four jurisdictions.

Also, when copyright infringement is established, the aggrieved party may be awarded monetary relief (**second column**). Although the Enforcement Directive provides some guidance on the "damages" that may be claimed, each national system has its particularities and own practice and tradition as to ascertain what amount can be awarded, how to calculate it and whether punitive damages can be awarded.

[168] Case-law provides for a rebuttable presumption according to which the claimant that commercially exploits the work at issue is presumed to be the copyright owner.

[169] Specifically, if: the infringement is directly connected to an act which the licensee had been licensed to carry out under the licence; and the licence is in writing, signed by the copyright owner, and expressly grants the non-exclusive licensee a right of action.

	Injunctive relief	Monetary relief
 Belgium	Preliminary injunctions immediately enforceable can be granted in all infringement matters which are deemed "urgent".	Can only be obtained in normal proceedings on the merits. General principle of full compensation of the harm, taking into account all relevant aspects of the harm suffered. In practice, the judge will usually grant a lump sum. No punitive damages.
	Permanent injunctions can be obtained via regular proceedings on the merits as well as via the specific copyright cease-and-desist action (which is an accelerated action on the merits).	
 France	Preliminary injunctions can be obtained through summary proceedings (article 808 of the French Civil Procedural Code), which require to demonstrate an urgency or a lack of serious contestation of the infringement.	Same principles as for Belgium. However, law provides that when the judge awards a lump sum, the said sum must be higher than the amount in royalties or fees which would have been due, should the infringing party have requested authorisation to use the infringed right in the first place.
	Permanent injunctions can be awarded via a proceeding on the merits, each time the judges finds there is an infringement	
 Germany	Preliminary injunctions are only admissible in cases of urgency.	Compensation equal to the actual damages (German civil law concept of restitution in kind). German law acknowledges three different ways to calculate damages (reasonable licence fee, damages suffered and profits of infringer). The infringed party is given the choice as to the way to calculate the amount of damages to be paid (methods cannot be combined). In principle, no punitive damages.
	Permanent injunctions can be granted in proceedings on the merits	
 UK	Preliminary injunction: the claimant must demonstrate that he will suffer irreparable harm if the injunction is not granted and that the balance of convenience lies in favour of granting the injunction.	Claimant's option as to which remedy it seeks. Punitive damages can be awarded in addition to the basic amount, where the infringement has been particularly flagrant. However, such damages are rarely granted.
	Permanent injunction can be awarded as part of a final assessment on the merits of a case.	

Criminal proceedings

In addition to the above civil remedies, criminal proceedings can be initiated against the infringer in certain cases.

	Offences	Criminal sanctions
 Belgium	Any malicious or fraudulent infringement of copyright shall constitute a criminal offense of counterfeit (article 80 of the Belgian Copyright Act).	Offense of counterfeit is subject to a prison sentence of minimum three months and maximum three years and/or to a fine of up to 600.000 EUR. Courts can also order the infringer to deliver all infringing copies or all the profits gained with the counterfeiting actions. The courts can also order the publication of the judgment.
 France	Copyright infringement as such is a criminal offense (articles L. 335-2 to L. 335-3 FIPC).	Copyright infringement may be punished by a maximum of three years of imprisonment and a fine of up to 300.000 EUR.
 Germany	Criminal sanctions may apply to: (i) unlawful exploitation of copyrighted works and to (ii) unlawful affixing of designation of author (article 107 of the German Copyright Act).	For the unlawful exploitation of copyrighted works and unlawful affixing of designation of author: imprisonment of not more than three years or a fine. If the above acts are made on a commercial scale: imprisonment of not more than five years or a fine. Also, the products which are object to the criminal offence may be confiscated.

	Offences	Criminal sanctions
 UK	Section 107 of the CDPA lists acts of copyright infringement which constitute criminal offences. The main offences cover making infringing copies available for sale or hire, importing infringing copies into the UK other than for private use, exhibiting or distributing infringing copies to the public in the course of trade, or distributing infringing copies otherwise than in the course of trade but to such an extent that it is prejudicial to the copyright owner. These offences apply to those acts done in relation to works which the infringer either knows or has reason to believe are infringing copies[170].	Criminal remedies apply in parallel with civil remedies, and offences carry varying levels of possible punishment including fines and/or imprisonment with, in certain cases, a maximum term of imprisonment of ten years and a fine.

[170] The courts have held that when considering whether someone would have reason to believe the works were infringing copies, regard was to be had to what a reasonable man with the defendant's background and experience would have reason to believe (*La Gear Inc v Hi-Tec Sports* [1992] FSR 121).

Chapter 5. The right of translation

The right of translation (or right to translate) is one of the economic rights of the author.

Its recognition in the various legal systems is, however, less straightforward than it is the case for the core economic rights as the right of reproduction, of distribution, of communication to the public, of rental and lending – see Chapter 4, Section 6. For instance, while the right of translation is expressly provided for in the Berne Convention, it is overlooked in the European Union directives in the field of copyright[171] and more particularly in the InfoSoc Directive[172].

At the national level, the right of translation is regulated in various ways: some countries recognise it explicitly, while others encompass it as part of the broader right of reproduction.

As always, the interface between economic rights and moral rights must be kept in mind. This is especially true for the right to translate: the fact that someone is granted the right of translation does not provide him with a blank cheque: the translation shall have to abide by the moral rights of the author of the source work as well. Also, it goes without saying that obtaining the right to translate a work does not automatically give the translator the right to reproduce, communicate to the public and distribute images, graphical cover etc. in the source document. Such visual works can be protected by copyright as well, and specific rights (authorisations) need to be obtained from the respective right-holders in relation to these contents if one wishes to use it.

[171] With the exception of the Software and Database Directives, which do however not cover translation within the scope of this Study.

[172] Scholars emphasize that the adaptation right and the translation right are not explicitly mentioned in the InfoSoc Directive, except if one would consider that the reproduction right also includes such translation and adaptation rights (as is the case in some countries). They conclude that while the concept of the reproduction right in the InfoSoc Directive has been intentionally made very broad, it would however perhaps not cover the act of translation. Nonetheless, according to such scholars, a distinction should be made between a human and an automated translation, where the latter could involve a reproduction in the sense of the InfoSoc Directive (J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)' (2014) 32).

Section 1. The right of translation in the Berne Convention

The Berne Convention considers the right of translation as "*a fundamental right of the author of an original work*"[173].

Such importance shines through the fact that the right of translation was the first right to be recognized under the Berne Convention. In the historic context of the 19th century, it was felt as important that knowledge and culture circulate cross-border, and thus that works be translated. But as a matter of fact authors of original works rarely translated themselves their own work. Therefore, it was considered important to regulate the right of translation in international copyright legal instruments at that time.

That was the purpose of article 5 of the Berne Convention in its original version of 1886. Such right has evolved since then. Currently, article 8 of the Berne Convention, entitled 'Right of Translation', reads as follows:

> "*Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works*"[174].

Such right allows the author of a given work to translate that work by himself or to authorise a third party to "*transform the work, in another language, in such a form that the thought, style and message of the original work are faithfully communicated*"[175].

[173] WIPO/Unesco Committee of Governmental Experts, 'The Printed Word - Preparatory' Document for and Report of the WIPO/Unesco Committee of Governmental Experts' [1988] Copyright 42, 88.
[174] Article 30 and the Appendix to the Berne Convention allow certain reservations with regard to the translation right of article 8.
[175] WIPO/Unesco Committee of Governmental Experts, 'The Printed Word - Preparatory' Document for and Report of the WIPO/Unesco Committee of Governmental Experts' [1988] Copyright 42, 88.

Section 2. The right of translation under national laws

The right of translation is a good illustration of how national legislators can implement a given right differently in their national copyright instruments and create important discrepancies among the different countries. Let us take the example of the countries selected for this Study.

Belgium

The Belgian Copyright Act explicitly recognises the "right of translation". Article 1 reads as follows:

> "*The author of a literary or artistic work alone shall have the right to reproduce his work or to have it reproduced in any manner or form whatsoever.*
> *This right shall also comprise the exclusive right to authorize adaptation or translation of the work*" (our own translation).

The Belgian legislator has therefore included the translation right in the broader category of reproduction right of the author. Case-law from the highest courts of Belgium reaffirm the fact that the right of reproduction related to a protected copyright work notably includes the exclusive right to consent to its adaptation or translation[176].

France

The translation of a given work requires the prior authorization of the author of that pre-existing work. This results from the derivative nature of the translation.

The basis of the matter is found in article L. 122-3 of the French Code of Intellectual Property: "*Reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording* (…)" (translation provided by *Legifrance*).

That provision is interpreted in such a way that there will be "reproduction" of a work even when said work is transformed into a derivative work (such as an adaptation or a translation) but when the material elements of the original work remain, wholly or partly, in the derivative work. In other words, as soon as the main and essential characteristics of a piece of work are found in a derivative work (such as a translation), this will qualify as an act of reproduction. That extensive interpretation is meant to enable the authors of the pre-existing work to control the use of that work.

In that context, a translation is a derivative work that requires the reproduction of the initial work and therefore the authorisation of the owner of the copyright on said initial work in order to avoid infringement.

Germany

German Law perceives translations as adaptations of an existing work that can be protected by German Copyright law if the translation itself is regarded as the own intellectual creation of the creator (translator). Article 3(1) of the German Copyright Act reads as follows:

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[176] Anvers, 14 October 2002, A.M. [2003] 276; Belgian Supreme Court, 25 September 2003, C.03.0026.N/1, R.A.G.B. [2004] 216, note F. Brison.

> *"Translations and other adaptations of a work which are the adapters own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work […]."*

Further to that, article 23 of the German Copyright Act relating to 'Adaptations and transformations' provides for the consent of the author of the translated work for any publication or other exploitation of the translation. Article 23 states:

> "*Adaptations or other transformations of the work may be published or exploited only with the consent of the author of the adapted or transformed work*" (translation provided by the German Ministry of Justice and Consumer Protection).

This consent is required irrespective the originality of the translation[177]. An exception shall apply if the use lies within the scope of the Copyright exceptions. Article 62 German Copyright Act provides that no alterations of a work are permitted even if the use of that work is permitted according to copyright exceptions. However, as an exception to that principle, translations are permitted provided that they necessitated on account of the purpose of the use, e.g., translations are permitted for the purpose of quotations according to article 51[178].

United Kingdom

The Copyright Designs and Patent Act states at section 21 that making an adaptation is a right restricted by the copyright in a literary, dramatic or musical work, and at section 21(3)(a)(i) that "adaptations" shall include translations of literary, dramatic and musical works. Therefore, while there is no separate "translation right" it is within the scope of the adaptation right. There is no further definition of "translation" within the Copyright Designs and Patent Act, but it is generally accepted to mean the translation from one language to another.

[177] See Hoeren in Loewenheim, Handbuch des Urheberrechts 2nd Edition 2010, § 9, 209.

[178] T. Dreier and G. Schulze, UrhG Kommentar (4th., C.H. Beck 2013) § 62 Rn. 15.

Section 3. Consequences of the right of translation

As it will be developed in Chapter 6 of this Study, a work of translation shall be considered as a standalone literary work and shall be protected by copyright if it fulfils all criteria of protection. The translator shall be considered as a separate author.

But at the same time the translation constitutes the reproduction of the pre-existing source work, which by hypothesis can also be protected by copyright and which by hypothesis was created by another author..

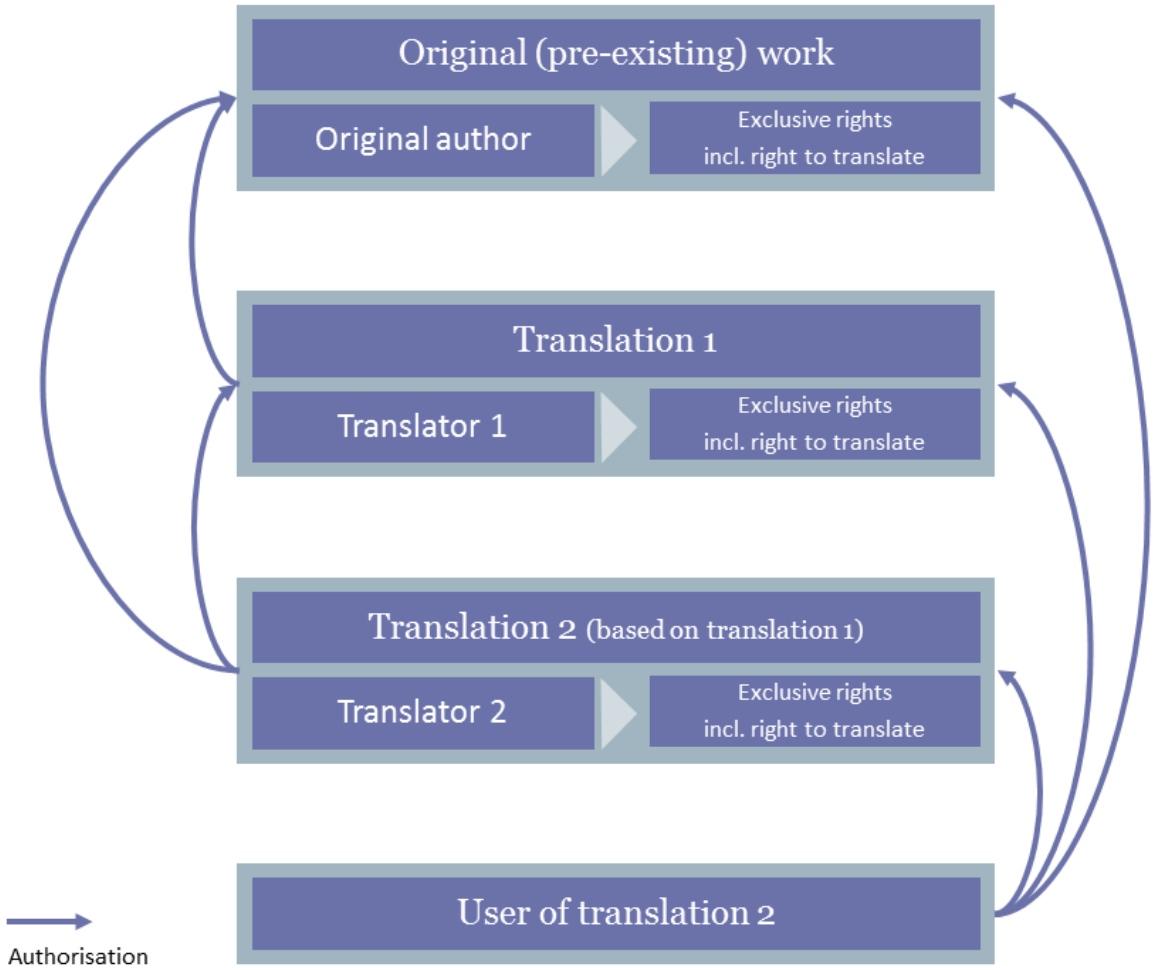
A translation is moreover generally not a creation made in common by the author of the pre-existing work and the translator-author[179]. The author(s) of a translation has/have generally worked independently of the author(s) of the pre-existing work[180]. There is generally no collaboration between them.

In that sense, a translation does not generally fall within the category of works created by multiple authors (under the category of works of collaboration and collective works), but under the category of derivative works or composite work created on the basis of a pre-existing work.

Hence, while the copyright on the translation belongs only to those who created it (the translator(s)), the complication is that said proprietary translation may not be exploited (used) without the consent of the owner of the copyright on the pre-existing source work.

As a result of the above, multiple authorisations may be needed in order to exploit (use) an original work and its translation(s). This is illustrated in the diagram on the next page (which does not take into account the possibility of having multiple authors of each work, which would increase even more the number of authorisations required)[181].

[179] Although it could be the case in practice that the author of the pre-existing work collaborates with the translator. In such event, the author of the pre-existing work might qualify as the co-author of the translation.
[180] F. de Visscher and B. Michaux, *Précis du droit d'auteur* (Bruylant , Brussels 2000) 42.
[181] Ibid.



As a result, in order to exploit any translation, authorisation must be obtained from (i) the original owner of the rights on and to the source document in the source language and from (ii) the owner(s) of the rights on and to the translation(s) in the target language(s)[182].

[182] In the 1853 English case of Murray v Bogue (1853) 1 Drew 353, in a non-binding part of the judgment the court stated that if a defendant retranslated a German translation of an English work, even if the re-translator did not know that the translation was taken from the original English work, the original work could not be indirectly pirated and the owner of the copyright in the original work could restrain the distribution of the retranslation.

Chapter 6. Copyright protection of translations *per se* (downstream approach)

The present Chapter constitutes the second core Chapter of this Study. Translations are here studied as potential subject-matter of copyright protection. This is the so-called **downstream** approach.

It is first necessary to provide some legal background, from an international (especially under the Berne Convention) and national perspectives. In that regard, we will determine in the following sections that translations are not protected everywhere in the same way. Also, in order to clearly understand the particularities of translations, a distinction shall be made with other derivative works.

The heart of this Chapter lies within Section 5, where the essential requirement for copyright protection, i.e. originality, is first analysed and applied to translations. The Chapter will pursue by providing specific guidance for machine-aided translations. Other issues will also be covered: translation as possible infringement of the copyright on the source document, official and unofficial translations, rights and obligations of the translator, ownership and infringements.

Section 1. A historical perspective on the Berne Convention

The Berne Convention plays an important role when considering translations. Exclusive right on translation was indeed the first right recognised under the Convention in its first version of 1886[183].

Such early recognition has evolved over time until the currently applicable article 2(3), which includes 'derivative works' (among which translations) in the list of 'protected works', and article 8, which deals with the right of translation.

Other provisions of the Berne Convention explicitly refer to the legal regime around translations, such as article 11 with respect to 'certain rights in dramatic and music works' and article 11*ter* in relation to 'certain rights in literary works'.

A brief recapitulation of the evolution of that regime in the Berne Convention helps understanding the importance given to translation works in that fundamental international treaty, but also its alignment with other derivative works recognised by the Berne Convention over time.

- Initially, the 1886 version of the Berne Convention provided (article 5) for an exclusive right of translation ("upstream") for a limited period of ten years as from the publication of the original work[184]. It is probably not unimportant to remind that, at that time, the Treaty did not provide for a mandatory minimum protection term for copyright in general. The World Intellectual Property Organization Guide explains that "*this was a compromise between net exporter countries, which were in favour of the fullest protection for the right of translation possible, and net importer countries, which wanted to maintain the free availability of foreign works as much as possible*"[185].

- Article 6 of the original 1886 version further provided that "*lawful translations shall be protected as original works. They shall consequently enjoy the protection stipulated in Articles 2 and 3 as regards their unauthorized reproduction in the countries of the Union. It is understood that, in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers*". Consequently, translations were protected ("downstream") but only in a limited way: first, unauthorised translations were not protected; only "lawful translations" were; second, and in any case, translations were only protected against unauthorised reproductions (and not against other types of use beyond reproduction).

- The Paris Additional Act and Interpretative Declaration of 1896 amended the duration of the translation right ("upstream" - first paragraph of article 5 of the Berne Convention): "*authors who are subjects or citizens of any of the countries of the Union (…) shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works during the entire term of their right over the original work*". The amendment however also provided that "*the exclusive*

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[183] Both the TRIPS Agreement and the World Copyright Treaty provide that contracting parties are required to comply with articles 1 through 21 of the Berne Convention, and therefore with the provisions related to translations.

[184] 1886 Berne Convention, article 5 "*Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorizing the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.*

For works published in incomplete parts (livraisons) the period of ten years shall commence from the date of publication of the last part of the original work.

For works composed of several volumes published at intervals, as well as for bulletins or collections (cahiers) published by literary or scientific societies, or by private persons, each volume, bulletin, or collection shall be, with regard to the period of ten years, considered as a separate work.

In the cases provided for by the present Article, and for the calculation of the terms of protection, the 31st December of the year in which the work was published shall be regarded as the date of publication."

[185] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 53.

right of translation shall cease to exist if the author shall not have availed himself of it, during a term of ten years from the date of the first publication of the original work, by publishing or causing to be published, in one of the countries of the Union, a translation in the language for which protection is to be claimed". This was an incentive for authors to disseminate translations of their works.

- The Berlin Act of 1908 has included translations under article 2 related to 'literary and artistic works' ("downstream"): "*translations, adaptations, arrangements of music and other reproductions in an altered form of literary or artistic work as well as collections of different works, shall be protected as original works without prejudice to the rights of the author of the original work*".

- In the same Berlin Act, article 8 explicitly provided for the exclusive right of translation ("upstream"), stipulating that "*the authors of unpublished works, being subjects or citizens of one of the countries of the Union, and the authors of works first published in one of those countries shall enjoy, in the other countries of the Union, during the whole term of the right in the original work, the exclusive right of making or authorizing a translation of their works*".

- The Brussels Act of 1948 amended more fundamentally articles 2 and 8 of the Convention by providing texts which have undergone little (stylistic) modifications since then. Also, article 11 referred for the first time to translations in relation to dramatic and musical works. It was not until the 1967 Stockholm Act that such reference to translations was included in relation to literary works in article 11*ter*.

- Nowadays, the following provisions of the Berne Convention (of the 1971 Paris Act) relating to translations apply[186]:

  Article 2(3) – Protected Works - derivative works: "*Translations, 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*".

  Article 2(4) – Protected Works - official texts: "*It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts*".

  Article 8 – Right of Translation: "*Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works*".

  Article 11(2) – Certain Rights in Dramatic and Musical Works - in respect of translations: "*Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof*"[187].

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[186] We do not study as part of this Study the questions related to reservations as to the right of translation provided under article 30 of the Berne Convention and its Appendix.

[187] As indicated in the report of the WIPO/Unesco Committee of Governmental Experts, "*Article 2(3) of the Berne Convention accords copyright protection to translations but without prejudice to the copyright in the original work. On the basis of that provision and of Article 8 (on the right of translation). Articles 11(2) and 11ter(2) do not seem to be absolutely necessary. Those Articles provide that authors of dramatic or dramatico-musical and literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translation thereof*" (WIPO/Unesco Committee of Governmental Experts, 'The Printed Word - Preparatory' Document for and Report of the WIPO/Unesco Committee of Governmental Experts' [1988] Copyright 42, 89).

Article 11*ter*(2) – Certain Rights in Literary Works - in respect of translations: "*Authors of literary works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof*"[188].

Finally, we note that the WIPO/Unesco Committee of Governmental Experts adopted in the 1980's fundamental principles which aim at synthesising the issues related to the copyright regime around translations[189]. In particular, we highlight the following two principles relating to the translator's rights:

- **Principle PW24**. (1) A translation of original character should be protected as a literary work without prejudice to the copyright in the original work which has been translated. (2) The translation mentioned in paragraph (1) should be protected irrespective of whether the original work is already in the public domain or otherwise is not protected because, for example, it is an official text of a legislative, administrative or legal nature. Official translations of such official texts, however, may be excluded from copyright protection.

- **Principle PW25**. The author of the translation mentioned in Principle PW24(1) should enjoy the same rights (including the right to authorise the translation of his translation into another language) for the same term of protection and under the same conditions as authors of original works do, without prejudice to the rights of the authors of the original works concerned.

[188] Ibid.
[189] The report of the Committee of Experts was adopted on 11 December 1987 (document number UNESCO/WIPO/CGE/PW/4), published in 'Copyright', the monthly Review of the World Intellectual Property Organization, Iss. 2, Feb. 1988.

Section 2. National laws

The recognition of translations as works which can be protected by copyright is regulated differently across the European Union. While some countries do not refer to translations as such, other Member States explicitly include them into the list of protectable works.

In the four countries under scrutiny in this Study, we note that, no matter whether there is a non-exhaustive list of protectable works under national law, none of the four Member States mention translations as works eligible for copyright protection. Nevertheless, in practice they all provide for such protection, as long as the translation is original.

In **Belgium**, the legislator has not included in the Belgian Copyright Act a list of works that would be eligible for copyright protection, nor the conditions for such protection[190]. Accordingly, "translations" are not *per se* mentioned in the Belgian legislation as copyrightable works but are certainly protected if they are 'original' and expressed in a concrete form.

Similarly, in the **UK**, "translations" are not expressly stated to be protected under section 3 of the Copyright Designs and Patent Act. However, as any other literary work, a translation will be protected if it is sufficiently original. For example, in *Wyatt v Barnard* (1814) 3 V&B 77 the court held that a translation, if it is original, cannot be distinguished from other work in which copyright would subsist and so is entitled to protection. Similarly in *Byrne v Statist Co* [1914] 1 KB 622 the court found that a translation was "*certainly a literary work*".

In **France**, article L. 112-2 of the French Code of Intellectual Property provides for a non-exhaustive list of protected works. Unlike the Berne Convention, the French Act does however not mention translations or other types of adaptation in that list. However, article L. 112-3 of the French Code of Intellectual Property recognises a translation as a piece of work that may be protected under the same regime of French "droits d'auteur" subject to its originality and without prejudice to the rights of the author of the source work.

In **Germany**, the legislator provides under article 2 of the German Copyright Act for a non-exhaustive list of protected works. That list does not include translations. However, article 3 (entitled 'adaptations') reads as follows: "*Translations and other adaptations of a work which are the adapter's own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work*" (translation provided by the German Ministry of Justice and Consumer Protection).

[190] Article 8 of the Belgian Copyright Act relating to literary works however provides that "literary works" encompass writings of any kind, as also lessons, lectures, speeches, sermons or any other oral manifestation of thought.

Section 3. Translations versus other works

Translations versus other derivative works

Before studying more in-depth the conditions and scope of copyright protection of translations, an important clarification must be made on the close relationship between 'translations' and other derivative works as referred to in article 2(3) of the Berne Convention (and in many national legislations like in Belgium and France).

Article 2(3) of the Berne Convention is worded as follows: "*Translations, 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 wording of article 2(3) of the Berne Convention seems to assume that translations are similar with the other types of derivative works. This is however not entirely the case. The nature of translations is indeed different[191]. A translator seeks to offer through a translation an existing literary work in a new language which is as faithful to the source text as possible[192]. **The elements of originality of a given translation shall be found in the "re-creation" of the original work in another language, by keeping the same structure, thoughts, phrasing, expressions of feelings, etc.** As it will be demonstrated below, the room for creativity will depend on the nature of the source and the type of translation provided. In that sense, adaptations, arrangements and other similar alterations are different: they do not as such "re-create" the original work as faithfully as possible; by definition, derivative works other than mere translations change not only the form but also – to a larger or lesser degree – the structure, presentation, thoughts, phrasing, expressions of feelings, etc. of the initial work.

Such difference of nature within the same category of "derivative works" has necessarily an impact on the applicable legal regime (such as for instance on the originality criterion) but also on the prominence, or scarcity, of legal issues and debates in the legal literature and case-law.

In this respect, the fraction of legal commentaries and case-law related to translations as compared with other derivative works is very illustrative: while there exist many cases related to adaptations for instance, the same cannot be said about translations, which are only rarely examined by national courts, and thus commented by legal scholars. **Translations face therefore an interesting paradox of being the first derivative work included in the Berne Convention in the 19th century but being the least analysed in comparison to adaptations, arrangements and other alterations.**

Translations versus interpreters' works

Despite their substantial similarity, translators are not to be confused with interpreters.

While translators exclusively present the result of their work in writing, interpreters 'translate' works orally (a speech for instance)[193]. It is however not unusual to have a written transcript of an interpreter's work (and in some case of the original version of a speech, conversation, etc.). In such case, protection as translations cannot be excluded[194]. Moreover, technological evolution has also played in recent years an

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[191] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 29.

[192] As clarified by scholars, "*changing words from one form or symbolic representation to another, for example, from standard lettering to morse, braille or shorthand, or vice versa, is not translation. (…) The distinction is important: someone wishing to make a braille or other coded version must make sure he is dealing with the owner of the reproduction, not the translation, right*" (D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 159).

[193] D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 159.

[194] "*For the protection of such translations, of course, all the conditions of copyright protection should be met and the legal consequences following from employment situations and from individual contracts should also be taken into account. Furthermore, such factors have to be considered as whether works have, under the law, to be fixed in a material form in order to enjoy protection*" (WIPO/Unesco Committee of Governmental Experts, 'The Printed Word - Preparatory' Document for and Report of the WIPO/Unesco Committee of Governmental Experts' [1988] Copyright 42, 91).

important role in this context, providing voice-recognition tools and voice-translators. Such issues are however not within the scope of this Study, although the legal implications definitely deserve to be looked at more in depth within the framework of another study.

Besides, it shall be briefly noted that countries are divided on whether to require a work's fixation in some tangible form as a condition to its copyright protection. While common law countries require the fixation in tangible form, civil law countries do not. This division results from The Berne Convention which indeed provides that it shall be a matter for national legislators to establish this requirement or to choose to not do so.

Accordingly, countries such as Belgium or France automatically authorise oral works (such as pleadings, interviews, conferences, radio phonic speeches, etc.) to be protected under copyright as long as they fulfil the originality requirement. However, such approach complicates the distinction between mere ideas (which cannot, in any event, be protected) and protectable works.

Section 4. Protection of translations as "original works"

Article 2(3) of the Berne Convention provides for that "*translations (…) shall be protected as original works without prejudice to the copyright in the original work*" [we emphasise]. That wording is ambiguous and may indeed lead to confusion. A two-step clarification is needed upfront.

First, the words "*protected as original works*" do not refer to the concept of originality as a condition for the existence of a copyright-protected work. Indeed, the provision uses the term "work". That term presupposes that the translation is protected by copyright and thus fulfils the necessary criteria (see Chapter 4, Section 1), i.e., being original and in a concrete (fixed) form: "*a work is by definition original since, if a production in the literary and artistic domain does not satisfy the originality test, it is simply not covered by the concept of "literary and artistic works*"[195].

Furthermore, as highlighted by the World Intellectual Property Organization[196], the words "*as original works*" are intrinsically related to the nature of "derivative works". Derivative works are indeed derived from "*pre-existing works in a way that certain elements of those works are present in them*". However, in order to have a derivative work that deserves copyright protection, other elements must be added to the existing elements of the "original work". "*Therefore, in this paragraph, the adjective 'original', in the expression 'original works', is in fact a synonym of 'pre-existing' or 'non-derivative'*"[197].

Second, with respect to the words "*original work*" in "*without prejudice to the copyright in the original work*", the same interpretation shall apply with the nuance that, as clarified by the World Intellectual Property Organization, in this second part of the sentence, "*reference is made to the concrete pre-existing – 'original' – work from which a translation, adaptation, etc. has been derived, and the phrase clarifies the relationship between the protection of a derivative work and the pre-existing – 'original' – work from which it has derived*"[198].

Article 2(3) could therefore be rephrased as follows (the added words are in italics): translations shall be protected as original works *are themselves protected*, without prejudice to the copyright in the original work *from which said translations derive*.

Under article 2(3), two levels of protection are therefore considered: (i) the pre-existing work; and (ii) the derivative work. This is of particular importance as a chain of authors is created, who shall benefit from full copyright protection, and thus exclusive rights, on their own work. As a result, an identical right is recognised to both the author of the source work and the author of the translation[199].

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[195] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 28.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Such clarity also exists under French law. According to L. 112-3 of the French Code of Intellectual Property, translations are protected under copyright law, provided that they are original: "The authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work". Accordingly, further authorisation of the translator shall be required for any act of reproduction of his translation. Otherwise, the reproduction of the translation without the authorisation of the translator would infringe the translator's copyright (Civ. 1re, 11 Feb. 1970 : D 1970.227).

Section 5. Originality of translations

A translation shall be protected by copyright as an "original work". Accordingly, the criteria for a work to be eligible for copyright protection in general shall apply *mutatis mutandis* to translations, including the most important condition of "originality". We therefore refer to our commentaries in Chapter 4, Section 3 and in particular those related to the originality requirement as interpreted by the Court of Justice of the European Union.

The main question boils down as to whether a translation automatically fulfils the originality condition by its mere creation or whether a higher threshold applies to such derivative work. The rationale behind that higher threshold would be that by definition, a translation consists in a work on someone else's pre-existing text, i.e., the work of expressing the other's thought into a different language.

Some legal scholars take the position that a translation should easily be considered as being original because "*a good translator uses at least as much skill and judgment (although of a different kind) as the author of the source work*"[200]. A similar view was adopted by the WIPO/Unesco Committee of Governmental Experts. In the opinion of that Committee, "*translation is a creative work in itself since it involves both a good knowledge of the subject treated and intellectual efforts of using appropriate phraseology, grammatical construction, style, expression, etc.*"[201].

If one were to follow such view, any translation of a pre-existing protected work would be considered as a new protected work because, by definition, a translator has used skill and judgment to create the translation.

The Committee itself nuanced its statement by emphasising that "*the question of what translations are to be accepted as original (and what are not) depends of course on the different levels of originality and creativity that determine copyright eligibility in various national copyright systems*"[202].

The question is indeed more complex and requires a closer examination of each pre-existing work and its corresponding translation. The two parameters are relevant.

First, the originality criterion, and thus the protection of translations, will indeed depend on the nature of the original text: the more creative, complex or original the source, the more likely it is that its translation will be original as well[203].

Second, the originality will also be contingent upon the nature of the translation itself[204]. Whenever the translator performs only a technical or mechanical translation (word-by-word), little originality is required and the translator will hardly be able to reflect his personality in the translation[205]. On the other hand, when the translation is literary or scientific, the translator's input will be more important and thus he will be able to express his creative choices and stamp his/her personal touch on the translation[206]. That being

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[200] D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 160.

[201] WIPO/Unesco Committee of Governmental Experts, 'The Printed Word - Preparatory' Document for and Report of the WIPO/Unesco Committee of Governmental Experts' [1988] Copyright 42, 90.

[202] Ibid. 91.

[203] "*The translation of a poem, for example, unless it is just a "rough translation" (simply offering the vocabulary equivalents of the words in the original language), may normally require creative efforts. On the other hand, a purely technical text may not offer the possibility of choosing different options when faithfully translated; thus, its translation may not qualify as an intellectual creation and, thus, as a work*" (WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 29).

[204] Such view has been suggested in *obiter dictum* by the Brussels Labour Court in M. Goche v O.N.P. [1998] 3 A.M. 303.

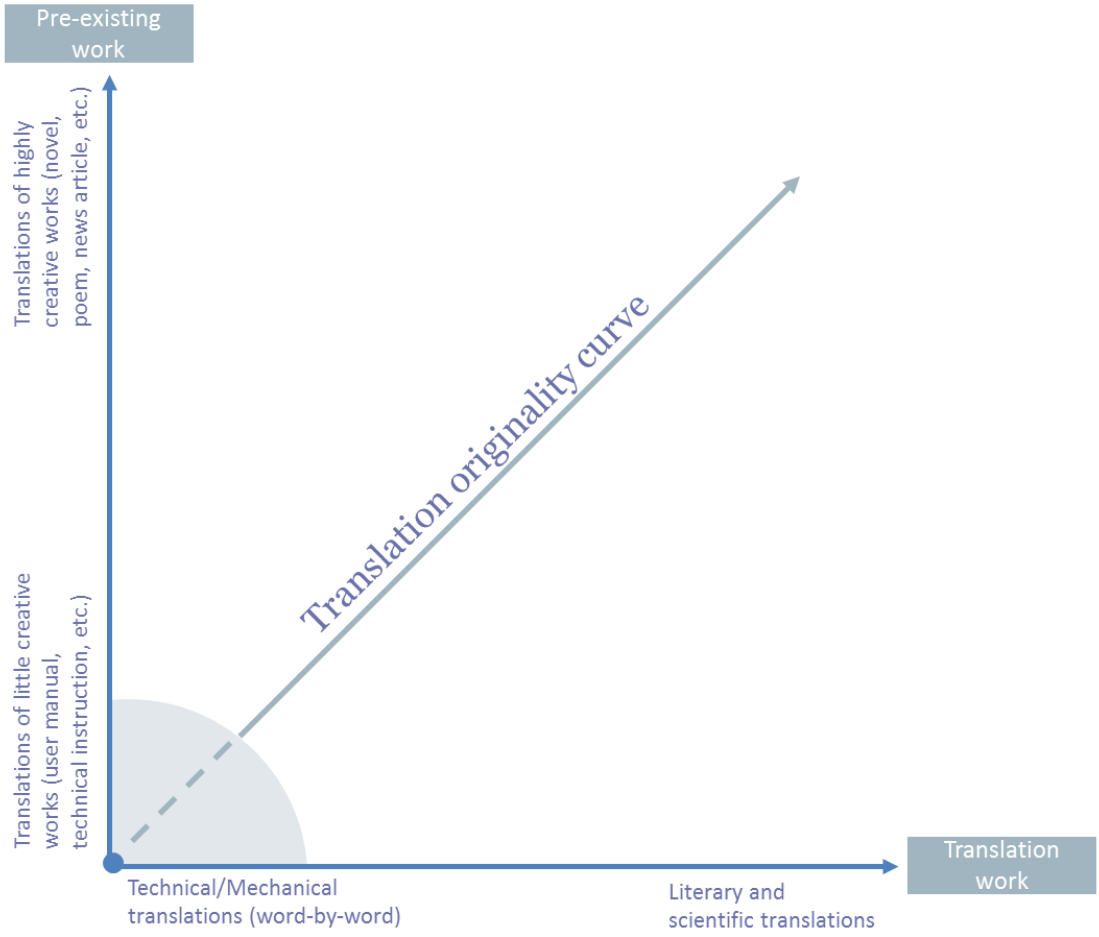
[205] A.R. Bertrand, Droit d'auteur (3rd, Dalloz, Paris 2010) 159.

[206] In this context, we refer to a decision of the Appeal Labour Court of Mons (Belgium) in which in substance the Court decides – in the context of social security and tax – that a translator is not an author as he must provide an accurate translation. In such particular case, the free-lance journalist specialised in critics of movies translated subtitles from one language to

said, it is at the same time crucial to keep in mind and abide by the paramount principle of copyright law that the quality of the translation is irrelevant for the determination of its original character (as it is for any work): indeed, as a matter of law, the work's merit or aesthetic do not matter when considering the question of copyright protection.

On another (related) note, although the length of a work does not *a priori* have a bearing on the originality criterion, it will nonetheless be relevant in practice because the translator's own creative choices will be more difficult to establish in a short translation of a few words or sentences than in a longer text[207].

The correlation described above can be depicted as follows:



Sure, there is nothing mechanical in copyright law and that type of graph is for illustration purpose only. For instance, it cannot be *per se* excluded that originality is found even in cases of quite technical/mechanical translations (word-by-word translation) of a very little creative work[208] (the grey area). However, the probability that such work

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another (Mons Court of Appeal, 14 March 2008, J.L.M.B. [2008] 1525). Following such case, we further refer to the short observations of the President of Labour Court of Tournai (Belgium) who raises the difficult question of the status of literary translators, concluding that with literary translations the boundary between a 'simple' translation and author work is hard to define (M. Westrade, 'Le difficile statut des traducteurs littéraires' [2008] J.L.M.B. 1526).

[207] However, as highlighted by French legal literature, it was considered that the translation of a two-words title (i.e., "Wuthering Heights" by Emily Brontë) into French ("Les Hauts de Hurlevent") constitutes an original creation of the translator, a personal work on which the author can claim copyright protection because such title is not a literal translation: the English word "Wuthering" has no direct equivalence in French (see A.R. Bertrand, Droit d'auteur (3rd, Dalloz, Paris 2010) 158 and case-law cited).

[208] In this context, Courts in Belgium, for instance, do not exclude copyright protection for works of low creativity. For instance, video games user manuals and instructions have been considered as works protected by copyright, including their translation, provided they are the result of an own intellectual effort (Brussels Court of Appeal, 11 April 1997, A.M. [1997] 265 note V. Vanovermeire). In the same vein, the First Instance Court of Paris concluded that a word-by-word translation does not exclude its originality as "*the search and use of a word, taking into consideration the richness of language, requires a choice reflecting the translator's own personality and sensitivity. Such choice evidently gives an original character to the outputted translation*" [our translation] (TGI Paris, 13 October 1992, Quentel v TEM, Gaz. Pal. [Feb. 1993] 17).

is eligible for copyright protection is most probably remote. Indeed, in such cases, it will be much harder for a translator to demonstrate that its work fulfils the criteria of originality laid down by the Court of Justice of the European Union and in particular those highlighted in Chapter 4, Section 3.

On a similar note, one must keep in mind that the degree of originality is *a priori* irrelevant to determine copyright protection. Indeed, the question is whether there is originality or not, irrespective of the high or low degree of such originality. That being said, it remains that a work falling into the grey zone of low originality shall in most likelihood be seen as lacking originality and thus not be protected under copyright.

There is unfortunately little reported case-law on that issue and, therefore, little guidance on the application of the originality criterion to translations.

In **Belgium**, however, the Brussels Commercial Court had the opportunity to (partially) take the above considerations into account with respect to the translation of a work related to osteopathy. Mr. R. Richard had been authorised to translate a book into French solely for his students and for non-commercial purposes. The Court finds that the translation is literal and devoid of creative character, except with respect to certain quotations. In order to clarify the situation, the debates were reopened. The Court finally ruled that the translations did not present an original character and were not protected by copyright[209].

In **Germany**, the Federal Supreme Court has confirmed that translations in general enjoy copyright protection[210]. According to the Court, a translation cannot be performed properly in a mere mechanic way: a certain degree of understanding and feeling for the language is required in order to express a text's message in a different language. Concretely, it was ruled that even the translation of a comic's speech balloons satisfy the originality criterion.

In the **UK**, the test remains that a translation or adaptation of an existing work will itself merit copyright protection if the translator/adaptor expended sufficient skill and labour to meet the basic "originality" test for a work to be protected. In *Sawkins v Hyperion Records Ltd* [2005] 1 WLR 3281 it was held that sufficient skill and knowledge had been applied by Sawkins, a musicologist, when he transposed original music by Lalande, editing it and correcting it where necessary to make it playable with modern notation. The court of appeal rejected the argument that Sawkins' work was a mere transcription of the original work. It held that the edition was a new musical work in itself despite the fact that Sawkins did not add any music to the original work.

In *Walter v Lane* [1900] AC 539 it was held that reporters transcribing political speeches in shorthand and then reporting them (including punctuation) to be verbatim of the original speech are entitled to copyright in their reports, despite the speechmaker also having copyright in their note of their speech.

[209] Comm. Bruxelles, 12 January 1987 and Comm. Bruxemmes; 28 June 1989.
[210] BGH NJW 2000, 140 - Comic-Übersetzungen II.

Section 6. Machine-aided translations

Machine-aided translations can be either completely automated or only partly, i.e., requiring post-edits by human translators. As any translation, they are based on an existing work, i.e., the source document. But unlike other translations, they are also based on previous translation works that have been aligned in a certain way at a certain segment levels (see Chapter 2) and organised in a certain way in a database. They are generated through the use of computer programs (which can be protected under copyright and/or specific *sui generis* rights).

The questions around how such machine-aided translations are protected or not under copyright and who should be considered as the author of such machine-aided translations, are particularly challenging and complex. There is very little legal research and analysis published in the existing legal literature or case-law, hence little guidance. The phenomenon Machine-aided works is overlooked by many national legislations.

Besides, the type of translation technology used, and thus the level of human contribution at stake, will have an incidence on these copyright issues, and there is therefore no general answer applicable to all types of machine-aided translations. But we can try to briefly identify a certain number of main common features.

First, on the issue of authorship.

A machine cannot be an author within the meaning of copyright law. Legal instruments related to copyright implicitly refer to authors as a human being creator of the work[211]. And true, even translations that are entirely generated by machine require some human input, even if in certain cases it is very remote. If we make a parallel with pictures taken by ordinary cameras or by satellites, the output result is always made on the basis of several operations involving humans (programming, initiative, editing, exploitation, etc.)[212]. **UK** is kind of an exception in the **European Union** in that respect. Works generated by machines are expressly considered. Under section 9(3) of the Copyright Designs and Patent Act, related to the authorship of work, paragraph 3 stipulates that "*in the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken*". In *Express Newspapers plc v Liverpool Daily Post & Echo plc* [1985] FSR 306 the court found that tables used in a newspaper competition were protected by copyright and that the author of the works was the person who instructed the computer to carry out the process by which they were generated (i.e., the person who wrote the computer program which generated the copyright work). The court held that to deny the writer of the computer program ownership of the end product in which copyright subsisted would be similar to denying the author of a manuscript copyright in the work by saying that in fact the pen was the author (being the tool by which the work was created).

Second, on the issue of originality.

As for any work (including any translation), in order for copyright protection to apply, the computer-generated translation must meet the general copyright conditions[213] and thus be original, and more particularly contain the stamp of the author's personality.

While it is clear that merely pressing a button to generate new elements does not create an original work within the meaning of copyright, the situation is less clear-cut when the

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[211] A.R. Bertrand, *Droit d'auteur* (3rd, Dalloz, Paris 2010) 159.
[212] Ibid.
[213] Such condition was highlighted by the WIPO/Unesco Committee of Governmental Experts in 1982 already: "in order to be eligible for copyright protection the work produced with the help of computer systems must satisfy the general requirements for such protection established by the international convention and national laws on copyright" (Second Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works, Paris, published in 'Copyright' [1982] 247).

elements generated are based on pre-existing works stored in a database, and in certain cases re-edited by human beings[214].

In this context, we are in a nutshell of the opinion that:

- A translation that is entirely generated by machine, without the intervention of a human translator to make corrections (such as is the case with pure machine translations) would not be protected under copyright given that it leaves no room for human creativity and would therefore be deprived of originality[215].

- One or more raw translation(s) that are generated by machine and suggested to human translators for either making a choice between various suggestions and/or post-edit the propositions (as is the case with the use of translation memories) could give rise to copyright protection in case the translator would be able to imprint his personality and make such work original[216]. The originality will however depend on the translator's required input, as well as the type of work to be translated.

  This second situation gives rise to an interesting paradox as the originality will depend mainly on whether the translator will need to edit the suggestions in a substantial manner. Consequently, the better the translation program, the less likely the result will be eligible for copyright protection[217].

These situations do however not exclude infringement issues related to the use of existing protected works (source documents and aligned translations) to generate the machine translation, as highlighted in the second Chapter of this Study, nor the question of (joint-)authorship of the final translation.

Finally, regarding crowdsourcing and user-generated content.

Both phenomena are developing fast and expanding to a growing number of areas, among which translation. The basic principle underlying the first, crowdsourcing[218], is the mobilisation of a large number of people (mainly "amateurs") to accomplish tasks on a global scale. The second phenomenon, user-generated content, refers to the idea of content which is made publicly available over the Internet, usually undertaken for free and in some instances relying on pre-existing works.

When considering translations, such phenomena rely on the participation of multiple people (amateur translators) for the creation of a translation and the improvement of translation databases made available on the Internet.

Such trends have generated criticism and worries, notably about the adverse effects they might have on the status of professional translators. Furthermore, the challenges arise on multiple levels as both phenomenon give rise to many issues related to intellectual property, privacy/confidentiality, undesirable content, etc. Some of the major issues related to intellectual property are examined in the study of J-P. Triaille[219]

More specifically regarding copyright, crowdsourcing and user-generated content necessarily complicate the issues relating to ownership and joint-

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[214] See in that sense A.R. Bertrand, *Droit d'auteur* (3rd, Dalloz, Paris 2010) 159.
[215] A.R. Bertrand, *Droit d'auteur* (3rd, Dalloz, Paris 2010) 159. However, this might not be the position in the UK having regard to the decision in *Express Newspapers v Liverpool Daily Post & Echo.*
[216] D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 162.
[217] Ibid.
[218] As long as we intend to stay short regarding this issue, we further refer to European Commission, *Studies on translation and multilingualism – Crowdsourcing translation* (2012), available at http://bookshop.europa.eu/fr/crowdsourcing-translation-pbHC3112733/
[219] J-P. Triaille, 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (the "InfoSoc Directive")' (2013) .

ownership on translations, and even more so when generated by computer. As there is no specific legal framework considering such issues, it is necessary to apply the general principles related to authorship and transfer of rights, as examined in Chapter 4, Section 4 above.

Section 7. Translations created without the authorization of the author(s) of the source document

The context is known: the author of a pre-existing work (the source document) has the exclusive right to translate his work or authorise someone to translate it. This derives directly from article 8 of the Berne Convention but also article 2(3) ("*without prejudice to the copyright in the original work*").

One of the issues ("ambiguity"[220]) arising from such context relates to the copyright protection of a translation which has been created without the prior authorisation of the author of the source document. Indeed, the Berne Convention does not explicitly indicate "*whether use of the underlying copyrighted material without authority not only subjects the derivative work's creator to suit by the copyright owner, but also deprives the derivative work of copyright*"[221].

The U.S. Copyright Act deals with that issue explicitly and the solution is clear: "*protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully*"[222].

The same cannot be said in countries such as Belgium, France, Germany and the UK.

In the World Intellectual Property Organization Guide to Copyright, a totally opposite approach is taken: a derivative work may enjoy copyright protection even if it were created without the authorization of the author of the source document. Such view is supported by the fact that although the translation is the result of an infringing act, that circumstance is in itself not sufficient to refuse copyright protection of a work of translation[223].

Legal scholars in the European Union tend to endorse that World Intellectual Property Organization approach. It is indeed based on the history of the Berne Convention: "*The records of the diplomatic conferences to revise the [Berne] Convention do not leave any doubt that this interpretation is correct and that it corresponds to the intentions of the representatives of members of the Union when they adopted the relevant provisions. The original, 1886 Act of the Convention only provided for the protection of 'lawful' translations (in that act, there were no provisions yet on the protection of adaptations, etc.). However, when the 1908 Berlin revision conference adopted, in substance (in the Berlin Act, still as the second paragraph of Article 2) what is now Article 2(3) of the Convention (only some non-substantive, wording changes took place later, at the 1948 Brussels revision conference), it removed the 'lawful' adjective from the text in stating that there was no justification to allow the use of the unauthorized derivative works 'with impunity'*"[224].

In the **UK**, it is clear that copyright can subsist in a translation or other derivative work despite that translation being an infringement of the copyright in an original work. For example in *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109, the English courts held that an arrangement of an opera score was sufficiently original as to warrant copyright protection in itself. However, if the owner of that arrangement attempts to

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[220] P. Goldstein and B. Hugenholtz, *International Copyright - Principles, Law, and Practice* (3rd, Oxford University Press, New York 2013) 207.
[221] Ibid 208. See also D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 161 and D. Vaver, 'Abridgments and Abstracts: Copyright Implications' [1995] E.I.P.R. 17 225, 229.
[222] US Code, Title 17, § 103(a).
[223] Goldstein and B. Hugenholtz, *International Copyright - Principles, Law, and Practice* (3rd, Oxford University Press, New York 2013) 208.
[224] WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 29.

publish that derivative work, it will be an infringement of the original work and therefore a licence must be obtained from the owner of the original work.

Under **French** law, an illegal derivative work can be protected by copyright provided it is original. In a slightly different setting, it has been ruled that the artists, who had created a fresco in a location they occupied illegally, could nonetheless be considered as "authors" and protected by "*droits d'auteur*" (even though they were sentenced to withdraw the fresco because of the illegality of the occupation which violated the proprietor's rights)[225]. However, it has also been ruled that in the case of an unauthorized derivative work, its author does not have the right to oppose, in an infringement action, those elements which have been unlawfully reproduced from an original work.[226] Applied to translations, this could mean that the author of a literal translation will not have the right to prohibit the use of his translation if that translation was not authorized by the author of the original work.

In our opinion, under the current wording of the Berne Convention (which is implemented in the four countries under examination in this Study), the legal regime is that no matter whether a translation has been made with our without the authorisation of the author of the pre-existing source work, said translation will be eligible for copyright protection (provided the conditions are met, e.g., originality) and its further use (e.g., reproduction, communication to the public, translation into another language based on such translation, etc.) will require the authorisation from the author(s) of the pre-existing source work and from the author(s) of the translation.

Such conclusion, in case of an unauthorized translation of a copyright protected pre-existing source work, does however not preclude the holder of the copyright on the pre-existing source work from bringing an infringement action against the unauthorized translator in order, for instance, to prohibit the dissemination of the translation or to claim damages[227] (see Chapter 4, Sections 9 and 10) for general considerations relating to copyright infringement and enforcement). Therefore, as it was already decided in the UK, if the owner of the copyright in the translation wishes to commercialise his new work, the owner of the copyright in the original source work will be entitled to his due share in any revenues generated by the translation[228].

[225] CA Paris, Ch. 1, section A, 29 January 2002, AICHOUBA vs LECOLE.
[226] CA Paris, Ch. 1, 12 November 1986.
[227] Ibid.
[228] See *ZXY Music GmbH v King* [1995] FSR 566.

Section 8. Translation of official texts and unofficial translations

Copyright protection of official texts and their translation in the Berne Convention

As was already briefly mentioned in Chapter 4, Section 1 above, certain texts are not protected under copyright due to their public interest nature, which by essence precludes an exclusive ownership on such works[229].

Article 2(4) of the Berne Convention provides that:

> "*It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative, administrative and legal nature, and to official translations of such texts*" [230]

Similarly, article 2*bis*(1) stipulates that it is a matter for national legislation to exclude, wholly or partly, political speeches or speeches delivered in the course of legal proceedings from copyright protection.

Copyright protection of official texts and their translation under national laws

Under the national legal regimes under review in this Study, the situation can be summarised as follows:

	 Belgium	 France	 Germany	 UK
Official translations of official texts/acts shall enjoy copyright protection	×	×	×	✓
There are, under national law, specific statutory provisions regarding the status of official texts	✓(1)	×(2)	✓(4)	✓
The status of official texts originates from case-law	×	✓(3)	×	×
Unofficial translations of official texts/acts shall enjoy copyright protection	✓	✓	✓(5)	✓

(1) Article 8 of the Belgian Copyright Act explicitly excludes the following literary works from copyright protection[231]: (i) speeches made in deliberative assemblies, in public hearings of the courts or in political meetings[232]; and (ii) official acts of the authorities[233].

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[229] "*The reasons behind the provision in paragraph (4) are quite evident. These kinds of official texts must be made available freely – their availability must not depend on the authorization of private persons – in order that citizens and legal entities may be as fully informed about their rights and obligations, and about the relevant decisions of the authorities, as possible*" (WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 30).

[230] For a study on the evolution of that provision in the Berne Convention, see A. Françon, 'Le modèle français, les pays continentaux et la Convention de Berne' [1996] R.J.T. 194.

[231] A literary work means writings of any kind, as also lessons, lectures, speeches, sermons or any other oral manifestation of thought (article 8(1) of the Belgian Copyright Act).

[232] Such works may be freely reproduced and communicated to the public, but only the author shall have the right to make offprints.

[233] The words "official acts" refer to law and other regulations, court judgments (including opinion of advocate generals) or parliamentary debates. A. Berenboom, *Le nouveau droit d'auteur* (Larcier, Brussels 2008) 100. See also D. Voorhoof,

(2) The French Code of Intellectual Property does not contain any specific statutory provision regarding the status of official texts (or their translations). However, pursuant to settled case law, "official acts" are not protected by French copyright[234] as being part of the public domain. The scope of "official acts" is not clearly defined, though. It covers any text that has a normative force, such as laws and regulations, but also court decisions[235]. In this context, it has nevertheless been ruled that summaries and comments of court decisions are protected by copyright and cannot be reproduced without the authorisation of their authors[236].
(3) We are further not aware of specific case law regarding copyright protection for the official or unofficial translations of such official acts. Professor Françon considers that official translations of official acts should not be protected by copyright, as they share the same function as official acts, namely to fall into public domain. However, according to the same author, unofficial translations should be protected by copyright, provided they are original[237]. This distinction makes indeed much sense to us.
(4) Article 5 of the German Copyright Act excludes so-called official works from copyright protection. "Official works" include acts, ordinances, official decrees and official notices, as well as decisions and official head notes of decisions (article 5(1)). Other official texts published in the official interest for general information purposes are also deprived from copyright protection (article 5(2)).
(5) Adaptions of official works shall enjoy copyright protection if they were not created/published by the responsible body. This comes from a ruling of the Federal Supreme Court in 1993[238]. Accordingly, the exploitation of adaptions of official works requires the consent of the owner of the copyright on the adaption.

Crown copyright in the UK

The situation in the **UK** is worth a more in depth analysis given its peculiarity.

Chapter X of the Copyright Designs and Patent Act deals with **Crown copyright** (sections 163 and 164 of the Copyright Designs and Patent Act) and Parliamentary copyright (sections 165 to 167).

In relation to legislation, a Bill will be protected by Parliamentary copyright until it receives Royal Assent at which stage it becomes an Act and is protected by Crown copyright. Crown copyright in an Act will subsist until the end of the period of 50 years from the end of the calendar year in which Royal Assent was given. In addition, Crown copyright will subsist in any work created by Her Majesty the Queen or by an officer of the Crown in the course of their duties. The Queen is the owner of any copyright in a work protected by Crown copyright. Crown copyright lasts for 125 years from the end of the year in which the work was made, or, if the work was published within 75 years from the year it was made, it shall last for 50 years from the end of that year of publication.

Similarly, for any work created by or under the direction of either the House of Commons or the House of Lords, Parliamentary copyright will subsist in that work. Works created "*by or under the direction*" of either of the Houses expressly include any works made by an officer or employee of either House in the course of his duties and any sound recording, film or broadcast of any proceedings in either House[239].

Unless otherwise stated (for example the term of copyright protection has been expressly amended as stated above), all of the provisions set out in Part I of the Copyright Designs and Patent Act (e.g., works in which copyright can subsist, acts of infringements, etc.) will also apply to works protected by Crown copyright and Parliamentary copyright. Licensing and enforcement of both Crown copyright and Parliamentary copyright are managed by the controller of Her Majesty's Stationery Office. However, in practice Crown copyright in UK legislative texts is seldom enforced. On the contrary, to enable the public

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'Afdeling 2. - Bijzondere bepalingen betreffende de werken van letterkunde' in Larcier (eds), *De Belgische Auteurswet - Artikelgewijze commentaar* (3rd, Groep De Boeck , Brussels 2012) and case-law cited.
[234] Crim., 17 January 1968, RTD com. 1968. 1037.
[235] T. Civ. Seine, 7 May 1896, Ann. Prop. Ind. 1897. 76.
[236] T. Civ. Seine, 7 May 1896 ; Ann. Prop. Ind. 1897
[237] A. Françon, 'Le modèle français, les pays continentaux et la Convention de Berne' (1996) R.J.T. 197.
[238] BGH GRUR 1992, 382 relating to the creation of headnotes of judgements.
[239] Section 165(4) of the Copyright Designs and Patent Act.

interest in members of the public having access to official information, increasing amounts of work which are protected by Crown copyright and Parliamentary copyright are being made available to the public for re-use.

Given that it has been several hundred years since there have been any cases regarding who owns copyright in any judgments given in legal proceedings, it is not clear whether judgments are subject to Crown copyright or whether copyright in the judgment is owned by the judge giving judgment[240]. If Crown copyright subsists in judgment, this right has not been enforced by the Crown.

The Copyright Designs and Patent Act also states at section 42 that copyright is not infringed by anything done for the purposes of any parliamentary or judicial proceedings, nor for the purposes of reporting those proceedings. However, this exception does not extend to copying published reports of those proceedings as copyright will subsist in those reports and therefore copying those reports will be an infringement of the owner's rights.

The Copyright Designs and Patent Act does not make any specific legislative provisions relating to official texts from European institutions (or translations of such works). Pursuant to Copyright and Performances (Application to Other Countries) Order 2008 (as amended), the rights set out in Part I of the Copyright Designs and Patent Act shall apply to any works of any person or corporate body of the countries listed in that Order and to any works first published in one of those countries (which include all European Union Member States). Therefore the owner of those works has the right to authorise (and prohibit) translations in any such works and copyright shall also subsist in those translations (presuming the originality requirements are met).

Conclusion regarding translations of official texts

It derives from the situation created by the Berne Convention that a distinction must be made in most Member States between the following three types of works: (i) official texts/acts; (ii) official translations of official texts/acts; and (iii) non-official translations of official texts/acts.

For the first two categories the regime is rather straightforward: no copyright protection. We note however, as underlined by the World Intellectual Property Organization itself, that mentioning official translations is rather unnecessary as such texts would in any event be considered as official texts/acts. Such redundancy is however due to historical reasons related to the evolution of the Berne Convention[241].

The situation is more complex with respect to non-official translations of official texts/acts. Scholars consider that the wording of article 2(4) *in fine* indicates *a contrario* that a contracting party of the Berne Convention "*cannot deny protection to non-official translations of these texts – presumably translations made by private publishers*"[242]. However, as rightfully mentioned by the same scholars, some questions remain unanswered, such as those related to the copyright protection of, for instance (i) translations that have been provided by non-official persons but which have received at a later stage the "*imprimatur* of official action", of (ii) codified laws enacted into laws, of (iii) judgments copying parts of lawyers' written briefs, etc. The same issues remain also

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[240] N. Caddick, G. Davies and G. Harbottle, *Copinger & Skone James on copyright* (16th ed., Sweet & Maxwell 2013).

[241] "*This may be regarded as a simple redundancy – which usually does not create any interpretation problems; on the contrary, it may confirm the appropriate interpretation of the text. However, there are, in fact, some historical reasons behind it. Until the 1967 Stockholm revision, the Convention only contained a provision on the possibility of excluding the copyright protection of translations (not only official translations) of official texts, due to the fact that (…), while the right of translation was explicitly recognized by the Convention, the right of reproduction was not yet*" (WIPO, 'WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms' [2003] 30).

[242] P. Goldstein and B. Hugenholtz, *International Copyright - Principles, Law, and Practice* (3rd, Oxford University Press, New York 2013) 221.

open with respect to potentially hybrid works, i.e., works that include both official and non-official texts, and their possible corresponding translation(s)[243].

[243] In this respect, in Germany, the Federal Supreme Court decided in 1990 that private norms (in particular the technical DIN-standards issued by a private institution) are excluded from copyright protection even if just referenced and not incorporated in official guidelines or statutes.In 2003 article 5 (3) was implemented in the German Copyright Act governing that private standards just referenced in official works no longer result in the loss of copyright. However, copyright owners must grant licenses to publish such norms under equitable conditions.

Section 9. Rights and obligations of the translator

Rights of the translator

The rights granted to translators in their translation are the same as the rights granted to the authors of the original text on their work[244]. More specifically, the translator will enjoy economic and moral rights[245]. For instance, the name of the translator (under paternity right) shall be indicated in any reproduction of the translation and his authorisation is required for any dissemination of his work (under divulgation right)[246].

The moral rights of translators are given an especially high level of protection in France. It has for instance been ruled that, even when the publisher had clearly indicated in advance to the translator that his translation would be revised by third parties, said publisher infringes the translator's moral rights when it omits to communicate to him the modifications made to the translation by said third parties and when it does not give to the translator the possibility to not sign the final translation and to not appear as being the person responsible for the final (modified) translation, a right that was expressly reserved in the translation contract[247].

Finally, unless otherwise provided for by contract (which can be tacit), a translator does not obtain the exclusive right to create all the possible translations of the original work. Hence, in the absence of clear contractual provisions and subject to the copyright protection of the first translation, a pre-existing source work may be translated by another translator into another language and even into the same language as the first translation[248].

Obligations of the translator

A person authorised to translate an original work enjoys exclusive rights on the translation but is also subject to various obligations with respect to the work to be performed.

In general, these obligations are dealt with by a contract which will determine the target language, the right to use third parties' existing works, the deliverance and quality of the translation, etc. Should this not be the case, translators are in any event bound by the general requirement to deliver the pre-existing source text into another language, being as faithful as possible to the original work. The newly created work can therefore not depart from the structure and thought of the pre-existing source work. Otherwise, the so created work could not qualify as a 'translation' but as an unauthorised 'adaptation' or alteration, and thus infringe the original author's rights. That being said, the need for the translator's additional input and the degree of alteration of the original source work that is required to provide the right translation will very much depend on the nature of such pre-existing source work. Indeed, in certain cases – take the example of the translation of a poem -, the translator may be required to re-arrange the original work in order to provide a good quality translation.

In **France**, translator unions have established regulatory practices in relation to what is to be considered as standards in the field of translation, namely quality standards. A "Code of Use" for translations of literary works has been enacted between translators and

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[244] See in that sense D. Vaver, 'Translation and copyright: a Canadian focus' [1994] E.I.P.R. 16(4) 159, 160.
[245] Please refer to Chapter 4.
[246] TGI Paris, 21 December 2007, n°06/09892.
[247] CA Paris, 8 December 1988, Ed. des Fem. v F., D.; see A.R. Bertrand, *Droit d'auteur* (3rd, Dalloz, Paris 2010) 159.
[248] However, see *contra* the decision of the Brussels Court of Appeal regarding the translation of a book into Flemish by two translators. The Court decided that the first translator benefited an exclusivity (Brussels Court of Appeal, 2 November 1960, J.T. 1961 61). However, in a much older decision, the Brussels Court of First Instance found that the translator did not have a monopoly, but that the author who transfers his right of translation without informing the other translator, could in certain circumstances be subject to claims for damages (Brussels Court of First Instance, 9 February 1929, P.P. n°170); A. Berenboom, *Le nouveau droit d'auteur* (Larcier, Brussels 2008) 131.

publishers and codified in the French Code of Intellectual Property, in order to ensure that moral rights of the authors of the original works are respected[249]. Pursuant to this Code, the translation must be of high quality and must comply with the rules of art, professional standards and the terms of the agreement between the publisher and the translator.

Additionally, the translator must also carefully take into consideration the moral rights of the original author of the text to be translated. Indeed, the author of the pre-existing source work may object to derogatory action to his work which would be harmful to his honour or reputation, with varying degrees of possible objections depending on the specificities of the applicable national law (see Chapter 4, Section 7). This is particularly relevant when considering bad quality or botched translations. Indeed, as already mentioned, the quality of a translation is not relevant with regard to the existence of protected work under copyright, but may have an incidence on the original author's moral rights. Authors of pre-existing source works are therefore not deprived of legal grounds to act against poor translations.

Under French law, it has been decided by the Paris Court of First Instance that bad translations or mistranslations may infringe the moral right of integrity of the author of the initial source work[250], and this even if said pre-existing work is in the public domain, as moral right survives without time limitation[251].

By contrast, in the **UK**, whilst an author has a moral right to object to derogatory treatment of his work (section 80 of the Copyright Designs and Patent Act), section 80(2)(a) expressly states that a translation of a literary or dramatic work shall not be "treatments" for the purposes of section 80 of the Copyright Designs and Patent Act. Therefore, where a translation is poorly done and irrespective of how damaging it might be to the author of the original work, that author does not have a claim for a breach of his moral rights. There does not appear to be any basis for this exception under the Berne Convention and its inclusion in English law seems to be an anomaly, as it is not clear why an author should be prevented from prohibiting the circulation of inept translations of their work.[252]

[249] <www.atlf.org/IMG/pdf/Code_des_usages_2012.pdf>.
[250] TGI Paris, 6 December 1976, RIDA January 1978, p.160.
[251] Trib. Civ. Seine, 20 Feb. 1908, Trib. Civ. Lyon, 16 Feb. 1961, Gaz. Pal. 1961, 1, 284, RIDA 1961 XXXII p. 124
[252] N. Caddick, G. Davies and G. Harbottle, *Copinger & Skone James on copyright* (16th ed., Sweet & Maxwell 2013) 11-42.

Section 10. Ownership of translations

General issues relating to translations ownership

The legal regimes of copyright ownership and of transfer of rights (by statute or by contract) differ substantially from one European Union Member State to another. If we take the four countries selected for this Study as examples, we observe that in Belgium and in France, the copyright legislative instruments provide for highly protective rules aiming at protecting the author through general principles and specific provisions related to certain contracts (e.g., publishing). In Germany, that pro-author policy is much less obvious as the protection is mainly organised around the interpretation of contracts with authors not around rules that per se force a protection of the author in said contractual arrangements. Finally, in the United Kingdom only very few rules are provided in the copyright law instruments, and they all mainly derive from the European Union Directives[253].

When the issue of ownership of rights is at stake, the following questions are relevant and should be kept in mind:

- Who is the author of the pre-existing work (being) translated? Is the original work in the public domain?
- Have the rights on the pre-existing work been assigned, licensed or otherwise disposed of by the initial author? Is there a contractual relationship between the initial author and a publisher?
- Is the translation made by:
    - a person under a contract of employment with the publisher or the (natural or legal) person who is the copyright holder of the initial work?
    - a person governed by service regulations with the legal person who is the copyright holder of the initial work?
    - a self-employed (free-lance) translator providing a translation in the framework of a commission contract?
    - a legal person (e.g., a translation agency)? In such case, it shall further be determined whether the actual translator(s) is/are in a contractual relationship with such legal person (e.g., contract of employment).

The answers to the above questions will most often help determining who may claim authorship on the copyrighted work and how rights have been transferred, on the basis of which type of relationship. Also, those answers may have an incidence on the content of the contracts to put in place and more particularly on the necessity to include specific clauses (e.g., warranties with regard to the transfer of pre-existing copyright of third parties).

Authorship and transfer of rights

In most cases, the original author of a translation is the translator himself. Hence, a transfer of rights is required before any exploitation of the translation, be it by the translator's employer, the commissioner of the translation or any other person willing to use the translation. In certain cases, the allocation of rights is provided for by statute,

[253] For more details see L. GUIBAULT and B. HUGENHOLTZ, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union' (2002).

with a specific regime relating to employer-employee and/or to commissioner-author relationships.

As established in this Chapter, translations may be protected as an original copyright work. Consequently, the rules relating to authorship and transfer of rights examined more in depth in Chapter 4, Section 4 apply *mutatis mutandis* here.

Section 11. Infringement

The issues related to copyright infringement, and to the enforcement of copyright, examined in Chapter 4, Section 9 are particularly relevant in the framework of derivative works such as translations.

Indeed, articles 8 and 12 of the Berne Convention namely provide for that authors of literary works shall enjoy the exclusive right of making and of authorising translations, adaptations, arrangements and other alterations of their works. Accordingly, any person making a derivative work without being permitted to do so by the author will be committing a copyright infringement (where the illegal translation is considered as the infringing work).

The situation can however be much more complex given that a person creating a derivative work, such as a translator, may also enjoy own exclusive rights on such derivative work. It can therefore not be excluded that multiple authorisations from various authors are needed, leading to a potential chain of responsibilities in relation to copyright infringements and to having a chain of infringing works.

Also, the advance of technological means enabling the publication of works to a large public, such as via the Internet, and allowing for the creation and use of – both of authorised and unauthorised – protected works has made it possible to easily transmit and reproduce any information in a digital form, including works protected by copyright. Such trend complexifies the enforcement of rights on original literary works and of their translations once published online.

With respect to the particular question of machine-aided translations, the (re-)use of source documents and their translation(s) in databases for their inclusion in translation memories can also amount to infringement of the right owners'/right holders' exclusive rights.

It is therefore important to carefully consider existing rights whenever a source document is being translated and/or used in databases for the purposes of creating translation tools.

Chapter 7. The protection of translation tools by database rights

The issues related to database are of substantial importance when discussing machine-aided translations. Indeed, translation tools such as translations memories and machine translations require that source documents and their corresponding translations are stored in larger databases in the form of segments (i.e., the texts are cut into pieces which are aligned). In a nutshell, the following significant steps can be highlighted in machine-aided translations[254]:

- The first step consists in having an original document in the source language. As demonstrated in the third Chapter of this Study, copyright protection and ownership on such work may vary from one country to another. While the author will by statute be the beneficiary of the copyright protection, we see in practice that when copyright protection is granted, copyright may be transferred by statute or by contract (for instance to the employer or the company commissioning such work).

- The second step consists in having a translation of the original source document in the target language. As already mentioned in this Study, copyright protection may be granted to such derivative work. IP rights on such translations (derivative works) can either belong to the translator or the translation company[255].

- **The third and key step occurs when a translation memory is created with segments being created and aligned in the source- and target languages.**

This last step is critical as "*TM* [translation memory] *technology creates a new database with its own format and attributes, and this forms a completely new work with its own IP rights*"[256].

In that context the legal situation related to the protection of databases needs clarification.

The present Chapter aims at answering the following question: are databases that include source documents and translations protected and how? In order to provide an answer, it is first necessary to identify the relevant applicable legal provisions. In that regard, the European Union Database Directive is of primary importance. We will see that it distinguishes between two independent types of protection (under copyright or under a so-called *Sui Generis* right) which can be applied to databases jointly or separately.

In the following sections, we will notice that this field of law gave rise to numerous judgments from the Court of Justice of the European Union. We consequently examine such decisions in the context of translation tools.

Although we aim to apply these principles to translation tools, and more particularly to translation memories, and we will try to formulate some conclusions, we do not intend to reach final findings and conclusions on the subject, but rather to open a broader discussion.

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[254] J. van der Meer and A. Joscelyne, 'Clarifying Copyright on Translation Data' (TAUS 2013) <www.taus.net/articles/clarifying-copyright-on-translation-data> accessed April 2014.
[255] Ibid.
[256] Ibid.

Section 1. The various protections of databases

International protection of compilations of data (databases)

Similarly to general copyright analysed in Chapter 3, the protection of databases is recognised at international and European Union levels.

First, the **Berne Convention** explicitly provides for (article 5(2) related to protected works) that "*collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations, shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections*"[257].

Second, the **TRIPS Agreement** and the **World Copyright Treaty** extend the protection of database to compilations of data or other material which by reason of the selection or arrangement of their contents constitute intellectual creations[258]. Such wording which refers to "*compilations of data or other material*" allows protecting databases which do not contain copyrightable elements.

Also, both the TRIPS Agreement and the World Copyright Treaty stipulate that the database protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation[259].

The protection of databases in the European Union

European Union law provides for a specific protection of databases, which goes beyond other international legal instruments.

The European Union Database Directive was adopted with the objective of harmonising the protection of databases in all Member States. A database is defined rather broadly in the directive: "*a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*"[260].

It therefore encompasses databases that include copyrighted and non-copyrighted elements, and database in an electronic format or not[261]. Also, European Union law does not require that the database be created for the purpose of retrieving individual elements of information.

National case-law illustrates that the notion of 'database' is open-ended and thus affords protection for instance to telephone directories, collections of legal material, real estate information websites, radio and television guides, bibliographies, encyclopaedia, address lists, company registries, exhibition catalogues, tourism websites, collections of

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[257] The 1908 Berlin Act of the Convention introduced the protection of collections, which were protected as a category of "derivative works", and were mentioned (in article 2(2)) along with translations, adaptations, etc. The 1948 Brussels revision conference transferred such protection in a separate paragraph.

[258] Art. 10(2) TRIPS Agreement; Art. 5 World Copyright Treaty.

[259] Also note that the WIPO Diplomatic Conference on certain Copyright and Neighbouring Rghts Questions held in December 1996 had among its document a *Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases* (available at www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_6.pdf >) to be considered by the Diplomatic Conference. Although agreement was not reached, the Conference adopted a *Recommendation Concerning Databases* (available at <www.wipo.int/edocs/mdocs/diplconf/en/crnr_dc/crnr_dc_100.pdf>).

[260] Art. 1(2) Database Directive. Also, Recital 17 of the Preamble stipulates that "the term 'database` should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data (...)." In the Fixtures Marketing III case, the Court of Justice of the European Union concluded regarding the requirement of independence and individual accessibility that "the term database as defined in article 1(2) of the directive refers to any collection of works, data or other materials, separable from one another without the value of their contents being affected, including a method or system of some sort for the retrieval of each of its constituent materials" (para. 32).

[261] Art. 1(1) also stipulates that the Database Directive "concerns the legal protection of databases in any form".

hyperlinks, and hit parades[262]. It is therefore of particular importance to examine national case-law[263].

Databases, within the meaning of the Database Directive, are protected in the European Union by **copyright** (Chapter II of the Database Directive) – where such copyright protection echoes the one recognised in the international treaties –, and a ***Sui Generis* right** (Chapter III of the Database Directive). Both rights will apply cumulatively if the conditions for both regimes are met. These two rights are independent. They can be applied separately.

A database will be protected by itself, by copyright and/or by *Sui Generis right* (if it fulfils the conditions of protection), without affecting the rights of third parties to the individual pieces of information as such, which are contained in the database[264] (such as the source documents and the corresponding translations).

The Database Directive resulted in a certain narrowing of the copyright protection of the database structure in some jurisdictions, such as in the United Kingdom in the sense that it introduced a level of originality for databases to obtain copyright protection which had not previously been required, while at the same time putting in place an additional protection scheme through a newly created and independent *Sui Generis* right[265]. Translation memories contain data arranged systematically and methodically and such data is individually accessible by electronic means. **Translation memories will therefore in all likelihood be qualified as a "database" within the meaning of the Database Directive.** This conclusion stands in contrast with the legislation in the USA which has a more restrictive approach. In the USA databases can only be protected by copyright if they qualify as compilations, meaning "*a collection and assembling of pre-existing materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship*"[266].

[262] P. Goldstein and B. Hugenholtz, *International Copyright - Principles, Law, and Practice* (3rd, Oxford University Press, New York 2013) 242.

[263] For instance, in Germany, with regard to periodic publications of articles in magazines (OLG München MMR 2007, 525) the court has concluded that copy delivery services do not infringe any database right of the publisher's as the arrangement of a publication does not follow a structural principle. The Frankfurt court further held that copy and paste of HTML-codes does not represent a database right infringement, when the creator of the code simply rewrites texts, images, logos and designs in HTML according to instructions of the client. The creator is then only responsible called for the implementation of the data (OLG Frankfurt GRUR-RR 2005, 299, 301). As for collection of law texts on CD-ROM, the Munich Court concluded that loose collections of third-party contributions, in which the emphasis is on the individual works (not its selection or arrangement), lack the necessary intellectual creation (OLG München NJW 1997, 1931).

[264] Art. 3(2) Database Directive provides that "the copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves".

[265] Computer programs that are used in creating or using the database are explicitly excluded from the scope of this sui generis protection (article 1(3)).

[266] US Code, Title 17, § 101.

Section 2. Copyright protection of databases in the European Union

Conditions of protection

The Database Directive provides for that copyright protection is granted to databases which, as such, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation[267]. Such definition refers to the notion of "**originality**" related to general copyright and examined in Chapter 4, Section 3 above.

As clarified by the Court of Justice of the European Union in *Football Dataco I* and on the basis of *Infopaq I* and *Painer*, "*as regards the setting up of a database, that criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices and thus stamps his 'personal touch'*"[268].

More particularly, the Court of Justice of the European Union clarified in *Football Dataco I* that:

- the intellectual effort and skill of creating that data are not relevant in order to assess the eligibility of that database for protection by that right;
- it is irrelevant, for that purpose, whether or not the selection or arrangement of that data includes the addition of important significance to that data; and
- the significant labour and skill required for setting up that database cannot as such justify such a protection if they do not express any originality in the selection or arrangement of the data which that database contains[269].

Consequently, a database may be protected under copyright even if the elements contained therein are in the public domain or are otherwise not protected by copyright.

It follows from the previous considerations that the object of copyright on a database is the structure of the said database, independently from the copyright which may exist on the elements contained in it.

The structure of a translation memory tool is therefore the focus of the attention in that respect. If it is original in the sense that it is the result of personal choices in terms, for instance, of segmenting and aligning the data, a copyright protection could be envisaged. By contrast, if the choices are commonplace or determined by technique (e.g. linguistic sciences) originality will be missing and no copyright protection available.

Some legal scholars have taken the view that **most translation memories will not qualify for protection under copyright (be it in the European Union, in the USA or in Canada for instance)** because the originality in the selection and arrangement of the data will most likely be lacking[270]. This is, in our opinion a position that must be at least nuanced subject to the possible original choices made in segmenting and aligning the data

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[267] Art. 3(1) Database Directive. No other criteria shall be applied to determine their eligibility for that protection.
[268] *Football Dataco I*, para. 38.
[269] *Football Dataco I*, para. 46.
[270] F. Gow, 'You Must Remember This: The Copyright Conundrum of "Translation Memory" Database' [2007] Canadian Journal of Law and Technology 175, 181.

Ownership

The copyright database protection is generally granted to the creator, the author, of such database. More precisely, article 4 of the Database Directive ('database authorship') provides for the following explicit rules:

- the author of a database shall be the natural person or group of natural persons who created the database or, where the legislation of the Member States so permits, the legal person designated as the right holder by that legislation

- where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright

- in respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Legal systems across the **European Union** related to database-copyright generally provide for similar rules with respect to the original ownership. They generally provide for that the author is the person who created the original database as his own intellectual creation by reason of his selection or arrangement of its contents.

The question is generally much more complex when considering works made within an employment relationship.

For instance, in **Belgium**, the Belgian Copyright Act contains a peculiarity with regard to works of employees. In contrast with other ordinary copyright works, the copyright on a database created by employees in the course of their employment contract will directly and exclusively belong to their employer in the non-cultural industry, unless otherwise agreed upon. For databases created in the course of an employment (or service) contract, economic rights will therefore be directly held by the employer. Such presumption is however rebuttable, and concerns only the author's economic rights. It does not concern databases created in the cultural industry. Collective agreements (at the level of the enterprise or at the level of a sector, for instance) may determine the scope and practical arrangements of such presumption[271].

By contrast, other Member States apply to databases the same rules as related to copyright in general.

In **France** for instance, an employment contract does not have incidence as to the ownership of copyright on a database. The individual author remains the sole owner of his creation[272]. Employers will thus need to conclude specific grants of rights except when the database was created under the regime of collective works, pursuant to article L. 113-2 of the French Code of Intellectual Property.

Similarly, in **Germany**, when the database was created as part of the fulfilment of obligations resulting from an employment or service relationship, the provisions of the subsection relating to the allocation of the exploitation rights of the German Copyright Act apply unless otherwise provided in accordance with the terms or nature of the employment or service relationship. If the database is established under a contract to produce a work, it must be ensured through contractual arrangements, that the necessary rights to use are granted.

Finally, the usual rules in the **UK** regarding ownership also apply to databases, including the rule that an employer shall be deemed to be the owner of a database created by an employee during the course of his employment, and that database can be jointly owned

[271] A. Berenboom, *Le nouveau droit d'auteur* (4th, Larcier, Brussels 2008) 297.
[272] Civ. 1, 16 Dec. 1992.

where the contribution of each author is indistinguishable from the contribution of co-authors.

Exclusive rights ('restricted acts')

With respect to exclusive rights conferred to the author of a database, article 5 of the Database Directive lists the following so-called 'restricted acts', which echo the exclusive rights for general copyright:

> *(a) temporary or permanent reproduction by any means and in any form, in whole or in part;*
>
> *(b) translation, adaptation, arrangement and any other alteration;*
>
> *(c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the right holder or with his consent shall exhaust the right to control resale of that copy within the Community;*
>
> *(d) any communication, display or performance to the public;*
>
> *(e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).*

In addition, authors of copyright protected databases will generally speaking enjoy the general copyright exclusive rights, including moral rights (as recognised under national law).

For translation databases we note in particular the potential importance of the right of reproduction and the right of communication to the public.

Exceptions

Exceptions to the exclusive rights of authors of the database are organised by the Database Directive. Member States have the possibility, in addition to the exceptions traditionally authorised under general copyright law, to provide for exceptions in the case of (i) reproduction for private purposes of a non-electronic database, (ii) where there is use for the sole purpose of illustration for teaching or scientific research, and (iii) where there is use for the purposes of public security of for the purposes of an administrative or judicial procedure.

The three-step test also applies when relying on exceptions under the database legislation (art. 6(3) of the Database Directive) (see section Chapter 4, Section 8).

Section 3. *Sui Generis* protection of databases in the European Union

The Database Directive dwells at greater length on the more significant and European Union-specific *Sui Generis* protection granted to databases.

The *Sui Generis* right created by the Database Directive aims at protecting the result of the substantial investment made by the database maker. It was developed in order to prevent free-riding without however stretching copyright protection too much. As will be discussed below, this *Sui Generis* right could potentially provide a useful protection to translation memories that do not qualify under copyright protection[273].

Conditions giving rise to the *Sui Generis* rights

The conditions for protection are governed by article 7(1) of the Database Directive: "*Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining[274], verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database*"[275].

It derives that the *Sui Generis* right will benefit the maker (the producer), i.e., the person who takes the initiative and bears the risk of the investments that are at the origin of the database. This excludes subcontractors[276]: if the work is subcontracted, the commissioner of the sub-contract will be granted the *Sui Generis* right.

Furthermore, in order for a maker to benefit from such right, he shall demonstrate the qualitatively and/or quantitatively "substantial" investment made to:

- obtain[277]
- verify[278] or
- present the content of the database.

Recital 40 of the Preamble specifies that "*such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy*". The Court of Justice of the European Union has had to opportunity in several cases to provide guidance on the proper scope and conditions of these notions (see in particular *British Horseracing Board* and *Fixtures Marketing I* to *III* cases relating to databases of sport information, both rendered on the same day).

Makers of translation memories could in certain cases enjoy the *Sui Generis* protection. Translators and translation companies, but also clients who order and are big users of translations, spend substantial investments in building their translation memory databases. This may for instance be the case of the European Union Commission

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[273] Ibid.

[274] We note *en passant* that the French Code of Intellectual Property does not transpose the notion of "obtaining". Article L 341-1 indeed stipulates the following: *"Le producteur d'une base de données, entendu comme la personne qui prend l'initiative et le risque des investissements correspondants, bénéficie d'une protection du contenu de la base lorsque la* ***constitution****, la vérification ou la présentation de celui-ci atteste d'un investissement financier, matériel ou humain substantiel".*

[275] The *Sui Generis* protection is much shorter than copyright protection as it is limited to 15 years (from the first of January of the year following the date of completion)

[276] Recital 41 of the Preamble of the Database Directive.

[277] *British Horseracing*, para. 42: *The expression 'investment in…obtaining…of the contents' of a database in Article 7(1) of the directive must be understood to refer to the resources used to seek out existing independent materials and collect them in the database. It does not cover the resources used for the creation of materials which make up the contents of a database.* ***It does not cover the resources used for the creation of materials which make up the contents of a database***

[278] *British Horseracing*, para. 42: *The expression 'investment in…the…verification…of contents' of a database in Article 7(1) of the directive must be* understood to refer to the resources used, with a view to ensuring the reliability of the information, contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation.

and more particularly of the DG Translation which have invested considerable time and money to create several databases such as the IATE or the Euramis central translation memory.

Sui Generis protection is much shorter than copyright protection. It is limited to 15 years as from the first of January of the year following the date of completion of the database. However, such protection may in practice be much longer. Article 10(3) of the Database Directive stipulates indeed that "*any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection*". Accordingly, **given that translation memories are usually continuously updated and fed with new data, the protection term can actually be extensive.**

The above rather positive preliminary conclusion for database makers in terms of protection of translation memories as databases must be nuanced to a certain extent. The trend in the case-law of the Court of Justice of the European Union is to limit the core concept of "*investment in (…) the obtaining (…) of the contents of that database*" to the resources used to seek out existing independent materials and collect them in the database, in contrast with the resources used for the creation of materials which make up the contents of a database (*Fixtures Marketing I* and *British Horseracing*)[279]. And overall, regard translation memories, it is probably true that the investment made in producing the raw material (the translations) can be higher than the investment made in segmenting and aligning that pre-existing raw material. In those cases, even the *Sui Generis* right might be at risk.

That being said, when the creation of the database is linked to the exercise of a principal activity (here, the translation activity) in which the person creating the database is also the creator of the materials that are processed in the database (here, the translations), there is no automatic exclusion from *Sui Generis* protection. It is however always to that person to demonstrate a substantial investment (qualitative/quantitative, in the obtaining, verification or presentation of the content) independent from the resources used to create these materials (here, the translations)[280].

In other words, the above trend at the CJEU might at first sight be detrimental to the *Sui Generis* protection of translation memories where "*the most significant part of the investment in any translation memories database will be in the creation of the translations that fill it. This is true both from the point of the translation vendor investing human resources and the client investing financial resources*"[281]. Nonetheless, as long as the makers of the database are usually not part of the translation industry, it will be therefore more easily proven that the substantial investment is independent from the resources used to create the translations contained in the database.

Rights of the database maker

The maker of a database is granted in substance two (exclusive) economic rights in relation to the *Sui Generis* protection, the contents of which are rather similar to the economic rights of a copyright author.

- **The right of extraction** (similar to the reproduction right)

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[279] *Fixtures Marketing I*, para. 49 and operative part. *In the context of drawing up a fixture list for the purpose of organising football league fixtures, therefore, it does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league*.
[280] *British Horseracing*, para. 35.
[281] F. Gow, Ibid 182.

The right of extraction is defined "*as the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form*" (art. 7(2) of the Database Directive). The Court of Justice of the European Union has held that this concept needs to be interpreted broadly, as encompassing any unauthorised act of appropriation (via a physical copy or not) of whole or a part of the contents of a database[282]. Neither the purpose of this extraction (commercial or non-commercial) nor the technique of extraction (copying by hand or electronically) is of relevance in this regard[283].

- **The right of reutilisation** (similar to the right of communication to the public)

  The right of reutilisation is defined as "*any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission*" (art. 7(2) of the Database Directive). This means for instance that incorporating the data from a database into a catalogue or a website without permission from the right holder amounts to a 'reutilisation' (cf. communication to the public)[284].

These two (exclusive) rights are limited to the extraction and reutilisation of *substantial* parts of databases. In this regard, *'substantial'* can mean both qualitatively substantial (a small part of the database that represents a substantial part of the investment[285]) or quantitatively substantial (a large part of the database).

Taking *insubstantial* parts of the database does therefore not amount to an infringement, unless this occurs repeatedly and systematically (article 7(5) of the Database Directive): the repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database, will infringe the *Sui Generis* database right when it conflicts with a normal exploitation of that database or unreasonably harms the legitimate interests of the maker of the database.

As regards machine-aided translations, the question as to whether the maker of the database has a ground on the basis of either or both exclusive rights remains open.

First, using translation databases (both in the framework of translation memories or machine translation) could entail to some extent the "extraction" of at a least a substantial part of the data stored in the database. The authorisation from the maker would then be required. However, it cannot be excluded that the particular functioning of translation memories and machine translation be seen as not extracting substantial part of the database. Indeed, only the extracts of the most relevant translation matches are extracted for a particular work of translation, and that extraction could thus – at least arguably - be seen as being insubstantial. Remains however the potential violation of article 7(5) of the Database Directive which prohibits repeated and systematic extraction of insubstantial parts of the contents of the database.

Second, the mere use of translation databases does not amount to a re-utilisation of such database within the meaning of the Database Directive and its interpretation by the Court of Justice of the European Union. There is indeed *a priori* no making available to the public of all or substantial part of the database. Also, the translated work in the

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[282] *British Horseracing*, para. 51.

[283] Regarding the notion of "extraction", see particularly, *Directmedia* , para. 36: "*The decisive criterion in this respect is to be found in the existence of an act of 'transfer' of all or part of the contents of the database concerned to another medium, whether of the same nature as the medium of that database or of a different nature. Such a transfer implies that all or part of the contents of a database are to be found in a medium other than that of the original database."*

[284] The Court of Justice of the European Union has had the opportunity of clarifying such notion in *British Horseracing*, *Football Dataco II* and *Innoweb*. See particularly *Innoweb*, para. 37: *In the light of that purpose, the concept of 're-utilisation' as used in Article 7 of Directive 96/9 must be construed as referring to any act of making available to the public, without the consent of the database maker, the results of his investment, thus depriving him of revenue which should have enabled him to redeem the cost of the investment(…)*

[285] *British Horseracing*, para. 78: *(…) the intrinsic value of the data affected by the act of extraction and/or re-utilisation does not constitute a relevant criterion for assessing whether the part in question is substantial, evaluated qualitatively (…).* In other words, it is the value of the investment which must be taken into account.

target language amounts in our view to a new work and does not qualify as being a re-utilisation of the database or a substantial part of it.

In any event, *if the database maker makes himself the contents of his database or a part of it accessible to the public, his Sui Generis right does not allow him to prevent third parties from consulting that base*[286]. However, it is unlikely that a translator will limit himself into consulting the database; he will rather extract the relevant translations.

Here is probably the place in the Study where to mention briefly the phenomenon of **text and data mining** and its link with database protection[287]. Data mining is *"the automated processing of digital materials, which may include texts, data, sounds, images or other elements, or a combination of these, in order to uncover new knowledge or insights"*[288]. There are many mining techniques and they are used to serve various purposes. Data mining may thus constitute a threat for translation memory makers in the sense that it can be used to uncover better translation knowledge from the translation memories of said translation memory makers.

As we have concluded above, **translation memories are likely to be qualified as database and to be protected under the *Sui Generis* protection** (if not under copyright). Consequently, the translation memory maker is recognised an exclusive right of extraction and an exclusive right of reutilisation (and he can consequently prohibit non-authorised extraction and reutilisation made by third parties, subject to certain conditions). Will these rights, provide the database maker powerful protection against the processing of its translation memory databases by a data miner? We are of opinion that it is likely that data mining will, in most cases, involve extraction of all or substantial parts of the content of the database but will normally not amount to a reutilisation of the said content.

Rights and obligations of "lawful users"

In the context of the *Sui Generis* protection, the Database Directive (article 8) contains provisions in relation to the concept of "lawful users".

Although it is not expressly so mentioned in the Directive, such notion is similar to the one of "normal use" referred to in the directive. In all likelihood, in the absence of clearer guidance at the European Union level, such concept concerns a use made in accordance with a contractual agreement with the producer, or a use that relies on statutory exceptions.

The concept of "lawful users" has been implemented differently in Member States. For instance, while Belgium refers to lawful users ("*utilisateurs légitimes*" – section 4 of the Belgian Database Act), French law refers to the person who has lawful access ("*la personne qui y a licitement accès*" – article L. 342-3 of the French Code of Intellectual Property) and in Germany, the legislator has not used the term of the lawful user as in the Directive, so that all consumer groups are recognized[289].

More particularly, article 8 of the Database Directive stipulates that:

- The producer may not prevent a lawful user from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively,

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[286] *British Horseracing*, para. 55 and *Directmedia*, para. 51.
[287] For a more in depth analysis we refer to J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)' (2014) .
[288] Ibid 17.
[289] Bundestag-Drs. 13/7934, p. 54. Furthermore, according to article 87e of the German Copyright Act a contractual agreement by which, inter alia, the owner of a lawful copy of the database undertakes vis-à-vis the producer of the database to refrain from reproducing, distributing or communicating to the public quantitatively or qualitatively insubstantial parts of the database shall be ineffective insofar as these acts neither run counter to any normal utilisation of the database nor unreasonably impair the legitimate interests of the producer of the database.

for any purposes whatsoever (where such authorisation is granted, it only applies to part of the database).

- A lawful user may not (i) perform acts which conflict with the normal exploitation of the database or unreasonably harm the legitimate interests of the maker of the database; nor (ii) cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

In that context the act of translating on the basis of a translation database could very well fall within the rights recognised to the lawful user if such user extracts only insubstantial part of the database. The question as to whether a user falls within such provision must be analysed on a case-by-case basis, in light notably of the case-law of the Court of Justice of the European Union which has interpreted the notion of "substantial" (see the British Horseracing decision). In any event, the lawful user is limited by article 7(5) of the Database Directive, as examined here above.

In that context, it is recommended that the contractual stipulations between the database maker and the lawful user(s) be adequately and clearly defined in writing.

Exceptions to the *Sui Generis* right

The Database Directive proposes three exceptions that Member States may transpose under their national laws. These exceptions cover (i) cases of extraction for private purposes and for the purposes of illustration for teaching or scientific research, as well as (ii) cases of extraction and/or re-utilisation for the purposes of public security or an administrative or judicial procedure.

Similarly to what is provided in the InfoSoc Directive (see Chapter 4, Section 8), we note the particular exception related to "scientific research" under article 9(b) of the Database Directive:

> "*Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents: (…)(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved (…).*"

Member States are provided with the possibility of limiting such exception to certain categories of teaching or scientific research institutions[290]. As a result, some Member States have not implemented such exception, and those that have, have done so in diverging ways and notably by providing additional conditions.

For instance, Belgian law requires that the name of the database maker and the title of the database be mentioned, and thus not only the source (article 7 of the Belgian Database Act). In France, the legislator has adopted a rather restrictive approach (article L. 112-3 of the French Code of Intellectual Property): it excludes from the benefit of the exception some databases[291] and certain use[292] and it limits the beneficiaries[293]. Also, the user must pay a compensation[294]. Under German law, article 87C of the German Copyright Act refers to "personal scientific use". Finally, we note that neither French nor UK laws do specify that the research must be scientific.

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[290] Recital 51 of the Preamble of the Database Directive.
[291] Databases created for educational purposes and databases created for a digital written edition.
[292] "To the exclusion of entertainment or recreational activity".
[293] "So far as the public to whom the extraction and the re-utilization are intended is mainly composed of pupils, students, teachers or researchers directly involved".
[294] The use of the extraction […] is compensated by a remuneration negotiated on a lump sum basis.

For similar reasons as already addressed in Chapter 4, Section 8 and given the particularities of the exception in the database context[295] (notably as implemented in national regimes), **we believe that the possibilities to rely on the exceptions to the *Sui Generis* rights in the framework of translation databases, and in particular translation memories, are very limited.**

[295] For a more in depth analysis, refer to J-P. Triaille, 'Study on the legal framework of text and data mining (TDM)' (2014) 79.

Section 4. Ownership issues relating to translation databases

One of the most debated questions in the scarce existing literature on translation databases concerns their ownership regime[296]. Without claiming to be exhaustive, we summarise in this section some of the major points of attention.

The issue is made complex by the fact that machine-aided translations involve the creation of various elements, which can each be protected by IP rights, as examined in the previous chapters.

- the **source document** (in the source language), which can be protected by copyright provided it fulfils the legal conditions set out under the applicable national laws; such copyright benefits one or more authors and can be transferred or licensed either by the effect of the law or by contract

- the **translation** (in the target language) as initially translated by one or more human translator(s), which can be protected by copyright provided it fulfils the legal conditions set out under the applicable national laws; such copyright benefits one or more authors and can be transferred or licensed either by the effect of the law or by contract

- the **original database** containing source documents and corresponding translations as segmented and aligned by an adequate software, of which database the structure can be protected by copyright, provided it fulfils the legal conditions set out under the applicable national laws; such copyright benefits one or more authors and can be transferred or licensed either by the effect of the law or by contract

- the **database** (whether original or not) containing source documents and corresponding translations as segmented and aligned by an adequate software; the substantial investment made to obtain, verify or present the content of said database can be protected by the European Union *Sui Generis* right specific to database, provided it fulfils the legal conditions set out under the applicable national laws; such *Sui Generis* right, benefits the maker of such database and can be transferred or licensed contractually

- the **subsequent translations** – later re-inputted in the translation database – made on the basis of existing correspondences between segments of source documents and their translations using a translation memory and post-edited by one or more human translator(s), which translation can be protected by copyright, provided it fulfils the legal conditions set out under the applicable national laws; such copyright benefits one or more authors and can be transferred or licensed either by the effect of the law or by contract.

This list presents a complex situation in a simple way but illustrates how many different actions play an important role such as the author of the source document, the publisher of such work, the initial human translator, the client requesting and paying for a translation, the maker of a translation database, the human translator producing a machine-aided translation, the translation company, etc.

The complexity is multiplied by the number of actions involved, each layer having its own peculiarities. For instance, it is not unusual in the translation industry that clients refuse

[296] F. Gow, 'You Must Remember This: The Copyright Conundrum of "Translation Memory" Database' [2007] Canadian Journal of Law and Technology 175, 175; R. Smith, 'Copyright Issues in Translation Memory Ownership' [2009] PriceWaterhouseCoopers available at </www.mt-archive.info/Aslib-2009-Smith.pdf>; J. van der Meer and A. Joscelyne, 'Clarifying Copyright on Translation Data' (TAUS 2013) <hwww.taus.net/articles/clarifying-copyright-on-translation-data> accessed April 2014; E. Ketzan, 'Rebuilding Babel: Copyright and the Future of Machine Translation Online' [2007] Tulane Journal of Technology & Intellectual Property

to feed large translation memories which would benefit other clients of a given translation company and thus request a separate and dedicated database. Also, some clients create their own translation memories and/or contractualise the transfer of ownership or impose a license of use with the translation company.

The complexity of the situation depicted above, yet already simplified, leads to the conclusion that each particular situation is different and requires a case-by-case legal analysis in light of factual elements and of the existing contractual relationships. Also, it can certainly be concluded that great attention shall be paid to the contractual issues, which shall necessarily take into consideration joint-authorship issues, the specificities of each national legal regime and foresee questions in relation to private international law due to the cross-border flow of data.

Chapter 8. Translation contracts

This last Chapter examines briefly some of the most important clauses that should be included in a contract with a translator.

The present Chapter intends to provide a pragmatic approach of contracts linked with translation missions. The following list does not claim to be exhaustive and applicable in every single situation, which shall have to be analysed on a case-by-case basis, notably taking into account the national particularities highlighted in the sections above. It nonetheless intends to put emphasis on some of the best practices observed in the translation industry.

We draw the attention to the specificities related to agreements with publishers which are in certain jurisdictions strictly governed, as is the case in Belgium or in France where the Belgian Copyright Act[297] and the French Code of Intellectual Property[298] include a section solely dedicated to publishing contracts. Similarly, under German law, the Publishing Act[299] provides specific protective provisions. Such specificities related to publishers (editors) are not examined in this Study.

Finally, a translation agreement with a translator does not only cover intellectual property issues but shall also govern the broader relationship with the service provider (translator). Like any other contract, this can be provided through a framework agreement along ad hoc special conditions and order forms, or simply with a one-time contract per mission. We analyse below both aspects of the contract, making recommendations both with respect to general issues and intellectual property matters.

[297] Articles 25 and seq. of the Belgian Copyright Act.
[298] Articles Article L. 132-1 of the French Code of Intellectual Property.
[299] Gesetz über das Verlagsrecht

Section 1. The translation contract: general provisions

Scope of the translation contract

Whether the contract concerns specifically a well-defined translation or a broader mission, it is strongly advised that parties clearly define its scope in order to establish the ground framework of the relationship with the translator. More specifically, the contract should at a minimum identify the source document(s) to be translated, the source and target languages and any other related services to be provided by either party. For the avoidance of doubt a high level of precision is recommended in the preamble and the provisions relating to the scope of the contract.

Duration and termination of the translation contract

It is recommended to include a clause regarding the duration of the (framework) agreement with the translator, determining the starting date, the completion or termination date of the relationship, the possible renewal, as well as any grounds for either party to terminate the contract, whether for expiration of the agreed term or for cause.

Such clauses related to the duration and termination of the contract are not to be confused with the duration of the transfer (assignment or license) of the intellectual property rights which will in most likelihood survive the termination of the translation service agreement. It is not because a translation agreement is terminated that the translator necessarily recovers his exclusive copyright.

Price and revision of price

The price and price revision clauses represent important provisions to be drafted with care. Such clauses may either only concern the price paid for the provision of the translation service, or also include the price, if any, paid for the transfer (assignment or license) of the intellectual property rights (including for the exploitation of the translation) on the work product. The revision of the price and the remuneration related to copyright are strictly regulated in some countries.

Moreover, it is a growing trend to include specific clauses in relation to the price regarding computer-assisted translations. It is indeed important to foresee the use of such information technology tools as it will have an incidence on the time spent to translate but also on the copyright remuneration (if any) as the output translation may be more or less protected by copyright (see the translation originality probability curve above). Also, it is recommended that parties clarify (i) which translation memory can be used for the requested translation(s) (e.g., any translation memory created by the translator or a translation memory dedicated to the client); (ii) whether the output translation is to be inserted into an existing translation memory; and (iii) the ownership of the translation memory.

Parties' obligations

Setting out each party's obligations is imperative in order to determine with accuracy how and when the source documents will be transmitted, under which format, the deadlines for the translation delivery (and the consequence for failure to meet such deadlines), the quality requirements, the quality control, the costs in case of unsatisfactory quality, the provisional and final acceptance of the work, etc.

Subcontracting and assignment of the translation contract

Like for any other contract, it is recommended that a clause is inserted that provides whether the agreement is establishing an exclusive relationship with the contractor or

not. Also, it is important to determine whether the translator may assign, or not, the rights and obligations arising from the contract, whether in whole or in part, and when applicable whether the authorisation from the party requesting the translation is required or not. Similarly, it is strongly recommended that parties determine whether the translator is entitled to sub-contract his obligations or more specifically have (part of) the translation work done *de facto* by a third party, and under which conditions.

Others

Similarly to any contract, other general clauses ought to be included, such as those related to the payment, payment methods and periodicity, confidentiality, data protection, liability, applicable law, competent courts, etc.

Section 2. The translation contract: copyright provisions

The paramount importance of proper copyright provisions in translation contracts transpires from this whole Study. These copyright provisions must cover multiple aspects and must be drafted with care. Not only must the parties define what their common intent is, but they must make sure that this intent is enforceable under the applicable law(s) which might provide for very strict binding requirements. A lack of caution or care may lead to the nullity of contracts or specific clauses, or to interpreting the translation contract in favour of the translator, and thus considerably reduce the exploitation rights of the beneficiary of the translation.

Despite this context, we note that the translation contracts which we analysed in the framework of this Study tended to overlook the copyright issues in relation to the original work to be translated and to the new works of translation to be produced.

More concretely, the following features should be contemplated in the translation contract.

Warranties regarding the original work

The author of the source document enjoys the exclusive right to have his work translated. Accordingly, if a translator is requested to make a translation, he must ensure that the original author consents to such translation. The same applies with respect to certain specific content of the source document which do not belong to the author of said document (e.g., quotations).

We therefore recommend that a warranty clause be included whereby the person requesting the translation and providing the source document to be translated warrants, where appropriate by providing written evidence, that he has all rights to have the work translated.

Warranties made by the translator

In addition to the warranties made by the person requesting the translation, it is also crucial that clauses are included in relation to the warranties made by the translator himself with respect to his work of translation and its content. We recommend for instance that the translator warrants that the translation does not contain or is not based on other translations of the same or similar work in the target language which could constitute a ground for liability on the part of the translation sponsor.

Furthermore, it may be advisable in certain cases that the translator presents relevant and exhaustive proof of acquisition of the necessary rights upon delivery of the requested translation. This can be done by presenting a statement signed by the translator and/or intermediaries who have worked on the work of translation. The same applies with regard to employees, where it may be recommended to have the translator submit documentary evidence (employment contract) as to how the rights were transferred and that the contribution made by such employee falls within his duties.

Transfer of economic rights (reproductions, communication to the public, etc.)

The contractual provisions related to the transfer of rights, whether through assignment (if permitted) or via licenses, are essential and require a high level of accuracy. It is recommended that the following issues are dealt with:

- which of the translator's work products may be exploited (e.g., the translation(s), revisions, reviews, amendments, layout, documented data, translation memories, databases, etc.);

- the types of exploitations that are authorised (reproduction, further adaptations including translations, communication to the public, distribution, etc.);
- the forms of exploitations that are permitted (paper copies, electronic format, etc.);
- the duration of the transfer (e.g., for a determined period of time or until the expiration of the copyright protection); and
- the remuneration (including the fair compensation) in relation to each mode of exploitation of the work(s).

Moreover, it is recommended (and made mandatory under various national laws) that parties determine the author's remuneration, the geographical scope and the duration of the transfer for each mode of exploitation.

Transfer (or waiver) of moral rights

Given the specific nature of moral rights (a personality right) and how they are governed under most national laws, it is strongly recommended that parties define by contract how these rights shall be treated. More specifically, the contract should determine whether the author waives his moral rights (if permitted), and how the right to disclose, the right of paternity and the right of integrity are to be dealt with. The latter is especially important when the contract provides for the possibility to have the translation reviewed and/or modified before final acceptance.

Translation memories

Since the questions of ownership of translation memories (including both the database structure and the content of the memory) are not settled under applicable laws and may trigger difficult issues, we recommend that they are dealt with and resolved by contract (e.g., who owns the technology, who owns copyright (if any) on the database structure, who owns *sui generis* rights on the content of the database and who owns copyright on the individual elements included in the database). Licenses can be envisaged too.

Annex 1

List of the main judgments of the Court of Justice of the European Union in the field of copyright and database rights

- CJEU 9 November 2004, case C-203/02, *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* ("**British Horseracing Board**").
- CJEU 9 November 2004, case C-46/02, *Fixtures Marketing Ltd v Oy Veikkaus Ab* ("**Fixtures Marketing I**").
- CJEU 9 November 2004, case C-338/02, *Fixtures Marketing Ltd v Svenska Spel AB* ("**Fixtures Marketing II**").
- CJEU 9 November 2004, case C-444/02, *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* ("**Fixtures Marketing III**").
- CJEU 7 December 2006, Case C-306/05, *SGAE v Rafael Hoteles* ("**SGAE**").
- CJEU 9 October 2008, case C-304/07, *Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg* ("**Directmedia**").
- CJEU 5 March 2009, case C-545/07, *Apis-Hristovich EOOD v Lakorda AD* ("**Apis-Hristovich**").
- CJEU 16 July 2009, Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* ("**Infopaq I**").
- CJEU 22 December 2010, Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* ("**BSA**").
- CJEU 4 October 2011, joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) ("**Premier League**").
- CJEU 13 October 2011, joined Cases C-431/09 and C-432/09, *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09) and *Airfield NV v Agicoa Belgium BVBA* (C-432/09) ("**Airfield**")
- CJEU 24 November 2011, Case C-283/10, *Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor* ("**Circul Globus**").
- CJEU 1 December 2011, Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* ("**Painer**").
- CJEU 17 January 2012, Case C-302/10, *Infopaq International A/S v Danske Dagblades Forening* ("**Infopaq II**").
- CJEU 1 March 2012, case C-604/10, *Football Dataco Ltd, Football Association Premier League Ltd, Football League Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v Yahoo! UK Ltd, Stan James (Abingdon) Ltd, Stan James plc, Enetpulse ApS* ("**Football Dataco I**").

- CJEU 12 July 2012, case C-138/11, *Compass-Datenbank GmbH v Republik Österreich* ("**Compass-Datenbank**").

- CJEU 18 October 2012, case C-173/11, *Football Dataco Ltd, Scottish Premier League Ltd, Scottish Football League, PA Sport UK Ltd v Sportradar GmbH, Sportradar AG* ("**Football Dataco II**").

- CJEU 19 December 2013, case C-202/12, *Innoweb BV v Wegener ICT Media BV, Wegener Mediaventions BV* ("**Innoweb**").

- CJEU 13 February 2014, case C-466/12, *Nils Svensson and Others v Retriever Sverige AB* ("**Svensson**").

- CJEU 27 February 2014, case C-351/12, *OSA - Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* ("**OSA**").

- CJEU 7 March 2014, *ITV Broadcasting Ltd and Others v TV Catch Up Ltd.* ("**TV Catch Up**").

- CJEU 27 March 2014, case C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproducktionsgesellschaft mbH* ("**Telekabel**").

Annex 2

List of the main national laws in the four countries examined in this Study (with links to official websites)

International legal framework

- The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 (the "**Berne Convention**").
- The Universal Copyright Convention as revised at Paris on 24 July 1971 (the "**UCC**").
- The Agreement on Trade-Related Aspects of Intellectual Property Rights (the "**TRIPS Agreement**").
- The World Intellectual Property Organization Copyright Treaty (the "**World Copyright Treaty**").

European Union legal framework

- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (the "**Database Directive**" or "**Directive 96/9**").
- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, (the "**InfoSoc Directive**" or "**Directive 2001/29**").
- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the "**Enforcement Directive**" or "**Directive 2004/48**").
- Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (the "**Rental and Lending Directive**" or "**Directive 2006/115**").
- Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (the "**Term Directive**" or "**Directive 2006/116**").
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (the "**Software Directive**" or "**Directive 2009/24**").
- Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (the "**Orphan Directive**" or "**Directive 2012/29**").

National legal frameworks

Belgium

- Loi relative au droit d'auteur et aux droits voisins (French version) / Wet betreffende het auteursrecht en de naburige rechten (Dutch version), 30 June 1994 (the "**Belgian Copyright Act**").

- Loi transposant en droit belge la directive européenne du 11 March 1996 concernant la protection juridique des bases de données (French version) / Wet houdende omzetting in Belgisch recht van de Europese richtlijn van 11 maart 1996 betreffende de rechtsbescherming van databanken (Dutch version), 31 August 1998 (the "**Belgian Database Act**").

- Loi relative aux aspects de droit judiciaire de la protection des droits de propriété intellectuelle (French version) / Wet betreffende de aspecten van gerechtelijk recht van de bescherming van intellectuele eigendomsrechten (Dutch version), 10 May 2007 (the "**Belgian Enforcement Act**").

France

- Code de la propriété intellectuelle, last consolidated version from 1 July 2014 (the "**French Code of Intellectual Property**").

Germany

- Gesetz über Urheberrechte und verwandte Schutzrechte (English version also available), 9 September 1965 (the "**German Copyright Act**").

United-Kingdom

- Copyright, Designs and Patents Act 1988

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