

Translation: Rights and Agency
A Public Policy Perspective for Knowledge, Technology and Globalization

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Abstract

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Copyright law relegates translation to a secondary, or derivative, status, which means that publishing a translation requires the permission of the rights holder of the original. This thesis argues for the timeliness of revisiting the translation right by analyzing its foundations and its implications from a transdisciplinary public policy perspective. This is done by first studying the historical and philosophical foundations of copyright law itself where the translation right is housed, revealing questionable philosophical arguments and a colonial past that has created legal path dependencies.

The thesis then undertakes an examination of the foundations of the translation right specifically, dubbed “the international issue *par excellence*,” which confirms the same pattern observed in the development of copyright law. Given the complete absence of the translator’s perspective from all international discussions on the translation right, copyright’s view of translation is then contrasted with recent scholarship in translation theory, with a special focus on the notion of agency(-ies), exposing the incompatibility of these views on translation, and highlighting the importance of including the perspective of translation studies in policies and laws related to translation.

The last part of the thesis explores the present-day realities of knowledge societies, digital technologies, and globalization, in order to identify the role of translation today and in the future, while highlighting the tremendous gaps between the have’s and the have-not’s, and the necessity of recognizing the specificities of different societies. Knowledge is the new capital of the world, and the translation right is an impediment to the key role translation can potentially play in allowing societies to participate in the cycle of its consumption and regeneration. Digital technologies are powerful enablers that have allowed those who have leveraged and embraced them, such as the open movement and prosumers of all types, to transform the nature of their interactions with their environment macro- and microstructurally. This has also been reflected in the profession of translation, where collaborative projects are constantly initiated, while the nature of the translator’s work is changing to the point where one seriously doubts whether the provisions of the century-old translation right still apply to it. The discussion on globalization focuses on language in a globalized world, power relations between linguistic communities, and means of preserving linguistic diversity and heritage.

The translation right, with its questionable foundations and outdated nature, is an impediment to the potential role of translation (as representative of the public interest) in the world, and must be revisited and at least reduced to the point of constituting balanced public policy. Social development, power relations and the necessity of differentiation (or “otherness”) are running themes throughout the work, which tries to balance between theoretical discussions from various relevant disciplines and reliance on United Nations and other public policy research.

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Introduction

I. Background and relevance

Intellectual property (IP) and copyright are complex areas of law, dealing with abstract and sometimes intangible subject-matter that relies on relative philosophical notions. It is a field where the interpretation of the law is constantly shifting in reaction to the changing realities of the world.

While copyright law and intellectual property used to be topics of interest almost exclusively of jurists and legal scholars, now, the majority of the citizens of the developed world are not only aware of it, but seem to have opinions about its various provisions, because it has crept into every aspect of their lives.

Not too long ago, we lived in a time and age when intellectual property laws were ignored. Software programs were pirated. Entire books were reproduced. Hollywood films were copied. Times have changed. Not only is the average citizen and business now much more aware of the rights of owners of intellectual property, the owners themselves are much more aware of their own rights, and more willing to enforce them around the world.

(Harris 2001, xvi)

While this is in large part the result of the expansionist efforts of the content industries – which were able to lobby their cause until IP was added to the General Agreement on Tariffs and Trade (GATT), affecting domestic laws the world over – other factors such as the integration of information and communication technologies (ICTs) into every aspect of life, and the effects of globalization together have created an environment where copyright colonized many new territories – and its expansion continues. Today, “[f]ew aspects of the law affect as wide and diverse a range of individuals, countries, industries, and interests as copyright” (Sundara Rajan 2006, 1). Education campaigns and proliferation of infringement cases in the media also played a role in bringing this obscure set of laws into the mainstream, albeit surrounded by feelings of fear and hesitation resulting from uncertainty.

[...] if you are a writer or musician, you are being told that as a “content provider,” you should be grateful for small mercies: just sign here, shut up, and be glad the big corporations are fighting the pirates on your behalf. If you are a consumer, you are being bombarded with messages that you are a pirate, that pirates are evil, and that pirates will face legal liability if they don’t stop their nefarious activities. If you are a teacher or a student, your school board or institution is warning you about the evils of piracy with a vehemence formerly associated with anti-drug campaigns.

(Murray and Trosow 2007, 2)

When all of the above is taking place in a world where capital and power reside in information and knowledge, copyright acquires a new significance in comparison to that of its original intent, because it was drafted by a very limited number of people, living in very different times, who could never have thought about the drastically different ways of creating and using works that would be possible through the Internet two centuries later, for instance, or how translation would be performed with the help of technology.

Copyright law is not only a legal matter; it concerns a nation's "ethical assumptions and cultural habits, including the notions of rewarding hard work, recognizing genius and creativity, ensuring wide and easy access to information, and encouraging experimentation in both art and commerce" (Vaidhyathan, 2001, 4). For example, in a country like the United States,

these issues raise questions about whether American culture, with its African American and American oral traditions and anti-authoritarian predispositions, can broadly deploy a legal framework drawn up by British noblemen three centuries ago. As American expressive culture becomes more technologically democratic, more overtly African American, more global and commercial, the archaic legal system it inherited has been remarkably able to accommodate all these changes, however imperfectly. The story of copyright law in the twentieth century has been the process of expanding, lengthening, and strengthening the ill-fitting law to accommodate these changes.

(*Id.*)

Because copyright is complex, abstract, integrated into our daily lives, and often surfacing whenever cutting-edge technologies appear, copyright law has been a polarizing topic since its beginnings, and the debate rages on today with even more fervour. Apart from textbooks and works explaining and interpreting copyright, most scholarship about it agrees on the common thread that it requires some reforms, but these range from one extreme to the other, with considerable literature leaning towards much more than small adjustments. For a specialized area of law which regulates billion dollar industries, it is certainly an anomaly to see the number of critical works growing so steadily, and questioning not only details of its enforcement, but the entire foundation on which it rests. Works with titles such as *How to Fix Copyright* (Patry 2012), "All Rights Reserved? Cultural Monopoly and the Troubles with Copyright" (Geist 2006), "The End of Copyright" (Nimmer 1995), "The Death of Copyright: [...]" (Lunney Jr. 2001), "The Escalating Copyright Wars" (Yu 2004a), etc. are not written by untrustworthy anarchist hippies, but by reputable legal scholars and practitioners who understand the roots of these laws, and the nuanced details of their application and enforcement, down to what most would consider minutiae.

In addition to being complex – in part because it deals with abstract subject matter – copyright is also a strange field, leading to strange situations. The very real pragmatism of copyright law, with its economic incentive

arguments and provisions impacting the fate of entire societies by determining to what extent they will have access to knowledge and culture, is contrasted by its abstract, fluid, almost intellectualist conceptions of originality, fixation, and moral rights.

The various copyright cases that appear before the courts and that make the news on a daily basis reveal some of the difficulties in dealing with copyright issues, from abstract notions like authorship, to the technicalities of its implementation, to the very real manner in which it has infiltrated everyday life. And in an era where good quality automation of various tasks is within reach, in areas like translation, copyright law will keep being pushed to adopt a more forward-looking perspective.

Take the example of the work done by Google's Neural Machine Translation System for instance. It relies on an artificial intelligence technology that now seems to have invented its own internal language to translate between multiple languages without relying on an intermediary natural language, such as English. The technology was first proposed and explained in a paper published in November 2016 (Johnson et. al. 2016) entitled "Google's Multilingual Neural Machine Translation System: Enabling Zero-Shot Translation." Recently, Google has announced the implementation of the technology in its Google Pixel Buds, wireless headphones that not only access the Google Assistant, but that can translate to and from 40 languages in real time, using Google Translate on their new Pixel phone: "It's like you've got your own personal translator with you everywhere you go" (<https://www.blog.google/products/pixel/pixel-buds/>).

The growing significance of copyright comes with a new urgency for it to be addressed in its various ramifications and wide-ranging provisions, including the translation right.

II. This thesis

In 2007 I had the privilege of editing half of Professor Basalamah's future monograph *Le Droit de traduire: Une politique culturelle pour la mondialisation* (2009) during which time I not only got acquainted with his work on the translation right (2000, 2001, 2004, 2005, 2007), but with the general issue of translation rights¹ as an area of research. Since then, I have come to realize that this question has received limited consideration from both translation scholars in translation studies (apart from Venuti 1995/2008, 1998: 47-66; Gow 2007; and Basalamah as already stated) and those outside the discipline (apart from Bently 1993, 2007; Hemmeungs

¹ While the translation right is mentioned in the singular in legislation (in reference to the copyright in an authorized published translation of an original work), it implies a bundle of rights, as does copyright. Therefore, I kindly ask the reader to accept my use of both singular and plural forms interchangeably throughout this work.

Wirtén 1998, 2004, 2006, 2009a, 2009b, 2011a, 2011b and with Ryman 2009; Ketzan 2010; Bannerman 2016; and Ost 2008, 2009), and that it deserves further investigation.

While I have made use of the findings of all of these works in my research wherever possible, I have gone beyond them collectively, especially in breadth, and in many instances in depth as well. In addition to having adopted the novel perspective of public policy, I have complemented the research with applications from various other fields as explained below, such as economics and knowledge society theories wherever I felt that such linkages were missing or needed updating. No other work currently exists which proceeds to demonstrate this level of complexity to the issue of the translation right nor of its treatment.

II.1 Statement of the issue

Current systems of intellectual property deem translation to be a reproductive/derivative activity, as though it simply consists in copying the contents of an original into a new linguistic form; while also granting it copyright protection, as though it is an original work itself. So although a translation is copyrightable as an original, permission from the rights owner must still be sought and granted prior to publishing a translation. Considered from the viewpoint of freedom of speech and expression, translation could be considered an act of speech, that ought to be guaranteed and protected as any other act of speech. But the translation right makes it clear that this act of speech is not as free as the translator would like it to be, because it requires the permission of the author of the original, which then also represents monetary and moral constraints for the translator.

Furthermore, “how can the original remain present within the translation, when the change in language constitutes a major change in form, and it is the form alone—the expression—which is protected under copyright” (Basalamah 2007, 122).

While translation studies have been emphasizing the role and agency of the translator and of translation, this agency is completely downplayed by the spirit of copyright law, which reduces the essence of translation to the servile function of faithfulness towards the original, which in turn results in society missing opportunities of benefitting from translation’s educational, cultural, social and political agencies.

This thesis is an attempt to answer the following questions: what are the effects of the translation right on translation and on society? How best to assess the situation? And can anything be done to improve the situation if the translation right is indeed producing a harmful effect?

Translation has historically played important roles in the preservation and dissemination of human knowledge and culture. The working hypothesis I am putting forward is that the translation right negatively impacts society by severely impeding the free circulation and dissemination of cultural and scientific works that is made possible by translation, while also perpetuating the harm done to the status of translators and translation. Furthermore, the translation right is inconsistent with current scholarship in translation studies on translation, in addition to being founded on questionable historical and philosophical foundations. Finally, the translation right is an outdated piece of legislation for the present and future realities of knowledge societies, globalization, and technological integration. In short, the current format of the translation right is simply unsuitable public policy, and must be revised.

II.2 Methodological remarks

Canada has been recently identified as having one of the world's most effective civil services overall (see e.g. *International Civil Service Effectiveness (InCiSE) Index 2017*). The effectiveness of a civil service is in large part a factor of its capacity to develop effective public policy. In this section, I will provide methodological remarks concerning the underlying frameworks of the work, beginning with public policy.

II.2.A Public policy perspective

Public policy represents the position and measures of the governing body in addressing social issues. "At its most simple," public policy is "a choice made by a government to undertake some course of action" (Howlett and Ramesh in Kay 2006, 8). Effective public policy leads to the prosperity and progress of the impacted population. It is a democratic process, which ensures representativeness, and it generally invites further engagement from citizenry. Social problems and situations are always complex, and will almost always involve competing stakeholders, all of them utilizing all the different tools at their disposal to protect their interests (Norwich University 2014), including public education campaigns and lobbying.

The difficulties encountered in representing the dynamism of complex systems in public policy arise because there are numerous processes, each with its own cycle and rhythm, happening at the same time (Kay *op. cit.* 1). Finding its origins in the writings of Harold Lasswell, public policy was presented as a multidisciplinary instrument to help direct political decisions:

Designed to cut across various specializations, the field was to include contributions from political science, sociology, anthropology, psychology, statistics and mathematics, and even the physical and natural sciences in some cases. It was to employ both quantitative and qualitative methods.

(Fischer *et al.* 2007, ix)

Policy making is considered one of the core functions of government. It can be further broken down into themes such as the quality of policy advice, the role of civil servants in setting strategic policy direction, policy proposal coordination across government, monitoring policy implementation, policy timeliness, and policy accuracy (InCiSE *op. cit.*). Quality of policy advice and its accuracy require a higher reliance on evidence, which in turn requires tracking and monitoring of the right indicators. The role played by civil servants in setting strategic policy direction will vary depending on the space given to external sources of influence, which includes lobbying. The coordination of policy proposals requires putting in place mechanisms to allow for effective and complete consultations with the right stakeholders, as well as the capacity to roll up and synthesize the findings to inform the decision-making process. Finally, the timeliness of policies speaks to their proactive or reactive nature, which is often the outcome of the level of competence and specialization of the civil service, and its ability to analyze its environment.

How policy is performed will be driven by factors such as integrity, openness, capabilities, inclusiveness, staff engagement, and innovation. Integrity includes themes like corruption, work ethic, fairness and impartiality, and processes in place to prevent conflicts of interest. Openness starts with the quality of consultations with civil society, and includes feedback mechanisms, as well as availability of / access to government data. The capability of the workforce can be assessed based on its levels of educational attainment especially in their areas of work, as well their levels of competence in leadership, commerce, analysis, and digital technologies. Inclusiveness in policy making requires the involvement of all constituent groups of society, including women and minorities (*Ibid.*).

While these indicators can be used to measure or predict the effectiveness of domestic policies, they can also be easily transposed to the international scene, where the unfolding and outcomes of international negotiations, treaties, and trade agreements can be assessed impartially.

The reason why public policy relies on such a complex array of indicators is that its ultimate attempt is to adopt a view that is representative of the complexity of the real world, in order to reach balanced solutions that allow for all the members of the society it serves to participate fully in social life and prosper within it. Of course, given the contradictory nature of the competing interests of the stakeholders, this implies making policy choices, such as determining where to use public funds, and whose rights are more in need of protecting. The balancing act required in these choices are what democratic populations expect to see from their policy makers. Applied to the debate on copyright, and by extension the translation right, part of the problem is that while “[t]he effectiveness of copyright has always depended on the ability to find an effective balance among the various social forces in play. Yet it now appears that there is little common ground among the actors involved in copyright issues” (Sundara Rajan 2006, 1). This is why an increasing number of scholars have openly questioned

whether this “balancing” is still being practiced, or whether the balance has completely shifted to one side at the expense of the other:

[...] lately, as a result of schools of legal thought that aim to protect “property” at all costs and see nothing good about “public goods,” copyright has developed as a way to reward the haves: the successful composer, the widely read author, the multinational film company. Copyright should not be meant for Rupert Murdoch, Michael Eisner, and Bill Gates at the expense of the rest of us. Copyright should be for students, teachers, readers, library patrons, researchers, freelance writers, emerging musicians, and experimental artists.

(Vaidhyanathan 2001, 5)

It is precisely the role of public policy to ensure that the various aspects and competing interests are equally taken into consideration in such far-reaching social issues. The public policy perspective will not only allow a better balancing of all the factors at play, but it will also provide the tool to quickly identify situations where the dominant agents have solidified their dominance at the expense of those who are more in need of the balance shifting in their direction, as we shall see.

II.2.B Historicism and path dependency

The heritage of the past and the unknowns of the future always surround policy decisions with historicity, which recognizes their concrete temporal and historical realities, and gives them a relative significance. Policies usually involve interrelated decisions, from various agents, with different perspectives, which are part of their own policy making processes. While they are always characterized by purposiveness towards a desired state (Kay *op. cit.*, 2) their outcomes cannot always be foreseen. And they are evidently impacted, shaped even, by previous policies and their outcomes.

This is not a work of history, but a special attention will be given to the historical developments of copyright and the translation right. The reasons for this are multiple: First, this helps understand the intended purposes and aims of introducing these legislations. Given the complexity of the arguments from the opposing stakeholders, it is important to identify the original *raison d'être* of copyright and the translation right, and then see how this evolved over time to become what it is today. Second, going through the history of the debates and the minutes of the negotiations not only provides us with the arguments put forward for, as well as against, these legislations, but by whom and at what point in their history. In addition to helping us better understand them, this also reveals the relativity of the positions of the stakeholders and the arguments themselves. This will be observed clearly in situations where a country that has been against certain provisions suddenly accepts them and becomes their enforcer, as was the case with the United States for instance, which will prompt us to investigate the conditions that make copyright law and the translation right favourable or unfavourable. The

relativity of these arguments will make us realize that they were often not accepted or rejected based on their intrinsic merit, but because of the power relations at play; not everyone's voice carries the same weight on the international scene, nor does it remain unchanged over time. This in itself will also explain why today, we find scholars often proposing the same arguments and solutions that were put forward sometimes over a century ago.

This emphasis on historical origins and developments carries a special significance in public policy and legal contexts. Public policy decisions are often large-scale and wide-ranging, and undoing them or modifying them significantly can become prohibitively costly. As for legal decisions, they become binding, and unless there is a break with the legal tradition which generates laws, it is very difficult to break free from this binding nature. Even the interpretations of the courts which may seem to be taking certain notions in a different path are still reinforcing the validity of the law being interpreted. When past decisions constrain present or future options, or when moves in one direction limit further moves to remaining confined within that same direction, we find ourselves in situations of path dependency. Throughout this work, we will encounter path dependencies which legally and conceptually curb the alternatives and choices available to countries attempting to find solutions that align with their interests, while remaining compliant with their international legal obligations. (Kay *op. cit.*, 29 - 30)

Although history will reveal and explain much of the present, it can never provide more than a partial account. When path dependencies are identified, they must be theorized based on the conditions that were interpreted to have generated them. The exercise is therefore always one of interpretation, in context. Our reliance on historical analysis will not mean that we accept the inevitability or determinism that follows from historicist approaches. That is why this thesis tries to balance between the various forces at play in producing outcomes, including the philosophical merit of arguments, dynamic power relations, and the various mechanisms fueling the transformation of today's world into networked knowledge societies, digital economies, and a globalized mega-system. Path dependency is not sufficient to predict the future completely. In identifying path dependencies, my intention is not to see society and its stakeholders resigned to some pre-determined fate, but to raise the awareness of policy makers about these path dependencies, which can become the impetus for thinking differently, from different angles and perspectives, in order to explore alternatives. In democratic societies, public policy consists in policy makers taking decisions in the public interest, based on the salience of certain issues and the reaction of the citizenry to them. While path dependencies can partially explain today's state of affairs, they are not sufficient causes, nor do they fully predetermine all future states. Public policy is, after all, about the choices a society makes.

II.2.C Absolutes and relatives

This thesis is not the story of a war between good guys and bad guys. Nor does it claim that there is suddenly an easy answer to a complex social, political, cultural, legal and economic issue. While it is clearly arguing the case for much weaker translation rights, it is premised on a theoretical model of public policy which rejects the idea that policy decisions are linear chains of causes and effects. As Kay says when describing the policy cycle:

Stages are often skipped or compressed and the idiosyncrasies, interests, pre-set dispositions, policy paradigms or mental maps of the actors involved often usurp the sense of a smooth process. There are a multitude of different processes at different scales and at different speeds occurring simultaneously.

(*op. cit.*, 9)

Nonetheless, there is also a general agreement among policy makers that there is a rationality to the process which goes as follows: in reaction to evidence that policy or policy change is required, a trial-and-error procedure takes place by which a desired outcome is identified, and a hypothesis for the best way to achieve it is developed. The hypothesis must then be tested successfully, and once implemented, the results must be analyzed so that a decision can be taken: proceed with the work, improve the policy in some respects, or cease the work (*Ibid.* 8-10).

Viewed in this light, we can consider the manner in which translation right has been conceived and implemented as a policy which is always open to revisiting, improving, or even terminating, based on the evidence being put forward.

II.3 Aim and contribution

This is a thesis that is simultaneously a threefold attempt to contribute, in a transdisciplinary manner, to public policy, law, and translation studies, in increasing order of importance.

The first aspect of the attempt is to provide policy makers with selected samples of evidence and research trajectories, so they may consider revisiting translation rights from a public policy perspective. I say samples because the translation right is a complex topic that needs to be approached from the lens of the *matryoshka* doll principle: it is part of the larger set of rights bundled in copyright, itself part of intellectual property, which has become an international regime with one foot in trade and the other in human rights. In addition to the philosophical foundations on which these rights rest, their multilayered embeddedness also has a long and complex history where colonialism and power relations play no small role, while it is also unfolding within the multifaceted reality and dynamics of societal aspirations and political platforms, ranging from economic growth

and market domination, to cultural and scientific progress, to the leveraging of deep technological integration. At the end of this work, it is expected that policy makers will be able to consider the role of translation and the translation right in social policies related to knowledge access, cultural development, education, language planning, and minority communities.

The second attempt of this thesis is to provide the translation perspective to jurists and legal scholars interested in the translation right, which has been missing since the very beginning of copyright negotiations on the translation right. In addition to the general lack of legal studies on the translation right, this is an attempt to foment a small research area concerned with the translation right from the relationship between law and translation. These two fields are in a dynamic relationship that allows the examiner to see each of them in a new light when viewed from the lens of the other. A number of scholars have already highlighted some of the analogies between translation and law (e.g. White 1990; Venuti 1995, 1998; Basalamah 2009 215-219; Ost 2007, 2009). The drafting and interpretation of laws is not that different from translation, in that they are both textual and linguistic activities.

The Canadian Royal Commission on Bilingualism and Biculturalism published a series of Studies on living in a bilingual culture and nation, one of which was Claude-Armand Sheppard's *The Law of Languages in Canada* (1971). "[...] the Study thus shows that the activities of "drafting" and "translating" cannot be separated from each other, as we normally think, or from "interpretation" either. These are not so much distinct practices as the same practice in different forms [...]" (in White *op. cit.* 243).

And finally, the third attempt of this research project is to contribute to translation studies, primarily by pushing forward the current scholarship on the translation right by a small step. This is done through contributing to both the topic of study, as well as the methodology and approach.

With regards to the topic, there is currently no study that looks at the impending effects of the translation right on the potential role of translation in the world today, as considered from the points of view of knowledge societies, digital economies, and globalization. By combining a critical examination of the historical and philosophical foundations of the translation right with the perspective of translation theory about translation, and contrasting the finding with the potential role of translation in today's world, this study demonstrates the timeliness (and urgency) of revisiting the translation right, and at the least reducing it to the point of constituting balanced public policy.

Furthermore, this work reaffirms translation's potential role as a destabilizing agent to dominant forces from the viewpoint of power relations. By its disseminating and multiplying nature, it becomes representative of the

collective interest in the copyright equation pitting the interests of the individual author against those of the society. This exploration of translation shows the possibility for law and globalization to operate “from below,” to borrow the idea from Santos and Rodriguez-Garavito’s (2005) *Law and Globalization from Below: Towards a Cosmopolitan Legality*, in which it is shown how grassroots and bottom-up movements can affect change in our understanding of the forces in globalization and law-making. This is directly related to an ethics of translation, which is briefly discussed below.

The contribution to translation studies from a methodological perspective consists in adding what I consider to be a transdisciplinary study to the growing body of interdisciplinary work in the field, in hopes of shedding light on the actual, symbolic and potential values of translation and the translator.

Views about interdisciplinary work range from one extreme to the other. While some (e.g. Taylor 2009, 2010) have called for abolishing university departments because they fatally impede interdisciplinarity, others see current academic interdisciplinary projects, programs and research mechanisms as sufficient in meeting all the needs for interdisciplinary work (Jacobs 2014).

Interdisciplinarity integrates the methodologies and perspectives of two or more disciplines to reach outcomes or advancements that would not be possible through the means of a single discipline. Multidisciplinarity and cross-disciplinarity are interchangeable terms to refer to interdisciplinary work where the level of integration of knowledge and modes of thinking is very low. Transdisciplinarity refers to interdisciplinary work that integrates methodologies, theories, contents and perspectives from various disciplines in a manner that goes beyond their respective boundaries, in order to create a unity of knowledge about a topic (Strober 2010, 15-36). This is the lens I have adopted in this work to address the topic of the translation right.

I will not be addressing the mechanics of translation nor the linguistic dimension of the activity. I am looking at translation as a phenomenon taking place in history, in society, in culture, in economy... to the extent that it is relevant to do so to study the history and repercussions of the current translation right. In sociological terms, this would be called a system, or a subsystem within a (mega)system. Copyright law is only concerned with translation as a product. And within that meaning, it does not distinguish between literary, scientific, legal, technical, general or any other type of translation. Except where it is further qualified of being of a certain type, when translation will be mentioned in this thesis to refer to the product, it will therefore be used in the same sense found in the law.

My adoption of the public policy perspective was in large part to reflect the complexity required to study the translation right because it is a complex issue that calls for an interdisciplinary approach that appreciates this

complexity. While translation studies and the history and philosophy of (copyright) law will provide much of the heuristic positioning, the substance and methodologies of other fields will also be borrowed wherever relevant. These will include economics, psychology, discourse analysis, criminology, sociology, ethics, social development, information technology, philosophy and globalization.

II.3.A Power relations

Without being presented in a dedicated section, a number of themes will be running through the thesis. One of the most important will be power relations. I will therefore present the framework of power relations that I will be using here in order to show its relevance in itself as well as for the notion of timeliness that I am arguing in this thesis, so that the reader keeps it in mind as it is applied and mentioned throughout the work.

Power is not observed as something that is possessed, but as a sort of authority that can be exercised, by the construction of dominant discourses through social relations (Farrand 2014, 2) which create and strengthen networks of power (Foucault 2004, 29). The dominant discourse makes certain arguments or positions weak and others strong by designating certain ideas as being “right” or “true”.

In *Networks of Power in Digital Copyright Law and Policy*, Benjamin Farrand (2014) tries to answer the question “why are some lobbyists more successful than others in having their preferred policy outcomes taken into account?” (2). In summary, he explains that the political salience of an issue will determine whether it may impact a citizen’s decision to vote in a certain way or not. If the issue happens to be in a highly technical area – such as IP for instance – then unless policy makers clearly feel the interest of citizens in the issue to the point of salience, they will defer to the established “experts” for data, arguments and solutions. The media plays an important role in establishing the salience of an issue (or lack thereof), and framing it, as well as assessing it. Policy makers will not invest time and energy researching issues where voters themselves are perceived to simply rely on the expertise of established authorities in the field. In the case at hand, corporate actors like the content industries, who also happen to control the media, are deemed to be the ones who best understand their business and field, and their expertise is therefore trusted in guiding the legislative process. In Foucauldian terms, the multinational corporations produce the type of expertise that not only establishes their authority in the network, but that also reinforces their power. Their discourse – of increased IP protection equating to economic growth and innovations, to society’s benefit, for instance – becomes the dominant, or “true,” or common-sense discourse – or to use Gramsci’s expression, hegemonic. As it grows in dominance, so do the difficulties of resisting or challenging it. As Farrand himself states “attempts to counter this discourse by arguing that the perceived problem does not exist are less likely to be successful than discourses proposing ‘solutions’ to that existing problem” (196).

While this model is relevant to this thesis in general, it is even more so to the notion of timeliness that I am proposing in my argument. The convergence of knowledge societies, digital technologies, and globalization on one hand, and the awareness of citizens about the constraining creep of copyright – cited at the beginning of this Introduction – on the other, are creating an environment that is most suitable for reviewing copyright as a legal regime. And more specifically, understanding the hindered role of translation in this environment, its destabilizing agency, its potential for social development, translation technologies and their role in a globalized world, make the suitability of reforming the translation right even more timely. It is my hope that this thesis raises the salience of translation as a legal, political, and public policy issue deserving of the attention and study of translation scholars, policy makers, and jurists. “While transformation of the networks of power operating in copyright law and policy development is difficult, this does not mean that it is impossible” (*Id.* 176).

II.4 Ethics of translation and ethics in law

In this thesis, I am interested in real world challenges and solutions, not purely academic or intellectual flights of fancy. Whether we look at the colonial past of copyright law or today’s free trade agreements in which copyright has become a standing item, it is clear that the topic cannot be addressed without also openly discussing power relations between those in the “center” and those at the “periphery.” And it is precisely where there are power differential and when power is exercised that we must react by ensuring that an ethical oversight is also allowed.

The essence of translation boils down to a negotiation of the relationship between the self and the other. If translation takes place, it is because the otherness of the other has been recognized and allowed. Paul Ricœur spoke of a “linguistic hospitality” as part of the “translation paradigm,” which allows us to inhabit the world of the other, while receiving the other in our world, and which allows us to discover the other within the depths of our self, and *vice versa*. I am in agreement with the numerous translation scholars who have declared that respect of difference is in translation’s intrinsic “ethicist” nature, and my reliance on their arguments is a premise for the entire project.

[...] translation forces us to respect the other – the other language, the other person, the other text – yet it nonetheless requires us to assert ourselves, and our own languages, in relation to it. It requires us to create a frame that includes both self and other, both familiar and strange; in this I believe it can serve as a model for all ethical and political thought.

(White 1990, xvii)

“The ethical stance I advocate urges that translations be written, read, and evaluated with greater respect for linguistic and cultural differences.”

(Venuti 1998, 6-7)

[Kuhn's theory of paradigms as carriers of values] applies particularly well to the question of translational paradigm with which we are concerned, and which, more explicitly than any other intellectual operation, reveals itself as the carrier of an ethical imperative. This is because translation is already accompanied by a recognition of the difference of the other, and the wish to begin an interaction with them, on the basis of the mutual acknowledgement of the limits of one's own language: it is what allows one to experience what A. Berman beautifully called "the Experience of the Foreign."

(Ost 2009, 34 – my translation)

[...] the freedom to translate is nothing more than the affirmation of the freedom to transform oneself at the touch of others by the inception of an internal dialogue, an examination, an incessant back and forth from oneself to oneself with the urgent perspective of translating the other with a thrust of mediation towards the universal.

(Basalamah 2009, 94 – my translation)

This ethics of respect of difference will therefore be one of the underlying themes running through the thesis, especially with regards to the widely varying circumstances of the different nations at the international level. Accepting translation's understanding of the relationship with otherness entails a high level of sensitivity to relations of dominance or hegemony, be they linguistic, disciplinary, legal, financial, social, cultural or political. It is an ethical position that reconnects with the notion of "*from below*" mentioned previously. When applied to the realities of international copyright law, I will therefore be sensitive to the following points of difference:

- Every society has its own history, struggles, challenges, circumstances, strengths and weaknesses;
- Every society has to take the time to reflect about its needs and choices in a free and democratic way;
- Every society also has to respect the needs and choices of other societies.

Application of this translation paradigm would result in respecting the other as an equal (a same) as well as a different other, or, as expressed more accurately in translation theory, difference in resemblance.

While I subscribe to this vision of translation, I have positioned the research angle of this thesis primarily for contributing to balanced public policy, often resulting in looking at issues from a social policy viewpoint. In other words, the evaluation and presentation of arguments will be mainly from a social policy perspective, as opposed to a purely ethical perspective². Social policy is public policy that is directly geared towards social issues impacting people's welfare, such as access to resources and redistribution of wealth, inequality, education, and health care, among other humanitarian issues. The well-documented lack of data in copyright law for the public policy indicators enumerated above has meant that I had to rely on the scholarship and analysis available in the other disciplines that have covered the issues being addressed, and complementing the discussion with a general

² Which has already been effectively adopted as an approach by Basalamah (2009).

assessment from the viewpoint of public policy, power relations, and others fields as relevant, as discussed earlier.

Since the domination of the positivist tradition in law, there has not been much room for an ethical discourse in legal studies: “The defining feature of modernist legality was the separation of legality and morality: a wholly positivized conception of juridical phenomena was predicated upon the exclusion of ethics, morality, value and indeed substance from questions of law, legality, validity and form” (Douzinas et. al. 1994, 16).

Yet recently, the number of legal works, especially on copyright law, that have looked at the topic from a policy or an ethics perspective has grown. Given the direct impacts of copyright on social realities, governments and law makers are now being urged by legal scholars to look at copyright in a *Balanced Copyright* manner that results in a policy frame that is *In the Public Interest* (in reference to Geist 2005 and 2010).

Why should we consider that the intersection between intellectual property and ethics be worth exploring? In part, because ethical issues are already finding their way on to the intellectual property law agenda: [...] through] the revival of interest in the general justification for intellectual property rights. The intersection between ethics and intellectual property has also formed part of much of the broader discussion on the theoretical justification for intellectual property legislation, or from a different perspective, the processes of its legitimation. In addition, ethical issues have been raised in discussions relating to the grounds of the obligation of confidentiality, the transfer of technology, and the legitimacy of using intellectual property rights to divide up markets. Further issues are clearly implicated by the way that intellectual property law is colonizing new geographies – a colonization that often presents a clash of cultures.

(Bently and Maniatis 1998,)

As stated, public policy entails looking at social issues from all relevant disciplinary angles. This is what is required when studying the complex issues surrounding the translation right within copyright because

the way in which copyright is perceived largely depends on the standpoint of the person asked [...] the perspective provided by legal doctrine is insufficient to enable one to understand copyright law, and, in turn, that copyright “must be set in a larger context which encompasses the organisation of cultural and economic life, the social attitude towards intellectual creations and their uses, and the position of the creator in society”

(Grosheide in Sherman and Strowel 1994, 214)

Law is a very dynamic field, constantly changing in reaction to many factors, such as a case law, new phenomena such as technology, and social behavior, values, and expectations. However, most of the dynamism (i.e. legal transplants) witnessed in legal studies has been limited to internal reactions and commentary. This is in part due to its self-referential nature, which means that copyright law sees its own notions as legal categories, therefore missing their economic, political, cultural, or social interpretations (see Sherman in *Ibid.* 114-116):

This heightened self-referentiality means that copyright law refers, increasingly, to its own criteria for evaluation, models for change, and, perhaps most importantly of all, self-criticism. It also means that while copyright law is cognitively open to new forms of subject-matter, it is normatively closed in the manner in which it deals with and treats that subject-matter.

(*Ibid.* 115)

Given the complexity of contemporary issues and the repercussions of the law in a globalized world, there has recently been a growing recognition of the need for increased interdisciplinarity in copyright law, as witnessed by government consultation rounds before drafting law and policy, as well as in academic works such as *Copyright and Policy: An Interdisciplinary Critique* (Bently 2010). Legal scholars have identified copyright's lack of openness to external criticism and debate as the source of blind spots in copyright law, which is itself evidence of a new awareness that is forming (Sherman *op. cit.* 118).

While there has been a general lack of openness from copyright law towards other disciplines until recently, one discipline that has dominated arguments, court cases, and negotiations is economics. While the economic dimension of copyright is crucial to the discussion, it becomes a serious issue when it is the *only* dimension being considered. Trying to reduce all the elements and aspects of a complex socio-cultural and historical issue to its monetary value is simply an impossible reduction. And yet, the language of economy has seemed to be the only one that decision-makers have been capable of understanding in too many instances related to copyright. So, although I recognize the undeniable significance of economics in the debate on copyright, I will strive to balance my presentation by relying on it when it is relevant, and resorting to arguments and studies from other disciplines when it is logical to do so.

Finally, while it would be ideal for us human beings to be able to approach objects of study in a truly integrated, holistic, non-fragmentary fashion, this is simply not possible cognitively, nor does it serve the purposes of disciplinary academic research: "One must distinguish the incomprehensible complexity in a system (or its environment) that would result if one connected everything with everything else, from determinately structured complexity, which can only be selected contingently" (Luhmann 1995, 27).

My methodological choice of using public policy as an analytical grid to create a "structured complexity" will provide the balanced yet realistic perspective required to unearth and assess the arguments, evidence, and points of view – in all of their structured complexity – that should be considered by policy makers looking at the phenomenon of translation in their society.

The translation right cannot be studied without also studying copyright law at a minimum, and ideally intellectual property as well. In fact, any recommendations to modify or reform the translation right will most likely require amendments, and perhaps a rethinking, of copyright law, as we shall see.

II.5 Outline

The thesis is organized in a three-part, ten-chapter, structure, plus a conclusion that summarizes the thesis, restates the findings, and provides an answer to “what now?”.

Part I (Copyright Law: The Foundations) provides an overview of the historical and philosophical foundations of copyright law. As stated previously, according to the current formulation of copyright law, the translation right stems entirely from it, and it can therefore not be studied seriously without first understanding copyright. Part I contains four chapters, which introduce and discuss the notions of copyright law according to their order of appearance in Canada’s *Copyright Act*.

Given the transdisciplinary nature of this thesis, I deemed it necessary to devote the first part to provide an overview of copyright law, to allow the readers who do not have a legal background in intellectual property law to understand not only the main concepts, but also their historical and theoretical/philosophical foundations, as well as the main discussions and concerns that surround them. Because the translation right is housed in copyright law, and because copyright law considers a translation both a derivative work and an original one, all discussions on key notions such as what constitutes a work, or the philosophy behind exemptions will have to be kept in mind for the translation right.

Before presenting the outline of the chapters, allow me to mention that my original aim was to focus on the Canadian landscape. In addition to the relevance of this choice for personal reasons, the Canadian situation presents two elements of interest for my topic. The first is that Canada has two official languages: English and French. The second is that Canada has two legal systems, namely, the *code civil* and the common law. These two binarities reflect Canada’s unique heritage and development over the past three centuries, evolving not only from those of the U.K. and France, but also from that of the U.S. and other international developments. This meant that, though the Canadian situation will be the starting point, I will follow the meanders of the research as they unfold, especially given the implications of globalization.

The singularity of the Canadian situation has, furthermore, forced me to reflect on the equally singular situation of every other region and nation in the world, each carrying its own historical developments, and each with its specific set of socio-economic circumstances. Looking at India, Russia, and Scandinavian countries, for

instance, will reveal circumstances common to those found in Canada at one point in time or another, as well as highlighting the fact that different circumstances call for different measures for prosperity, development, and growth.

Chapter 1 (Copyrightability) will explain copyrightability by covering the notions of works, conditions, and duration. Chapter 2 (Balancing Interests) will cover moral rights and exemptions, which includes a brief presentation of the conceptual infrastructure of copyright from the points of view of natural law (moral rights) and positive law (exemptions). Chapter 3 (Infringement) will address infringement and remedies as well as their effectiveness, while Chapter 4 (Institutions Mentioned) will explain the institutions mentioned in the *Act*, which will require a quick summary of the most relevant historical developments leading to contemporary international copyright law. This will introduce power and power relations as a running theme for the rest of the thesis.

Each of the 4 chapters in Part I will address the topics in 3 cumulative steps: Under the heading *Understanding the terms*, the main legal terms and notions will be presented. Some of the terms/notions will require a more thorough explanation, because their theoretical background and historical evolution are required for our understanding of their relevance to translation rights in general, as well as their effectiveness today (mainly addressed in Part III). Under the heading *Understanding the foundations*, I will therefore elaborate on their historical and philosophical foundations of these notions. Finally, where required, once the foundations of a notion have been explained, a more critical approach will be taken to assess the validity of the arguments and theories presented, and a more nuanced approach, with openness to alternative views, will be considered, all under the heading *Understanding the issues*.

More detailed discussions of these notions from the perspectives of translation theory as well as the world's new realities (knowledge society, information and communication technologies, globalization) will be postponed to Parts II and III respectively.

By the end of Part I, it will have been demonstrated that copyright law itself rests on questionable historical and philosophical foundations. Furthermore, the development of copyright law is the outcome of an interplay between various competing stakeholders that are part of a power network, in which the dominance of the discourse takes precedence over the merit of arguments, or social and democratic considerations.

Part II (Translation in Law, Theory and Practice) provides the translation perspective by attempting to answer the following questions: What is the translation right, and how is it presented in international legal documents? (Chapter 5: Translation Right) How did the translation right come about? (Chapter 6: Foundations of

Translation Rights). We will then see how translation views the role of the translator and of translation from the lens of the academic discipline of translation studies (Chapter 7: Agency of Translation/the Translator), in order to compare the extent to which this view is compatible with the premises of copyright law in general and the translation right in particular.

By the end of Part II, I would have argued that the historical and philosophical foundations of the translation right are as questionable as those of copyright law. It will also have been demonstrated that the agencies of translation and the translator, as understood by the discipline of translation studies, is in contrast with the assumptions of the translation right.

Equipped with all that we will have discussed about copyright's foundations and the translation perspective, we get to Part III, which brings the debate into our contemporary world. Today's societal and technological realities are sufficiently different from previous ones to allow us to truly say to be living under the "new world order" of networked societies. Populations of these new societies have already started embracing the possibilities of rethinking many of their institutions, policies, and business models to cope with these changes. To understand the nature and distinctive features of these new societies, I have broken down Part III into three chapters, to study it from the perspectives of knowledge societies (Chapter 8), information and communication technologies (Chapter 9), and globalization (Chapter 10). By the end of Part III, it should be clear that the radical changes in the political, economic, and technological aspects of our societies also require changes in the way we understand ourselves, our place in the world, our interactions with ICTs, and the potential and actual roles of translation in this context. Given the complex network of overlapping topics, these chapters are to be understood as three facets of the same realities.

Chapter 8 (Knowledge Society and the Translation Right) will address the construction of knowledge societies – where information and knowledge are the new capital, and hence, power – with an emphasis on the knowledge gap, and what role translation can play in this regard. The chapter will begin by explaining the evolution and state of the post-Fordist society. We will then look at how intellectual property serves the purposes of concentrating and monopolizing knowledge. Finally, we will look at the role translation can play in such a world by decentralizing knowledge (and therefore power) and rendering it much more accessible, pending the possibility of the legal impasse created by current translation rights.

Chapter 9 (Information and Communication Technologies and the Translation Right) explains the implications of the digital era by taking a closer look at technology and the open community. The history and developments of the techno-legal community of the past five decades are a living model and evidence that an open society can function and sustain itself through its recursive practices. The challenges digitalization poses for IP and

copyright are no less problematic for translation, which has to reflect on issues ranging from translation software to collaborative translation projects, which can reflect the open model. Ultimately, this chapter intends to see whether current translation rights have taken into consideration the new technological realities of the world, or whether they can be considered outdated.

In the first part of Chapter 9, we will try to understand the place and role of technology in today's world. This will include an explanation of how technological advances and IP advances have always run in parallel. We will then discuss what present-day technology has meant for collaboration and business, which mainly addresses the open movement. This will allow for a better understanding of the potential for translation projects that rely on collaborative and open models. In the second half of the chapter, we follow the evolution of technology in the discipline of TS, in order to better understand the manner in which translators do their work. If the work of the translator today is so different from what copyright law had in mind when its provisions were initially drafted (and which are still in effect today), to what extent are those provisions still applicable to translation?

Chapter 10 (Globalization and the Translation Right) will be a reminder of the complexity of interacting in a highly connected world, namely on the political scene. We will also highlight the importance of language, and hence translation, in a globalized world. Language, as a revealing microcosmic element of the complexities inherent in globalization, will be looked at from the points of view of Internet presence and overall power. This will reveal the power relation between different languages and, by consequence, the communities that speak them. We will try to see what lessons can be learned from the movement of "intercomprehension" which is taking place in Europe, in trying to foster cultural ties and feelings of European identity. This will highlight the importance of recognizing the specific situation of every participating entity in the globalized world. All of this will inform us on the current as well as potential role of translation in a globalized world. We will end the chapter with a brief discussion on the globalization of law.

By the end of Chapter 8, it will have been established that the translation right impedes translation's role in allowing citizens and societies to participate in the knowledge society as consumers and producers of knowledge. By the end of Chapter 9, it will have been shown that the translation right impedes the macrostructural role of translation by hampering collaborative translation projects, while lacking the necessary updates to address the microstructural and technological changes that have taken place in the translation profession as a result of the integration of translation technologies. By the end of Chapter 10, it will have been demonstrated that translation can play a significant role in the preservation of linguistic and cultural diversity, both online and offline. The chapter will also explain the specific needs for differentiation, particularly with regards to the translation right and its role for education in the developing world. By the end of Part III, it would have been demonstrated that the translation right is outdated and unsuitable for the new realities of the world, and that

instead of enabling the dissemination of knowledge and culture, it impedes the potential role of translation in performing those functions.

As already mentioned, a number of themes, such as power (e.g. power relations, concentration of power) and social development, will run through the entire thesis, appearing when they are relevant. The structure of the thesis was built in this manner for two main reasons, in addition to the logical groupings between the chapters.

The first reason, mainly pedagogical, is that it allowed me to present dense and complex subject matter in an incremental manner throughout the thesis. This was important because of the transdisciplinary nature of its content, which implies a heterogeneous readership, among whom there would be very few with a specialized expertise in all of the topics. I had to make sure that I could therefore present overviews and contexts when topics are first introduced, and provide in-depth analysis without repeating myself when required – which was usually in a different chapter or even part – while providing a seamless reading experience for the reader.

The second reason is that I wanted the structure to reflect the argument for the case I am making. My argumentation is complex, and I wanted the structure to facilitate its presentation by presenting its parts and their order in the most logical manner.

My claim in this thesis is that,

1. given the questionable philosophical and notional foundations of copyright law (Part I), and the translation right (Part II); and
2. given the colonial, biased, unrepresentative, and undemocratic political history of copyright law (Part I), and the translation right (Part II); and
3. given the complete absence of translation's/the translator's perspective from the translation right (Part II); and
4. given the emergence of knowledge society and the role translation could play in them and for their construction (Chapter 8); and
5. given the quasi complete integration of collaborative technologies and the emergence of open and collaborative business and social models and the possibilities they offer for translation (Chapter 9); and
6. given the impacts of globalization in general and on the languages of the world in particular, and the role translation can play to protect cultural and linguistic heritage and meet the specific educational needs of the developing world (Chapter 10);

It follows that the current formulation of the translation right within copyright law is

1. based on questionable notional foundations (Parts I and II);
2. based on questionable historical foundations (Parts I and II);

3. unrepresentative of scholarship in the one discipline dedicated to studying the phenomenon of translation as a process and a product (Part II)³;
4. outdated and counterproductive to the potential role of translation (Part III).

I therefore conclude that the translation right be revisited from a public and social policy perspective, and that it be, at least, reduced sufficiently to address the above-mentioned concerns (Conclusion).

³ This is a critical position not only towards law, but also towards translation studies.

Part I: Copyright law, the foundations

Part I provides an overview of copyright law by explaining its main terms and notions in their order of appearance in Canada's *Copyright Act*. Given the transdisciplinary nature of this thesis, I deemed it necessary to provide this brief overview, to allow the readers who do not have a legal background in intellectual property law to understand not only the main concepts, but also the historical and theoretical/philosophical foundations of copyright, as well as the main discussions and concerns that surround those foundational elements.

Chapter 1 will explain copyrightability by covering the notions of works, conditions, and duration. Chapter 2 will cover moral rights and exemptions, which includes a brief presentation of the conceptual infrastructure of copyright from the points of view of natural law (moral rights) and positive law (exemptions). Chapter 3 will address infringement and remedies as well as their effectiveness, while Chapter 4 will explain the institutions mentioned in the *Act*, which will require a quick summary of the most relevant historical developments leading to contemporary international copyright law. This will introduce power and power relations as a running theme for the rest of the thesis.

Each of the 4 chapters in Part I will address the topics in 3 cumulative steps.

Under the heading *Understanding the terms*, the main legal terms and notions will be presented. Some of the terms/notions will require a more thorough explanation, because their theoretical background and historical evolution are required for our understanding of their relevance to translation rights in general, as well as their effectiveness today (mainly addressed in Part III). Under the heading *Understanding the foundations*, I will therefore elaborate on their historical and philosophical foundations of these notions. Finally, where relevant, once the foundations of a notion have been explained, a more critical approach will be taken to assess the validity of the arguments and theories presented, and a more nuanced approach, with openness to alternative views, will be considered, all under the heading *Understanding the issues*.

More detailed discussions of these notions from the perspectives of translation theory as well as the world's new realities (knowledge society, information and communication technologies, globalization) will be postponed to Parts II and III respectively.

By the end of Part I, it will have been demonstrated that copyright law itself rests on questionable historical and philosophical foundations. Furthermore, the development of copyright law is the outcome of an interplay

between various competing stakeholders that are part of a power network, in which the dominance of the discourse takes precedence over the merit of arguments, or social and democratic considerations.

Chapter 1: Copyrightability

I. Forms and functions of intellectual property

Intellectual property (IP) can take varied forms and perform different functions (copyright, trademarks, patents...). Because the present work is concerned with translation rights, our main focus will be copyright law, because of their inclusion therein. That said, we will sometimes have to refer to other forms of IP or talk about IP in general, depending on what applies to the situation being discussed, because these various rights are related in philosophy and history, or because of their financial or socio-cultural ramifications on today's societies.

Intellectual property delimits the legal boundaries that manage a defined set of intangible products of human creative activity. One way to understand this is to compare it with real or physical property, which is often protected by physical security means, such as fences and other enclosures. Likewise, intellectual property is mainly protected by sets of enforceable legal “rights” granted to “owners” or “holders”. So, for example, a “patent” is a set of legal rights granted to an inventor. It is not the invention itself. Historically, patents and trademarks were called “industrial property rights” while copyright and related rights were referred to as “authors’ and artists’ rights.”

These legal rights are intended to solve the economic problem described by Kenneth Arrow as the “incomplete appropriability of knowledge” (Arrow 1962, 609). Arrow cites indivisibilities, inappropriability, and uncertainty as the reasons for the possible failure of perfect competition to achieve optimality in resource allocation. After defining invention as the production of knowledge and information, he goes on to show that “all three of the reasons given [...] for a failure of the competitive system to achieve an optimal resource allocation hold in the case of invention” (*Ibid.*, 610). Because intellectual property is intangible and usually easy to reproduce (i.e. competitors can easily appropriate it), it is difficult to capture the full value of investments in it. Unlike tangible objects where the proprietor can control the use of the object, the subject-matter of intellectual property can never be completely controlled. The various provisions and measures of IP can therefore be viewed as an effort to solve this “incomplete appropriability” problem (see Abbott *et al.* 2007: 6-7).

IP typically covers five areas of intellectual creations: patents, trademarks, industrial design, confidential information and trade secrets, and copyright. Ongoing developments in information and communication technologies cause IP legislators to expand the sphere of IP, to include such elements as integrated circuit topography (microchips) and databases.

Copyright specifically is granted to authors and artists to protect expressive works against unauthorized reproduction or distribution by third parties. To be more accurate, the first owner has not one “copyright” but a series of distinct rights.

II. Works

II.1 Understanding the terms: works

The Canadian *Copyright Act* (*Act*) is the Canadian federal law that aims to protect creative works and other subject-matter (called “neighbouring rights”) by granting their creator an exclusive control over their use (3.1). Each of the rights is enumerated, and each confers the ability to do a specific activity with the material in question, to the exclusion of others:

3. (1) For the purposes of this Act, “copyright”, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
 - (a) to produce, reproduce, perform or publish any translation of the work,
 - (b) in the case of a dramatic work, to convert it into a novel or other non-dramatic work,
 - (c) in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise,
 - (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
 - (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
 - (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,
 - (g) to present at a public exhibition, for a purpose other than sale or hire, an artistic work created after June 7, 1988, other than a map, chart or plan,
 - (h) in the case of a computer program that can be reproduced in the ordinary course of its use, other than by a reproduction during its execution in conjunction with a machine, device or computer, to rent out the computer program, and
 - (i) in the case of a musical work, to rent out a sound recording in which the work is embodied, and to authorize any such acts. (*Act*, 3)

In the above article, expressive works are broadly defined, and include such things as books, films, music, recordings and computer software. There is, in fact, no express limit on what material might be considered to embody protectable artistic expression.

II.2 Understanding the foundations: works

The *Statute of Anne*, the British ancestor of Canadian copyright law, applied only to particular types of literary works. But as William Hayhurst observes, “During the eighteenth and nineteenth centuries in England, engravers, textile designers, sculptors, dramatists, music publishers, artists and photographers managed to have a succession of statutes enacted [...] Added to rights to prevent copying were rights to prevent unauthorized public performances of dramatic and musical works” (in Loewenstein 2002: 214). As new representational technologies and cultural practices developed, the category of works continued to expand (Murray & Trosow 2007: 38).

In the *Act*’s context, however, “works” refer to literary, artistic, dramatic, and musical works, while “other subject-matter” refers to sound recordings, performers’ performances, and communication signals. The *Act* further states that

every original literary, dramatic, musical and artistic work includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science (*Act*, 2).

These are merely examples illustrating the meaning of “work”, and protection is therefore not limited to these. Also, there is no distinct category for works in digital format. But courts have interpreted the *Act* in specific cases to protect new types of works not mentioned therein. In some instances, these new types of works are the result of new technology and, as such, were not contemplated by the drafters of the original law in 1921. This was the case with respect to computer software, where the law was interpreted to extend to computer software without any specific mention of computer software in the legislation.

In recent years, computer code has triggered some important questions about translation rights, but not in the common usage of “translation”. Scholars have wondered whether it is a translation, as understood by “translation right” in the act, to rewrite a computer program in a different programming language. In *Apple Computer v. Mackintosh Computer* (1986) the federal court held that conversion from one code to another did not constitute a translation (Rose 1993: 43). But in another case, *Prism Hospital Software v. Hospital Medical Records Institute* (1994), a B.C. court ruled that the conversion of a software into a different programming language did constitute a translation. There is therefore still some uncertainty surrounding programming languages (see Murray & Trosow, op. cit. 59 – 60).

However, computer programs are now protected by copyright law. The *Act* defines a computer program as “a set of instructions or statements, expressed, fixed, embodied or stored in any manner, that is to be used directly

or indirectly in a computer in order to bring about a specific result” (*Act*, 2) This definition was added to the *Act* in 1988, following court decisions, though the question whether copyright protection is sufficient or whether this is the most efficient way to address computer programs resurfaces regularly (Gervais 2012: 94).

What is specifically protected in computer programs is the code, not the function or the output of that code. Hence, if another programmer designed software that performs similar or identical functions to a copyrighted computer program, there would be no infringement so long as the code is different. So if I used someone’s computer program to generate a story or a translation, then the copyright – if any – protecting my work does not belong to the owner of the computer program, but to me, as I am the one who exercised skill and judgment.

II.3 Understanding the terms: literary

The term “literary”, which is often used in the *Act* to qualify “works”, should not be taken in its literal sense. For one thing, the work need not necessarily be *written* in the ordinary sense of the word “literary” to be protected as a literary work. Also, the work need not possess particular literary merit to be protected. So long as the author is considered to have used labour, skill and ingenuity to arrange their thoughts, it is deemed a literary work (e.g. *University of London Press Ltd. v. University Tutorial Press Ltd.*). This means that copyright also protects such literary works as contracts, business forms and manuals, menus, and brochures.

That said, there is such a thing for works as being “too minimal”, or simply insufficiently creative, to satisfy the requirement of original literary work, as we can witness from a number of cases. To cite just one, in *Exxon Corp. v. Exxon Insurance Consultants International Ltd.*, though the court acknowledged the effort in creating the name “Exxon”, it rejected the copyright claim for a single word, because it is only part of a literary work, and not one in itself (*Exxon Corp. v. Exxon Insurance Consultants International Ltd.*).

II.4 Understanding the terms: exclusive control

As we saw above (*Act*, 3.1) the *Act* provides an “exclusive control” over the work. This can be understood as an economic control as well as a moral one. While the economic right is not mentioned as a general category in the law, the economic activities that fall under it have been, including reproduction, performance in public, publication, translation, adaptation, telecommunication, rental, etc. as mentioned in the cited section (*Act*, 3.1) The moral right, however, has been explicitly mentioned (*Act*, 14 and elsewhere). (cf. *British Columbia v. Mihaljevic* (1989, 1991); *VIA Rail Canada Inc. v. Location VIA-ROUTE Inc.*)

II.5 Copyright as a distribution right

Moyse (2007) presented a new reading of copyright, considering it first and foremost a distribution right. His reasoning is that once a work is produced and reproduced, it must still make its way to the market, which is after all, the aim of the entire enterprise of publishing. If we look at national statutes, the American and British laws mention the right of distribution, while the French and Canadian acts make no mention of it. Distribution rights were not given a strong presence in these laws out of fear that they would end up creating monopolies over the book trade (cf. *Bobbs-Merrill Co. v. Straus*). Internationally, there was only mention of national treatment and reproduction rights. However, more recent international treaties, such as TRIPS and WIPO treaties, do mention distribution explicitly.

But as we increasingly become an information/knowledge society with a digital economy, we are told that the reproduction right, much more concerned with the physical presence of the item, will eventually be replaced by the distribution right, which can make it easier to address electronic distribution.

Virtually distributing a work can be interpreted as sharing it (Scassa in Geist 2005: 62-64), which has always been legal. Buying a physical book does not preclude the owner from sharing it with family and friends, nor reading any part of it as many times as they wish, so long as the physical copy of the book remains in decent shape to permit its use. New technologies have given content producers and managers the ability to limit such distribution activities and interactions significantly (*Ibid*, 41 - 65).

This initiative claims that by equating copyright with distribution rights, we are empowering the author (as opposed to the publisher) in a manner consistent with a basic human right – not only commercially, as it often the focus. By interpreting copyright as distribution-related, the author regains his position at the heart and in the spirit of the law, instead of being left to be dealt with in contracts between authors and publishers. The corollary of this approach is that the law will have nothing to say about a work, even derivative, so long as it is not being distributed. There can also be distinct rights for physical and electronic distribution.

III. Understanding the terms: reproduction

Sometimes the line between what is or is not a production or reproduction is blurred. The 2002 Supreme Court case *Théberge v. Galerie d'Art du Petit Champlain* wrestled with the copyright implications of a chemical process that can remove an image from a piece of paper and transfer it to a canvas. In a split decision, the majority of the judges decided that transferring the images from one medium to another did not constitute a reproduction. For them, the important question was whether the number of works increased: at both the start and end of the process, there was one work. For the remaining judges, however, the important point was that there was a new and independent fixation of the work even though the source was destroyed: a new work was “produced”

(Murray and Trosow, *op. cit.* 55-56). The relevance of the notion of reproduction for this thesis lies in copyright law considering translation a reproduction, or a derivative work, while also considering it an original work and granting it copyright protection. We shall return to this notion throughout the thesis, especially in Part II.

IV. Understanding the terms: conditions

To be protected, a work must meet certain criteria, or “conditions”, namely: be original, fixed in some material form, and the author must be a citizen of Canada or a “treaty country”, meaning a country that has signed the Berne Convention (BC), the Universal Copyright Convention (UCC), or a member of the World Trade Organization (WTO).⁴ Of particular concern to us are the conditions of originality and fixation. Our explanations of originality will force us to address the notions of authorship and creativity. And to gain a better understanding of fixation, we will have to present the idea/expression dichotomy.

IV.1 Originality

IV.1.A Understanding the terms: originality

Though the term “originality” has been used in the *Act*, it has not been defined therein. To get a better understanding, we must therefore go back to the principle that copyright protects the expression of an idea, not the idea itself, because it is implied that ideas belong to the public domain and no one can have a monopoly over them.

IV.1.A.i The idea-expression dichotomy

Though there may seem to be some contradictory statements from Canadian jurisprudence about it⁵, it is generally accepted that copyright does not extend to functional works or ideas (See for instance *Feist Publications v. Rural Telephone Service*). This is because of a generally accepted principle, often referred to as the “idea-expression dichotomy,” with the idea portion of the work excluded from copyright protection. The effort of originality must therefore relate to the expression and external manifestation of the idea, not the thought itself, nor its novelty.

IV.1.B Understanding the foundations: originality

⁴For signatories to the *Berne Convention*, see <http://www.wipo.int>; for UCC members, see <http://portal.unesco.org/la/convention.asp?KO=15381&language=E>; and for members of the WTO, see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, all last accessed in August 2017.

⁵ In *DRG Inc. v. Datafile Ltd.* (1991), the judge explained that although some works are created to serve a functional purpose, this does not deprive them of copyright protection.

Unlike the Canadian *Copyright Act*, the American *Copyright Act* is very explicit in its exclusion of that to which the law does not apply. It states:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.
(*Copyright Law of the United States of America*, 102)

Separating idea from expression is no easy task (many of the major thinkers of the twentieth century provided arguments for their complete merging)⁶, but the courts have developed principles to demarcate one from the other. In *Cuisenaire v. South West Imports* (1969), the plaintiff attempted to apply copyright to a set of coloured rods used for teaching children, as described in a book he had published. The court rejected this claim, noting that copyright applied to the book, but not to the rods themselves – the idea embodied in the book. A similar conclusion was reached in the classic U.S. case *Baker v. Selden* (1879). In that case the court allowed copyright in a book describing accounting methods, but not in the methods themselves or the particular forms devised to facilitate them: “the very object of publishing a book of science or the useful arts is,” the court said, “to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book” (in Litman 1990: 981).

One may also wonder where to trace the boundary between “idea” and “expression” in works of fiction. At a more abstract and general level, dramatic plots are “ideas,” not “expressions.” For example, the “boy meets girl and their families are outraged” plot is not in itself copyrightable. But by adding details here and there and filling out the general plot an author may be able to claim copyright. In *Anne of Green Gables Licensing Authority v. Avonlea Traditions* (2000), the defendant, a manufacturer of “Anne” souvenirs, relied on *Cuisenaire* for the proposition that copyright should not extend beyond a book to cover three-dimensional objects described therein. But the court held that a literary work includes “any of its characters whose descriptions are distinctive, thorough, and complete.” It rejected the defendant’s parallel with *Cuisenaire*, stating that the “Anne” merchandise required licensing as an expression of the “detailed verbal portrait” in the literary work. So here we have, in a sense, copyright upheld in an idea – the idea of the characters in a book.

“Idea protection” is a growing body of law, but much of it has nothing to do with copyright cases and statutes *per se* – one of the typical complications surrounding intellectual property law in general. Instead, it is a complex

⁶ In the Humanities, this has been a regular theme since the “linguistic turn”. For the linguist Ferdinand de Saussure, and according to the Sapir-Whorf hypothesis, language structures our very experience of reality. This model was elaborated by thinkers in other disciplines not long before, such as psychoanalyst Jacques Lacan, Marxist scholars of ideology like Louis Althusser, and numerous anthropologists and feminists. The linguistic turn mainly refers to the reversal of the role of language, from one originating from thought and then expressing it, to one from which thought originates, and therefore shaping and structuring it. We will revisit the impacts of the linguistic turn on multiple occasions throughout this thesis.

web of trade secret laws, unfair competition laws, contractual obligations, and industry traditions. Idea protection evolved because copyright law explicitly denies protection for ideas and reserves it for expressions. But the efforts of the literary, film, music, and computer industries, as well as the pervasive reliance on moral rights “property” discourse, have made it possible to use copyright law to limit the use and distribution of ideas, instead of just the expressions of those ideas. So when Art Buchwald did not like that Paramount released a hit motion picture that resembled an idea he had submitted to the same studio, he sued and won – but not based on copyright principles, rather as a breach of contract. Buchwald argued that the studio had breached a contract with him. Buchwald’s victory for the idea he submitted for an Eddie Murphy film that eventually became *Coming to America* (1989) can be said to have brought idea protection into the public consciousness. (Vaidhyanathan 2001: 33-34)

With respect to a computer program, what is protected is the computer program itself and not the language used to write that program (since languages are not protected by copyright). Also, the idea of the program is not protected. Anyone can reach the same end result by creating his or her program, which performs the same functions, as long as it cannot be shown that the other program was used in doing so. It is to be noted that outputs displayed on a computer screen resulting from a computer program should not, in theory, be protected by copyright either, since they are ephemeral – as opposed to permanent – therefore the criterion of fixation is not met. Of course, this can be serious consequences when applied to the current applications that perform various tasks, such as live translation (see Chapter 9).

Courts have recognized that innovation may be threatened in society from understanding “expression” too broadly. In a dispute between two computer software companies, *Debrina v. Triolet Systems* (2002), the court explained that “[i]f there is only one or a very limited number of ways to achieve a particular result in a computer program, to hold that that way or ways are protectable by copyright could give the copyright holder a monopoly on the idea of function itself.” This shows how the idea-expression dichotomy will act as a limit on the scope of copyright in a case in which a particular idea can only be expressed in a very limited number of ways. (Murray and Trosow, *op. cit.* 46)

IV.1.B.i Standard of originality

With this in mind, we can now go back to the legal notion of originality. The standard of originality that has been used by many Canadian courts is explained by the following statement:

[...] the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.

(*University of London Press Ltd. v. University Tutorial Press Ltd* 1916, 601)

So the meaning of “originality” in the *Act* is that it originates from the author, as opposed to being copied from another work. But in addition, case law has shown that courts do take other factors into consideration when deciding whether the work is an original or not.

Court cases have interpreted the criterion of originality to possess the following qualities: [...]

- The work must be the fruit of an independent, creative effort rather than a mechanical or automatic arrangement;
- The author must use skill, experience, labour, taste, discretion, selection, judgement, personal effort, knowledge, ability, reflection and imagination.

(Harris 2001: 19)

Copyright allows its holder to prevent unauthorized copying and distribution. It does not prevent a third party from independently creating the same (or a substantially similar) work. In this sense, copyright is fundamentally different from the patent. The holder of a patent has the right to prevent any third party from making or using the invention, even if the third party developed it without any knowledge of what the patent holder had done. For this reason, the patent is sometimes referred to as a *hard* form of intellectual property. In the same spirit, because the copyright does not preclude independent creation of a work performing a similar function as another, it is sometimes referred to as a *soft* form of intellectual property.

In addition to protecting the author’s specific form of expression, copyright also protects against the unauthorized reproduction and distribution of derivative works such as translations and adaptations. There are many issues that arise in assessing whether a secondary work is merely an adaptation of an existing work, or is sufficiently transformed so as to constitute a “new” work.

Most copyright infringement lawsuits begin with an attempt to assess whether the alleged infringer copied the relevant subject matter. It is often difficult for the copyright holder to directly prove copying. The act of copying may be “inferred” from the alleged infringer’s access to the work and the degree of similarity found between the works.

Comparison of copyrighted works for substantial similarity involves determining an appropriate level of “abstraction.” At the highest level of abstraction all movies are the same, that is, they are expressive cinematic works. At a lower level of abstraction, movies fall within broad categories, fiction and non-fiction for instance. At progressively lower levels, movies have broad themes, plot outlines, titles, developed plot lines and characters, sets, and dialogue. At a relatively high level of abstraction – two people fall in love, try to stay together while enduring hardships [...] If copyright did not allow for such similarities at some levels of abstraction, thousands of novels and movies would be copies of each other. At this high level of abstraction, the movie is a common “idea.” A “merger” between idea and expression takes place at this level. Only when

an adequate level of detail is achieved may the author's expression become sufficiently distinctive to be protected against misappropriation. (see *Abboott et. al. op. cit.* 421-422)

Courts have had some difficulty in arriving at consistent conclusions based on these principles. In *B.C. Jockey Club v. Standen* (1985), the trial court held that the compilation of information in horse-racing forms could be protected. In *CCH. v. Law Society of Upper Canada* (1999), the trial court held that headnotes summarizing reported court cases lacked a sufficient amount of imagination or "creative spark" to satisfy the condition of originality.

In 2004, the Supreme Court provided much needed clarification in its decision in *CCH. v. Law Society of Upper Canada*, the case in which the trial court had set a standard of creative spark for originality. The Supreme Court followed the Appeals Court in rejecting that approach. "For a work to be original," it stated, "it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique" (paragraph 38). While noting that "creative works will by definition be 'original' and covered by copyright" – in other words, "creativity is not required to make a work 'original'" – Chief Justice McLachlin went on to provide a more precise articulation of the originality test, which is now the standard:

What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work.

(*Ibid.* para. 16)

IV.1.B.ii originality and authorship

Originality and the creative process can be viewed in a number of different ways that qualify the relationship between the work and its producer. Of particular concern to us are the two that distinguished pre- and post-Romanticism. Prior to copyright law, the author was seen more as a vehicle, a mirror for external realities, as opposed to being the source and fountain of art (in Sherman and Strowel 1994, 199).

To find the sources of our present understanding of originality, it seems that we have to go back a few centuries, when in the Italian courts of the late fifteenth century, sculptors and painters first started distinguishing themselves from artisans and manufacturers, and claiming a position not unlike that of the *savant*, that is, free, independent, and holding unique knowledge (*Ibid.* 57-58). In turn, this placed their activity in a distinguished position among the liberal arts (see Bourdieu 1971; Moulin 1992: 251-255). The Enlightenment ideas of the creative genius found therein a natural philosophical subjective fit, which later produced the Romantic notion

of the author as an independent subject and creative genius, trickling down in all artistic practices, such as history, aesthetics, and law.⁷

The writer of the Renaissance and neoclassical periods was seen as a conduit. But in the Eighteenth century, writing was no longer viewed as craftsmanship, but as an inspiration from within the writer (Woodmansee 1984: 427).

Many elements of the Romantic literary theory, such as those pertaining to the sacredness attributed to the status of the author and their work were already present in Edward Young's *Conjectures on Original Composition*, originally written as an anonymous letter in 1759, which had a clear influence on a number of important German thinkers, including Herder, Goethe, Kant and Fichte, whose thoughts and influence on copyright law will be briefly discussed later in Part I. Discussion around the economic and legal aspects of copyright had already prepared the ground for accepting many of these ideas to be integrated culturally by the likes of Samuel Taylor Coleridge, who introduced many of these ideas into English through his writings and translations from German.⁸ Authors were increasingly deified, and their works approached with a sanctity hitherto reserved mainly for religious scriptures.

Many did express some reticence towards the implications of providing legal protection to all authors and all works on such bases. Already in 1762, a writer was warning that

The Courts of Westminster would be filled with suits hitherto unheard of. Poet would commence his Action against Poet, and Historian against Historian, complaining of literary Trespasses. Juries would be puzzled, what Damage to give for the pilfering an Anecdote, or purloining the Fable of a Play. What strange Changes would necessarily ensure. The Courts of Law must sagely determine Points in polite Literature, and Wit be entered on Record.

(*An Enquiry into the Nature and Origin of Literary Property* 1762: 13).⁹

Several years later, Joseph Yates, the dissenting judge in *Millar v. Taylor*, warned against the endless litigations that would ensue from admitting literary works as property: "Disputes [...] among authors themselves – 'whether the works of one author were or were not the same with those of another author; or whether there were only colourable differences:' – (a question that would be liable to great uncertainties and doubts)" (*Millar v. Taylor*: 2394).

⁷ Historians have already provided us with valuable analysis of the origins of authorship. For instance, see Chartier (1992), which discusses the way knowledge (and power) was circulated and institutionalized around books from the 14th to the 18th centuries; Hesse (1990) on the epistemology of legal authorship; Woodmansee (1984) on literature; Fyfe (1985) on art; Edelman (1979a) on film; and Nesbit (1987) on authorship.

⁸ Chapter 4 presents the historical developments leading to and following the adoption of copyright law by England, Germany and other states.

⁹ This work has been attributed to William Warburton (1698 – 1779) by Arthur Simons Collins in *Authorship in the Days of Johnson* (85). However Rose considers the attribution unfounded (in Sherman & Strowel *op. cit.* 51-53).

Despite these hesitations, this new way of understanding authorship and literary works became the law, and the British and American traditions were then based on this conception of the author as a creator of original works, instilling in them his effort, skill and judgment (Vaidyanathan *op. cit.* 20).

For a work to be copyrightable, according to this new model, there must be something distinctively attributable to the author. This presupposes that original works break with the tradition, and the author is someone who has “little learning or disdains whatever learning he has [and who] takes a fresh look at nature and feeds his art direct from that source. The confrontation [...] is personal, not filtered through past authority” (Kaplan 1967: 24).

IV.1.C Understanding the issues: originality and authorship

Is it at all possible to talk about any activity as being free from the constraints of culture and tradition?

All art is equally conventionalised, but we do not ordinarily notice this unless we are unaccustomed to the convention. In our day the conventional element in literature is elaborately disguised in a law of copyright pretending that every work of art is an invention distinctive enough to be copyrighted.

(in Carpenter and McLuhan 1960, 43-44)

Originality, it must be remembered, is a legally imposed notion, as culturally and historically determined as any other legal notion. This relativity is not contested by the courts either, which recognized some of the risks early on. For instance, the Tribunal de la Seine declares that

the utmost circumspection must be exercised in such an imprecise, elusive, and diverse matter as the expression of an idea, given that everything has already been said, and that there are no subjects, situations, or characters which have not been evoked a hundred times.

(in Sherman and Strowel *op. cit.* 83)

If the above is true, then it follows that there is no such thing as literary originality in the strict sense of originality, or as an absolute “first” in literature, no creation *ex nihilo*. All works are created within a tradition, and are therefore intertextual. Because of the necessary processes of borrowing, adapting and manipulating existing material, all writing is constantly spilling into the boundaries of other works around it, continuously producing new perspectives. Nor can we appeal to the figure of the author to determine fixed boundaries for a literary work, because in modern criticism, the “death of the author” is now a statement that is met with little or no resistance (see Eagleton 1983, 138).

Copyright law’s originality requirement has been – and continues to be – strongly criticized, because it implies an overly individualistic Romantic idea of authorship. Indeed, one must wonder about the extent to which we can talk about originality, given that we all work within shared traditions and languages, and which constitute

the raw materials that we rearrange into our individual outputs. Decades ago, H. N. Frye blamed the copyright regime for society's tendency to exalt an author's contributions, instead of recognizing the rich tradition from which they spring (Frye 1957, 96). And according to Mark Rose, copyright is "an institution built on intellectual quicksand: the essentially religious concept of originality, the notion that certain extraordinary beings called authors conjure works out of thin air" (Rose 1993, 142). But as Jussica Litman puts it, "[t]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea" (Litman 1990, 966). In Canada as elsewhere, though, the courts have not generally understood originality to mean novelty in the strict sense, as mentioned previously. The law seems much more preoccupied with the individual intellect which produced the work, and thus refuses copyright to a copied work, but it does not require that the work has no antecedents: it does not demand that a work should rise spontaneously from the vital root of genius, as the Romantic poets would see it. If it did – if authors had to *prove* originality – copyright law could not function at all.

According to copyright law, the productions of Willie Dixon, Mark Twain and Bill Gates all fall within the category of "works", and therefore, they are all "authors." Scholars such as Cathy Davidson (1986), Martha Woodmansee (1984) and with Peter Jaszi (1999), Mark Rose (*op. cit.*), Basalamah (2009), Vaidhyathan (*op. cit.*) and David Sanjek (in Woodmansee & Jaszi *op. cit.*) have shown the importance and relevance of the critiques of Roland Barthes and Michel Foucault about western ideals of authorship. (see Woodmansee 2004)

In 1968, French literary theorist Roland Barthes wrote an essay called "The Death of the Author," exploring how the West had arrived at the figure of the author. Barthes urges us to look beyond the sum of assumptions of psychological consistency, meaning, and unity we – the readers – refer to as the "author." Instead, he argued that it is the critics and readers of a text who produce its meaning. He eliminates the historical and biographical figure of the author, leaving the reader alone, but empowered, with the text (Barthes 1977, 142-148).

In response to Barthes, Michel Foucault suggested that the author is a function of reading, criticism, and literary analysis. In a culture in which the notion of author would be dead, the language of critical discourse would be unable to express its analysis properly. It would not be possible to direct criticism at anything or anyone, and the work would therefore have no ramifications. Foucault's author is a function in the sense of an accountable, legal entity, as opposed to a biologically and psychologically human one. The ownership, expertise, constraints, obligations, penalties, and retribution associated with a work all converge in the common locus of the author. To Foucault, the importance of the author is therefore the function he plays within a culture, and not the individual represented.

This dehumanized “author-function” has a number of defining characteristics: First, it is linked to the legal system that regulates discourse within a culture, which is different from one culture to the next. Secondly, it only comes into existence once the work is created, as part of its legal and cultural environment. And finally, because it does represent an individual human being, it can actually refer to several independent, even contradictory or conflicting identities (Foucault 1979, 141-160)¹⁰.

This very theoretical way of looking at originality and creativity is generally supported by a number of famous authors, even ones who defended copyright, as we find that most of them openly admit to borrowing from others. For instance, Mark Twain “lifted” from others in his journalism, speaking, and storytelling. As he wrote himself in an article about international copyright in 1888: “But then, we are all thieves” (in Vaidhyathan *op. cit.* 56).

Helen Keller, an American author and lecturer, was stigmatized throughout her life with accusations of plagiarism. In a 1903 letter to Keller, Twain defended and comforted her in a way that undermines the same notion of authorship that he was defending before the American Congress three years later:

Oh, dear me, how unspeakably funny and owlishly idiotic and grotesque was that “plagiarism” farce! As if there was much of anything in any human utterance, oral or written except plagiarism. The kernel, the soul – let us go further and say the substance, the bulk, the actual and valuable material of all human utterances – is plagiarism. For substantially all ideas are second-hand, consciously and unconsciously drawn from a million outside sources, and daily used by the garnerer with a pride and satisfaction born of the superstition that the originated them; whereas there is not a rag of originality about them anywhere except the little discoloration they get from his mental and moral calibre and his temperament, and which is revealed in characteristics of phrasing.

(in Vaidhyathan *Ibid*, 64)

One must however keep in mind that there was no money at stake for Twain himself as he wrote that letter. And if there ever was any doubt that he may be excluding himself from such “plagiarism”, later in the same letter, he makes the following confession about his *Innocents Abroad*:

In 1866 I read Dr. Holmes’ poems, in the Sandwich Islands. A year and a half later I stole his dictation, without knowing it, and used it to dedicate my *Innocents Abroad* with. Then year afterwards I was talking with Dr. Homes about it. He was not an ignorant ass – no, not he: he was not a collection of decayed human turnips, like your “plagiarism court;” and so when I said, “I know now where I stole it, but whom did you steal it from,” he said, “I don’t

¹⁰ While his analysis of the “author-function” is very useful, especially when trying to make sense of how copyright law operates in western culture, Foucault’s historical analysis, rarely criticized, has been called “suspect” by Vaidhyathan (193-194) who claims that the Gospels and other works of Indian origin can be used to demonstrate that the author-function did indeed exist before the eighteenth century Romantic authorship, when the first legal codification of authorship emerged in Europe in 1709.

remember, I only know I stole it from somebody, because I have never originated altogether myself, nor met anybody who had.

(*Id.*)

In that same letter from Twain, one finds a number of ideas that we would attribute to post-modern thought. “No doubt,” he writes, “we are constantly littering our literature with disconnected sentences borrowed from books at some unremembered time, and now imagined to be our own.” And he goes on to say:

When a great orator makes a great speech you are listening to ten centuries and ten thousand men – but we call it his speech, and really some exceedingly small portion of it is his. But not enough to signify. It is merely a Waterloo. It is Wellington’s battle, in some degree, and we call it his; but there are others that contributed. It takes a thousand men to invent a telegraph, or a steam engine, or a phonograph, or a photograph, or a telephone, or any other important thing – and the last man gets the credit and we forget the others.

(*Ibid.* 65)

His conclusive remarks are filled with morality and humility: “These object lessons should teach us that ninety-nine parts of all things that proceed from the intellect are plagiarism, pure and simple” and then he concludes by saying “[a]nd the lesson ought to make us modest. But nothing can do that” (*Id.*).

Others have said that the modern notion of authorship was invented by the booksellers of London, who emphasized the status of the author as a weapon for their own gains.¹¹ By promoting and protecting the interests of the author, the stationers were fighting for their own ends. Copyright, they argued, was the way to order their trade; otherwise, publishers would not publish books, and would therefore not pay authors for their manuscripts (Patterson 1968, 147).

Before the conceptual transformations that took place as a result of post-structuralism and post-modernism, literary scholarship had a genuine interest in maintaining the integrity of a work by considering it the aesthetic product of the efforts and thought of an individual author, hence the latter’s ownership of its meaning as well as its financial derivatives. Traditional textual studies were mainly concerned with what an author really meant in their writing – with the premise that there can actually be a unique, objective, determinable literary interpretation – and to what quantifiable extent their writing was indebted to another’s. But a cultural and intellectual shift took place, creating an increasingly greater gap between this old legal structure (which mirrors the old literary paradigm), and present-day literary thinking, in which the notion of originality is, at best, a problematic one (e.g. Rose in Sherman & Strowel *op. cit.*). Though such questions were exceptional prior to post-modernism and deconstructive thought, it is quite ordinary today to ask where one text ends and another begin, or even where an individual’s identity and psyche end and that of the collective begins, because we now

¹¹ As can be seen from the full title of the Statute of Anne: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*

understand that entities – whether humans or their outputs (i.e. works) – permeate, enable and define each other.

IV.2 Fixation

IV.2.A Understanding the terms: fixation

The second condition of copyrightability is fixation. And though it is not explicitly defined, one can tell the general contours of its meaning from its use in the *Berne Convention* for instance, which uses the same expression in Article 2: “It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form” (Berne 2).

There is no fixation requirement on the face of the Canadian statute; the fixation requirement comes from case law, as we shall see in a moment.

The U.S. statute however does spell out the fixation requirement. It grants protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device” (*Copyright Law*, 102). Moreover, it states that

a work is ‘fixed’ in a tangible medium of expression when its embodiment in a copy of phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.

(*Ibid.* 101)

It seems that the most cited Canadian case about the fixation requirement is *Canadian Admiral v. Rediffusion* (1954), involving televised Montreal Alouettes football games. The gist of the case, at least insofar as fixation is concerned, was that the transmission of a live broadcast of a game did not meet the fixation requirement. The court contrasted simultaneous, unedited transmission with the broadcast of a taped game, which it did recognize as meeting fixation.

To many readers, the following warning will seem familiar: “No picture, descriptions, or accounts of this game may be broadcast or retransmitted without the expressed, written consent of the office of the Commissioner of Major League Baseball.” That is because it (or a variant of it) used to be made towards the end of every televised baseball game. The problem is that, though viewers seem to accept it without much resistance, copyright itself does not go that far in its protection of televised games. The office of the Commissioner may claim protection over the actual images being broadcasted as a result of the joint agreement between the Major League Baseball and the network, but this does not include any descriptions or accounts of the game. If you

were to write a description of an exciting play during the game, or take a picture of a diving catch for instance, the copyright associated with these products would be yours, not the office of the Commissioner. And it seems valid to wonder whether the office of the Commissioner can really be thought of as the actual author of that game to get the copyright protection granted to authors over their works, and whether this kind of exclusive protection really serves culture and society (Vaidhyanathan *op. cit.* 17).

That is perhaps why, in his book *Copyright Law*, David Vaver holds a sceptical view of fixation as a requirement for copyright, arguing that it is better thought of as a rule of convenience than as a fundamental principle (Vaver 2000, 65). Indeed, the requirement is quite complicated now that we are in the digital age, when the distinction between fixation and lack of fixation seems almost arbitrary, or at least ambiguous. Naturally, those forms of contemporary art in which the work's essence lies in their changeability – with media such as melting ice, shifting light, or even, notoriously, rotting meat – will have difficulty meeting the fixation requirement (e.g. cf. Serbak 1987), unless it is updated to take into account such products.

But this is not a new problem: an older challenge comes in the case of an oral presentation. If a speaker is speaking from notes, clearly the notes are fixed works in which copyright subsists. But what if the words exist only in spoken form? The *Copyright Act* contains a special definition for “lecture” that includes a speech, address, or sermon – a definition that seems to constitute an exception to the requirement of fixation. Not all oral presentations are speeches, addresses, or sermons, and this has left storytellers, for example, vulnerable to having their work appropriated by listeners bearing tape recorders or notepads. The relatively new category of “performers’ performance” would cover many oral presentations. In the case of a performer’s performance, the Copyright Act is explicit that there is no requirement for fixation (Murray and Trosow, *op. cit.* 44).

V. Duration

V.1 Understanding the terms: duration

Because copyright is national in application, different countries have different copyright terms: In the United States, copyright generally lasts for the life of the author plus seventy years, and in Mexico the term is life of the author plus one hundred years.

In Canada, if the three conditions are met (originality, fixation and citizenship), then copyright protection applies automatically the moment a work is materialized (or fixed), and lasts for 50 years after the creator’s death, at the end of which it is said to come into the public domain, to be used by anyone without the copyright holder’s permission (Murray and Trosow, *op. cit.* 49):

6. The term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author, the remainder of the calendar year in which the author dies, and a period of fifty years following the end of that calendar year.

(Act, 6)

V.2 Understanding the foundations: duration

The protection afforded by copyright is substantially longer in duration than that afforded by the patent. The *Berne Convention* and *TRIPS Agreement* minimum term of copyright is the author's life plus 50 years. This long duration is partially justified by the fact that copyright is weaker than the patent right, since it does not preclude independent creation. The term of copyright was extended to the author's life plus 70 years by the *EU Copyright Directive*, and this extension was adapted by the United States as well.

On October 27, 1998, then President Clinton signed into law the *Sonny Bonno Copyright Term Extension Act*¹², which immediately extended the term of copyright an additional twenty years, making the term for most works the life of the author plus 70 years. As such, Canadian works are protected in the United States for life-plus-seventy years whereas American works are protected in Canada for life-plus-fifty.

The U.S. Supreme Court's decision in *Eldred v. Ashcroft* highlights the argument put forward on behalf of the U.S. copyright industries that failure to extend the copyright term would lead to a "protection gap" with the European Union, encouraging authors to publish outside the United States.

V.3 Understanding the issues: duration

The implications of the difference in the durations of copyright protection will only continue to creep further as the globalization of our world continues, so that what happens elsewhere affects what happens here in a more direct fashion. The main argument that *granting shorter protection will put one's state at a disadvantage* will therefore continue to be reiterated, pressuring the legal system to finally grant the longer duration of protection so as not to place one's respective nation in a weaker position legally and financially. There are, however, a number of issues with this line of thinking.

V.3.A A vicious circle

¹² "Named after a Member of Congress, who, the legislative history records, 'wanted the term of copyright protection to last forever'." (Justice Breyer, in *Eldred v. Ashcroft*)

One needs to remember – as it will be explained below – that the main players in the copyright arena are multinational entertainment and publishing companies monopolizing an information capital that becomes the exclusive right of a very select few, and that the influential lobbying of these entities works at a world scale.

This was even recognized by Justice Breyer in the *Eldred v. Ashcroft*, when he stated: “Its [the 1998 *Sonny Bono Copyright Term Extension Act*] primary legal effect is to grant the extended term not to authors, but to their heirs, estates, or corporate successors.” And if this was not enough, he concluded his commentary by saying that:

It is easy to understand how the statute might benefit the private financial interests of corporations or heirs who own existing copyrights. But I cannot find any constitutionally legitimate, copyright-related way in which the statute will benefit the public. Indeed, in respect to existing works, the serious public harm and the virtually nonexistent public benefit could not be more clear.

(*Eldred*)

In other words, representatives of the same actors will argue for stronger and longer protection to the European Union in order to boost its competitiveness against the United States for instance, and then appear across the Atlantic, making the point that there is a protection gap in the United States that necessitates an equal protection duration, or else, authors will be encouraged to publish elsewhere.

V.3.B Does longer protection create legislative uniformity?

To take the *Sonny Bono Act* as an example of a legislation extending the duration of copyright protection, the answer would be a straight “no” for all works created before 1978 or those made “for hire”.

As for works created after 1977, there will be uniformity, but it will only be a minority of works that will realistically retain any commercial value after 75 years (see Rappaport 1998), and one can wonder how much of an additional incentive to the (most likely) long-dead author this provides, to create new works in Europe as opposed to the U.S. for instance.

V.3.C Does longer protection provide further incentive?¹³

¹³ The validity of the underlying “economic incentive” premise for copyright law will be addressed later. Our concern in this section is to question the claim that longer protection provides further incentive.

First, as supported by research and common sense, authors should not be under the impression that their works have much likelihood in being commercially profitable for so long that an extension of copyright will make any difference to them. Research suggests that between 55 and 75 years after their publication, it is, at most, only 2% of copyrighted materials that retain any commercial value (Rappaport 1998, 7). It is therefore safe to assume that after 75 years, that percentage keeps sliding even lower.

Secondly, assuming that there are authors who will create works because they are motivated by the idea that their works will have commercial value that much later, how much monetary value are we talking about exactly? As Justice Breyer illustrated in *Eldred*, “for example, a 1% likelihood of earning \$100 annually for 20 years, starting 75 years into the future, is worth less than seven cents today” (*Eldred*). Therefore, it seems quite unlikely that this additional seven cents today will be the determining factor for the author.

Thirdly, the U.S. Constitution explicitly mentions that “limited Times” are required for copyright protection in order for society to benefit from innovation. But the financial argument being made in favour of extension could work for any duration, all the way to the end of times, not just twenty years. As Justice Breyer stated, “from a rational economic perspective the time difference among these periods *makes no real difference*” (*Eldred*).

Fourthly, the protection that was granted by U.S. law prior to the *Sonny Bono Act* was identical to Canadian and international (Berne and TRIPS) duration of protection: life of the author plus 50 years. The argument being made is that by adding this 20 years of protection at the end of the 50 years after the death of the author, they will be more motivated to publish in the U.S. as opposed to Europe. Keeping in mind that the purpose of copyright law is to encourage the creation of new works, we can rephrase the question by asking how extending the duration of copyright protection will encourage the author to create new works because they will be protected 70 years after their death, as opposed to 50.

So if there is no real economic incentive in adding the twenty years of additional protection after the life's death, can we still talk about a competitive disadvantage in publishing in the U.S. before this act? Will an author truly decide where to publish their work because of this particular difference between European and U.S. duration of protection, when the advantage of one over the other, if any, is so minimal as to be worth pennies in the present?

Finally, the sought uniformity that might be invoked here is superfluous, in the sense that it is not a political effort to conform to an international treaty of the reach of *Berne* for instance.

Since there are no tangible advantages to the extension of the duration, let us now see if there are any harms or disadvantages that may result from adopting such an extension.

V.3.D Impact on freedom of speech

Longer durations for protection have a direct impact on freedom of expression and the progress of knowledge in a society: “And most importantly, its [the *Sonny Bono Act*] practical effect is not to promote, but to inhibit, the progress of “Science” – by which word the Framers meant learning or knowledge” (*Id.*).

Although a more detailed discussion about freedom of expression is beyond the scope of this thesis, and that we will explore the progress of science at length in Chapter 8 and elsewhere, it is worth noting here the importance that was given to these drivers in a case that was primarily about duration. Justice Breyer explained that the copyright clause and the first amendment, both contained in the Constitution, share the common objectives of the creation and dissemination of information. Their aim is not pure economic regulation or providing any special private benefit, but promoting expression and stimulating artistic creativity through the free dissemination of speech, information, learning, and culture. The reward of the author is secondary: it is a means, not an end.

He then highlights the risks of granting exclusive controls to some at the expense of others by referring to the intentions of the Founders.

Madison, like Jefferson and others in the founding generation, warned against the dangers of monopolies. [...] (‘What was it that drove our forefathers to this country? Was it not the ecclesiastical corporations and perpetual monopolies of England and Scotland?’) Madison noted that the Constitution had ‘limited them to two cases, the authors of Books, and of useful inventions.’ [...] he thought that in those two cases monopoly is justified because it amounts to ‘compensation for’ and actual community ‘benefit’ and because the monopoly is ‘temporary’ – the term originally being 14 years (once renewable). [...] Madison concluded that ‘under that limitation a sufficient recompense and encouragement may be given.’ [...] but he warned in general that monopolies must be ‘guarded with strictness against abuse.’

(*Ibid.* 5)

He goes on reminding us that if the U.S. agreed to sign the *Berne Convention*, it was because it was upholding the same values announced in the American Constitution of facilitating the flow of ideas in the interest of learning. Finally, he gives us his criteria to distinguish between acceptable and unacceptable copyright laws and policies:

For present purposes, then, we should take the following as well established: that copyright statutes must serve public, not private, ends; that they must seek ‘to promote the Progress’ of knowledge and learning; and that they must do so both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright’s ‘limited Tim[e].’

V.3.E Cost of duration to the public

The objective of copyright is to promote innovation, creativity, and the advancement of knowledge in society. The means through which this is done is the granting of a monopoly over the commercial use of those works to those who create them, as an incentive to ensure their continuous production.

The public, in order to reap the benefits of creativity, must pay two types of costs. The first is in the form of royalties, which may already be higher than necessary, resulting in the restriction of a work's dissemination (and ultimately its disappearance from culture) given its higher price, instead of encouraging it. When the duration of a copyright comes to an end, what is expected – and intended by copyright law – is the free market's natural tendency in allowing for the appearance of much cheaper editions, resulting in its spread in society. Unnecessary extension of the duration have the opposite effect.

While research (e.g. Rappaport 1998) indicates that it is only 2% of works that will continue to generate commercial interest between 55 and 75 years of its production – and when adjusted for inflation rates, this results in insignificant profits for authors – this still translates as hundreds of millions of dollars out of the pockets of society in general. Any extension to this duration would be tantamount to doubling the charge on the public for something it has already paid for through the grant of copyright. In the words of Justice Breyer, “(despite declining consumer interest in any given work over time) one might conservatively estimate that 20 extra years of copyright protection will mean the transfer of several billion extra royalty dollars to holders of existing copyrights—copyrights that, together, already will have earned many billions of dollars in royalty ‘reward’” (*Ibid.*).

In other words, this additional income does not serve the ends of promoting learning in society; it is a private interest for which copyright was not intended. And though one might argue that this is simply the price that has to be paid to use these works in a free market, the reality is that such costs will ultimately be downloaded on society in general. “Even the \$500,000 that United Airlines has had to pay for the right to play George Gershwin's 1924 classic Rhapsody in Blue represents a cost of doing business, potentially reflected in the ticket prices of those who fly” (Justice Breyer, in *Eldred, op. cit.*).

And though it may be argued, again, that when works are in such demand, then it is that demand that must dictate the price to be paid to the rights holder, the problem is that any extension to the copyright duration will apply not only to those classics that are in high demand, but to the millions of other works under copyright

protection that are not in such demand, and preventing them from entering any consumption, or even historical tracking and archiving until that much later.

This brings us to the second type of cost, namely, that of acquiring the permission of the copyright holder before reproduction. In many cases, the costs associated with the search for the holder of the rights will be prohibitive in itself, regardless of the author's willingness to permit reproduction.

In many fields, the older the work, the more likely that it will be useful to history and learning. But at the same time, it ought to be clear that, the older the work, the less entitled is the owner in preventing reproduction or asking for exorbitant fees, simply because they are not the creator of the work.

This obstacle is even more apparent at a time when technology can facilitate the research required for such activities as the creation of archives and databases, because the creators and administrators of such collections will tend to simply avoid works whose owners are difficult to track or deal with.

When all of this is multiplied by the millions of works that will be prevented from entering the public domain because of extensions to the duration, one starts to understand the scope of the costs to society of extending copyright protection.

V.3.F What about statutory exemptions?

In his comments, Justice Breyer explained why the exemptions accorded to libraries, the fair use exceptions, and the restriction of copyright to a work's expression (as opposed to substantive content) are not sufficient to appease the concerns that were stated above:

Neither the exception nor the restriction, however, would necessarily help those who wish to obtain from electronic databases material that is not there—say, teachers wishing their students to see albums of Depression Era photographs, to read the recorded words of those who actually lived under slavery, or to contrast, say, Gary Cooper's heroic portrayal of Sergeant York with filmed reality from the battlefield of Verdun. Such harm, and more [...] will occur despite the 1998 Act's exemptions and despite the other 'First Amendment safeguards' [...]

(Eldred)

V.3.G Concluding remarks on duration

As Justice Breyer mentions, several publishers and filmmakers argued that extending the duration provides incentive to republish and redistribute older copyrighted works. The answer he provides highlights once again the importance of keeping the spirit of copyright law in mind when deciding on such issues. He says that their

“rationale is inconsistent with the basic purpose of the Copyright Clause – as understood by the Framers and by this Court.”

He explains that “the Clause assumes an initial grant of monopoly, designed primarily to encourage creation, followed by termination of the monopoly grant in order to promote dissemination of already-created works.” In other words, “[i]t assumes that it is the disappearance of the monopoly grant, not its perpetuation, that will, on balance, promote the dissemination of works already in existence.”

As we have seen here, an extension of the duration of copyright causes harms to freedom of expression and inhibits the dissemination of older works longer. In addition to providing no economic or other advantage, it slows down the preservation of national cultural heritage and historical tracking. Despite all of these arguments, the U.S. passed the legislation in 1998, extending copyright protection by twenty years after the life-plus fifty that was in place. All of these issues will be further amplified when we will consider the arguments presented in Chapter 8, where we see that knowledge and information have become the new capital of the world, and that they are constantly regenerated and modified, especially with the help of technology, which should add an increased urgency to works re-entering the public domain to be useful to society in the shortest amount of time possible. The duration of the protection for translating copyrighted works has always been a very contentious issue, but like all other aspects of copyright, it has simply gotten longer over time. Duration of protection provides a good case-in-point, among many others to come, that, more often than not, it is not sound social policy, nor evidence-based proposal, but powerful stakeholders who steer copyright law in the direction of their interests.

Chapter 2: Balancing interests

I. Moral rights

As a legal notion, moral rights only exist in the copyright law of certain countries. Their purpose, where they exist, is to protect the honour and reputation of an author. They include the right of attribution and the right of integrity. The right of attribution is the legal acknowledgment that the author has created the work. Countries that are signatories of the *Berne Convention* no longer require a license for attribution. While some of the open content licences we will explore in Chapter 9 place the work directly in the public domain, crediting a work to its author is universally considered as a sign of decency and respect. As for the right of integrity, its intent is to preserve the work in a form that is satisfactory to its author by preventing anyone else from modifying it without the author's approval. This is not only to protect the work, but the reputation of the author, because a work is considered a reflection or an extension of the author's personality.

Since moral rights protect the author directly and are "personal" rights, it is felt that they cannot be exercised except by authors themselves or by their heirs. Thus, the holder of moral rights is always the author of a work, even where the author is not the holder of the copyright in the work (Harris 2001, 93-94).

The extent of moral rights protection varies from one jurisdiction to another. The Canadian law integrates the moral argument including attribution and integrity. While moral rights cannot be transferred, they may be waived in part or in part. The creation of the work under one's own name, anonymously, or under a pseudonym is part of the right of attribution. Where a work is modified without the authorization of the author in a manner that harms the honour or reputation of the author, even if it is simply by associating it with someone or something that produces such an effect, there is infringement of the moral rights of the author.

14.1 (1) The author of a work has [...] the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights. [...]

14.2 (1) Moral rights in respect of a work subsist for the same term as the copyright in the work.

(2) The moral rights in respect of a work pass, on the death of its author, to

(a) the person to whom those rights are specifically bequeathed; [...]

28.1 Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights.

28.2 (1) The author's right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

(*Copyright Act*)

I.1 Understanding the terms: authorship and ownership

There is a distinction to be made between the material supporting the expression of an idea, and the actual idea. These constitute two different ownerships. Lord Mansfield in the 1769 English case *Millar v. Taylor* defined “copy” as the “incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever” (*Millar v. Taylor*). The ownership of the copyright is not transferred with the ownership of the object holding the protected idea.

This explains why the *Act* distinguishes between author and owner. For instance, while the author holds the moral rights in a work (14.1), the copyright owner is the rights holder of economic rights (3).

In Canadian law, although the moral right cannot be sold, assigned, or licensed, like its economic counterpart, it can be waived by the author in whole or in part, in the case where an author agrees not to exercise it.

In 1992, the book publisher Guérin published an anthology for schools entitled (ironically, it turns out) *Libre expression* (tr. “Free Expression”). The book included an unauthorized extract consisting of about one-third of Doric Germain’s young adult novel *La Vengeance de l’original*. Sales of the novel plummeted, and Germain’s publisher sued for infringement. Germain claimed that the abridgement of the novel – for example, the removal of descriptions of hunting and fishing methods – was also an infringement of his moral rights. The court found that Guérin had infringed the reproduction right, and awarded damages. But on the issue of moral rights, the court did not find the author’s distress at the abridgement of his novel sufficient to prove damage to his reputation and honour. It dismissed the moral rights claim. (*Prise de Parole Inc. V. Guérin*)

Moral rights protection under American federal and state laws is not the same as moral rights protection under the Canadian *Copyright Act*. The explicit moral rights protection that exists in the American law (through an amendment made to it by the *Visual Artists Rights Act* of 1990) is for one group of creators – those who create “works of visual arts.”

The United States has been, generally speaking, against the idea of moral rights, which does sometimes get in the way of maximum exploitation of a market for work. Keeping that in mind, we can say that Canada lies somewhere between France (in which moral rights are perpetual) and the United States.

For instance, in the case of “work made for hire” situations in the U.S., the employer or other person for whom the work was prepared is considered the author and owner of the copyright. By contrast, in Canada, even in employment situations, the original creator of the work remains the moral author of the work for copyright purposes, notwithstanding the fact that the employer is the owner of the copyright.

1.2 Understanding the foundations: natural law

Any serious discussion of copyright law requires a solid understanding of its theoretical and historical foundations, which have traditionally relied either on natural law arguments, or positivist arguments. Proponents of natural law usually argue that copyright law’s main purpose is a moral one, either because a work is an extension of its author, or because a work is the labour of an author.

Proponents of natural law believe that the law exists independently from any legislation that has been put in place by any particular state or legal authority. The principles of natural law are expressed in documents such as the *Magna Carta Libertatum* and the *Declaration of the Rights of Man and of the Citizen*. When the *American Declaration of Independence* states “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,” it is providing a good example of natural law philosophy. More generally, the idea of “human rights” is derived from a natural law approach: laws come from nature, not from a particular ruler or government. This approach leads to two classic arguments in IP and copyright, namely that property over a good is a result of the effort to produce that good (labour argument), and that a person’s creation is an extension of their personhood (moral argument).

We shall discuss both versions of the moral argument below. On the opposite end, those who reject this moral argument try to justify copyright law on the basis of a positivist utilitarian argument. (We will reserve the discussion about the utilitarian argument for the next section, *Exemptions*, where the incentives discussion is a more appropriate fit.)

1.2.A The conceptual infrastructure of moral rights in IP¹⁴

The theories in Western philosophy that we are going to present have become the main sources for intellectual activity and legal institutionalization internationally. Justin Hughes, in his excellent article “Philosophy of Intellectual Property,” says “[p]roperly elaborated, the labour and personality theories together exhaust the set

¹⁴ It is not without merit to mention that, although in typical scholarship the arguments we are going to present are disentangled, juxtaposed, and compared as incompatibles, in reality, they are much more intertwined and mixed, but more weight is given to some over others by different stakeholders. And though it may not have been the case originally, today, many of the laws that have ensued do the same. For instance the Canadian law, especially when taken conjointly with jurisprudence and legal commentary, draws from moral arguments in some cases, while it gives precedence to utilitarian discourse in other instances.

of morally acceptable justifications of intellectual property. In short, intellectual property is either labour or personality, *or it is theft*” (Hughes 1988, 2). Although other theories have been proposed, it is very difficult to argue with this proposition from a foundational point of view. As we shall see, labour theory primarily refers to John Locke’s property theory, and personality theory refers mainly to the thought of Kant and Hegel. Because the matter requires a more nuanced and comprehensive investigation, the contributions of other thinkers will be briefly mentioned where relevant.

1.3 Versions of the moral rights argument labour (Locke) and personhood (Kant and Hegel)

The philosophical foundations of moral rights stem from 2 versions of natural law, namely, John Locke’s labour theory, and Kant’s and Hegel’s personhood theory. John Locke’s theory grants authors the property of their own works, because they are, after all, the result of their efforts and labour. The classic presentation and interpretation of Locke’s theory (based on his *Two Treatises*) may however need a closer examination, given that he did address author rights elsewhere in his works. The German philosophers, on the other hand, consider the work to be an extension of the personhood of the author. These theories, and the different interpretations they have received since their initial formulation, are based on the idea that copyright is granted by nature to the author, as is evident in French and German law, for instance.

The idea that a work completely belongs to the author because it is the result of their efforts and labour is not new; it was the main argument of the London Booksellers of the 1700s: “Labour gives a man a natural right of property in that which he produces: literary compositions are the effect of labour; authors have therefore a natural right of property in their works.” (Enfield 1774, 21) In France, the decree of the King’s Council of August 1777 implied perpetual privileges granted to authors based on this argument:

His Majesty has recognized that the privilege of the booktrade is a grace founded in justice that has as its object, if it is accorded to the author, to reward his labour; if it is obtained by a bookseller, to assure him the reimbursement of his advance payments and compensation for his expenses, so that this difference in the reasons determining a privilege will produce [a difference] in its duration.

(Chartier in Sherman and Strowel, *op. cit.* 14)

This is based on the idea that a state ought to recognize and enforce a person’s natural property when they invest their efforts on resources that are largely unknown or belonging to the public. To a very large extent, this simply represents John Locke’s theory of property, applied to the intellectual domain. The raw materials of literary works are in fact resources that are held in common, and they do require the labour and investment of someone to make them into concrete finished products.

I.3.A John Locke (1632 - 1704)

Referring to Locke's *Two Treatises of Government* is almost mandatory in any discussion about property, as Locke has reached an almost totemic status in property theory. Because of their very significant weight, it is important to try to understand Locke's ideas accurately and in detail. In Book II, Chapter V of the *Second Treatise of Government*, Locke describes a state of nature in which goods are held in common through a grant from God. In order to make use of these goods, human beings must exert labour upon them, which makes them into private property.

We can ask in what sense do goods belong to the commons? Is it in a positive way, in the sense that every good actually belongs to every individual forming the group? Or does it mean that all are free to use it, because it does not belong to anyone in particular, in a negative way? If we opt for a more positive ownership, then are we also expected to ask every individual's permission before using any object forming the commons? Is negative ownership of the commons sufficient in society, or will it lead to anarchy and chaos? These are questions that are not addressed in the presentation of Locke's ideas.

Locke writes that in the primitive state of human society, there are natural limits to how much every human being can use and acquire through labour, leaving sufficient amounts for others to enjoy. This is fair for all, as each will get as much as they are willing to work for. Moreover, this way of doing things will prevent the accumulation of so much property that some is destroyed without being used. These two conditions, Locke calls *the enough and as good condition* and *the non-waste condition* (or the non-spoilage condition).¹⁵

In today's complex and completely interrelated, or "networked" societies, is it still really possible to conceive of the labour of any one individual independently of the labour of others? Should society not recognize the direct contributions that enable the production of an abstract object? In line with the post-modern critique of originality briefly presented in Chapter 1, and as we shall see later in this chapter, the argument can be made that abstract objects should be collectively owned by virtue of the joint social and cultural labour that went into their creation.

Such valid questions have resulted in Locke's work to be interpreted to the point of contradiction, like that of all major philosophers. For instance, some interpreters hold that his theory ultimately justifies the commons, not private property, while others maintain that Locke is simply a capitalist ideologue providing a moral foundation for private appropriation by the bourgeoisie.¹⁶

¹⁵ From a critical analysis point of view, if the *enough and as good condition* is understood and applied fully, the *non-waste condition* becomes quasi-obsolete. Nozick (1974) among others has studied this point in detail, but it is not relevant to our purposes here to delve further into those details.

¹⁶ See for instance the opposing interpretational positions of James Hamilton Tully (1980) and Crawford Brough Macpherson's possessive individualism (1969).

These two conditions (*the enough and as good condition* and *the non-waste condition*) form the negative justification for Locke's property: given these two conditions – there is enough left for others in a sufficiently good state, and we are not wasting the goods – why would we not grant private ownership? But Locke does not limit himself to negative justification, nor does he make labour the only reason for accepting private property: he also clearly states that granting people private property over goods obtained through labour is a way to increase the common stock of humankind, which is a utilitarian argument (see §32 and §37).

Property, however, is either private or common. If it is common, then the private owner will not see how he will personally benefit from putting his labour into it, which would defeat the purpose. If the property is private, then in what way is everyone else benefiting from the individual's private ownership?

Locke's solution to this problem was the introduction of money into the economic system. A money economy means that the individual will be able to acquire more than he can use; there will be a personal motivation to do so, and there is nothing wrong with this, as the accumulation of gold and silver can hurt no one in itself, as would be the case with the accumulation of natural resources for example. There only remains the problem that this would cause unequal distribution of wealth among people, but Locke would answer that this is legitimized by the people's tacit consent to be governed. So though there may be a number of elements required for this theory to work, it is the labour justification that has always been highlighted.

To summarize Locke's approach, we can say that:

- 1) production of ideas requires labour;
- 2) ideas belong to a 'common' that is not devalued by the ideas' removal or usage; and
- 3) the non-waste condition is not breached by using the ideas.

Now that we have understood the centrality (but not sufficiency) of labour for Locke's legitimate property ownership, we can explore the following two questions:

- A) Does society consider the production of ideas as requiring labour?
- B) Does the production of ideas actually require labour?

A) There is a general consensus that the development of ideas requires efforts, or in the words of Locke, 'pains' (see §29) and that it is, in that sense, something relatively unpleasant, or undesirable, in and of itself. And so, we must somehow reward people in order to get them to do this form of labour.

We could critically argue here that this line of thought, if maintained, yields the strange result of having to protect intellectual works requiring unpleasant labour, and denying protection to those produced by enjoyable labour.

The “value-added” theory is another interpretation of Locke’s labour justification. Its adherents maintain that labour adds or creates social value, and thus enhances the public good; it is this added social value that must be rewarded, not labour itself. But in the case of copyright for instance, one is left wondering what value is added to the public good when an author registers (or is automatically registered) for copyright protection without ever planning to publish the work for example.

B) As for the second question, (Does the production of ideas actually require labour?), we can say that the production of ideas can be considered, in a broad sense, a two-step process: first, thinking the idea; and second, implementing it. In some intellectual works, it can be rather difficult to distinguish between the limits of these two steps. But when we are able to see that distinction, the implementation of the idea invariably involves labour, whereas the creation or discovery of the idea itself does not always clearly require labour, or at least requires less labour.

Indeed, when copyright law is applied, we see that it is always the implementation of the idea that is protected: a book, not its underlying thesis; a technical application, not autonomous mathematical formulae, etc. Protection only applies to works that have been clothed in some tangible, permanent garment. There is a fine line to walk here in trying to balance between protecting and rewarding the artists, and the need to free access to ideas and freedom of expression. Protecting the tangible expression of the idea is consistent with what we just said, namely that generally speaking, we are certain that the execution of an idea requires labour.

We have mentioned the expressions ‘public good’ and ‘common’. What exactly is meant by these expressions?

Putting the Platonist interpretation of the commons aside, perhaps a good way to answer this question is to understand the main difference between physical and intellectual objects. From a proprietary perspective, there are two main distinctions to be made. The first is that intellectual objects can be used simultaneously by everyone without causing a quantitative or qualitative decrease in the object being used. The second distinction is that it is not possible to prevent the private use of intellectual objects. (These same distinctions have been put forward as arguments against intellectual property by some thinkers, as we shall see later.)

These distinctions make of intellectual objects a much better fit for Locke's 'common' than physical objects.¹⁷ The use of a natural object, no matter how practically inexhaustible it may seem, will deplete the availability of that object. In most legal regimes, the common is augmented by returning the copyrighted idea to it at some point, fifty years after the author's death for instance. And this expiration of intellectual property may be the Lockean answer to intergenerational distribution of common goods.

But is there really something like an intellectual common? After all, shouldn't abstract objects belong to the intellectual worker who generated them? By limiting this worker's rights to his or her creation, are we not trespassing on their rights? Locke's starting point is the 'common', granted from God to humanity. In other words, the common is the norm, and property is the exception.

This brings us back to the understanding of the common, or the community who has access to the common. Is it an inclusive community, meaning that all of humanity has access to it? Or is it an exclusive community, determined by certain defining, common traits? Of course, these are not questions Locke answered in his work directly. Perhaps it should be up to the community itself to answer them, or at least be heard on them.

The concept of community opens the door to many more questions. One of them is that of the community's responsibility in encouraging creativity within its members. The issue of creativity is a broad and difficult one to address, especially since traditional philosophy has not said much about it. This is partly due to the fact that this concept only gained wide currency in the 20th century, with a strong beginning anchored in the 18th century Romantic movement, as we saw earlier.

The tendency is to view creativity as a highly individual process or trait. There is also another point of view considering the human being in general as the product of their upbringing, their social environment, their genetic constitution, etc. In other words, creativity would be subordinated to external, impersonal forces. But both of these views are rather incomplete. The truth of the matter is that there is at least as much joint effort that goes into creativity as there is individuality, for every artist belongs to a tradition, and their work can only make sense within a history, a tradition, a heritage. To that extent, the individual is a borrower, a copier. It is only when the act of creation is complete that the individual can step forward and demand his title of inventor, pioneer, genius, etc. while always recognizing the debt of the borrowing. Intellectual property law, by focusing on individual ownership, encourages the anachronistic embedding of an individualistic notion of creativity that does not do justice to what others have handed down to us.

¹⁷Whether the state of wilderness and pre-monetary conditions described by Locke ever existed is questionable. Besides, even if it did exist, all land and goods would eventually be owned, and there would be no 'common' left.

This quick overview of Locke's property theory gives us a powerful but incomplete philosophical foundation for intellectual property.

Robert Nozick presented a modern version of this argument in *Anarchy, State, and Utopia* when discussing patent law, but with the incorporation of Locke's condition that a person may only acquire property rights by investing their efforts in resources held in common if, after the acquisition of the rights, there is enough and as good left in common for others. In other words, this acquisition of property rights is only legitimate if no one else suffers any harm from it, such as being left poorer, or constrained in the use of the remaining resources, while keeping the good of all in mind.

So if a patent is assigned to an inventor, although this limits everyone else's use of that invention, the invention would have simply not existed were it not for the inventor's efforts. The consumers are therefore left with the benefit of having the invention, though their use of it is constrained.

Nozick adds two points to this argument to ensure that it corresponds to his interpretation of Locke's philosophy and condition. The first is that if someone else dreams up the idea independently, whether simultaneously or subsequently, they must be permitted to implement it and sell it as well. This, however, would require a reform of current patent law, which does not protect independent invention, as copyright does. The second is that the duration of the protection of the patent must not be longer than it would have taken someone else to create the invention independently.

To contrast this with Canadian jurisprudence, in the case of *CCH. v. Law Society of Upper Canada*, the court stated that the "exercise of skill and judgment will necessarily involve intellectual effort" and that "the exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise" (*CCH* 2004). The court was therefore explicitly rejecting Locke's "sweat of the brow" doctrine, which accords originality to works simply by virtue of the labour that went into them (Murray and Trosow, *op. cit.* 43).

I.3.B The personhood argument

Besides the labour argument, the moral argument – derived loosely from the writings of Kant and Hegel – is the other main justification for IP based on natural law philosophy. Its premise is that private property is necessary because it satisfies an innate human need. In this line of thinking, legislators and policymakers therefore ought to create a system with entitlements that best help people fulfill those needs.

I.3.B.i Immanuel Kant (1724 - 1804)

Fichte and Kant made their interventions regarding the publishing industry in a context of unregulated publishing which led to clear unfairness (Saunders 1992, 109 - 113).

The distinction between the intellectual form and its material concretization, between the author's discourse and its material support was elaborated on by Immanuel Kant, but not only to justify property rights. In 1785, Kant published an essay which was translated into English in 1798 under the title *Of the injustice of counterfeiting books*. A further discussion of publishing rights was to appear under the title "What is a book?" in section 31 of his 1797 *The Metaphysical Elements of Justice*.

However, John Ladd's translation (1965) of this work astonishingly provides the following commentary instead of translating what Kant wrote, because the passages: "are mainly concerned with technical concepts belonging to eighteenth-century German law. These concepts are derived from Roman law and do not have any exact counterparts in Anglo-American law. Hence they are of little interest except to the specialist" (in Kant 1965: 57).

So I resorted to Saunders' translation, which gives the following rendition of Kant's passage:

[T]he book, on the one hand, is a *material product* (*opus mechanicum*) which can be imitated (by he who legitimately possesses a copy of it) and, consequently, there is a right *in rem*; on the other hand, the book is a discourse from publisher to public, and this no one can reproduce publicly, without first having from the author the authority to do so, such that it is a matter of personal right. The error consists in confusing these two rights.

(Kant in Saunders *op. cit.* 240)

Books are therefore linked to the book market because they are material commodities, but also – through the *person* of the author and the relationship between author and publisher – to universal reason. In this latter mode of its being, the book becomes a non-appropriable, non-possessable entity. (Kant excludes paintings from this type of right, because he considers it impossible to separate the intellectual element of the painting from its material form.)

The difference between the legitimate publisher and the pirate, is the former's right in addressing the public on behalf of the author, and his rendering into a material form the immaterial ideas of the author, and communicating them to the public.

In section 31/II of the *Metaphysics of Morals*, Kant asks:

Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because on the one hand a book is a corporeal artefact (*opus*

mechanicum) than can be reproduced (by someone in legitimate possession of a copy of it), so that there is a right to a thing with regard to it. On the other hand a book is also a mere discourse of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so (*praestatio operae*), and this is a right against a person. The error consists in mistaking one of these rights for the other.

This distinction was not introduced by Kant. We read the following in Seneca's *De beneficiis* (VII, 6):

In all the cases which I have mentioned, each party is the owner of the same thing. How is this? It is because the one owns the thing, the other owns the use of the thing. We speak of the books of Cicero. Dorus, the bookseller, calls these same books his own; the one claims them because he wrote them, the other because he bought them; so that they may quite correctly be spoken of as belonging to either of the two, for they do belong to each, though in a different manner.

As a result of inquiring into how the human makes sense of experience, Kant eventually came up with the notion of a subject whose mental operations result in bouts of creativity and genius that do not follow rules of causality, but rather, react to experience and create original art. One could experience this notion of genius by contemplating artistic works that trigger new insights and understanding in gifted subjects who have been exposed to them. This expansion of one's horizon became particularly important in German Romanticism, whose authors would translate foreign authors, like Shakespeare, in order to rework their own language (see Steiner 1992, 400-2).

Kant's main concern was not in the thoughts expressed by the authors – because these are not tangible things that can be owned in that manner – but in the author's control over the expression or communication of those thoughts. He wanted to protect the autonomy of the author in deciding how their discourse would be communicated, and ensuring that their thoughts would reach others, unaltered by anyone or anything (Geller in Sherman and Strowel, *op. cit.* 168).

Kant saw intellectual property as an inalienable right, meaning that no one was allowed to deliver a similar speech to an existing one without referring to the name of the person who has already delivered it. Specifically for this view, Kant was to become a major philosophical source for copyright law. In short, he was saying that the foundation for the author's right over his work is found in his personality, making of copyright an innate right, inherent in the author's own person. In this way, Kant's remarks can be seen as precursors to Hegel's theory, which we shall explore shortly.

Kant also considered the bond between author and work as conferring upon the former not only a moral right but one of exclusive exploitation of the work in all possible ways (see Kant's *Of the Illegitimacy of Pirate Publishing*). But in reading the words of a major Kantian figure, J. G. Fichte in *Demonstration of the Illegitimacy of Pirate Publishing*, one is left wondering, for he says that ideas “are not transmitted hand to hand, they are not paid with shining cash, neither are they transmitted to us if we take home the book that contains them and put in into our library.”

Up to this point, most people would agree with his thinking. Our question is how then do we make these ideas ours so that someone's exclusive right over them does not restrict our use of them? And Fichte answers "In order to make those thoughts our own [...] we must read the book, meditate – provided it is not completely trivial – on its content, consider it under different aspects and eventually accept it within our connections of ideas." In other words, by interiorizing and integrating someone else's ideas and thoughts into our own mental universe, we are appropriating those thoughts. This process of interiorizing and integrating someone else's thought into our own psyche, knowledge and value system will be an important pillar of later philosophies dealing with hermeneutics, and we will have to come back to it when analyzing the agency of the translator, in Chapter 7.

Fichte wanted to limit the reach of copyright in order to prevent a prior author from controlling subsequent thought and communication resting on prior works. In order to do so, he distinguished between ideas, still freely usable, and protected expression, which already belongs to an author. The premise of Romantic discourse is to consider every self-expression a unique and personal one, meaning that copyright only protects the personal turn, the unique way in which an author expresses ideas, which highlights their concern of never constraining a thinker from accessing thoughts and ideas, while highlighting personal creativity (Geller in Sherman and Strowel, *op. cit.* 169).

It is in this sense that we can understand his statement, entitled *Proof of the illegality of reprinting: a rationale and a parable* (1793), that:

[E]ach writer must give his thoughts a certain form, and he can give them no other form than his own, because he has no other. But neither can he be willing to hand over this form in making his thoughts public, for no one can *appropriate* his thoughts without thereby *altering their form*. The latter thus remains forever his exclusive property.

(in Woodmansee 1984, 445; also Saunders *op. cit.* 109)

I.3.B.ii Georg Wilhelm Friedrich Hegel (1770 - 1831)

Among the alternatives to Locke's property theory, and in the same line as Kant's and Fichte's theory, Hegel's personality theory is perhaps the most powerful within the Western philosophical tradition. Instead of thinking about rewarding hard work, or labour, this theory underlines human dignity, self-actualization and personal expression.

The gist of the theory as found in the *Philosophy of Right*, is that in order for each of us to develop properly into a person, a free human being, one must have a certain degree of control over the resources of one's external

environment. In this sense, the idea does not belong to its author because the latter applied his or her labour to produce it, but rather because it is an expression, a manifestation, an extension of the author's personality. European legal systems have recognized a personality foundation for intellectual property, and called it the "moral right".

According to Justin Hughes, some of the main pillars of an intellectual property regime consistent with Hegel's thought are to grant higher or easier legal protection to works that are highly expressive and personal, as opposed to more factual ones; and legal protection must include a person's public image, mannerism and physical features, though they require no labour; while authors are free to make money and earn respect from their works, their rights can never be surrendered to someone else. (Fisher 2001, 8)

Before we get to the *personality* component of Hegel's theory, we must get an overview of his philosophy of the mind. The mind is free, but it is too much so, which disconnects it from the world. In order to be more concrete, it must acquire self-knowledge to have the beginnings of a personality. But this is a very weak existential form of personality, which has to achieve a more concrete form of existence. And this is where property comes into the equation. As we acquire more things, our existence becomes increasingly concrete.

Personality is the will to struggle in order to rise above and become free from subjectivity and the inevitability of confrontation and immediacy of the physical world, and claim the external world as our own. Property is the first step in this process. To Hegel, freedom is increasingly realized as the individual unites with and is expressed through higher objective orders and degrees of realized self-determination. Animals have more freedom than inanimate objects; human beings, more than animals; the family more than the individual human being; the state more than the family; and world history more than the state.

But as we progress in Hegel's discourse on property, we notice a subtle shift taking place. Hegel starts with a sort of abstract psychological exploration, but he eventually transitions very smoothly into a much more concrete sociological dimension. In addition to the role it was playing for individual psychology, property must also perform functions deriving from the human being's presence in civil society, which leads Hegel to talk about contracts as links between personality and state (though we will not follow him that far here).

Society must acknowledge and approve property claims. As the latter takes place and the individual's claims upon physical objects are accepted, possession becomes property, and the individual acquires more objectivity. It is not just anyone who can make any claim over any thing their appetite fancies. This is more in the lines of an implied ethical understanding that can only take place between two human beings recognizing each other as such. This social recognition to a person's claims to private property implies an approving (objective) social

will, and this is how increased objectivity equates with increased freedom. The ownership of the good is therefore a relationship the limits of which are to be decided by society, which may be considered a positivist, consensualist element in Hegel's theory.

The relationship between the person and the possessed object is very fluid in the Hegelian system. The property relationship between person and objects is only maintained so long as the will of the person is manifested or expressed in the object. This has nothing to do with being the first to own an object. (Labour then, though a sufficient condition for possession, is not a necessary one.) If the will to possess the object is not constantly expressed, the person will lose possession of the property – they may also voluntarily withdraw their will from the object, a Hegelian process that has been translated as alienability or alienation, and we can see its direct application in copyright law, especially in the notion of inalienable moral rights.

Since property is an act of will, it can be abandoned, or alienated, by an act of will. Personality is, for Hegel, something belonging to the self, and can only take place through conscious self-development. However, this is not an inevitable outcome, but only a potential that may, or may not, be reached. The personality itself, or some of its capacities, such as rationality and morality, can be alienated by handing over the reigns of these capacities to another. Hence, a further justification for property is that the mind must appropriate things and occupy them, so that others may not do so instead and rob it of its freedom.

In some of his earlier writing (see for instance *Early Theological Writings*) Hegel explained that some forms of self-identification with property were destructive to the individual, for example, when it prevents that person from maximizing self-actualization. Moreover, Hegel endorsed the view that property can be denied to person X if giving this property to X would deny Y the possibility of obtaining property (Radin 1982). This reminds us of Locke's theory, in the sense that as long as there is enough and as good potential property for the self-actualization of others, one may appropriate the object. The fact that certain situations of copyright protection may prevent others from being able to own property has been taken into consideration by legislation and the courts. An example of this would be when there is logically only a very limited number of ways to perform certain functions or reach certain outcomes while coding a computer program. Even more interesting for our purposes would be to consider the negative of this argument, when there is only a very limited number of ways to provide information to certain people, such as through translation.

Hegel addressed intellectual works directly, considering them 'personality traits' that could be materialized. But that said, he did not allow for the author to alienate himself from his work by selling rights to someone for instance, because one cannot alienate or surrender any universal element of one's self (thus, prohibiting slavery

and suicide). This is a contradiction in today's copyright systems, where it is possible to waive the moral right under certain regimes, as we saw.

As with Locke's model, the application of the personality justification contains many problems. First of all, it is quite slippery to try to determine in what capacity people have a personal involvement and stake in particular objects, when the process is so deeply internal and subjective. Furthermore, different objects, different categories of objects, and different people will result in very different degrees of manifestation. It is generally understood that there is a difference between the amount of personality to be found in a poem and that found in a microchip. Does this mean that more personality, supposing that this could be determined, warrants more protection? Should there be varying protection levels associated with the different categories of intellectual works? What about a translation or an adaptation of such works, when done by someone different from the author of the original?

Some works may involve little or no apparent personality from their creators, just like some works may require little or no labour to produce them, as we saw. Using the same logic, can we say that intellectual property rights would protect the net gain of personality?

There also seems to be some incoherence with the notion of alienation. Two people may exchange objects if each one of them thinks that they would achieve more self-realization by acquiring the object presently owned by the other. But in a money-based economy, people alienate their possessions for *value*, which can then be invested in things that could increase self-actualization more than simply keeping the object.

So it was thought that instead of thinking about the exchanged, alienated object in terms of monetary value gained, we should think about it in terms of the future of the object. When deciding what to do with an object the property of which is not or will soon not be an expression of my personality, I should try to find "a good home" for it, in the sense that I ensure that the next owner will see it as the expression of his or her personality. But if I am alienating this object from myself, my decision holds no legitimacy anyway. So personality justifies the protection of property, but fails to explain the exchange of property.

Moreover, if an author or inventor sees that their work will neither manifest their vision nor be an expression of identity, why should they derive economic gain from it? On the other hand, if we maintain that ideas really are an extension of the personality of the author, then whether the author likes it or not, they cannot alienate themselves from them, for the same reasons that Hegel rejected slavery and suicide, because that they are forms of alienating one's own personality, a surrender of a universal aspect of the self.

Hegel does not see it as a problem to be paid for an intellectual work. In fact, he considers it as acknowledgment. The payment is recognition of the individual's claim over the property. And by being recognized as owner, society is acknowledging him as a person. Also, when royalties received for an invention allow the inventor to buy a piano that he always wanted, then this transaction contributed to self-actualization. But maybe the money will be used to buy necessities that do not really participate in self-actualization... in any case, these are issues that are now part of the information society's fabric, as we shall see in detail in Chapter 8, when we discuss the self-fulfilment and actualization that is expected from jobs in a knowledge society.

Personality arguments are prone to be viewed as granting authors a distinct set of rights, as we previously mentioned when presenting Kant's thought. Producers of intellectual works become entitled to make claims that other property-owning moral agents cannot. When a mechanic restores a car, he is not granted moral rights over the car once he sells it. So though property is seen as being more of a continuum in the Hegelian system, we are still left begging the question of why special rights should be granted to a certain group of workers or owners. The answer we can fall back on is that copyright tries to encourage the production of creative works and therefore increase society's culture, as we shall see when discussing the utilitarian argument below. But this reply does nothing to explain the intrinsic value of personality. Personality is only a means to another end, namely the production and preservation of art. In other words, we always seem to have to resort to the utilitarian argument.

Alienating a work by selling copies¹⁸ of it is much better justified by personality arguments than by labour. When selling copies, the original owner still maintains some rights over the work. If my work is identified as mine, and if it is not modified without my consent, then by distributing my work, I gain the most exposure for my ideas, which will in turn, grant me more respect and honour, making me more of a person.

These two conditions of being clearly identified as the author and being guaranteed that my work will not be modified without my consent are what came to be known in German and French law as the moral right.

All theories presented so far have their respective strengths and weaknesses. For instance, the labour model cannot justify an idea whose production does not seem to involve labour; whereas the personality model does not really apply to works that do not contain an element of personality, at least in the eyes of society.

Though demonstrating this properly would require an independent study, both models seem to apply more readily to intellectual property than to tangible objects. Labour theory is a better fit for intellectual property

¹⁸ Kant refers to this as *corpus mechanicum*, as opposed to *corpus mysticum* or work as an immaterial good

because of the notion of the common, which in the case of ideas, is truly inexhaustible. As for the Hegelian theory, it applies more easily to intellectual products because they are resulting from mental processes, and because they are a better way to gain recognition for the individual, as he is the producer of the object, and not someone who simply seized it.

As we saw, though the moral argument is often referenced as a justification for authors' rights, a deeper look into it reveals that its reasoning contains many weaknesses, contradictions even, that undermine its belonging to the category of natural rights. And though it may be true that not all legal systems explicitly rely on the moral argument to justify IP, it is clear that the moral argument is one of the most prominent ones in all discourses on IP, whether at the level of technical jurisprudence and legal scholarship, or at the level of the common citizens and the lobbying groups.

For instance, if it is truly an inalienable right, how can it be sold, licensed (meaning rented), assigned (granted completely to another person) disposed of (such as if the work is made in the course of employment, as is often the case for translation) or resulting from a commission?

The principle of national treatment in copyright law is another instance confirming that copyright is not a natural right. By comparison, Canada could never say that because its citizens were not being granted basic human rights in some other state, then it will retaliate by not upholding the human rights of foreigners from that country currently on its soil. Yet, that is a retaliatory approach often encountered in the domain of IP at the international scene. Such cases are clear evidence that we are clearly not dealing with an instance of natural rights, but an administrative, utilitarian, and strategic or diplomatic one.

1.4 To what extent is the work individual/joint?

If we link this discussion on the inalienable moral rights of the author with what we discussed under the condition of originality and postmodernity's critique of the notion, then it is difficult to reject the idea that intellectual and artistic works are joint enterprises between the author and the society with which they interact.

The notion of the solitary creative genius, whether in the artistic or the legal paradigm, has little to do with everyday practices. The most that can be said is that it is a notion that has been constructed in these discourses over time. Looking at the history of cinema, we see that, in order to be treated as an art form equal in artistic and legal status to the others, there was a need for an "author"; the film director (Deleuze 1986). It is as though the current IP discourse requires society to raise one of the contributors above the others before it recognizes the legitimacy of the work (see Salokannel 57 - 77 in Sherman and Strowel 1994).

But the truth of the matter is that, not only is society responsible for the cultural and intellectual traditions that give the author the materials to work from, but it also provides a decisive contribution to the formation of the author's personality. In order to "create" any successful work, an author must first be able to consume and interiorize cultural elements provided to him by society, before being able to re-express, or translate them as his own (Scafidi 2001, 804). The public, collectively, nurtures that tradition and provides the stimulation required for the author to react to it.

When copyrighted works profit so clearly and so significantly from the contributions of the present and past publics, it out to be considered fair and logical for law to consider copyrightable works as social constructions, and to accept that their ownership should not be an exclusive property, but a joint one. It would then be up to public policy to determine whether this would be exclusively within a society, between authoring and translating societies, or if it is a matter of human culture and heritage.

If, as human selves in human communities, we are constituted by and constitute ourselves with shared cultural symbols, then it is important that legal theorists consider the nature of the cultural symbols "we" "share" in consumer societies and the recognition the law affords them.
(Coombe, 1991, 1864)

By insisting on the celebration of the individual, we underestimate and under-reward the role of the public in the development of the cultural and intellectual capital, the public domain, with which authors and thinkers interact, eventually impoverishing it (Scafidi, *op. cit.*).

Cornish writes that many would:

revive the old cry that the creator derives as much, *if not more*, from the culture in which she was born and bred as she gives back in her work, and so deserves no property entitlement. So far, however, these counterclaims appear to have had no more than marginal impact upon the copyright position that has built up over two centuries.
(2004, 50)

These ideas may seem to have a modern, or even post-modern attitude, but they are not recent inventions. In his second Satire, John Donne says, reflecting how Renaissance writers regarded the theft of IP:

But he is worst, who (beggardly) doth chaw
Others' wits' fruits, and his ravenous maw
Rankly digested, doth those things out spew,
As his own things; and they are his own, 'tis true,
For if one eat my meat, through it be known
The meat was mine, th'excrement is his own.

(Donne in Vickers, 524)

Collaboration “was a prevalent mode of textual production in the sixteenth and seventeenth centuries, only eventually displaced by the mode of singular authorship with which we are more familiar” (Masten 1997, 4). Works of collaboration were “standard practice in Elizabethan, Jacobean, and Caroline drama” (Vickers 2002, 137). And even today, in a world where interdisciplinarity and higher levels of expertise in various disciplines are increasingly required to produce any significant works, it is only normal to see that products are “collective, corporate, and collaborative” (Jaszi in Woodmansee and Jaszi 1994, 38). This applies as much to the writing of scientific articles – where the lists of contributors and authors just keep getting longer – as it does to a music video, involving artists, musicians, choreographers, etc.

We all – the public, as well as authors – have much to gain from recognizing the contributions of more than the one “author” who “created” the work, and it is a positive step to see this in instances as the ones we mentioned. But the public, or society, remains an unrecognized contributor, despite its undeniable input, and the indebtedness of the work to its predecessors. Current IP law simply ignores the “gift all artists receive, namely, a tradition and world they have not made” (Gordon 2004, 77).

Author can try to lean beyond the tradition and knowledge of their time and create something *ex nihilo*, or completely original, but the effort is never completely successful. As Emerson wrote, originals “are never original” (Emerson 1883, 172).

In fact, this is something Locke would have wholeheartedly agreed with, as it is consistent with his epistemological theory, stating that at birth, a human being is a *tabula rasa*, and that any known is a result of experimentation and interaction with the external world. The greatest claim any of us can make is that of having been able to breathe into what we have inherited from society some unique meaning or subjective interpretation.

That is why some copyright scholars have argued that copyright policy ought to formally recognize the authorial role of the public by considering copyright as joint authorship between the public and the author, in order to be more reflective of the creative process as well as more sustainable for the public domain (see Zemer 2007).

1.5 Moral rights in today’s copyright law¹⁹

“There is something about the idea of creativity, individuality, ability, that we are unwilling to discard.”
(Craig in Meredith 2006, 108)

¹⁹ For excellent discussions on moral rights in Sundara Rajan (2011).

Calls for the “death of the author” (Barthes 1977, Foucault 1979, Derrida 1988) have had an undeniably important influence on philosophy and literary criticism, but they have not had much impact on copyright law and scholarship, where the notion of the author seems to have remained largely unchanged. Any attempts, therefore, to integrate, as is, that kind of discourse into copyright scholarship will most likely not go very far, because it will either be said that claims of the death of the author are hyperbolic metaphorical exaggerations,²⁰ or, if accepted, then copyright law as a whole must be eliminated. In other words, it is too drastic as an approach and argument if the aim is to reach a practical reform.

Moral rights are undeniably among the most accepted in the world, and particularly in the case of copyright law, where they seem to be recognized across the board, whether by Continental Europe, India, or sub-Saharan Africa (Sundara Rajan 2011, 41). This seemingly universal acceptance of moral rights is, in itself, a point that must be kept in mind, separately and beyond its philosophical validity, especially at a time when copyright has trouble maintaining its credibility for normal citizens. It is refreshing to hear about morality in the discourse on intellectual property, when all talks and decisions seem to be begin and end with economic rationales. The general human respect for the underlying values of the moral argument offers hope for the future of copyright law.

Intrinsic to the moral argument is the idea that the relationship between author and work is that of an inalienable, quasi-sacred, ownership and representation, to the point where we consider one to be a projection of the other. That is why a work must be protected from damage or distortion, not for any economic reasons, but for personal, artistic, and cultural ones.

As we shall see in Chapter 9, the moral argument is well understood and applied in an unsaid and natural manner even in the open source community, which is notorious for its anti-copyright position. In the communities of online computer programmers, individuals will hold on to their moral right as a way to maintain their integrity and reputation and gain respect for their expertise and creativity amongst their peers.

On the international stage, Article 6bis of the *Berne Convention* codifies international moral rights. The *TRIPS Agreement*, however, is more ambiguous on the topic. On the one hand, it requires its members, in Article 9.1, to “comply with Articles 1 to 21 of the Berne Convention (1971),” but it goes on to state that “members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom.” A careful reading of the relevant articles means, technically,

²⁰See Aoki, 1993, who argues that the resilience and continued potency of the Romantic author notion in modern copyright law is evidence of the fact that claims about the “death of the author” have been exaggerated.

that though TRIPS has made copyright enforceable internationally, moral rights are excluded from this enforcement, and will have to continue to be administered by WIPO, which has no enforcement mechanism.

As we shall see in more detail in the next section (under Exemptions), the United States has generally been very reluctant to recognize moral rights. That said, in more recent negotiations, such as the ones for the *TRIPS*, it seems that their opposition was more a matter of politics and lobbying than legal tradition. And though WIPO's *Performances and Phonograms Treaty* (WPPT) brought international moral rights for performers, the lobbying of the US's film industry was able to constrain those rights to audio performances, and stop them from extending to audiovisual ones (Nimmer 1992; Fraser 1998, 1).

Europe and, to a lesser extent Canada, have criticized the American approach to moral rights. France for instance, not only rests its copyright law on the moral argument, but also makes a point to distinguish between commercial interests and cultural interests in their trade negotiations. In matters of intellectual property, Britain's common-law tradition poses the same problem for the *droit civil* tradition, and partially explains the challenges facing efforts to harmonize European law in the European Union (Sundara Rajan, *op. cit.* 65).

In today's copyright laws, the moral right argument is directly or indirectly acknowledged, because there is something universally agreed upon in granting attribution where it is due. It is therefore this attribution right that I must agree with as a minimum, and recommend maintaining for all works, whether original or derivative, and in perpetuity.

1.6 A note on the convergence of copyright and droit d'auteur

Many legal scholars have been arguing, not without reason, that there is a notable recent trend towards the convergence of copyright and *droit d'auteur*. The only remark we can add is that this trend is still young, and we are still far from seeing it erode centuries of legal and philosophical tradition in a short period of time.

While the copyright tradition concentrates on the protection of works, the *droit civil* system focuses on the author's rights. This explains why, in the US, it is quite common to transfer copyright through contractual agreements, whereas this is not possible in most of Europe, either completely (in Germany for instance), or with clear restrictions (rest of Europe). So while a practitioner of *droit civil* may get the impression that common law permits negotiating in pecuniary terms a human's basic rights, a common law practitioner will wonder why *droit civil* seems to treat all authors as though they do not have the mental or legal competence to decide how to negotiate their own rights. This is a philosophical difference that transcends and overarches policy and law, and that is why the full merging of both into one coherent system is still a matter of aspiration. In Canada, the judges of the Supreme Court seem to have been divided along linguistic (and hence legal tradition) lines in the

famous *Théberge* case, which speaks volumes to the work that remains to be done for such a convergence (c.f. Meredith, *Forward*).

That said, as mentioned previously, the trend seems to be that the opposition between common law's copyright and the *droit d'auteur* of the *droit civil* tradition is indeed losing some of its usefulness as a result of internationalization and the weight of the World Trade Organization, and the discourse of both sides needs to be nuanced.

Historically, there are many instances of contact with and borrowing from the other tradition. As notable examples, the US imported from France its collective management of author rights, and we can find evidence of its increasing favour towards moral rights in its art-preservation statutes (state level) as well as its adoption of the *Visual Artists Rights Act*. In return, it has exported its compulsory licensing to European countries. In 1911, Great Britain abolished the necessity of registering copyright for a work to be protected, and it progressively integrated moral rights of authors and artists, especially in its 1988 modifications. And if we look beyond the US and Europe, some countries, like Japan, were inspired by the mechanisms, notions, and terminology of both systems (Halpérin 2009, 358-360).

II. Exemptions

II.1 Understanding the terms: exemptions

Copyright law, and the intellectual property system in general, try to balance between the rights of creators and those of society, because copyright is intended to benefit the public by encouraging authors and artists to create and disseminate their works. For that reason, it provides for “lawful infringements”, exceptions and fair dealings, namely for the purposes of: research or private study, criticism or review, news reporting or private use. In addition, if it is done with no motive of gain, that is, not recovering more than the costs of the activity, some flexibility is allowed for educational institutions, but always with limitations, such as the following:

29.4 (3) Except in the case of manual reproduction, the exemption from copyright infringement provided [...] does not apply if the work or other subject-matter is commercially available in a medium that is appropriate for the purpose referred to

In addition to the five purposes already mentioned, Bill C-32 (later Bill C-11) introduced education, satire, and parody as legitimate fair dealing purposes.

None of these categories is defined in the law, and any activity falling outside of them is considered an infringement. In reviewing court judgements, one observes that judges seem to rely on dictionary definitions.

Fair dealing is limited to “private” study, which most likely means individual use, rather than wider educational purposes. And as we just saw above, if copying prevents or reduces sales, even in the future, then copying would probably not be deemed fair.

II.2 Understanding the foundations: exemptions

Fair dealing has been part of the *Copyright Act* since it was first passed, in 1921. The wording of the section concerned with fair dealing is therefore to be understood originally for a world in which researchers were copying quotations by hand, before photocopiers, scanners, electronic files, word processing, translation memories and machine translation. Despite these developments, the wording has remained virtually the same, and so has the underlying thinking.

That said, while the law has remained unchanged, jurisprudence on fair dealing is a good example of the dynamism of the law (Murray and Trosow, *op. cit.* 77; Geist 2013).

In 1990 the Supreme Court reiterated the view from a 1934 case, *Performing Right Society v. Hammonds*, in which it was stated that the Copyright Act “was passed with a single object, namely, the benefit of authors of all kinds.”²¹ This approach was also followed in *Michelin v. CAW* (1997). Michelin sued the Canadian Auto Workers for using an image of the Michelin Man (whose name, it turns out, is “Bibendum”) on union posters. The court noted the categorical nature of fair dealing and concluded that its provisions “should be restrictively interpreted as exceptions.” In the section of *Michelin* dealing with the union’s claim that its freedom of expression had been infringed in violation of section 2(b) of the Charter of Rights and Freedoms, the court even went so far as to state:

[Michelin] argues that using another’s private property is a prohibited form of expression or else qualifies as a special circumstance warranting the removal of the expression from the protected sphere. I agree with the plaintiff’s submission that the defendants are not permitted to appropriate the plaintiff’s private property – the “Bibendum” copyright – as a vehicle for conveying their anti-Michelin message. Thus, the defendants’ expression is a prohibited form or is subject to what Justice Linden... called [78] a “special limitation” and is not protected under the umbrella of paragraph 2(b).

(*Michelin v. CAW Canada*, Part II.iii, Part III.A.ii)

The court found the CAW to be infringing Michelin’s copyright, reflecting the textbook thinking about fair dealing. But within a very short time this approach was cast aside by no less than the Supreme Court of Canada – illustrating just how much the principle of users’ rights had developed in recent years. It seems quite unlikely today for instance that a court would make such a judgment (c.f. Bailey 2005, 125-166).

²¹ *Bishop v. Stevens* (1990) citing *Performing Right Society, Ltd. v. Hammond’s Bradford Brewery Co.*, 1 ch. 121, 127

Perhaps this shift in thinking started with the 2002 *Théberge v. Galerie d'Art du Petit Champlain*, when the Supreme Court maintained that the proper balance in copyright:

lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them.

Though the case was not directly one of fair dealing, the *Théberge* court seemed to be announcing a new policy by stating that:

[e]xcessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.

(*Théberge v. Galerie d'Art du Petit Champlain Inc.*, para 31, 32)

Again, in the 2004 *CCH v. Law Society of Upper Canada*, the Supreme Court made a number of points that clearly expanded the scope of fair dealing:

Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the *Copyright Act* than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.

(*CCH. Canadian Ltd. v. Law Society of Upper Canada*, para 48)

The court went on to quote, and adopt, legal scholar David Vaver's observation: "User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation" (*Ibid.*).

The same year, in *SOCAN v. CAIP*, the Supreme Court noted, "The capacity of the Internet to disseminate 'works of the arts and intellect' is one of the great innovation of the information age." To which it added, "Its use should be facilitated rather than discouraged, but this should not be done unfairly at the expense of those who created the works of arts and intellect in the first place." (*Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, para 40.) In these three major cases (*Théberge*, *CCH*, and *SOCAN*), the Supreme Court articulated the idea of users' rights, while also demonstrating the need for careful balancing of interests.

Finally, the *CCH* case also states the following:

It may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch.D.), the importers and distributors of “study notes” that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.
(*CCH*, para 55)

This constitutes a key reminder for all of us that our customary activities in a “particular trade” play a role in determining and changing the law. Instead of asking permission for every possible use – which keeps consolidating the law – it is to our advantage to show a little common sense and courage in our interactions with various works to establish habits of use that are more realistic and in the public’s interest.

But as is the case with the copyright law in general, things are always surrounded by a layer of ambiguity, even contradiction. In the *CCH* case, the court explained some of the criteria²² for making a decision about whether a use is fair. While it stated the following:

If multiple copies of the work are being widely distributed, this will tend to be unfair. If however, a single copy of a work is used for a specific legitimate purpose, then it may be easier to conclude that it was a fair dealing. If the copy of the work is destroyed after it is used for its specific intended purpose, this may also favour a finding of fairness.
(Para 55)

It failed to see the contradiction, or at least ambiguity, in declaring that “[a]lthough certainly not determinative, if a work has not been published, the dealing may be more fair in that its reproduction with acknowledgement could lead to wider public dissemination of the work – one of the goals of copyright law” (Para 57).

It is noteworthy that the Canadian “fair dealing” is, in principle, different from the United States’ “fair use”. The U.S. law, like that of Israel and the Philippines, determines fairness based on specific criteria mentioned in the law, while the Canadian system draws these factors from case law. There are also wider allowances for the free use of copyrighted materials under the fair use model, because the latter is more open to interpretation, in addition to its specific provisions for teachers and librarians for instance. As an example, in the U.S., fair use allows for the making of multiple copies for use in classroom under certain circumstances. As a number of commentators have already pointed out, the recent rulings by the Canadian Supreme Court may have brought fair dealing closer to fair use (Geist 2013).

²² Strikingly similar to the U.S. statute’s four-part test, the *CCH* case presented a six-part test for fair dealing, considering, namely, the purpose of the dealing, its character, amount, alternatives, nature of the work, and its effect on the work.

As for the *Berne Convention* and *TRIPS Agreement*, they also permit some exceptions for fair use of copyrighted works. As for the availability and scope of the exceptions, they are mainly subject to national law (Abbott *et. al.* 2007, 422-423).

II.2.A The utilitarian argument

II.2.A.i *Legal positivism*

From what we have just presented, it is clear that the reason behind allowing exemptions for fair use or fair dealing is to ensure that IP remains balanced between the monopoly granted to the owners of the rights – which, we are told, is the price society is paying to motivate the authors and inventors to work) – and the right of the public to access those works. In other words, in its spirit, the IP regime considers fair dealing as an allowable, almost necessary, transgression on the property rights (even moral rights, as we saw earlier) of the authors and inventors, so as to benefit the public as well. In this sense, the foundations of the notion of lawful infringement can be traced back to legal positivism.

Legal positivism is a philosophy that places the law not in any established practice or custom, but in the actual legislation. The classic formulation of legal positivism, as stated by John Austin in his 1832 work *The Province of Jurisprudence Determined*, is as follows: “the matter of jurisprudence is positive law; law strictly and simply so called: or law set by political superiors to political inferiors” (Austin, 1832, 9). In a certain sense, positive law carries an anti-rationalist or anti-philosophical charge, in that it does not view law to be determined by some fundamental or necessary logic. So instead of relying on purely rational arguments, one can resort to historical examples and legal doctrine to argue for this or that position. The German social theorist Niklas Luhmann writes:

For us, the foundations of law can no longer be located in a supreme natural law that exists objectively and through its objective truth is permanently binding. The stability and validity of the law no longer rests upon a higher and more stable order, but instead upon a principle of variation: it is the very alterability of law that is the foundation for its stability and validity.
(Luhmann 1982, 94)

Today, most legal education is based on some modified form of positivist law. Perhaps a more realist and moderate version of this approach is to locate legal authority in the interaction between the written laws, as well as the general practices and interpretations pertaining to them.²³

²³The most famous proponent of the realist philosophy was Oliver Wendell Holmes: see Holmes 1897. For an accessible discussion of related issues, see Macdonald 2002.

On the surface, when we look at the exceptions granted by copyright law for fair use, we get the impression – in large part because of the terminology being used – that the main reason behind copyright law and IP in general is the protection of the rights of the authors and inventors, but exceptions are allowed for the benefit of society. There is, however, another way of looking at this, which consists in reversing the equation, by considering the welfare of the masses more important, and that of the individuals as secondary. This is done by placing the interest of society and the right of the public to scientific and artistic works at the center, instead of the rights of authors to their labours. This rationale for IP and copyright is therefore based on the utilitarian argument, instead of the moral one.

In today's discourse, the most important argument for copyright emanating from positive law derives from utilitarianism, which is attributed to the nineteenth-century English philosopher Jeremy Bentham. According to him, people can make decisions in a situation of competing interests by measuring the total amount of "happiness" produced. "A measure of government," he wrote, "may be said to be conformable to or dictated by the principle of utility, when [...] the tendency which it has to augment the happiness of the community is greater than any which it has to diminish it" (Bentham 1789, ch. 1, article VII).

The utilitarian argument has been used in IP and copyright as the basis for the economic incentive argument. The greater good of society lies not only in using, but also in constantly producing new art and science. To incite potential artists and scientists to produce new material for the benefit of society, society guarantees them an exclusive monetary reward.

The Copyright Clause of the *U.S. Constitution* is a case-in-point for utilitarianism: it does not appeal to a higher power, as in natural law thinking, but rather empowers Congress to enact intellectual property laws as a tool for the general benefit – that is, "to promote the progress of science and the useful arts." As for Canada, Section 91 of our Constitution lists copyright as one of the powers of the federal government, with no rationale or guidance provided. Moreover, Canada's courts and legislators have often invoked public or national interests in their decisions and judgments, which could be said to fall under utilitarianism (e.g. see *Théberge* para. 32).

The rationale for IP, and copyright in particular, can resort to natural law – as we saw earlier – or positive law, and these two philosophies produce four main types of arguments: labour and personhood – which we have already discussed – as well as utilitarian and "social planning" (Fisher 2001).

As mentioned previously, while the continental tradition based its IP regime on the moral argument, the Anglo-American one rests its rationale mainly on utilitarian grounds. Apart from the different philosophical and legal

traditions that can be used to explain this difference, the importance of individualism and individual freedom in a capitalist market can help us better understand the different implementations of IP.

This brings us to the economic dimension of IP. In the U.S. employers and business are worried that if authors retain some residual rights in their works, they may be faced with demands from the author later on that the work not be altered without their permission for instance, especially when there are tens or hundreds of millions of dollars at stake. And this tension is an old and understandable one; artists have always wanted to perform with as much freedom in, and control over, their own work as possible, but they are often under pressures from producers, who are usually much more concerned with the financial aspect than the artistic one.

But even in the U.S., where the utilitarian argument completely substitutes any discussion about moral rights, the courts have recognized that the good reputation of the artist is a condition for the economic success of their works, showing that the two arguments are not entirely separate from each other:

the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law [...] cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent.

(Gilliam v. American Broadcasting Companies)

II.2.A.ii The utilitarian argument and the economic incentive

When lawmakers apply the utilitarian model of maximizing the net social welfare to IP, they try to find the optimal balance between the exclusivity rights that stimulate creation, and the public right to benefit from those creations while offsetting the monopoly. As our societies transition into knowledge-based economies, this argument may be expected to gain ground, because the defining and influential outputs are all service- and knowledge-based, as opposed to goods and mechanical or industrial work (see Chapter 8). The IP regime will therefore cover more ground, because, as the argument goes, it is the main driver of such an economy.

The economic premises of copyright law are as follows:

- 1) the free market is the best mechanism for the creation and the dissemination of knowledge-based products;
- 2) without sufficient market-based incentives to owners and creators, knowledge-based products will be under-produced; and
- 3) strong – even maximalist – intellectual property rights are required to protect the market from any behaviour that may undermine it.

Presented in this format, the argument combines the features of the knowledge – and information – society to the classic utilitarian argument. Since we have a chapter dedicated to the information society, we will concentrate on the economic dimension of the argument here, and postpone issues related to the information society to Chapter 8.

II.2.A.iii The foundations of the utilitarian argument in copyright law

In its classic form, the economic debate around IPRs is not one about knowledge-based goods and services, but about public goods (see Drexler, in Dreyfuss 2010). This is what we find in the work of William Landes and Richard Posner on copyright law (1989). Intellectual works are public goods: their most distinctive features are that they can be easily reproduced, that their enjoyment by someone does not prevent their enjoyment from another (non-rivalry), and nobody can be excluded from accessing them (non-excludability). These characteristics form a risk to the creators that their works will be easily copied by others, who will only have to incur the costs of copying them, as opposed to the initial costs of thinking them up and producing them. Consumers will therefore be presented with similar, or even identical products, at very low prices. This possibility will therefore discourage creators from engaging in intellectual and artistic creations that are socially valuable. In other words, the problem of such goods is that, on the one hand, they are very beneficial to society, but on the other, investors will not be able to recoup their investment in producing them, because of their features (easily copied, non-rivalrous, and non-excludable), and will therefore not create them in the first place. IP law is an attempt to solve this problem by legally creating market exclusivity.

Copyrighted works may also be called ‘common goods’ or ‘commons’, a term often used outside economics, in disciplines like philosophy and political science, as we saw in Locke’s argument above. There is no standard definition for ‘common goods,’ but it may be said that the concept underlines society’s benefit of – and even need for – having such goods (like water, air, etc.). As we shall see in Chapter 9, this understanding of the commons comes closest to its use in the discourse of the creative commons (CC) movement, which pushes for the use of a particular form of licensing that promotes (and in some instances, ensures) the production of creative derivative works, in the public interest.

Yet, use of the term ‘common goods’ for copyrighted works may also be mixed up with the economic concept of the ‘commons.’ While their consumption decreases their availability for the use of others, commons in economics are similar to public goods, in that others cannot be prevented from using them. The notion of the ‘tragedy of the commons’ describes the risk that the self-interest of the individuals will eventually destroy such resources, although this is obviously against their individual as well as collective interest (see Hardin 1968). The classic example of this is over-fishing.

Copyrightable works do not raise the issue of a tragedy of the commons, because they are not rivalrous. They do, however, raise the possibility of a ‘tragedy of the anti-commons,’ which takes place when too many exclusive rights, from different holders, exist in a good. If one has to pay all those right holders before accessing such a good, the access is no longer worth it, as the cost would be clearly superior to its market value (Heller 1998).

This is more of a problem for patents in the IT sector for instance, where every right holder who owns a standard with others can prevent everyone else from using it. While standards can ensure a broader distribution or a technology resulting from interoperability between products and systems, standards are usually protected by patents. If users have to negotiate separate licenses with all the right holders, they will most likely be overcharged. In the case of copyrights, as in that of patents, this is often solved by pooling the rights, and using collective management organizations (CMOs) as clearing houses for all users (see Gordon & Watt 2003).

In addition to ‘public goods’ and ‘common goods,’ intellectual works may also be called ‘collective goods.’ As defined by the Max Planck Institute for Research on Collective Goods, collective goods are “those goods whose provision and enjoyment are treated as community concerns.” This notion goes beyond that of public goods in that it is concerned with the collective interest in preserving and ensuring access to such goods for existing as well as future generations. (*Id.*)

Now that the nuances between public goods, common goods, the commons, and collective goods have been explained, we can see that IP deals with intellectual and creative works as public goods. In its economic justification, it argues that by allocating exclusive rights to make copies of their work, society encourages and empowers the creators to continue to create, and hence solve the problem of the public goods, described above. A purely capitalistic and competitive market would not allow those creators to charge higher prices to access their works, because they would not be unique and other alternatives would be available. Landes and Posner explain that there are alternatives to this model, but they are all more wasteful of social resources. This, in short, is the utilitarian rationale that has been the most commonly used to shape not only copyright, but also IP in general.

For example, the same line of thinking is used to justify trademark law. The authors tell us that there are two economic benefits to trademarks. The first is that trademarks decrease the searching cost of consumers, because they can simply rely on their previous experience with the brand without having to continuously research the features of other ones to see what is the most suitable one. The second economic benefit of trademarks is that it provides an incentive for businesses to always produce goods and services of the best quality, because customers know that the different brands cannot imitate each other’s quality simply by using their name or

mark. Interestingly, Landes and Posner also claim that trademarks improve the quality of society's language by continuously introducing new words and phrases that make conversation more pleasurable as well as more informative, which is an economy on communication costs.

Finally, they tell us that though there is always the risk that competition is discouraged because an especially attractive or informative brand name has already been taken, judges and legislators are always adjusting the law so as to ensure that it protects society's interests, while discouraging that which is deleterious to it.

However, for this argument to be applied consistently, courts or refereeing mechanisms can be put in place to assess the social value and benefit of every produced work, or at least their marketability, which would then only be granted a level of protection commensurate with the cultural, scientific or market value the work generates for society.

II.3 Discussing the utilitarian argument in copyright law

As we delve deeper into this line of reasoning, we can see that there should be two complementary facets to this argument, running in parallel with each other, namely, theory and evidence.

The theory, based on utilitarian economics, tells us that the purpose of copyright law is to incentivize investment in the production of creative works in the interest of society. In order for this to work, laws of exclusivity must be introduced, but just to the appropriate level, so as to avoid over-protection, to the detriment of society. One of the ways this is done, we are told, is by imposing a term on the duration of the monopoly, which ensures that the public will have an unrestricted access to the work once the incentive for the creation of the work is no longer required (Landes & Posner, 2003, 210-249). It may be argued that the term of protection should be fixed according to the expected time needed for the recoupment of the initial investment. This, however, cannot be supported. Copyright as such does not have the goal of guaranteeing recoupment. It is for the market to decide on the economic success of individual works and the speed of recoupment. The recoupment argument would even advocate a longer term of protection for those works that are less liked by consumers. But there is agreement that there are great benefits for society to have access to the work during the time of its protection, not only afterwards. That is why statutory exceptions, or exemptions, are also introduced in the law, but determining their appropriate amount is perhaps the most challenging task for legislators and courts.

Does granting exclusive individual rights actually promote the production of creative works? Does it ensure having access to them for society? If it does, to what extent? Is it the most efficient means for arriving at this end, or are there alternative that would work? If so, what are the pros and cons of every possibility?

Economic theory explains that the exclusive rights granted to the author are in themselves the incentive required for the right holder to publish the work. In fact, the right holder will not only exploit the work – making it accessible for the greater welfare of society – but they will also choose the most efficient and profitable way to exploit it, because it is in their best interest to do so. In other words, what we have here is a perfect example of Adam Smith’s principle of the invisible hand of free markets at work. The economic interests of the authors and inventors will coincide perfectly with those of society.

But if we are to accept the matrix of the free market, then should it not be left to the free market and its uncoerced participants to determine what mechanisms to implement to maximize profits and benefits, and decide whether exclusivity is required, and in what spheres of activity. If that is the case, how should that exclusivity be implemented in the market? And is granting monopolies to one industry or sector of the economy the most effective and socially beneficial strategy?

Surprisingly, however, free markets also see the rise of monopolies and unequal bargaining powers between different players, as in the case in some EU member states, like Italy and Austria, where domestic laws provide for the emergence of legal monopolies (see Drexler, *op. cit.*).

Instead of accepting, maintaining and perpetuating the same mechanisms without question, it is important that policy makers, legislators and courts regularly revisit these mechanisms and their foundations as they assess the best interpretation and implementing of IP regimes.

II.3.A The evidence

In order to proceed with the implementation of such an IP regime, one would expect decision makers to rely on accurate figures to support the claims of the theory, in that IPRs actually result in more creations by authors and inventors, or better quality creations – ideally, both. In addition, there should be convincingly accurate figures assessing the true cost of copyright infringement in a given society. Data in this domain, however, is either nonexistent, incomplete, or simply not trustworthy. At best, correlations between IPRs and output of creative works “remain elusive” (Abbott 2007, 92).

There are obvious difficulties and challenges awaiting any type of evidence-gathering research. It may be argued that the transactional or bureaucratic costs of providing accurate “evidence” for the efficiency of IPRs would be too great, because it would require a monetized labelling of all transactions.

Furthermore, while it may be simple enough to measure the financial profits to owners from exclusive copyrights, how does one measure society’s losses of having its access to certain works limited? That is why

some have argument that, in practical and measurable terms, this type of analysis simply “makes no room for intelligent deliberation about how to best use our resources,” and that it thus “defeats its own aims” (Richardson 2000).

Finally, different stakeholders in IPRs have different needs, and come to the discussion table with very different resources, backgrounds, histories, and political power. How can their positions all be properly balanced, when they are not all represented equally in the discussions?

Though these challenges are real and considerable, the IP regime is an overarching dimension in our societies, and its implications and ramifications are too important to be left to theory and conjecture alone. Any evidence that tries to be objective and representative of the complexity of IPRs will still better serve a balanced utilitarian argument than accepting the over-simplified, ill-defined, unilateral discourse that more protection is good for everyone, which fails to see that additional rights for someone mean further restrictions for someone else.

What applies to IP in general applies equally to copyright protection. How much, if any, creative work is gained or lost as a result of copyright, and what does that represent in economic value? For example, movie and music companies, as well as other right owners, are constantly presenting “data” of the losses they incur as a result of file sharing and copyright infringements (see Chow *et. al.* 2005). However, these numbers, if valid, cannot be considered separately from the cultural and even economic benefits of society’s access to such material, or what financial repercussions those companies derive from any illegal dissemination.

A well-known example of this is the Napster case, during which economists had great challenges in assessing the effects of copyright infringement on the music industry, because it was clear that any losses from uncompensated file-sharing would have been offset, to some degree at least, by profits in sales resulting from multiplied exposure resulting from the illegal activities (*A&M Records v. Napster* 2000, 2001).

Economic studies must not only try to find the maximum economic benefit that can be gained by rights owners, but also account for those who desire to see their works more widely disseminated, because it tempers the maximum financial returns. That is, *if* the legislator’s main concern is the interest of businesses and authors behind the works... But the circumstances may be such that it is the promotion of the public’s welfare through greater access to creative works that is more of a concern, in which case, determining whether the current IP regime is really the most effective model takes a different tone.

Before law and policy makers can decide whether stronger or weaker IPRs are required, much evidence is therefore needed. And stronger or weaker IPRs can be applied to different aspects of the law, whose

determination also requires evidence-based research. For instance, if stronger IPRs are required because they would provide a stronger incentive to create original work, does that mean stronger exclusion of independent creations, longer durations for exclusivity and protection, or more price control? And what would be the different consequences be of limiting public access to creative works through these means?

II.3.B Does the economic-incentive model work?

So does the economic-incentives model really work? In order to answer this question, we have first tried to explain that though such a model requires a theoretical foundation – which we have summarized above – it also requires factual evidence. And the evidence, when it does exist, does not support the claim that IPRs are the only, nor the best regime in all situations, for a number of reasons. First, it is clear that incentives are not limited to financial ones, or, put in another way, the economic-incentives model cannot be applied equally to all spheres of activity. Secondly, there are other economically viable models that can provide the required mechanisms to ensure that society will have a sufficient output of intellectual works.

While a lot (if not most) of discourse and textbooks support the economic incentive argument for IPRs, an increasing number of recent studies (Geller in Sherman and Strowel *op. cit.*; Cohen and Walsh in Dreyfuss *op. cit.*) are casting doubts on this model. For instance, for scientific works, their findings are that the primary incentive for research and publishing is not monetary; that sharing research results produces greater overall benefits than granting exclusive rights to individual researchers; and that IPRs in fact impede the dissemination of knowledge instead of helping to spread it.

In 1841, the British historian of law Thomas Macaulay argued before the Parliament that “copyright is a monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. The effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad” (in Bettig 1996, 104). In 1876, Sir Louis Mallet presented a report containing similar arguments, and highlighting that a “limitation on supply by artificial causes, creates scarcity in order to create property [...] It is within this [...] class that copyright in published works must be included” (*Id.*).

In 1934, Arnold Plant was questioning whether a monopoly granted by copyright could actually encourage the production of new works sufficiently to offset the cost of the monopoly and the higher prices of goods protected by it. In his economic analysis of IP, Stanley Besen summarized Plant’s points by writing that “unless the gains from additional creation more than offset the inefficiencies from reduced use, the copyright and patent system cannot be justified” (Besen 1987, 11). In 1970, Stephen Breyer also questioned the effectiveness of copyright from the utilitarian perspective. His article “The Uneasy Case for Copyright” starts by emphasizing that every sector of the market performs within its own parameters and rates, and must therefore be studied

separately. In looking at the book trade market, he concludes that the case for copyright is “inefficient” and therefore “weak,” that the first publisher of a book benefits from significant advantages that will discourage other publishers, and that alternative systems could be used to replace the function of copyright more efficiently (Breyer 1970).

In Benjamin Kaplan’s *An Unburied View of Copyright* (1967), he argues that if literary activity flourished during the Elizabethan era, considered as the English Renaissance, it is because of the freedom of borrowing (plots, characterizations, settings themes...) and derivation (adaptation, abridgment, translation, dramatization...) afforded to authors. The introduction and enforcement of copyright law has therefore stifled creativity, and inhibited or prohibited new works, according to Kaplan.

As technology makes the practices of borrowing and mashing-up much easier than ever before (as we shall see in detail in Chapter 9), the urgency to review the economic-incentive argument becomes more pressing, if maintaining the balance the interests of producers and consumers is still a priority. If the marketplace becomes the main forum for negotiating this balance, then efforts must be made to ensure that all stakeholders are appropriately represented.

The economists referenced above, and many others, agree that intellectual property suffers from inefficiencies and requires government intervention “in order to improve on the workings of the market” (Shmid 51), while proposed measures range from minimum intervention to active government participation.

Despite these economic and social shortcomings and recognized inefficiencies, there does not seem to be any appetite for replacing copyright or reviewing its foundations. While Besen explains the lack of initiative in exploring other models as being due to copyright being the lesser of all evils by stating that “although private markets for intellectual property cannot be expected to function efficiently, none of the alternatives is without its flaws” (*op. cit.* 60), Breyer is more direct in stating that copyright is supported not because of its superiority “but rather [because of the] uncertainty as to what would happen if protection were removed” (*op. cit.* 322). All of this demonstrates that the economic argument for copyright has a long history of being criticized by economists and jurists (Bettig *op. cit.* 79-115).

II.3.B.i The Hargreaves Review

In November 2010, Britain’s Prime Minister David Cameron commissioned a five-month review of his country’s IP legislation and its effects on economic growth to see whether the UK could have IP laws that were “fit for the Internet age”, because the founders of Google had said that “they could never have started their company in Britain” due to the lack of flexibility of British copyright law (Boyle, May 18, 2011). This study

became known as the *Hargreaves Review* (Hargreaves). Professor Ian Hargreaves introduced his study by asking whether “laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators’ rights are today obstructing innovation and economic growth? The short answer is: yes” (Hargreaves, 1). After explaining that the coming years will carry significant pressures to adapt the framework of IP, he “urge[d] Government to ensure that in future, policy on Intellectual Property issues is constructed on the basis of evidence, rather than weight of lobbying, and to ensure that the institutions upon which we depend to deliver intellectual property policy have clear mandates and adaptive capability. Without that, the pile of IP reviews on the Government’s doorstep – four in the last six years – will continue to accumulate” (*Id.*).

Due to its relevance to this section, as well as its credibility and objectivity, we will start by summarizing the main finding of this report in the next pages. To lighten the text, all references to the *Hargreaves Review* will simply be indicated by the number of the page between brackets. We will then proceed to mention studies and cases that have particularly examined the domain of academic scientific research, because innovation in science is regularly cited as one of the main reasons for the *raison d’être* of IPRs, in addition to scientific innovation’s general importance for society at multiple levels (economic, political, military, medical, etc.). In addition, science is a field in which we, as a society, seem to have different expectations from those who write and produce it, because we expect their work to be solely for the lofty values of social welfare and scientific advancement. These expectations are not limited to the masses; they are even reflected in the reasoning of judges and courts.

The Review gives a quick overview of the situation at the time of writing – still very relevant today as we shall see in Chapter 8 – indicating that in advanced economies, where innovation is crucial, IP policy becomes an even more important mechanism for stimulating economic growth. In the UK, investment in intangible assets has been superior to tangible assets for over ten consecutive years: in 2008, the amounts were respectively £137 billion to £104 billion (c.f. Farooqi *et.al.* 2011). Creative industries, according to Government figures, account for 5.6 per cent of the UK’s gross value added. Their 2010 *Plan for Growth* noted that the exports of the digital creative industries are third only to those of advanced engineering and financial and professional services (*UK Trade Performance* in HM Treasury and BIS). Internationally, IP licensing in 2010 was worth more than £600 billion a year, representing 5% of world trade, and still on the rise (3, 27).

Digital technologies are forcefully transforming the copyright landscape. There is rampant infringement, poor understanding of the law, citizens are looking to Government to act against companies that are transgressing their rights, and companies are looking to Government for vigorous enforcement against

piracy (26). The changes have been so dramatic that “the very idea of copyright as a protected source of income to creators is under threat” (*Id.*).

Different sectors have been affected to various degrees by the advent of these technologies (28). However, newspapers, the music industry, book publishers, magazines, television, film and video gaming have all struggled to keep their profits as they were prior to this technological revolution (Association of American Publishers February 2011; also Gelles and Edgecliffe-Johnson 2011).²⁴

In this type of climate, where content owners are panicking because they see their sales dwindle and their business models shaken, society is still aware that it is the business of small and young firms that is responsible for much of the required innovation. And yet, the Review tells us, it is this business that is often hampered by IP transaction costs. Instead of encouraging innovation and growth, copyright is acting as a regulatory barrier to business, especially when considering that this revolution is only beginning, because (at the time of its writing in 2010) two thirds of the world’s population had yet to achieve direct connection to the Internet (3). Today, this is closer to about half of the world population, as we shall see in Part III.

Before the economic incentive underlying the IP regime can work, the report tells us, consumer confidence in IP has to be increased, because current laws are either disregarded, not understood, not acceptable, or too expensive to enforce in the public’s eyes. In order to restore consumer and investor confidence, as well the social solidarity uniting the law-abiding majority against criminal activities, Government must take long-overdue action, for example by making copying lawful where it is for private purposes, and does not damage the underlying aims of copyright (4 -5).

With regards to piracy, though the study confirms the presence of “turbulence from digital copyright infringement” (5), it concludes that “measurable impacts are not as stark as is sometimes suggested” and that “we should be wary of expecting tougher enforcement alone to solve the problem” (6). In fact, governments ought to resist over-regulating activities that do not prejudice the provision of incentives to creators, and instead, take full advantage of all allowed exceptions, especially with regards to non-commercial research and library archiving, amongst others (8).

²⁴ As we shall see in Chapter 10, and perhaps counterintuitively and against popular belief, the publishing industry is still growing and registering record sales year after year until the time of writing this, 2017. See Part III.

However, one of the major problems, according to the report, is that “lobbying on behalf of rights owners has been more persuasive to Ministers than economic impact assessments” (7). That is why the first recommendation of the study is the following:

1. Evidence. Government should ensure that development of the IP System is driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights. (8)

The problem with the non-reliance on factual data is a complex one. Hargreaves mentions three obstacles that are all partially responsible for lack of supporting evidence in the arguments and reasoning on the economic impacts of IP. The first is that not all IPRs are equally well documented and traceable. For instance, while there is a relatively good amount of data on patents, copyright use is much less documented. The second problem is that new markets and new technologies are not well understood, so it is only normal to find more controversial policy questions in those areas. And finally, it seems that the significant, empirical data with regards to copyright is privately held, and only enters the public domain as “lobbysynomics”, supporting the arguments of lobbyists, as opposed to being independently verified research (18).

For instance, it seems quite clear that any retrospective extension of the copyright term cannot be invoked as having an incentive effect – as we discussed at length in the section on Duration – because these works already exist, and many of their authors are already dead. While an international study found term extension to have no impact on output (P.n.g. and Wang, 2009) an assessment by the UK Government found it to be economically detrimental (IPO Jan 2010, in *Hargreaves* 19). Yet, there are frequent and continuous proposals to keep increasing the term of copyright protection (*Id.*).

II.3.B.ii Data on infringement activities

Given the predominant place it occupies in any discussions related to IPRs, one would think that there is plenty of evidence of the scale and dynamics of online piracy, but the study clearly states that this is not so. Though it is impossible to deny that there is a great deal of piracy taking place, it is not possible to accurately quantify the phenomenon, because, as stated in the report, “in the *Review*’s four months of evidence gathering, we have failed to find a single UK survey that is demonstrably statistically robust.” (69).

Statistical challenges are not a new problem in criminology (since infringement is considered a crime, as we shall discuss in the next section), where experts have developed various surveying techniques to gather what

information they require to reach solid conclusions. But online infringement of copyright presents a much more complex scenario, for numerous reasons. Among those cited in the report are the following:

- There is no physical trace of infringement;
- Respondents to survey questions do not sufficiently understand the difference between lawful and unlawful activity;
- What is legal in one country may not be in another, while the internet allows international transactions;
- Money not spent on legal copies is not lost to the economy – though this is of no comfort to the sector suffering the losses, the effects across the economy will not necessarily be problematic;
- Within the affected industry, purchases triggered by infringing activities can offset losses;
- In the software sector, piracy can propel a software to such popularity that it becomes the global standard, used by the crushing majority. (69-73)
- Evidence cannot only be economic – legitimate questions of culture and fairness also arise, and they are obviously not quantifiable. (19)

Despite these challenges, the *Review* does rely on a number of studies to reach its conclusions and make recommendations. One quickly observes that, when the data is available, it does not seem to be supporting the position of those who are pushing for stronger IP protection to minimize piracy and incentivize innovation.

Research in the U.S. indicates that, although sales in the music industry may have decreased as a result of file sharing, the latter has not weakened the incentive to create new works:

Piracy, in effect, has allowed the major vendors to dominate low-and middle-income markets [...] that they have little financial incentive to serve. [...] Piracy acts as a barrier to entry for competition, especially “free” open-source alternatives that have no upfront licensing costs. When these emerging markets begin to grow, as most did in the last decade, piracy ensures they do so along paths shaped by the powerful network and lock-in effects associated with the market leaders [...]. As Microsoft executive Jeff Raikes observed: “In the long run the fundamental asset is the installed base of people who are using our products. What you hope to do over time is convert them to licensing the software.”

(Karganis 2011, 52-53)

Other research has found no evidence that the quantity of artists or music coming to the market has changed since Napster made file-sharing possible in 1999 (see Waldfogel 2011). (75)

The study does mention a submission from the British Recorded Music Industry (BPI), which explains that, due to decreases in sales caused by online piracy, record companies have reduced abilities to fund new artists and invest in young careers (*Id.*). But when looking at the data provided, it is difficult to tell whether there is

actually a decrease in the quantity of talent entering the market, or a decentralizing of the sources of new talent, which is not necessary going through the BPI to enter the market.

Hargreaves also cites studies that have specifically focused on the impacts of investment in stronger enforcement on compliance with copyright and sales. One 400-page study by the US Social Science Research Council (SSRC), which looked at music, film and software piracy and enforcement locally and internationally, concludes by saying that “[d]espite the stream of lawsuits and site closures, we see no evidence – and indeed very few claims – that these efforts have had any measurable impact on online piracy” (Karganis *op. cit.* 30).

The *Review* mentions that there is some evidence trying to suggest that the UK’s *Digital Economy Act*, the French Hadopi²⁵ law, and measures introduced by South Korea may have had a positive impact on compliance, but it quickly follows by saying that “[o]ur reading of the research is that it does not provide clear evidence either way” (77).

Particularly for South Korea, which has introduced a much more comprehensive programme to fight piracy that goes beyond strict enforcement, the report advises that “further study would be needed to understand the relative merits of the different aspects of the programme” (*Id.*). This last point forces us to address another issue of the incentives argument, namely, whether this model would work equally for all nations, especially when we keep in mind that they are at very different developmental phases, and may therefore have very different needs and tendencies. This will be a theme that we will explore throughout the thesis.

The *Hargreaves Review* is indeed clear about the different effects IPR regimes can have on different economies. It explains that, while developed economies such as the UK’s can benefit from effective IPR regimes, stronger IP protection has little effect on low-income countries, and may even hinder their economic growth – while having no significant effect on the likelihood of developed nations seeking to sell goods there. As for some middle-income countries and emerging economies, improved enforcement regimes may yield better rewards (Hassan *et. al.* 2009). In fact, in 2011, the UK announced (*Plan for Growth* 2011, 100) that it would appoint IP attachés in a number of countries, in order to help UK firms exploit those specific IP markets (24).

This is, of course, a clear indication that what may work for one market may not work for another. But this ought to go both ways, in that if some measures are detrimental to the economic or cultural context of a state, they should not be imposed on them, because it is to the advantage of some other, more powerful nation, such as the U.S. or the U.K. This point gains additional weight when we take into consideration the resistance of a

²⁵ Haute Autorité pour la Diffusion des œuvres et la Protection des Droits sur Internet. See this study, mentioned in the Review, http://www.hadopi.fr/download/HADOPI_T0_version_long.pdf

nation like the U.S. to agree to international IP laws, out of fear that they would not be in its favour. We shall come back to this point throughout the thesis, explaining that, historically, economies in transition (such as the US's) have always relied and insisted on weaker IP rights and looser or no translation rights in order to grow.

When we continue to look for the evidence in the *Review*, we find that it supports a position of weaker IPRs and more exceptions for the sake of innovation. Even for an advanced economy like the UK's, we are told that education and technological development are hampered by excessive IP restrictions.

The study tells us that while technology has expanded the potentials for communication, research, learning, and access to resources, the outdated system of copyright unnecessarily blocks this potential from ever being fully realized, even in the UK's world-class universities (41). In addition to the general ambiguity around what can and cannot be done in scholarly and educational settings, substantial sums of public and private money must still be spent to access works which have often been produced at public expense by academics and research students in the first place (*Id.*).

When copyright becomes an instrument for regulating the development of consumer technology, its economic benefits as an incentive mechanism need to be measured against its impeding impacts elsewhere in the economy. "Copyright holders have a long history of resisting the emergence of technologies which threaten their interests" (46).

As another example of the impediments copyright causes to research and innovation, the study goes on telling us of the existence of thousands of scientific articles from the first half of the twentieth century, orphan works, dealing with neurosyphilis and malaria that could have been made available online if it weren't for copyright laws. It is to be noted that malaria stills kills some 800,000 people annually (mainly children) and – if it is the economic factor that still matters after this figure – it is estimated to cause a reduction of up to 1.3% annually in the economy of Sub-Saharan Africa (*Id.*).

The *Review* also addresses the role of the policy makers, explaining that their role consists in reshaping copyright law where it is out of touch, as well as supporting policy with consumer education and effective law enforcement. It goes on to add that "Emphasising enforcement as an alternative to improved digital licensing and modernised copyright law is the wrong approach" (81).

The question then becomes how to strike a balance between the resources required to enforce the reshaped IP laws, and the benefits reaped from such a reasonable level of enforcement. Hargreaves turns to the conclusions of WIPO's Advisory Committee on Enforcement on this matter, quoting the following recommendation passage:

It is optimal for governments to devote a level of public spending on [sic] law enforcement, such that the marginal benefit of fighting IPR violations equals the marginal cost of enforcement activity. The marginal benefit includes the welfare effects [...] the marginal cost includes the opportunity cost of not using scarce fiscal resources to provide other public goods. Public spending on law enforcement will affect the probability of apprehension and the penalties faced by suppliers, distributors and (knowing) consumers of IPR infringing goods, leading to adjustments in the market for offences until equilibrium is reached.

But the *Review* quickly adds that, “At this moment, given our state of knowledge, no-one in the UK could make an informed assessment of what is the right level of resource for online enforcement in the UK. We can only guess and get on with it, using rigorous evaluation to develop the kind of cost-benefit framework described by WIPO” (*Id.*).

II.3.C Academic research and IPRs

Before reviewing the conclusions of some of the research that has studied the effects of IP on academic research, it is important to note that in the academic world of the natural sciences in particular, people have been wondering what it means exactly to be an author, when tens, hundreds, or even thousands of people sign a single paper. The career trajectories of academics, especially those at the beginning of their careers, are very much determined by the number and quality of the publications listed on their CVs, so it is understandable that their participation, in any capacity, ought to be recognized somewhere. While the recognition of the many is applauded, how does one go about determining the significance and nature of the contribution of each of these individuals to the overall project, and on the light of which one can proceed with hiring, or promoting, or awarding a Nobel Prize for instance? This is why some scholars have stated that recognition comes with a burden of responsibility with regards to the truth of the claims being made. If the credit / responsibility duality is not taken together, cases of scientific fraud will surface (Biagioli in Biagioli and Galison 1998; LaFollette 1992). Thousands of policy statements, articles, and reports are underlining this issue in the world of the natural sciences, because its implications are very practical (c.f. Biagioli and Galison *op. cit.*), and I think that it would be important to keep this in mind, because it helps understand the context in which academic research is done.

Geller’s study (in Sherman and Strowel 1994) shows that, at best, market incentives can only succeed partially in prompting authors to create more works, or more creative works (see Vaver 1991, 133-135), especially when we clearly distinguish between incentives to create, and incentives to communicate results to the public, and they cannot therefore serve as the only argument for copyright.

[Incentives] are necessary only to encourage investment in media of communication to the admittedly variable extent these media represent scarce resources. Finally, the marketplace in works itself only functions efficiently if the very media subject to copyright systematically communicate information concerning available works.

(Geller, *op. cit.* 177-178)

As for the academic world, research is showing that academics simply want to get on with their work, and will therefore use any available research to progress, with little or no regard to IP constraints (Cohen and Walsh in Dreyfuss 2010). For instance, surveys indicate that only about 5% of scientists will check regularly for relevant patents. This number is not reported to have increased significantly since the *Madey v. Duke* decision, where Duke University continued to use lab equipment patented by Madey after his dismissal, so he sued and won partially, nor does it differ significantly between scientists that had been alerted by their institutions to check for patents compared to those that did not receive such instruction.

So although a patent may create a legal exclusion, it does not seem to be a very effective exclusionary mechanism in academic research settings. That is why scientists will themselves limit access to their own work, because their primary concern is gaining credit and recognition for their work (Merton 1973; Hagstorm 1965, 1974).

This restriction to their work obviously hampers scientific progress in general, in a number of ways. When research is not disseminated, there is a strong possibility that duplicative work is occurring elsewhere, instead of moving on to solving another problem. Secondly, by sharing findings, there is a strong possibility that collaborations may ensue, resulting in efficiencies in the solution, or complementary work that is strongly related (Cohen and Walsh, in Dreyfuss 2010, 5 - 7). And finally, when a discovery is made and communicated, there are oftentimes still particular problems within it that remain unsolved. When access to the relevant upstream research inputs is limited, it affects scientific advancement because it limits the range of approaches and capabilities that can eventually solve those problems (Nelson 1982).

There are a number of exclusionary tactics and strategies used by scientists that can have hampering effects on science. For instance, researchers will not publish partial studies reflecting the intermediate phases of their work to increase their chances of making the discovery before anyone else (Merton 1957, 1968; Dasgupta & David 1987, 1994; Stephan 1996). One would also think that, since scientists are primarily after recognition for their work, scholarly publishing is the best way to solidify their good reputation, because it shows the scientific community the validity of their work. Only, scientists realize that if they keep the intermediate data, materials, methods, etc. undisclosed, others will simply not be able to duplicate their research and possibly have a breakthrough before they do. Then, there are, of course, the commercial motives that may discourage researchers from disclosing their findings fully and promptly. These types of behaviour raise the issue of the conflict of interest academics face between the academic and commercial incentives not to disclose works, and society's right to have access to such research, especially when it is partially or completely funded by public institutions and tax dollars.

But while researchers tend to exclude others with secrecy and partial explanations of the intermediate phases of their work, they are also willing to share information when they are asked for it specifically. In biomedicine for example, about four-fifths of requests for materials by academic researchers to other academics are satisfied (Cohen and Walsh in Dreyfuss 2010, 22) and in the long run, this can create networks of mutually beneficial exchange.

In short, it seems clear that when they are trying to limit access to their work, scientists are not relying on the mechanisms put in place by the IP model society has provided, but on secrecy. Perhaps patents are not the chosen means of exclusion because they are costly both in time and in money, and administratively burdensome. Why choose the patent route, when simply (actively or passively) not sharing the data or know-how will do suffice to prevent others from using it, at a much lower cost?

This is a domain in which we clearly see that the vision of the current IP system is too narrow, because it only considers financial costs and benefits, when this may not always be the incentive behind someone's willingness to share or not to share. In the circles of academic scientific research, the ultimate rewards are those that improve the reputation and symbolic capital of scientists. If the aim of policy reforms is to encourage collaborative behaviour, for instance, then more room has to be allowed for such psychological and socio-cultural factors, instead of a complete reliance on the financial and transactional aspects of intellectual works.

If we look more specifically at copyright law, we find that some scholars, such as Mauss (1967), Hyde (1983) and Hagstrom (1965, 1974), have argued that the world of science is one of a gift economy, where scientists harmoniously exchange all that is required for their research, driven by values reminiscent of Kant's categorical imperative: reciprocity, reputation, and responsibility – because any commodification of scholarly work would simply be immoral. However, more recent sociological work (Bourdieu 1988) has argued that academic science is a system of accumulation and investment of symbolic capital. Bruno Latour and Steve Woolgar (1979), who looked more closely at the social interactions in the setting of scientific laboratories, had also reached similar conclusions when they stated that researchers share their knowledge and work to get, in return, recognition from their peers, which will further entitle them to produce and share more scientific knowledge. We will explore some of these points further in Chapter 9, where we will provide an overview of the open source movement and the self-iterative mechanisms put in place by members of its community as means of resisting copyright.

II.3.C.i Interesting case

In 1977, when she was a fourth year radiology resident, Heidi Weissmann (W) started to work with the chief of nuclear medicine at Montefiore Medical Center, Leonard Freeman (F). In addition to a number of published as well as unpublished works they co-authored, was a syllabus for a course they co-facilitated at Harvard Medical School in 1980, and which they both revised a number of times afterwards (*Weissmann v. Freeman*; McSherry in Biogiali *op. cit.*).

In 1985, W published a slightly modified version of the syllabus listing herself as the sole author. In 1987, F used this latter version for one of his courses, under his name alone. When W learned of this, she asked that the syllabus be withdrawn from course materials and F complied, though copies had already circulated. W filed an infringement lawsuit against F, stating that her modifications were important enough to qualify her as the sole author of a derivative work. F's defence was that the syllabus was a work of joint authorship stemming from their previous research partnership. Moreover, he argued, his inclusion of the work in his courses falls under fair use, not infringement.

Some commentators have rightly indicated that the court should have concentrated on determining two things: were both W and F intending the work as a joint authorship, and were W's changes sufficiently substantial to transform the work as a derivative? Instead, Judge Milton Pollack concentrated on the working relationship between W and F. The judge argued that the syllabus simply evolved from their previous collaboration, as opposed to being an individual effort. Pollack then declared that the court was fortunate enough to have access to the opinion of the best qualified expert to assess the originality of W's: that of F! And, not surprisingly, F found W's modifications trivial.

The judge then proceeded to discredit W's testimony as both witness and scientist, because she had claimed that this was her work, and that it did not involve any participation from F, but the court was presented with visual evidence of his contribution, as well as previous versions of the work listing F as co-author. This made W a liar on the stand. In addition, Justice Pollack stated that if it weren't for F's name as principal investigator, the initial would never have been possible, and that is why he is "the person with whom 'the buck stops'" (*Weissmann B*). So it was clear, according to the judge, that this was a work of joint authorship, as F had claimed.

In other words, the judge deduced that this was a work of joint authorship, based on the previous working relationship of the two parties, as well as their credentials and reputation. This judgment has been considered counter-intuitive, or at least too hasty, by experts who are familiar with the numerous empirical studies stressing that the contributions of superiors are usually minimal, if any (Shapiro *et. al.* 1994; Tarnow 1999).

The reason behind this rationale from a judge, and his preoccupation with establishing the relationship between the two parties, as well as their credentials – instead of focusing on whether this was actually a work of joint authorship and whether it was an autonomous derivative work – is that society, and the courts included, has different expectations from academic authorship, because we do not consider it appropriate to label scientific work as private property. The entire foundation of copyright, as we have been explaining in this section, is the assumption that authors need – and merit – an exclusive financial profit for their work, which in turn, fulfills one of society's important needs, namely creative and useful intellectual works. Only, this way of putting it does not sit well with our generally accepted discourse that academic authors write for the sake of knowledge itself, or because they work in a system of gifts exchange, as opposed to a system where goods are exchanged for personal interest.

Once an academic work is published, its author will gain additional recognition and a better status. It is therefore a system in which the value of a work is calculated according to the recognition it garners to its author (Mauss, Hyde, Hagstrom, *op. cit.*). In order to demonstrate to the community that they belong to it, scientists must, in a gift exchange model, share some of their findings and cite the work of others, among other things, to strengthen community ties.

Gift economies are an increasingly recognized exchange model, as we shall see when discussing the characteristics of the open community in Chapter 9. There are numerous works that have dealt with the idea of gift exchange in an original manner, for example *Essai sur le don* of Marcel Mauss (1924)²⁶; *The Gift Relationship* of Richard Titmuss (1970) and Marshall Sahlins's *Stone Age Economics* (1972). Of special relevance to us is the work of Lewis Hyde, a translator and cultural critic, who has eloquently made the case for the importance of gift exchanges in his now-famous book *The Gift: Creativity and the Artist in the Modern World*.

[...] a gift that cannot be given away ceases to be a gift. The spirit of a gift is kept alive by its constant donation. If this is the case, then the gifts of the inner world must be accepted as gifts in the outer world if they are to retain their vitality. Where gifts have no public currency, therefore, where the gift as a form of property is neither recognized nor honored, our inner gifts will find themselves excluded from the very commerce which is their nourishment. Or, to say the same thing from a different angle, where commerce is exclusively a traffic in merchandise, the gifted cannot enter into the give-and-take that ensures the livelihood of their spirit.

(Hyde 2007, Introduction)

²⁶ later translated by Ian Cunnison as *The Gift: Forms and Functions of Exchange in Archaic Societies* (1967) and by others since then.

Judge Pollack's outrage against W's position is better understood if we keep in mind the generally understood gift exchange relationship that is commonly found between supervisor and student. It is immoral for W to try to make the syllabus into some personal property, when it should have been passed on as a gift to the rest of the community, just as F had given her the gift of his name and reputation initially to give her professional recognition. W's sin was trying to transform a gift into a personal commodity through the most unpardonable insult in academic life: plagiarism. That is why the judge wrote, in his final paragraph, that her entire claim "resulted in a grave insult to our mentor and professional colleague. Dr. Freeman [who] had neither motive nor need to plagiarize, considering his preeminent grasp of the subject" (*Weissmann* IV). This reasoning from the judge has pushed some scholars to state that "joint authorship doctrine exemplifies copyright law's refusal to take account of collaborative cultural production (Jaszi 1994)." (McSherry in Biagioli and Galison 1998, 235).

So unacceptable was the behavior of W, according to the court, that it had to state that "judging by the hostility evident in W's demeanor and testimony, the answer [to why she would even bring this case before the court] has to be that this action was brought for personal reasons." And therefore, this was not a case that had anything to do with copyright infringement, but an "unfortunate lapse of judgment" on W's part (*Weissmann Ibid.*).

Pollack was making it clear that the academic world was one of collaboration and exchange of gifts, where hierarchies of donor and receiver must also be maintained and respected. But this rhetoric from the courts was later reversed by Judge Cardamone, who argued that previous co-authorship did not automatically mean joint authorship in all subsequent works, and the authors could not have intended for their work to remain as joint forever (*Weissmann* 2nd circuit, I). The judge continued stating that the student had gone on to improve the work of her mentor, thus making it her own, and her changes were obviously significant, otherwise, why would F have used it himself?

The Second Circuit Judge argued that "Dr. Freeman stood to gain recognition among his peers in the profession... He did so without paying the usual price that accompanies scientific research and writing, that is, by the sweat of his brow. Particularly in an academic setting, profit is ill-measured in dollars. Instead what is valuable is recognition" (*Id.*). This treatment of the dispute brought back the case to one of personal interests and property, as the copyright system intended, but it did so by rejecting the assumed, unspoken, "honor system" (the gift exchange economy) of the academic context.

A number of important points are exemplified in this case. One of them is that despite its claims of providing the possibility of joint authorship, copyright law is, practically speaking, unable to accommodate collaborative practices in a manner that is fair to all parties involved (Jaszi 1994; Boyle 1996; Lunsford and Ede 1994). The

counterclaim to this is that there is no true collaborative, joint authorship, as we just saw in the previous example.

This case illustrates, in more than one way, that copyright law and IP in general cannot be the most effective system in every sphere of activity. Authorship, in academia, is equivalent to credibility and reputation, or scientific symbolic capital in sociological terms. Once it is accumulated, it can be invested in permitting someone else's work to be recognized by the community (a graduate student for instance), or in getting subsequent work accepted, usually both only made possible by further funding. To use economic terminology, we can say that scientists will get more funding (which usually means that they are getting more symbolic scientific capital as well) if they are able to supply that which is in demand.

Understandably, all of this creates a lot of confusion and delicate situations to professors and students who are publishing. Many professors feel entitled to be mentioned as co-authors on papers when they provided nothing more than the funding required to do the research, as they were able to secure it in the first place through their own research or proposals. And many students see no problem in having their professors or research supervisors sign as co-authors, because they understand that, according to these “unspoken rules of the game,” this counts as a “thank you” for having been given the chance to do the work with them in order to be published eventually. In a certain way, this system is quite similar to authorship under conditions of employment, whereby the copyright belongs to the corporation, while the work was produced by an employee who will get monetary compensation. In the case of academic publishing, mentioning professors and supervisors who did not have any intellectual contribution to the work is profitable to all, only the profit is of a symbolic, as opposed to a directly monetary one.

These instances bring us back to the very notion of “work” in copyright, while clearly showing that the incentive to write something for a lawyer, a scientist, or a novelist will not be the same, and if one class of writers is shown to require economic or other encouragement to write, do all others need encouragement, and of the same type? Is it true that a software code, an article in molecular biology, a poem, a lottery ticket, and a personal diary entry all need the same incentive to be written, and the same copyright protection once they are produced?

II.3.D Are there viable alternatives to this type of incentive argument?

In the previous section, we saw that a number of inherent challenges are related to gathering data to support the maintenance of IP restrictions and strengthening them. Yet these challenges do not tell the entire story. Beyond the sometimes questionable data invoked in “lobbynomics” to dictate policy agendas, there is actually an entire body of work providing evidence that it is weaker IPRs and different business models that promote creativity in society.

II.3.D.i Reggae music and IPRs

In the 60's, the music industry in Jamaica was still in its infancy. Recorded music was broadcast on sound systems, and the success of the music was determined by whether the people would get up to dance when they heard the music (Stolzoff 2000, 52-3). In order to prevent competitors from discovering the point of origin of the records – usually studios in the U.S. – sound system operators simply scratched the labels off the records (*Ibid.* 52). Some copyright scholars have drawn interesting parallels between the function of this tactic and that of copyright, in that both “represent the imperative to exert monopoly control over new products and cultural market where innovation is at a premium” (Toynbee in Bentley 2010, 357).

With time, continuous and gradual transformations eventually led to the birth of reggae music. Socially, some have called it intensification – though technically, interestingly enough, it is called translation (Toynbee 2007, 87-94).

Music is a combination of many different features. What happened in Jamaica is that sound artists and musicians were collectively changing particular features of existing music, rendering them more salient over continuous recordings. What is relevant to us is the collective nature of this process. The competition between the producers, sound system operators, musicians, vocalists, engineers, etc. did not prevent the collective research and development required to create this new genre. The approach basically consisted in copying the work of others, but with some changes to it. This manner of viewing one's contribution to a tradition is very different from the more individualistic one we traditionally have in Western societies today, which also lies at the foundation of copyright law.

In fact, many of the socio-economic factors relevant to the birth of reggae music that were present in Jamaica were also found in Britain, and eventually led to the emergence of British rock music:

In both cases new musical forms were built upon thriving new markets and ways of consuming music. In both, recording took a much more important and autonomous role than previously when its function had been merely to document the live performance. And in both rock and reggae, musical sources beyond the home culture was hugely important.

(Toynbee in Bentley, *op. cit.* 359)

But while the innovations required for British rock were made possible through the individualistic model of authorship and corporatist copyright law, reggae was made possible because of a blend of collaboration and competition that would have not been possible under an IP regime.

Translation, in music, consists in broadening a musical code by borrowing outside of it (*op. cit.* 369). Artists are continuously modifying musical genres by making such incremental changes to existing features, but there are elements, such as melody and lyrics, that are considered to be at the very core of musical works, and which will therefore not be copied – otherwise, the risk of infringement is quite high. In the case of reggae music, however, it was perfectly legitimate to copy even those features without any hesitation. Existing songs were reused, titles were borrowed, and melodies were copied. The driver behind the innovation was not the individual contribution as recognized by copyright law, but a contribution to a tradition that is always and forever unfinished.

At the end of his study on the legal conditions surrounding the birth of reggae music, in which he argued that its emergence would have simply been impossible had copyright been implemented on the island, Toynbee asks a very important question: “If copyright is supposed to prevent free-riders from exploiting the all too copyable work of others, if it generates an incentive where none would otherwise exist, how can we account for the vitality of Jamaican music making?” (*Id.*)

The author then goes on drawing a comparison between reggae music and the open source community of software development, which we shall explore in Chapter 9. This is done by highlighting three areas of convergence, namely, the motivation of the authors, the coordination of the work, and the advantage of the first comer on a market.

The motivation of individual programmers is their intrinsic interest and enjoyment in solving software problems, their desire to gain better acclaim from other programmers, and an altruistic culture shared by the members of the community (Weber 2000). In other words, producers as well as consumers are dealing with the item as a non-rival good, where everyone understands that better software/music, means a better market for everyone.

Secondly, when the entire community is working on collectively produced goods, the acclaim of the contributions is greater because the audience is bigger, and the possibilities of finding solutions to problems or improving the overall quality are that much higher than working on one’s own code (which is known as “forking”²⁷).

²⁷ In his *Jargon File*, under the entry “Forked”, Eric S. Raymond writes: “[common after 1997, esp. in the Linux community] An open-source software project is said to have forked or be forked when the project group fissions into two or more parts pursuing separate lines of development (or, less commonly, when a third party unconnected to the project group begins its own line of development). Forking is considered a Bad Thing — not merely because it implies a lot of wasted effort in the future, but because forks tend to be accompanied by a great deal of strife and acrimony between the successor groups over issues of legitimacy, succession, and design direction. There is serious social pressure against forking. As a

Finally, the sheer competitive advantage of being the first in a market is sufficient to promote innovation. In fact, the “first-mover” advantages come into play before any IP incentives in most markets, and a practical monopoly of the market will be held by the “first-mover” until competitors are able to reproduce the artefact, at which point the costs will have been covered and more. When IP is introduced and strengthened by governments under the pressures of lobbying, the scope and duration of the monopoly are artificially, and unnecessarily, extended (Boldrin and Levine 2005, 1252-6). That is why Toynbee concludes his article by wondering whether the introduction of the 1993 *Copyright Act* in Jamaica (Power and Hallenkreutz 2002) will threaten the economy that made possible the creation and achievements of reggae music (Toynbee in Bently *op. cit.* 373).

Reggae is but one instance of a market where it seems that copyright’s grant of monopoly was not necessary for providing the incentive required for innovation. As we shall see in detail in Chapter 9, research on open-source software (c.f. Weber *op.cit.*) as well other goods (Boldrin and Levine, *op. cit.*) suggests that there are alternatives to the forced monopolies of the IP regime that may work as well, if not better, in providing encouragement for creativity.

There is a good amount of research on European markets (Clayton *et. al.* 2009) indicating that technologies spread faster in society and are better utilized when it is easier for new competitors to enter the market, and that such markets result in higher productivity in their respective countries (Bravo-Biosca 2011, Bravo-Biosca and Criscuolo 2010).

II.3.D.ii Will the new model have to be free?

Of course, not every business will be successful and viable simply by relying on collaboration and fair competition in a world where there is so much “free”. The question then becomes how to find that niche, that practical monopoly in the market, without relying on the legislative measures of IP enforcement. Though it is clear that competing with free will be an ongoing characteristic of our new economies, there is much evidence (Ghosh *et.al.* 2005) suggesting that consumers are willing to pay for distinctive quality products, albeit not market price, even when the same product is available in a pirated version. Other studies suggest that users are increasingly opting for licensed streaming of music instead of file sharing (Brindley and Walker 2009).

result, major forks (such as the Gnu-Emacs/XEmacs split, the fissionings of the 386BSD group into three daughter projects, and the short-lived GCC/EGCS split) are rare enough that they are remembered individually in hacker folklore.” The GPL licence specifically prohibits forking.

But there is no cookie-cutter answer to this question. In short, new business models are required, and they must be creative. For example, Spotify offered a combination of free and subscription-based access to music; the film industry is increasingly adding new online streaming options to their services; the computer gaming industry is using monthly subscription packages to develop more personal relationships with their customers; the *Financial Times* developed a global business model based on conditional free use, etc. (80).

When the evidence is actually taken into consideration, it is difficult to ignore the importance for the IP framework in general to better respond to the changes that have taken place in technology and markets. The complicated and opaque copyright laws have been identified, time and again, as the best illustration for IP's inability to adapt (90). But in many cases, there is simply a failure of public policy, because the law just doesn't seem to be grounded in a foundation of evidence.

From that all that has preceded concerning the utilitarian argument, we can safely conclude that while there are challenges to gather evidence, it is the only way to move forward in reforming copyright law based on sound social policy, and beyond conjecture and the rampant lobbymonics. There is a need to nuance studies and specify their spheres of analysis, as that which applies to one market or domain may not apply to another, and that which may be beneficial in one context and at one point in time, may be detrimental to another. And finally, there must be openness to exploring alternative models for encouraging the production of innovative and creative works of culture and science. And as for those who repeat that the role of policy is primarily educating the public about the importance and benefits of IP and raising its awareness, I will repeat the words of the renowned David Vaver:

For the intellectual property system to survive, it must gain and keep public respect. To be respected, it must be known. To be known, it must be understood. To be understood, it must be coherent and persuasive. There are now calls that the public should become better educated about intellectual property. Such calls are, naturally, music to the ears of any educator. But one must be prepared for the consequence that an educated public is entitled to demand greater coherence and persuasiveness from the intellectual property system than that system presently exhibits. If those calls are not met and answered, then greater knowledge will not produce greater public respect, but instead cynicism, disregard and avoidance.

(Vaver 2000)

II.3.E A more sophisticated utilitarian argument

It is interesting to note that many of the authors who have been critical of IP in the U.S. have emphasized that its foundations and purposes were never supposed to have anything to do with moral rights. Yet, because of the desperation and influence of the content owners, moral rights arguments have become so ubiquitous – even if only as rhetorical devices for thicker copyright – that it has changed social perceptions and even influenced the judicial system (e.g. Vaidhyathan 2001).

For instance, Jeremy Phillips insists that the rights associated with copyright law have “no existence outside the four walls of the *Copyright Act*”, and that “ownership of copyright is only a legal right to exercise a legal right, and has not existence except as a legal right” (in Saunders 1992, 186). This is, as we saw earlier, in reaction to moral rights which are a “specific *formalisation* of the personality of the author” or the “author's personality *in action* in the Aristotelian sense.” The *droit moral* is “open to, admits and protects the 'libidinal relation' between author and work, a relation that copyright regimes simply cannot recognize” (Edelman 1987, in *Id.*).

As we mentioned earlier, there are four main types of arguments that can be invoked for IP and copyright: 1) personhood, 2) labour, 3) utilitarian, and finally 4) “social planning” (Fisher 2001)/ “democratic paradigm” (Netanel 1996)/“proprietary theory” (Alexander 1997). This last argument is utilitarian in the sense of invoking the social welfare of democratic society as its main concern, but it does go beyond classic utilitarianism in its inclusion of the factors that ought to be taken into consideration (see Keith Aoki 1993, Rosemary Coombe 1991; Niva Elkin-Koren 1995; Michael Madow 1993, and William Fisher 1988).

The approach to copyright law according to this argument rests on the premise that all property rights should be dictated by the general aim of creating a just and attractive culture. In this sense, it shares the teleological outlook of utilitarianism, but goes beyond its notion of the “social welfare”. The arguments required for this approach are usually inspired by a number of thinkers, including Jefferson, the early Karl Marx, Legal Realists, as well as classical republicanism (Fisher *op. Cit.* 6).

A representative example of this approach to copyright is found in Neil Netanel's article: “Copyright and a Democratic Civil Society,” wherein the author poses the existence of a highly participatory and dynamic civil society in which citizens lead prosperous and highly engaged lives. This, we are told, should be a general aim for our societies because it is a necessity for the perpetuation of democratic political institutions.

Copyright can help in such an environment by playing a productive role and a structural one. The productive role consists in providing the necessary incentives to feed the “discursive foundations for democratic culture and civic association.” As for its structural function, “copyright supports a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.” However, Netanel suggests some reforms to the current regime in order to further advance the overarching social and cultural aims of such a vibrant democratic society. He proposes the trimming of the duration of copyright to increase the size of the public domain, and the reduction of the control of copyright owners over derivative works, among others.

III. Drassinower's alternative model

This chapter allowed us to explore the balancing act copyright law operates between the interests of authors and those of society. In *What's Wrong With Copying?* Abraham Drassinower (2015) presents an alternative model of copyright and its philosophy by arguing that the current theory and argumentation – as we have presented in this chapter and will continue in Chapters 3 and 4 – do not constitute a theory of copyright in its own terms, but one that simply serves as an instrument to balancing between the interests of creators and users, authors and society. While there is no doubt that copyright does have a place in the balancing of these diverse interests in society, its theorization cannot solely rely on elements external to itself if it is to be treated as having a theory.

I understand this as meaning that if the purpose of copyright is the public's interest, then there can be other ways of serving it besides copyright law. Unless we can argue in favour of copyright law itself, for its own sake, then copyright is an instrument, among potential others, to meet a purpose. The logical corollary to this approach is that in order to determine whether an action constitutes infringement, we must perform a calculation of the social cost involved in the exchange between the individual author's benefit and the cost society incurs. According to this instrumentalist approach, law must always rule in favour of the public interest, for which copyright was legislated in the first place.

Drassinower rejects “balance” in favour of “dialogue”, and reframes copyright as protection for authorship as a communicative act that is not concerned with reproduction, but with publication. Authorship, he says, is about saying things in one's own words, and having the right to decide whether to publish or not to publish those words. Copyright is therefore protecting the act of communication, not ownership over a commodity.

Balance, according to him, will always be an unsuccessful attempt to merge the public domain with the author's right. Both the public and the author views themselves as the rule, and the other as the exception that must be tolerated. He tells us that the balancing act we have explored in this chapter is not a juridical category, but a “suffocating arrangement,” and an “unhappy marriage [...] in which each of the participants is willing to grant the other nothing more than what is absolutely necessary for cohabitation to continue without becoming totally insufferable,” that is nothing more than a “sociological euphemism for the copyright wars” (Drassinower 2015, 219).

In the next chapter, we will explore infringement. According to Drassinower, infringement only takes place when unauthorized recommunication takes place. A non-communicative use of a work, which includes all personal uses, therefore cannot constitute infringement. Unauthorized publication is compelling an author to speak when they have chosen not to, and constitutes a transgression on their irreducible prerogative. While this refreshing outlook may be perfectly acceptable intuitively, we shall see that it runs counter to present doctrine.

Chapter 3: Infringement

I. Understanding the terms: infringement

Apart from the usages that fall under the exceptions and fair dealing provisions, any unauthorized use of a copyrighted work is deemed an infringement. The *Act* explains that there are two types of infringement: direct and indirect. While the former means doing something that can only be done by the copyright owner, the latter means dealing with infringing copies.

27. (1) It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.

(2) It is an infringement of copyright for any person to

(a) sell or rent out,

(b) distribute to such an extent as to affect prejudicially the owner of the copyright,

(c) by way of trade distribute, expose or offer for sale or rental, or exhibit in public,

(d) possess for the purpose of doing anything referred to in paragraphs (a) to (c), or

(e) import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),

a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it. (*Act*, 27)

As a specific example of infringement, the law addresses the importation of books in the following manner – relevant to us because we are concerned with translation rights:

27.1 (1) [...] it is an infringement of copyright in a book for any person to import the book where

(a) copies of the book were made with the consent of the owner of the copyright in the book in the country where the copies were made, but were imported without the consent of the owner of the copyright in the book in Canada; and

(b) the person knows or should have known that the book would infringe copyright if it was made in Canada by the importer. (*Ibid.* 27.1)

II. Understanding the terms: remedies

The logical corollary to infringement is remedy; the law not only protects the rights holder, it also punishes the infringing party.

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

(2) In any proceedings for an infringement of a moral right of an author, the court may grant to the author or to the person who holds the moral rights by virtue of subsection 14.2(2) or (3), as the case may be, all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right. (*Act*, 34(1),(2))

42. (1) Every person who knowingly

(a) makes for sale or rental an infringing copy of a work or other subject-matter in which copyright subsists,

(b) sells or rents out, or by way of trade exposes or offers for sale or rental, an infringing copy of a work or other subject-matter in which copyright subsists,

(c) distributes infringing copies of a work or other subject-matter in which copyright subsists, either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright,

(d) by way of trade exhibits in public an infringing copy of a work or other subject-matter in which copyright subsists, or

(e) imports for sale or rental into Canada any infringing copy of a work or other subject-matter in which copyright subsists

is guilty of an offence and liable

(f) on summary conviction, to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both, or

(g) on conviction on indictment, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding five years or to both. (*Act*, 42 (1))

III. Understanding the foundations: infringement/remedies (*piracy*)

A better understanding of the foundations of infringement and remedies can be gained by looking at these notions from the linguistic and criminological perspectives.

What exactly makes an infringement an infringement? What is piracy? How does it differ from plagiarism? What are the underlying premises upon which these notions have acquired their validity and authority? Are the offenders clearly accountable and culpable for their behaviour because it is based on a completely free will, or is their behaviour the result of their interpretation of the concept of crime? And can infringement really be considered a crime? Or is it more a matter of an injury or harm to another, in the sense of a moral wrong?

A few general reminders are in order before analyzing the notion of infringement. The original goal of the copyright system was to create enough incentive for artists and authors to create and innovate. In other words,

society is “buying” innovation and intellectual goods at the cost of the monopoly it is granting to the authors. Viewed in that sense, the issue brings us back to the very useful approach of public policy, as opposed to a debate about whether it is actually possible to steal notions and ideas when they are clearly non-rival and non-excludable.

Canadian copyright law distinguishes between large-scale commercial infringement, and the everyday use of most citizens of protected materials, which usually helps the growth of culture and economy. In *Théberge v. Galerie d'Art du Petit Champlain* (2002), the Canadian Supreme Court stated that “Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it” (para. 31). Its rationale for making such a statement was that “excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization” (para. 32).

Similar statements abound in jurisprudence and legal scholarship, warning against the repercussions of excessive control. Yet, one of the main tactics for stronger IPRs – leading to the detrimental effects of stifling innovation and creativity by limiting or slowing the circulation of works – is the constant reference to piracy and theft.

Publishers, broadcasters, film and music industries, etc. have been lobbying hard at national, regional and international levels for stronger enforcement of IPRs and penalties against infringement. And their efforts have not gone in vain: in many countries, laws are being changed to wage a stronger fight against the rampant “piracy”. For example, in 2009, France started implementing its ‘graduated response’ mechanism, which forces Internet service providers to cut their service from any users implicated in P2P sharing. Some have argued that the complaints of the US against the weakness of the prosecution threshold of Chinese copyright are what led to the ACTA negotiations between the EU, the US, Japan, Australia, etc. In 2002, the UK increased the maximum penalty against copyright infringement from 2 to 10 years of imprisonment, making it equal with assault and violent crimes (Bentley 2010, xvii).

Since the introduction of technologies that have made it much easier to copy and distribute copies at lower – or at no – cost, the public’s disregard of copyright has continued to grow. This is an indication that there is a serious disconnect between the provisions of the law – which are supposed to be representative of the citizenry from whence they emerge – and society. When the credibility of the law is seriously at stake, the rhetoric of oversimplifying and demonizing infringing activity, reducing it to plagiarism, piracy and theft may therefore not be the most appropriate public policy approach to deal with infringement. And perhaps, given the complexity and multi-facetedness of the phenomenon, it ought to be looked at from various angles, not only from the

point of view of legal scholarship. And this need to look at legal issues from various viewpoints has been recognized recently by legal scholars themselves. In attempting to address the issue of copyright law's weakening normative grip on the general public's behaviour and the ensuing widespread of infringement, Lionel Bently writes: "We take the view that it requires the multiple inputs of economics, historians, technologists, sociologists, cultural theorists and criminologists –as well as lawyers" (*ibid.* xviii).

In the next few pages, we will therefore try to understand infringement not only as a legal notion, but as a social phenomenon. We will first distinguish between plagiarism and piracy, then discuss those notions from a linguistic as well as a criminological perspectives, to better understand their place in the general public's psyche.

III.1 Plagiarism: the legal perspective

It is not without significance that English has derived "plagiarism" from the Latin "plagium," which means kidnapping (*Webster's Revised Unabridged Dictionary*, in www.TheFreeDictionary.com).

Contrarily to infringement, determining whether a piece of work is plagiarized or not is mainly dependent on elements that are external to the text itself, such as the cultural and aesthetic contexts of its reception (Randall 2001, 4). In other words, it is mainly the reader or receiver of the work who will judge whether, and to what extent, the work is plagiarized. This is an indication that the application of the notion of plagiarism to actual texts is relative (cf. Alford 1996). That said, there is general agreement, even from different cultures and eras, that plagiarism mainly consists in copying another work without identifying it as a copy, with little or no significant alterations, and claiming it as one's own, thereby fraudulently taking credit for an other's work (see Isabella Alexander in Bently 2010; Randall *op. cit.* 15 - 18). The fraudulent aspect of the activity is related to the intent of the author, because they are hoping – and even counting on the fact – that no one finds out that the work has been copied from another (hence the lack of reference) (Randall, *op. cit.* 151).

The intention behind copying is in fact an important distinction between infringement and plagiarism. Whether the "borrowing" from another constitutes infringement does not depend on the intent of the "borrower" to copy it without any explicit reference. One can therefore be infringing copyright subconsciously, which is generally not the case in plagiarism, as it requires the "borrower's" clear intent in not referring to the source, and in trying to pass the work as their own, which establishes guilt or fraud.

Infringement, on the other hand, is a legally imposed notion. We can see it clearly, for instance, in the impossibility of infringing against works that are not themselves protected by copyright. While everyone may agree that plagiarism is taking place in this or that case, this will not necessarily equate to infringement. Moreover, the fact that the copyright laws have special clauses for exceptions about fair dealing for example is

further indication that infringement is a legal construct, and not a naturally derived right, as seems to be the case with plagiarism, which is much more instinctively and universally rejected.

Though some scholars consider copyright as a subset of plagiarism (*Ibid.* 16) I tend to agree with Isabella Alexander that the relation between copyright and plagiarism is more like “intersecting sets” (Alexander, *op. cit.* 11), because it seems clear that not all cases of plagiarism are deemed infringement, just as not all cases of infringement are considered plagiarism.

From all of this, it seems clear that plagiarism is mainly a matter of moral convention rather than legal definition. But in 2006, the UK introduced the *Fraud Act 2006*, which includes fraud by false representation as one of the three classes of fraud – the other two being fraud by failing to disclose information, and fraud by abuse of position. When addressing fraud by false representation, it explains the followings points:

- (1) A person is in breach of this section [Fraud by false representation] if he—
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
 - (2) A representation is false if—
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (*Fraud Act*, section 2)

The second point above corresponds to our previous explanation that plagiarism requires the clear intent of the author. So in that regard, the criterion of fraud applies to plagiarism rather well. But how applicable is the first paragraph to plagiarism? It is, in fact, made up of two conditions, namely for the activity to be plagiarism, 1) the false representation must be dishonest, and 2) there must be intent to to make a gain for oneself or cause loss to someone else.

There is a case in English criminal case law, *R v Ghosh*, which is telling in how to establish whether an act is dishonest in the following manner: “[...] a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest [...] If it was dishonest [...] then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest” (*Regina v. Deb Baran Ghosh*). So if both the accused as well as reasonable people would consider an act dishonest, then it is dishonest.

But what about the second condition, that of trying to make a gain for oneself or causing loss to another? Does it apply to plagiarism? As we have already stated, and will be further emphasizing throughout the thesis, copyright law has mainly relied on financial arguments in its rationales. So if this tendency is maintained here, then the gain or loss must be in monetary terms, which may not always be the case with plagiarism. The motivation to plagiarize will often be better understood in terms of a gain of reputation and symbolic capital as opposed to a monetary one – though it may eventually translate into promotions and increased revenues.

III.2 The linguistic perspective: language, metaphors and skeumorphs

The conceptual framework in which we understand copyright has been expressed by a language that is not neutral, but one mined with metaphors and wordings that are heavy with certain connotations. The compounding of these uses of language with positive law have made it difficult to even question the legitimacy of such a framework or to talk about its implications in a neutral and objective manner.

Though it may sometimes seem to be the case, metaphors are not simply decorative linguistic devices; they are responsible for the intellectual associations we create in trying to understand our world by moving from that which is known to that which is unknown, and will therefore have practical repercussions on our attitudes and behaviours. Cognitive scientists tell us that “our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature” (Lakoff and Johnson 2011, 3). The usefulness of metaphors – from a cognitive perspective, as opposed to a literary or poetic one – lies in their ability to render new concepts and phenomena more comprehensible by drawing attention to pre-existing ones sharing some similar characteristic.

In reviewing works concerned with copyright law and the protection of literary works, it becomes clear that metaphors have played a key role in the analysis, presentation, and even enforcement of copyright by all parties involved, from the authors and publishers, to governments and courts. Some have even argued that the metaphors of copyright have been, if not more than, at least as influential in shaping today’s copyright reality as legal theory or jurisprudence (St Clair in Deazley *et. al.* 2010, 374).

Metaphors describing various aspects and phenomena related to copyright vary greatly in the images they use, but often revolve around realities found in nature. For instance, metaphors of the body were frequently applied to what is now called plagiarism (Kewes 1998, 2003). Many leaders and popular figures, including Sir Thomas More, not only defended but seemed to genuinely enjoy the practice of burning the authors and translators, as well as the books, of which they disapproved, as if ridding the body of poisons. In *The Answer to a Poisoned Book* (1534) More describes his opponents as “the contagion [that] crepeth forth and corrupteth further, in the

manner of a corrupt cancer”, in that regard not much different from the “leech that fasting cometh very near and long sitteth by the sick man busy about to cure him” (in Simpson 2007, 270).

Even William Shakespeare was not spared his share of jabs. Then again, by modern standards, he would be considered a plagiarist for his practice of versifying whole passages of historical works – as he did in *Anthony and Cleopatra* for instance. That is perhaps why Robert Greene – in a pun alluding to the feathers that used to be placed on hats and which can give false impressions of a man’s status, but which can also mean writing instruments – described his younger contemporary as “an upstart crow beautified with our feathers” (St Clair *op. cit.* 384).

Authors or booksellers who made their reputation or gained their wealth by appropriating other people’s words were called drones: “He is a very Drone of a Printer, that lives upon the honey which he sucks clandestinely from the hives of his fraternity” (in Bond 1963, 258). And so were patentees, with their mysterious business practices:

*Those Drones, that fly about in mists
Divielish Projectors, damn’d Monopolists*

(*Ibid.* 385)

To assess and understand metaphors of copyright and intellectual property in general, we must understand the essence of these notions. In what sense is “intellectual property” property? From everything that we have explored thus far, it is clear that intellectual property is more about a state-imposed policy granting a mainly commercial monopoly to the creator of an intellectual good, in exchange for the public’s access to it. However, with time, it seems that the notion of property rights over physical goods took over in the sphere of intellectual goods as well, as a result of its ubiquitous usage by courts, media, and the public in general.

The earliest use of the collocations “intellectual property” seems to be from 1967, during the first assembly of the United Nations’ World *Intellectual Property* Organization (WIPO). Since then, the expression has been gaining ground very quickly, becoming part of our general upbringing and culture, with obvious psychological implications. After all, if the discourse on copyright is framed in terms of property – even if only at the level of its wording – then arguing against it in any way means arguing for theft of property.

In 1585, when a *propriety* was granted in England, it meant an exclusive right to copy and sell texts in printed form. But a point was made to explain that this was a right that was being moved from the public sphere to the individual receiving this right. In fact, this right was referred to as a *privilege* because it inherently carried public

purposes²⁸ (St Clair *op. Cit.* 387). With time, wording and meaning shift, and we end up having a more individualistic understanding of property. The same can be said of the verb *to own*, which originally included not only the notion of having a right over something, but also of being responsible for it, or *owning up to it* (Greene 2005).

III.2.A Theft

The language equating any infringing activity as theft or piracy has had quite a steep escalation. It seems that the first occurrences of the language of stealing appeared in England at the end of the seventeenth century, and quickly became, from that moment on, the main metaphor for infringement. Prior to that point in time, infringement was described as abuse, disorder, violation, trespass, etc. (St Clair *op. Cit.* 388).

As we just saw, a number of metaphors were inspired from other domains, but after 1710, theft became the dominant trope for copyright infringement. This could be expressed as shoplifting, letter-picking, purse-cutting, highway robbery, burgling a house, plundering a hospital, and piracy. It is noteworthy that, though today these terms seem to be solely aimed at users of copyrighted works, this was not always the case. In fact, there are documented instances in which it is those who hold the monopoly of the books who were called pirates (*Id.*).

But although this metaphor did appear over three centuries ago, no one until recently had seriously considered any illegal copying as actual stealing, worthy of the same moral disdain associated with the latter. And although the identification of infringing activities with theft in all regards is now a very common thing to hear – especially since its criminalization – the fact that it still doesn't sit well with the opinion of the general public (*Ibid.* 391) is an indication that perhaps the metaphor has been stretched beyond its natural limit.

III.2.B The paternity metaphor

Among the rich and varied metaphors that have been used throughout history to describe copyright realities, we have already encountered the two most important ones. The first is the *paternity* metaphor, which considers a work the *child*, whose *father* is the author. The second is inspired from *real estate*, and associates intellectual property in general with physical property of land. For instance, Eaton Drone, the author of the leading nineteenth century American treatise on copyright “maintained that putting a term limit on copyright was the same in principle as putting a term limit on a farmer’s right in his orchards and fields” (Eaton Drone, *A Treatise on the Law of Property in Intellectual Productions in Great Britain and the United States*, 51 (1879) in Rose 2002, 2).

²⁸ This partly explains why obscene and pornographic material is not protected under copyright law in some countries; even in the U.S. the matter seems ambiguous.

The authorship as paternity metaphor is certainly not a recent one. In the *Symposium*, Plato writes that Diotima said the following to Socrates:

Those who are pregnant in the body only, betake themselves to women and beget children – this is the character of their love; their offspring, as they hope, will preserve their memory and giving them the blessedness and immortality which they desire in the future. But souls which are pregnant – for there certainly are men who are more creative in their souls than in their bodies conceive that which is proper for the soul to conceive or contain. And what are these conceptions? – wisdom and virtue in general. And such creators are poets and all artists who are deserving of the name inventor. But the greatest and fairest sort of wisdom by far is that which is concerned with the ordering of states and families, and which is called temperance and justice. And he who in youth has the seed of these implanted in him and is himself inspired, when he comes to maturity desires to beget and generate. [...] Who, when he thinks of Homer and Hesiod and other great poets, would not rather have their children than ordinary human ones? Who would not emulate them in the creation of children such as theirs, which have preserved their memory and given them everlasting glory? Or who would not have such children as Lysurgus left behind him to be the saviours, not only of Lacedaemon, but of Hellas, as one may say? There is Solon, too, who is the revered father of Athenian laws; and many others there are in many other places, both among Hellenes and Barbarians, who have given to the world many noble works, and have been the parents of virtue of every kind; and many temples have been raised in their honour for the sake of children such as theirs; which were never raised in honour of any one, for the sake of his mortal children.

(Plato's *Symposium*)

If we fast-forward to the Renaissance, during which, as we saw, the Romantic theory of authorship became popular, we find Cervantes using the same analogy while introducing his famous *Don Quixote*:

Idle reader: thou mayest believe me without any oath that I would this book, as it is the child of my brain, were the fairest, gayest, and cleverest that could be imagined. But I could not counteract Nature's law that everything shall beget its like; and what, then, could this sterile, illtitled wit of mine beget but the story of a dry, shrivelled, whimsical offspring, full of thoughts of all sorts and such as never came into any other imagination—just what might be begotten in a prison, where every misery is lodged and every doleful sound makes its dwelling? Tranquillity, a cheerful retreat, pleasant fields, bright skies, murmuring brooks, peace of mind, these are the things that go far to make even the most barren muses fertile, and bring into the world births that fill it with wonder and delight. Sometimes when a father has an ugly, loutish son, the love he bears him so blindfolds his eyes that he does not see his defects, or, rather, takes them for gifts and charms of mind and body, and talks of them to his friends as wit and grace. I, however—for though I pass for the father, I am but the stepfather to "Don Quixote"—have no desire to go with the current of custom, or to implore thee, dearest reader, almost with tears in my eyes, as others do, to pardon or excuse the defects thou wilt perceive in this child of mine.

(Cervantes, *Author's Preface*)

It is in fact not difficult to trace the roots of this idea back to the natural order of the world. In such works as Robert Filmer's *Patriarcha or the Natural Powers of Kings* – quite representative of the general understanding of the hierarchy of powers in the world – the author tells us that the paternal power naturally stems from the royal power, which in turn comes from the divine (Filmer 1680).

Naturally, authorship was paternity, whereby the mental generation of the work results from an author impregnating a special germinating cavity of his brain – much like a womb in the brain – with emanations from his spirit (c.f. Rose 2002, 4).

In a periodical essay written in 1710 to garner support for the bill that was to become the *Statute of Anne*, Daniel Defoe wrote that:

A book is the author's property, 'tis the child of his inventions, the brat of his brain; if he sells his property, it then becomes the right of the purchaser; if not, 'tis as much his own, as his wife and children are his own.

(*Ibid.*, 5)

Rose is right in concluding that Defoe is not trying to stir controversy by suggesting that one sells their children; rather, “he is merely developing the narrative potential latent in the paternity metaphor” (*Ibid.* 6) and preparing the ground for a new metaphor, this one, more suitable to the needs of the future bill that will protect literary property.

III.2.C The land metaphor

Although there are a number of allusions to writing and writing tools as being similar to plowing fields and making furrows (c.f. Curtius 1953, 313 – 315) I do not consider these as directly relevant as they are not looking particularly at the act of creating literary works, but rather at the magical-mystical symbolism of the mechanics of writing.

However, there is a 1709 essay in which Joseph Addison, also lobbying for the same bill, can be credited with the creation of the land metaphor of the author as a property owner carrying the fruits of his work to the market (Rose *op. cit.* 7).

The essay talks about Tom, an author who considers his brain as an estate yielding produce that varies according to the seasons, just like a farmer. While Tom's brain produced murders and accidents in winter, spring was a season for monsters, while summer was about war, which made Tom “fatter,” – a reference to his greater success as an author of war stories. The argument being made by Addison was that the livelihood of authors is a function of their intellectual estate, which must therefore be protected.

One can see how the transition from authorship as paternity to authorship as land or real estate represents a sophistication in the language used, because the latter is more applicable to the legal ramifications that were being sought. Land property provides more concrete and tangible notions, which can be more easily assimilated

to literary property than the abstract and intangible images of paternity. The rules of ownership and use of land were already in place in the post-Lockean political world, they only needed to be applied to the more abstract domain of intellectual works in the form of copyright.²⁹

In *Poetics of Imperialism*, Cheyfitz (1997) also explains how certain Western notions of land and place that may be conquered, owned, and used as property, directly contradict the notions of place and land in native cultures. While Europeans understood land as something individuals could possess, the “Indians” viewed sovereignty and ownership of land as a community possession. What may be done with “owned land” or on it also differs from one culture to another. Cheyfitz then goes on to highlight that the terms “ownership,” “sovereignty,” “possession,” etc. lose their meaning once we take them out of the legal and socio-cultural systems of Europe and try to transplant them into that of the natives. When “property,” “ownership,” “possession,” and “title” are used without sufficient account of their cultural specificity, when they are universalized where they shouldn’t be, they erase the boundaries between very different cultures in a manner that benefits colonial agendas, as Cheyfitz demonstrates in the case of these English common law terms used to refer to Algonquian land (41-58). The negotiations between the English and the natives were always on unfair ground: “can one translate the idea of place as *property* into an idea of place the terms of which the West has never granted legitimacy?” (*Ibid.* 58). All of these points were quickly mentioned to highlight the relativity of the legal notions and the metaphors that are used to describe them, as well as the additional layers of complexity that surface once these notions travel from one legal, historical, and socio-cultural reality to others.

III.2.C.i Today

And though these references date back centuries, they are still used today to serve as the model for copyright. Works that are not protected by copyright belong to the “public domain,” a notion taken from land law. An author's exclusive rights over their works still runs parallel to a landowner's legal right to monopolize their own land to the exclusion of others. Naturally, infringement is equated with trespassing. And instead of fences and physical borders to protect one's private ownership, copyright law uses the notion of originality (see Litman 1990, 967).

This image is still useful in present times, despite the significant decrease in the numbers of those who can still identify with farming activities. In an important judgement of 2001, one of the judges in the British House of Lords wrote that “no one else may for a season reap what the copyright owner has sown,” (in St Clair *op. cit.* 3).

²⁹ Cheyfitz’s very interesting discussion on the metaphorical translation of identity, property and land ownership (in 1997) is worth mentioning here, though it is out of scope for our purposes.

Despite the greater utility of the real estate metaphor, the image of paternity is still very present, though not as bluntly stated as before. One still encounters this 1878 statement in various legal texts justifying copyright law: “The man who brings out of the nothingness some child of his thought, has rights therein which cannot belong to any other sort of property” (in Ladd 1983, 426). Even legal wording refers to an author's right to have their name attached to a work, to be mentioned as the creator of a work as the “right of paternity”.

While the paternity metaphor solidifies a naturally resulting ownership over one's brain children, the real estate metaphor reminds society that these children are still commodities that can be sold and bought, like any other good. Not only do they both make a case for literary property, but they can also both be used to argue for permanent, never-ending property rights. Who can argue against perpetual rights over one's creations, when the process emulates the divine act of creation *ex-nihilo*? And there is generally no reason to ever interrupt the ownership of a land. There is also the possibility of combining the strengths of both metaphors and claiming that an author actually creates the land (in his mind). That is precisely the argument we find in an anonymous pamphlet from 1735, lobbying for an extension of the fourteen-year term that was in place. It stated that an author's right is even greater than that of a farmer for instance, “for, in some Cases, he may be said rather to create, than to discover or plant his Land; and it cannot be said, that an author's work was ever common, as the Earth originally was to all the World” (in Rose, *op. cit.* 9).

Therefore, both metaphors are still alive today because they are still useful. And it is not difficult to associate the former with moral rights, and the latter with the labour argument.

III.2.C.ii Incompatibility of the two metaphors?

While the strengths of both metaphors can be maximized by combining them, this approach also highlights an inherent contradiction between them: the paternity metaphor is about personal creativity, individual originality, and an extension of personhood; the real estate metaphor makes the work another generic commodity ready for commercial consumption. The incompatibility that arises from putting the two arguments together has actually always been part of the copyright debate, only recently it has become more apparent, most likely because of the exponential growth in commercial and non-personal works like commercials and software.

This incompatibility can even be found in recent jurisprudence. In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Supreme Court of the U.S. determined that the white pages of a telephone directory do not constitute an original work. On the one hand, the judge emphasizes the commercial and quantitative requirement of the originality, while on the other, she is looking for a spark:

The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was

independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be. (II, A)

III.3 Playing the metaphor game

Metaphors are supposed to be fictional associations that serve to make a certain point. Most would agree that creating a literary work is very different from fathering a child or working in the fields. Therefore, the argument could be made that we ought not to look with too much scrutiny at these tropes. However, as some scholars have suggested, the constant reference to these metaphors creates an “unconscious of copyright” (Rose *op. cit.* 8). When we keep in mind the centrality of the metaphors in the discourse on copyright, we understand for instance, why, in the last forty years, the U.S. copyright term has been extended eleven times (Lessig 2001, 1065). In addition, although perpetual copyright terms have been rejected repeatedly, it seems that so long as society keeps thinking of copyright as being similar to the right of a father over his children combined with the right to own and use one's private land, then we expect the duration of copyright to keep growing.

Nevertheless, instead of concentrating on the inadequacy of these metaphors for discussing literary rights – especially since they seem to be too deeply rooted to disappear anytime soon – we can concentrate on reusing them, only this time, highlighting aspects that have been hitherto ignored. For example, as regards the real estate metaphor, we can follow in the footsteps of James Boyle, who compared the incessant term extensions of copyright law and the growing erosion of fair use to the environmental crisis that engendered the environment movement midway through the twentieth century. While the environment was suffering significant blows, the entire environmental dimension was virtually non-existent in society's discourse and consciousness, until a public movement brought it to the forefront. Boyle makes the point that, in order to protect the intellectual commons, a public movement will be required (Boyle 2002).

As for the paternity metaphor, Rose (*op. cit.*) has interestingly suggested reversing it by using the same analogy on intellectual works, and using authorship as a metaphor for maternity in the following manner:

Johnson v. Calvert was a case involving two women – one who provided the ovum, the other who carried the baby to term – both claiming to be the child's mother. Interestingly, in trying to determine who the mother is, the court's thinking shifted to the intellectual world, asking which woman was the originator of the mental concept of the child. While the majority awarded the case to the woman who provided the ovum, Justice Joyce Kennard – the only woman on the court – dissented, rejecting the treatment of a human being as property.

Custody could only be determined by evaluating the interests of the child, now and in the future, in addition to those of the parents.

Likewise, carrying the metaphor back from life to art, literary works may be considered to have a life of their own, often leading to the production of other works. The life of a work does not end with the origination of the idea into material form; that is only its beginning. In the 1710 *Statute of Anne*, the duration of copyright protection was fourteen years, with the possibility of another fourteen-year renewal if the author was still alive and interested. The freeing of the work, once it has served its time in restriction, into the public domain is implicit in the original idea of copyright law. With the continuous extension of copyright terms, a work may remain bound outside the public domain for more than one hundred and twenty years, as in the U.S. under the *Sonny Bono Act*.

Moreover, the manner in which the court dealt with the *Johnson* case by looking at the problem from a copyright perspective reveals the over-simplistic conception of the generative act as the result of a singular finite action (or idea) by one agent, when in reality, no work can be generated by a singular independent individual, nor any baby for that matter, as pointed out by the court in this case. It is much more accurate and fair to recognize the collaborative – or at least collective – nature of the creative act in human beings, be it in the biological realm, or the intellectual one. Authorship as paternity is simply a misleading notion.

Finally, the constant referral to these metaphors gives society the impression that copyright is really about the rights given to an individual over their work, when in reality, the discussion ought to revolve around powerful corporations and the interest of the public, as we will further explain throughout the thesis.

III.4 From a cognitive perspective

The greatest usefulness of metaphors, from a cognitive perspective, is that they allow the speaker to explain unknowns (or less known) entities simply by comparing them to better-known ones. As mentioned previously, when two realities are compared metaphorically, there are features and aspects in which they will be quite similar, while in others, they may differ greatly. In this respect, metaphors are similar to skeumorphs, which are design features that are preserved from older to newer artifacts, in order to ensure the users' acceptance of the new ones. By concentrating on the reuse of information that distinguishes skeumorphs, some cognitive scientists have generalized this notion to non-tangible realities (e.g. Gessler 1998) to see for example, how legal systems can transition into a digital society (Larsson 2013).

The similarities between skeumorphs and metaphors are to such an extent that, for our purposes here, we may use the two notions interchangeably. Hayles writes that with skeumorphs (like metaphors):

The new becomes more acceptable when it refers back to the earlier iteration that it is displacing, while the earlier iteration becomes more valuable when it is placed in a context where we can experience the new. A skeumorph simultaneously focuses on the past and future, while reinforcing and undermining both.

(Hayles, 1999, 17)

Moreover, as is the case with metaphors, the implications associated with the use of skeumorphs do not stop at their being linguistic ornaments; there are risks associated with them. When our understanding of a new phenomenon is based on the explanations provided about an older phenomenon, we will also tend to associate the new phenomenon with the norms and interpretive scheme surrounding the older phenomenon (Larsson *op. cit.* 26).

When the language being used to help us understand new or more complex matters is metaphorical, additional care must be taken in identifying which norms can be transposed from the former to the latter phenomenon, because this transposition will often take place seamlessly (c.f. Larsson 2011). This becomes even more important when those using the metaphorical language happen to be the representatives of the legal system. In the words of Justice Cardozo, “metaphors in law are to be narrowly watched, for though starting as devices to liberate thought, they end often by enslaving it” (*Ibid.* 13).

To what extent are the metaphors of land property and brain children applicable to the kind of property implied in the spirit and purpose of copyright law? In what sense are they similar, and how do they differ? Are the differences in degree only, or are they more fundamental?

For instance, if we look at the notion of copying, as the original framers of copyright law understood it, we can see that it is much narrower in scope than the manner in which citizens of digital societies understand it today. In other words, a legal conceptual expansion of the “copy” took place, and it is arguable whether society considers today's copying equivalent to the copying that was excluded in the original drafting of copyright laws (Larsson 2012; also Chapter 9).

There is a genuine risk associated with the repeated use of a metaphor at large scale, because it will eventually efface its figurative aspect and, with time, that metaphor will become the automatic interpretation of the phenomenon being explained or argued, hiding the novelty or differences of the new phenomena (Larsson 2013, 13 and 25). Though one may think that policy-makers and legal specialists are more immune to these risks because they will be more aware of them, research indicates that myths, metaphors and symbols clearly do affect courts and lawmakers regularly (Berger 2009, 262-66; Lakoff 1993; Kövecses 2008 168 – 84; Winter 2001).

III.5 Conclusion

Metaphors are not only linguistic figures of speech; they are figures of thought (Lakoff 1986) that form an important part of our conceptual system and how we understand and categorize reality (Lakoff and Johnson (1999, 3). More specifically, metaphors are explicitly mentioned in the rationales and justifications of the courts, as was the case in *Johnson v. Calvert*. As such, they are sufficiently influential in society as another dimension to be studied in serious discussions about copyright, and additional efforts must be made to be “acutely aware of the metaphors that lawyers and judges employ when thinking about [...] legal issues” (Bellia *et. al.* 2011, 26). Some scholars have suggested (c.f. Rose *op. Cit.*) that, in order to find solutions in the domain of copyright, we must try to understand the existing metaphors differently, and leverage their rhetorical and persuasive powers. And though this provides some elements of solution, it also raises an important issue: if it is possible to easily manipulate these and other metaphors into saying one thing and its opposite, or into saying much more or much less than they should – without providing much analysis or even further explanation – the debate quickly slips from one about facts and reason to one about rhetoric and literary prowess. And if we can use these metaphors to both promote and discourage stronger copyright, then practically speaking, they are no longer adequate to describe the phenomenon being discussed, and in that sense, we can consider them *dead* metaphors.

In addition, the actual comparative power of the metaphor lies in its highlighting of the similarities found in some key aspects of the entities being compared. So when it is those very same areas of similarity that are questioned, the metaphorical function is weakened to the point of becoming obsolete.

Intellectual goods differ fundamentally from land and crops – or any other physical goods – in that they are non-rival. In fact, this is their distinguishing conceptual feature, and it happens to be their defining purpose, from a legal point of view. When someone shares knowledge or an idea with others, they do not own any less of it than they did previously, nor does it impede their ability to use that knowledge repeatedly after having shared it with others. However, when the metaphor used to describe intellectual goods likens them to rival goods, they simply erase that very specificity for which the legal notion was created. And when they talk about private property resulting from labour or extension of personhood, they give the false impression that copyright was created to protect and promote rights of individuals over their works, when in reality, the objective has always been to advance the progress of knowledge and art in society – the monopoly right of the individual just happen to be the price society has to pay. If we are to accept a metaphorical language when discussing copyright – especially in public policy discussions – the metaphors being used must therefore respect the non-rival nature of intellectual works, as well as maintain the original purpose and general spirit of advancing learning and science in society.

Few – if any – devices can match metaphors (and skeumorphs) in their ability to render the unknown intuitively accessible. They are crucial to human understanding and communication, and as such, no attempt to rid language – including legal language – of metaphors can be taken seriously. “The lesson for legal analysis” we are told “is not to shun metaphor, or to seek liberation from it, but rather to realize that this aspect of thought is part of how the law functions, and that we can use it as an opening for reform though we must also live within its constraints” (Bjerre 2005, 140).

IV. Understanding the issues: infringement (the criminological perspective – or the construction of fear)

There is no doubt that technologies have made it possible, or easier, to engage in a number of illegal activities. Perhaps the first recorded instance of “piracy” using technology was the unauthorized overseas transmission of Charles Dickens’ works to the United States via telegraph (Yar in Jewkes and Yar 2010, 3). This occurred daily and moved Dickens to take legal action.

Criminologists now distinguish between ‘computer assisted’ and ‘computer oriented/focused’ offences on the Internet (see Wall 2001, 2007). Computer assisted crimes are activities that were taking place before the advent of the Internet, but the latter gave them a new venue. They include participating in prohibited sexual representations, harassment, bullying, defamation, fraud, counterfeiting, theft, pyramid schemes, as well as intellectual property offences. Although these crimes may have acquired new manifestations, and automation has given them a much greater reach (Jewkes 2003; Yar 2005a, 2006; Wall 2007), they pre-date the online world and are in no way unique to the Internet. Computer oriented crimes attack the very infrastructure of the Internet by developing malicious software, overloading servers, or hacking (Yar 2005b).

As technologies infiltrate every nook and cranny of our modern societies, and our reliance on them keeps growing, it is only realistic to expect these behaviours to increase in frequency because new opportunities for offending keep emerging.

Some studies indicate that, in 2000, “MP3” was the most commonly searched word on search engines.³⁰ According to the Recording Industry Association of America, the piracy of music in the mid 1990s was costing the record industry \$5 billion a year, with \$1 million lost daily in the USA. A 2007 study by Stephen E. Siwek was indicating that the U.S. loses \$12.5 billion yearly and 71,060 jobs as a result of piracy of sound recordings (IPI 2007). As we have seen previously, such statistics abound in discussions arguing for stronger

³⁰ ... along with the word “sex” (Hinduja 2000).

copyright enforcement,³¹ and ought to be treated with suspicion, because not every illegal use necessarily amounts to lost sales, and there is much exaggeration in journalism (assuming the original research is valid) about the impacts of piracy on society that quickly slips into “spirals of amplification” (Goldacre 2009).

As explained earlier, there is much research recommending that readers “retain a healthy scepticism” with regards to reported figures and statistics of losses and infringement activities incurred by the industry, because “‘hard facts’ [‘used by interest groups in pursuit of their particular agenda’] about the scope or extent of such offences can be thin on the ground,” and because “media commentators, politicians, criminal justice and security professionals, and economic actors, have shown a demonstrable tendency to sometimes overplay the risks presented” (Jewkes and Yar 2010, 4).

For instance, a report by the Australian Institute of Criminology states that the music industry is unable to “explain how it arrives at its statistics for staggering losses through piracy” (Greene 2006). There are also studies that now suggest – as has been claimed for a long time – that the illicit downloading of MP3 music files in fact promotes music culture and markets. Not only do the illegal downloads increase the exposure of the work of musicians and artists to much larger portions of the population without having to spend on marketing or sign contracts, but the market for music in general has seen a growth for both older and newer music. Oberholzer-Gee and Strumpf refuted the claims of the music industry in a 2004 study about the impacts of downloads on the sales of physical CDs by stating that “downloads have an effect on sales which is statistically indistinguishable from zero” (Gibson 2005; Potier 2004; Schwartz 2004). Researchers consider the success of legal MP3 downloading sites, and the popularity the various MP3 players as further evidence of these findings. Moreover, Leading Question conducted a study in which it demonstrated that Internet users who share music files purchase up to four-and-a-half times more legal music than user who refrain from illegal music sharing (Gibson 2005; Leading Question 2005).

These and similar studies were in reaction to the recording industry's much publicized private legal actions, which are usually framed in a crime discourse in an effort to subdue the illegal downloading activities. The amount of legal actions launched by the Recording Industry Association of America and the British Phonographic Industry was proportional to the popularity gained by the MP3 technology. While more than 16,000 cases were brought mostly against individuals, few actually made it to court, as the majority were settled privately (Vance 2005). And running in parallel to these publicized lawsuits were publicity campaigns seeking to garner the sympathies of the public as well as warn them about the damages suffered by the industry as well as society as a whole by equating illegal downloading with support to organized crime. The combination of

³¹ See statistics from the Recording Industry Association of Americana, International Intellectual Property Alliance, the IP Crime Group, etc.

these elements has had the dual effect of giving the impression that prosecution is inevitable, and that it is scary (Wall and Yar, *op. cit.* 261).

Moreover, there is a host of complications that arise from the very responses that are supposed to counter them. For instance, the constant presence of pornography and sexual predation in the news can cause social panics online; for safety and other reasons Internet Service Providers (ISPs) are increasingly required to gather and disclose email and traffic data; and in order to protect intellectual works, copyright holders have been pushing digital theft up on the list of the most dangerous and problematic criminal activities, and successfully legislating criminal sanctions.

Any scholarship in the sphere of Internet crime must situate its research in the wider social, economic, and political context of the phenomenon. Attempts to solve problems must take into account more than the gains – monetary or otherwise – to be made from possible solutions, but also their offsetting costs, often in the form of losses in rights, freedoms and privacy. Finally, no research can ignore the underlying power relations, symbols, and cultural narratives that shape all human discourse.

As society gives increasingly greater importance to information as capital, we can expect to see a rise in information theft, both in type and quantity. What will most likely happen as a consequence of this shift is that rights relating to the protection of information will be strengthened and “informational” crimes will move higher up the list of dangerous activities (see Yar in Jewkes and Yar, 2010, 104). Accessing, using and manipulating information, however, is one of the most distinguishing features of the technologically advanced knowledge societies. If social trends indicate that such practices will be beneficial because of their power to generate more knowledge (see Part III), then policy-makers must be careful in striking a balance between the protection of private, personal and confidential information, and the enabling of accessing, manipulating (and translating...) public information where it is in the public’s interest.

IV.1 Public opinion and policy

Given the scope of changes taking place in societies as they move towards knowledge and digital networks, it is clear that law alone cannot meet all the requirements of balancing all the stakes and stabilizing the forces at play when considering intellectual property; a large part of that role will have to be played by a more flexible set of guiding principles, or policies, until the new landscapes fully emerge.

Policy-making is not a straightforward task. A number of divergent social actors come into play before policy is born. First, there are the policy-makers and the government, trying to put in place principles that will result in stability and the protection of the welfare of society in all its complexities. Second, we find the public opinion,

which reflects society's priorities and preferences, if properly captured. Third, there are lobbies and interest groups who can have such power as to directly or indirectly shape public opinion, the process of policy-making, as well as the actual resulting policies.

Analysts have put in place a number of different scenarios in trying to identify the workings of policy-making. Some have postulated that policy-makers have a high degree of responsiveness to public opinion, be it out of commitment to democratic values, or motivated by the self-interest to remain in power by meeting voter demands (Erikson 1976). One must account for the importance given to any matter of public policy by the public, as well as its relevance and impact on other government positions for instance.

A second theory sees public opinion as the result of policy-making, which shapes and molds it through various means. For example, political leadership can aggressively educate citizens on certain issues and convincingly inform them of the proper and acceptable solutions. Of course, these problems and solutions can be very real (Key 1961), or fabricated and misrepresented (Miliband 1980).

A third position gives much more weight to the power of lobbies and special interest groups, who possess the different kinds of resources required to shape policy to meet their own interests, regardless of the wider public's preferences or even awareness (Olson 1974, Lowery and Brasher 2003).

However, these different models for the relationship between the different forces in the policy-making equation are not necessarily mutually exclusive. Public opinion, policy-makers and lobbying groups all influence each other to various degrees, depending on the specific circumstances of the policy in question (see Page and Shapiro 1983: 175).

For example, if we look at the reactions of the public to threats to child safety and the spread of child pornography, the preliminary impression we get is that there are clear instances where widely shared and strong feelings come together almost spontaneously to form "grass-roots" pressures to reform policies and laws. But a closer inspection of such cases would also require an analysis of the manner in which some stories are reported by mass-medias and their effects on public opinion, which prompts us to at least consider the possibility that public opinion is not formed as spontaneously as one might think; that there might be a vicious circle in place.

When it is the reporting of the media of specific incidents that results in shaping the public opinion in demanding action from policy-makers, we are in the presence of what Stanley Cohen presented as the classic cases of moral panics (Cohen 1972). This model is therefore quite relevant to our topic; it is easy to see how IP becomes the symbol for social order and values, and that anyone who destabilizes this order is threatening the

entire edifice of cultural values, which is done from various angles, such as the language being used (with metaphors, word choice and hyperboles) or the sympathy towards victims of crimes like piracy. In fact, William Patry, a copyright law specialist, wrote a book entitled *Moral Panics and the Copyright Wars* (2009).

That said, some have argued (Yar 2005) that what has happened in the case of IP does not fit the classic model of moral panics, because it runs against general public opinion and preferences, so it is much more difficult to garner sympathies for the cause of strengthening the IPR, instead of loosening it. Going back to the dynamic trichotomy of public opinion, policy-makers and lobbies, this would instead be a case where the work of the latter is much more evident in driving policy. According to this view, the incessant criminalization of copyright violations are “in significant part the outcome of aggressive lobbying from copyright holders who have pursued a concerted campaign to persuade legislators and law enforcers that such offences need to be prioritized.” Lobbies and interest groups invest heavily in industry-funded research that always suggests “massive financial losses accruing from ‘piracy’ activity, and attempts to link copyright offences to ‘terrorism’ and ‘organized’ crime.” And yet, despite these efforts, “few members of the broader public appear to attach any great weight of concern to such offending, and indeed many Internet users are actively opposed to legal restrictions on what they see as a legitimate form of ‘culture sharing’” (Yar in Jewkes and Yar 2010, 106; also see Yar 2006b and Yar 2008).

IV.2 The lobbying of the powerful

One of the ways in which interest groups, and even policy-makers, push public opinion and increase their sympathies for the cause of IPR is by moving the victimization away from the big corporations, for whom the great masses may not feel much sympathy, to the individual artists as well as each and every individual. As our societies provide more opportunities for creation and sharing through social platforms, the push will be to protect all of that content – something that does not seem to have happened yet, in the sense of enforceability, based on the research available. So, maybe it is here where the argument will shift towards convincing the masses that it is their own content and creations that will be at risk of being stolen or pirated, with the aim of acquiring their support for increased copyright protection. Of course, this will be countered by the developers of the platforms – themselves very powerful now – enabling sharing, as their entire business model rests on the assumption that people will share freely, providing all the content required for continued interest.

To better understand why such tactics work in technologically advanced societies, we must understand the role of the effects of victimization, or fear of crime, on society in general. This is a reference to one’s perceptions about levels of crime and their estimated personal vulnerability to them – as shaped by personal experience and social and cultural inputs, such as media coverage. Some studies (e.g. Shaftoe 2004) have established that Western societies demonstrate high levels of fear in the face of crime and victimization in general. There are

also other variables that seem to play a clear role such as gender, age, and ethnicity (Parker et al. 1993; Smith and Torstensson 1997; Tulloch 2000). That said, one of the most noteworthy findings of all such studies is that fear of crime “often exceeds any objective measure of likely victimization. In other words, public perceptions of risk are largely out of proportion to the actual chances of being a victim of any given form of criminal predation” (Yar in Jewkes and Yar 2010, 107).

This gap between the fear of crime and the objective risks of crime have been explained in criminological literature by two approaches. The first is an attempt to link fear of crime to the broader social and cultural atmosphere in which we now live, which is experienced subjectively as a threatening and unstable world (Loader and Sparks 2002; Bauman 2005), a ‘risk society’, in which we have lost tradition and communal identity, resulting in a lack of ‘ontological security’ (Giddens 1991a, 1991b; Beck 1992). This is further exacerbated by society’s longstanding reticence towards significant technological change (Yar 2006a: 25-7), constantly pushing us to anticipate some catastrophe as technology’s unpredictable harms creep up on us. Some have gone one step further (Furedi 1997), arguing that the resulting psychological framework of the inhabitants of a ‘culture of fear’ is one of crippling vulnerability, because too few in society still carry the optimism and confidence to think that they can be factors of change. It is not difficult to see how the combination of these elements in a society can exaggerate the fear of crime to disproportionate measures in the minds of its citizens.

The other attempt to explain the disagreement between levels of anxiety and actual probability of crime occurrences, simply emphasizes the effects of the moral panics theory, especially in societies where crime is sensationalized by the media, which then intensifies the feelings of fear, concern and despair.

It seems clear, however, that these attempts are explaining the disjunction at two different levels, and that they complement each other by describing not only the triggering causes of the problem, but also its deeper consequences on society, both as a collective entity and as a group of separate individuals. What is more important to note is that these exaggerated perceptions of crime result in a change in the everyday patterns of behaviour, such as avoidance behaviour (Stanko 2000; Roman and Chalfin 2007; Furedi 2001), and preventive measures (Shearing and Stenning 1981; Johnston 1992; Wood and Shearing 2006). “It has long been argued by those studying fear of crime that anxieties and expectations about victimisation (whether ‘objectively’ warranted or not) shape social behaviour in significant ways” (Yar in Jewkes and Yar 2010, 107).

That said, the intensity and extensiveness with which the public will express its concerns about online crimes will differ greatly. If the risk concerns crimes such as identity theft or paedophilia, the levels of fear will understandably be quite high. But on the other end of the spectrum, we will not only find “crimes” to which public opinion is indifferent, but of which they are accepting and approving. For example, many studies have

revealed that a significant portion of the population considers computer hacking in a rather positive light (Dowland et al. 1999: 720; Voiskounsky et al. 2000: 69-76), perhaps because it is seen as a form of resistance to power (Yar 2006a: 26-7) and emancipation from the economic inability to enjoy culture, or in short a form of democratization and cultural participation. As some have put it, the hacker-type is viewed as “a schizophrenic blend of dangerous criminal and geeky Robin Hood” (Hawn 1996 in Taylor 1999: xii).

Piracy or IP theft happens to be this type of crime, where public attitude consistently rejects viewing it as constituting a risk to them resulting in moral panics. Most Internet users consider the illegal downloading of online content (movies, music, software, etc.) as convenient and see no moral problem in saving money this way (Bryce and Rutter 2005). In 2004, a survey in the US revealed that only 26% of professional workers opposed piracy ‘in principle’ (IPSOS 2004). Another poll in the US found that ‘more than half of all 8-18 year-olds have downloaded music, a third have downloaded games and nearly a quarter have downloaded software illegally from the Internet’ (Snyder 2004, 1). As for the UK, a poll indicated that 44 % of 18-29 years old owned pirated IP, and stated that “there is little stigma to owning counterfeit goods” (Thomson 2004). For the same year, here in Canada, 47% of 12-21 year-olds had intentions to illegally download music, video or software from the Internet “over the next six months”, and 70% of that age group “deemed [illegal downloading] acceptable” (Jedwab 2004: 1). Numerous studies have also shown that the illegal downloading and installing of copyrighted software (commonly called ‘softlifting’) is widely practised around the world, and that the “legal and moral objections” are of little importance among college students (Kini et al. 2003: 63-4).

Fast-forwarding to 2012 gives us a similar picture of the general attitudes of the public. For instance, a research note from The American Assembly found that 46% of people had engaged in piracy, with this figure rising to 70% among those 19-27 years old. Of those surveyed, 75% would share music and 70% would share film with other family members; those figures decrease to 56% and 54% respectively for sharing with friends. And when it comes to penalties, it is still very clear that the public is much more lenient and forgiving than the legal system wants to be. Consider the following findings.

Only 25% of people support penalties for downloading copyrighted music and movies and they limit this support to warning and fines, not means like disconnection from the Internet – which is only supported by 16% of Americans, and for a maximum of 1 month. As for fines, among the 25% who support them, 75% support amounts under \$100 per song or movie infringed. As the report itself states this is “hugely undershooting the current statutory penalties” (1). Any settlement or due process in matters of IP infringement requires a court (as opposed to adjudication by private companies) according to 54% of responders. And finally, there is no doubt that people expect their personal rights and freedoms, such as privacy, to be respected to a high degree. Sixty-nine percent of people are opposed to monitoring of their Internet activities for enforcement

purposes, and 57% oppose blocking or filtering by commercial intermediaries if it means that some other legal content will also be blocked or filtered. Finally, it is interesting to note that while 56% oppose any government involvement in blocking access to infringing activities, this figure rises to 64% when the term “censor” is used instead of “block” (American Assembly, 2011).

However, it is noteworthy that while a lot of illegal activity is still going on, and while there is little stigma attached to infringing activities, one of the conclusions of the study was that “all other things being equal, people prefer to obey the law.” But it seems that “so far the data suggests that streaming music services are getting this right, but users are still unwilling to accept the current range of video streaming offerings at the current price and convenience points” (Thomson, 2012).

All of these cited studies indicate that public views around Internet crimes are quite ambivalent, and that the case of IP infringement is still only viewed as a very minor crime, if at all. Nevertheless, public opinions and perceptions about risks of Internet crimes will impact people’s behaviour. The threat of financial losses due to copyright infringement through piracy has triggered the creation of digital rights management tools (or digital locks), to prevent (and recently, even criminalize) any attempts of infringement, as understood by the manufacturer – seen in the Digital Millennium Copyright Act and elsewhere.

What is clear is that the relationship between lobbying, policy formation, and public opinion is dynamic and reciprocal, where each of these important elements can play a dominant or passive and reactive role. The intensity of public opinion about the problem, its perception that it is an actual problem, the extent to which it is shaped by powerful interest groups, and the presence and influence of legislators and policy-makers will all compete for their respective interests. In these times of social change, policy-makers trying to reform legislation and policy must be more attentive to the cues of society, and more weary of powerful lobbies, who usually represent the interests of the very few at the expense of the society at large. As for the public, it must fight to make its expectations heard and its realities understood, because the citizens are the ones who will have to live with these codes for a long time, especially given the time it has taken to see any significant reforms to IP laws when the intentions to reform have been announced as governmental commitments.

IV.3 Drivers for infringement

One of the strategies used by rights holders has been to force those caught downloading materials illegally to settle out of court, or take out civil lawsuits against them. In 2003, the Recording Industry Association of America zoned in on university campuses which were active with peer-to-peer file sharing (Webb 2007). If the individual refuses to settle at a discounted rate out of court, they are sued. The 2007 case of Jamie Thomas comes to mind. A single mother in the UK who had \$220,000 awarded against her for illegally downloading 24

songs, challenged the record companies of the U.S., and, at her retrial in 2009, the jury awarded \$1.92 million in statutory damages against her. When the court reduced that amount, a new trial to determine damages resulted in the jury awarding \$1.5 million against her. In July 2011, that amount was once again reduced to \$54,500, and once again appealed. In 2012, the Eighth Circuit of Appeals reversed the District Court's reduction, and reinstated the \$222,000 of damages against Thomas (www.artsbeat.blogs.nytimes.com).

Are such interventions actually effective in deterring the general population from proceeding with their infringing activities, or are there more effective methods and approaches? To answer such questions, we must first try to understand the motivation to infringe and the nature of the infringing activity.

What drives people to infringe on the intellectual rights of others? Do those who infringe have specific personal dispositions or inclinations that arise from choice and free will? Or are their actions more the result of their cultural, economic, and societal contexts (Christie 2004) which will also define their notions of crime in general, and copyright infringement in particular?

According to psychological and biological theories, all of our actions are direct consequences of biochemical reactions, personality disorders, and genetic heredity (K. Williams 2004). In other words, such theories will not provide much explanation beyond the "mechanics" of the activity, and will be of little or no help in trying to predict or understand criminal behaviour in its specificity – as something different from any other behaviour. Copyright infringement is generally present in all social groups when there is access to the required technology, so it is difficult to try to explain piracy on the basis of any personality traits found in the acting individuals.

From a more sociological perspective, it has been argued that the likelihood of engaging in activities that break the law increases proportionally with the difficulty of getting the desired object through the legitimate channels. Again, this would be useful as a theoretical explanation if it were possible to identify a social group that would react to its feelings of guilt, anger, embarrassment, or frustration by engaging in infringing activities. But this does not seem to be the case. In fact, those who proceed with infringement have usually been reported as saying that "everyone does it" and believe that there is little chance for them in ever getting caught (Furnell 2002). So, contrarily to such theories that would explain infringing behaviour on the basis of some sort of rebellion – which would make them stand out – those who engage in infringing activities actually do so with the assumption that they are blending in and doing like everyone else.

Social learning theories (Bandura 1977) try to understand human behaviour by looking at the two-way relationship between an individual and their cognitive context. Depending on whether an individual's experience leads to social punishment or social reward from their context, their behaviour will be shaped to

maximize rewards and minimize punishment – which can also provide an explanation of infringement from a game theory perspective. If we apply this theory to piracy, we would say that people engage in infringing activities because this behaviour is rewarded or reinforced by their peers or communities. However, this theory falls short when piracy is done in what the users think is a private setting (when we know that in reality, service providers will for instance sell to or share the IP addresses of their infringing customers with the rights owners).

We can also take a different starting point³² and ask who in society, has the authority to decide what constitutes a crime, in the sense of a public harm – beyond, or underlying the letter of the law – and how that specific behaviour has come to be known as such. A Marxism-inspired criminologist (e.g. Taylor *et. al.* 1973) might therefore answer these questions by saying that criminal phenomena are the natural response to the oppression of capitalist states, and the labelling of the activities as crimes is the states' control and defence mechanisms.

This approach, like the ones before it, has some clear limitations and if we were truly trying to build a criminological theory, then we would say that it would have to account for all of the elements we have mentioned until now. But for our purposes here, we find that this last approach is more useful, because we are precisely concerned with understanding how and why certain types of activities (namely, infringement) have been labelled crimes. In order to do this properly, we would have to look at those activities throughout social, political and legal history, identify the milestones, and analyze them by trying to see how the activity evolved into a “crime”. This is what we have tried to do throughout the thesis, until now and in what remains, according to thematic lines of enquiry.

There is also no necessity in emphasizing further that according to this approach, crimes are considered social constructs, and that they require an understanding of the deeper power relations involved in the system being studied. And since power relations are in constant realignment to each other, so will our notions of crime be in constant change to readjust to those determining factors.

As we will discuss further in the chapter on Chapter 8, as society transforms and evolves to adapt to the new informational order of the world, we are witnessing an exponential growth in the registration of intellectual property (trademarks, patents, etc.) combined with an aggression in the application of IP laws. The race to grab all that can be protected in any way before anyone else does has become so rampant that it would probably be difficult to have a normal conversation without having to pay royalties to someone – as illustrated by the attempt of Russian entrepreneur Oleg Teterin to trademark the emoticon ;-) (BBC 2008). As these new commodities

³² This approach has been called *critical criminology* (see Gelshorpe in Bently 2010).

appear, it is only natural to witness the corollary appearance of behaviours that will attempt to profit from them in one way or another (Wall and Yar, in Jewkes and Yar 2010, 257).

Society finds itself in a transitional period, one in which the definition of notions like originality and ownership are no longer fully applicable, and in which the boundaries between criminal and acceptable behaviour are constantly changing. For example, Section 1 of the UK's *Theft Act* 1968 required proving an offender's intention to permanently deprive another person of their digital information property in order to prosecute – a condition that would be useless given the non-rival nature of intellectual goods, which are simulacra in the words of Baudrillard (1994). The regulation of intellectual property, then, is fundamentally different from regulating the use of physical property; it becomes a matter of policing its usage, the management of which creates a number of different issues because digital copies are simply identical, and they virtually never suffer degradation as a result of time or usage.

As the digital and intellectual content – the digital real estate – becomes more sophisticated, it becomes more valuable to those who own it, as well as more appealing to those who want to own it. The latter will therefore find ways to hijack the value of that content either by finding a way to access it, or simply counterfeit it.

Along with their ability to gain considerable profit from protecting their intellectual property, owners of digital content will therefore always be at risk of losing the revenue generating exclusive control over that content. Due to these complications, there is a very strong push from content owners to put in place additional and more rigorous policing mechanisms, laws and regulations, even if it means damaging other freedoms, rights and privileges, such as privacy and freedom of expression (e.g. Boyle 1996, Madow 1993).

That said, they also face dilemmas resulting from the inherent contradictions of the transitional period society is witnessing. On the one hand, the business model they have always known consists in restricting the access and circulation of their property to guarantee profits. But on the other hand, as we shall see in detail in Part III, the present users of technology expect to contribute and interact with content, which requires its release – partially or in full – into the public domain (Tapscott and Williams 2007). However, for content owners to give in too much to the realities of “wkinomics” threatens them not only with the loss of income streams, but also with the dilution of the value of their property. There is therefore a balancing act required on their part (Wall 2004, 35) but which can only be properly calibrated by equally considering the interests of society, in addition to their own.

IV.4 Conclusion

Criminological research on infringement activities confirms a number of issues that were raised by other fields as well.

Of special interest are the doubts of criminologists with regards to the objectivity and validity of the data cited in studies about the losses incurred by content owners (c.f. Peitz and Waelbroeck (2004); IFPI 2009), as well as the balancing required to render any remedying measures socially effective (e.g. Wall 2009). That is why some have proposed to have some professional and trustworthy evaluation of the effects and consequences of IPRs on society in general, before proposing penalties and remedies. “Uniquely, for this most vital of monopolies, we have no regulator, no equivalent of Ofcom³³ or Ofwat³⁴, no codes of practice, and no appeal tribunals, although the risks from the monopolization of knowledge, ideas, education, and the means by which they are made available, are matters of at least as much importance as telephone charges and water bills” (St Clair in Deazley *op. Cit.* 395).

In addition, criminologists have also confirmed the power of the linguistic context in shaping opinions about public issues – to the point where they find definitions of crime problematic and clearly socially constructed (Christie 2004, Gelsthorpe in Bently 2010). While a number of surveys and reports indicate that there is still little stigma attached with infringing activities (IPSOS *op. Cit.*), some scholars (Yar 2006a *op. Cit.*) have explained that this is changing as a result of the heavily loaded discourse used around infringement, as evidenced by a number of cases in which juries have awarded considerable sums to content owners against infringing individuals. Infringing activities are described as “high risk” and “serious crimes,” supporting directly or indirectly “organized crime” and equated with “fraud.” These and other related terms have added a moral layer to the discourse on copyright infringement in an attempt to win the emotional and psychosocial case against the activity before it even reaches the legal or philosophical discussion. This process of sociocultural criminalization of an activity by “moral entrepreneurs” (Cohen *op. Cit.*) may be interpreted as an attempt to counter society's acceptance of it (c.f. Reed 2012, 121-128; Feldman and Nadler 2006, 577-618; Karagnis & Renkema 2013; Svensson & Larsson 2012, 1147-163) by creating a normative consensus about its harmful nature.

Finally, as content owners intensify and diversify their tactics to protect their monopoly – for instance by launching campaigns targeting school children, such as copyright kids (www.copyrightkids.org) – there is evidence that cultural resistance to these tactics is also on the rise (Escolar 2003), as we shall see when discussing movement such as A2K (Access to Knowledge) in Chapter 8.

³³ The Office of Communications of the U.K.

³⁴ The Office of the Water Services regulation authority of the U.K.

Chapter 4: Institutions mentioned

IV. Understanding the terms: institutions

By institutions we mean the organizations of social order and cooperation governing the behaviour of societies and individuals, as well as the administration of laws and regulations pertaining to IPRs (Adapted from the definition of “social institution” found in *The Stanford Encyclopedia of Philosophy*, Miller 2012).

In Canada, the Canadian *Copyright Act* empowers the Copyright Board of Canada, an economic regulatory body, to administer certain royalties, supervise agreements between users and licensing bodies, and issue licenses when the copyright owner cannot be located. A number of other government bodies are also involved in the administration of copyright and related-issues, including the Copyright Policy Branch in the Department of Canadian Heritage, and the Intellectual Property Policy Directorate of Industry Canada. These organizations work with various interest groups and stakeholders, and occasionally hold consultations, in order to keep the policies up to date.

To honour its international agreements, Canada has integrated the provisions of international agreements and treaties it has signed into its *Copyright Act*. These include the *Berne* and *Rome Conventions*, both mention in the article 91a and b.

V. Understanding the foundations: institutions (national and international)

Canadian legislation refers to its international legal obligations by mentioning a number of institutions. In this section, we will look at their history and development.

We will see how the European situation first created the Canadian obligation towards copyright law. We will then look at the influence that the U.S. and the international scene have had in forcing Canada to adopt the positions that came to be embodied in the current *Copyright Act*. We will finally examine the WIPO and WTO, as well as explain the recent political developments in copyright and IP, and their effects on Canada and the rest of the world.

At the level of the nations of the world, it is clear that the tensions resulting from an increasingly complex and globalized IP system are not limited to a specific geopolitical sphere. As we shall see, the United States (U.S.) and the World Trade Organization (WTO) – the superpowers in this regard – have been using the other nations'

dependence and reliance on them to twist arms, regardless of the specific needs of regions and states. Though perhaps to a lesser degree, the same can be said of the European Union.

II.1 Europe

II.1.A The United Kingdom

As seen, modern English and American copyright laws are usually considered derivatives of Britain's 1710 *Statute of Anne*, whose full title is *An Act for the Encouragement of Learning, by Securing the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times Therein Mentioned*. We need to understand how the *Statute of Anne* represented a departure from that to which the printing industry was accustomed to during the hundred and fifty years preceding it.

When the printing press made its way to England in the sixteenth century, the monarchy feared the appearance of seditious works. In order to control the risks associated with this new technology, it allowed a group of London printers and booksellers – the Stationer's Company – a publishing monopoly with perpetual rights, and the large profits associated with it, in return for playing the gatekeeper function and censoring all works going through them. The Stationers therefore proceeded to register all books and pamphlets to track their monitoring activities. Recording property ownership of literary works was still not customary, and would not have served much purpose then, as authors made their income mainly from wealthy patrons, as opposed to selling copies, since a book could only be sold once, to the publisher, who would determine all terms related to its printing from then on (Patterson 1968).

By the mid-seventeenth century, during and following the Civil War, the registers were disorganized or lost, and in 1692, Parliament let the Act lapse, while simultaneously expressing a sudden willingness to encourage freedom of speech. “The licenser’s judgment was [...] to be displaced by the more methodical constraints of the laws of libel, seditious libel, and treason” (Loewenstein 2002, 214).

This seems to have paved the way for a personality rationale to emerge alongside the Lockean labour argument, the most popular at the time. Though the model was still very much only concerned with economic rights, the author was now entitled to a reward for his unique creativity (Saunders, 148). Defoe declared that

[i]f an Author has not a right of a Book, after he has made it, and the benefit be not his own, and the Law will not protect him in that Benefit, ‘twould be very hard the Law should pretend to punish him for it.

(in Murray and Trosow, *op. Cit.* 22)

The situation was quickly changing and required economic and legal adjustments. Alarmed by the larger number of printers which began to appear to meet the growing demand, the Stationers wrote to the House of Commons to warn them, in the

rhetoric of pathetic domesticity, that if Parliament failed to confirm literary property, thousands of mechanics and shopkeepers would be deprived of their livelihood, and “Widows and Children who at present subsist wholly by the Maintenance of this Property’ would be reduced to extreme poverty”.

(Rose 1993, 43)

Without reinstating the monopoly previously granted to the Stationers, the *Statute of Anne* was put in place to regulate the book trade. However, the term of protection was now fourteen years, renewable for another fourteen years if the author was still alive; and authors (and their assignees) could now own those rights themselves (Murray and Trosow *op. Cit.* 21 - 23).

[...] for the encouragement of learned men to compose and write useful books; may it please your Majesty, that it may be enacted [...] That from and after [April 10, 1710], the author of any book or books already printed, who hath not transferred to any other the copy or copied of such book or books... shall have the sole right and liberty of printing such book and books for the term of one and twenty years, to commence from [...] [April 10, 1710], and no longer; and That the author of any book or books already composed, and his assignee, or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years [...] Provided always, That after the expiration of the said term of fourteen years, the sole right or printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years.

(*Statute of Anne*)

As can be seen from this formulation, the essentials of present-day copyright law are present in the *Statute of Anne*. While protection terms have been extended and coverage was applied to media other than books, the intent remains to grant a monopoly to the author so they may exploit their work and prevent others from doing so, for a limited duration.

The Stationers quickly accepted the idea that the rights belonged to the author for a number of reasons: it was an easier and more convincing argument to invoke authors’ rights instead of those of booksellers or publishers; and court judgements clearly stated that if publishers had any rights, they were derived from those of the authors, who must therefore have them. However, publishers had more difficulty accepting the limited term of protection, and even argued that authors’ rights were perpetual under common law – but this argument was rejected explicitly in *Donaldson v. Becket* when it stated that the *Statute of Anne* cancelled any existing common-law copyright (Saunders *op. Cit.* 148) and confirming by the same token that copyright law is the result of legal positivism.

II.1.B France

It is common knowledge that Canadian copyright law stems from both French and British traditions, which is the natural result of having been a group of colonies from both nations. Canadian copyright law contains elements of the French *droit d'auteur* (natural law arguments) as well as the British *copyright* (utilitarian and positivist argument). But much can be (and has been) said about this attribution of traditions based on geography. As we have already mentioned, today, both traditions are converging towards each other and borrowing from each other (Strowell 1993, Basalamah 2009). But what about historically?

During the Eighteenth century, France was the stage of lively debates about the philosophy and application of copyright law. For instance, while Denis Diderot maintained that the notion of property fit the products of the minds even more than land itself, the Marquis de Condorcet argued that literary property was socially constructed. And though Condorcet's argument was the one that was officially accepted, the French Revolution swiftly revoked all previous legislation related to the book trade. Ironically, Condorcet was participating in the drafting of a law that recognized literary works as property, but with a protection of only 10 years after the life of the author.

Between 1793 and 1957, that act governed copyright based on the idea of a limited property right – similarly to the U.K. It may be surprising to many of us to learn that, during that time, the general thinking of French legislators was that copyright was not derived from natural law; only in the first half of the twentieth century did this shift in thinking occur, as it is clear from the first article of the French 1957 act:

The author of a work of the mind shall enjoy in that work, by the mere fact of its creation an exclusive incorporeal property right which shall be enforceable against all persons. The legislator does not intervene to attribute to the writer, the artist, the composer, an arbitrary monopoly, under the influence of considerations of expediency, in order to stimulate the activity of men of letters and artists in the interest of the collectivity; the author's rights exist independently of his intervention.

(Davies 2002, 153 - also in Murray & Trosow, *op. cit.* 27)

This is further evidenced by other scholarship indicating that the *droit moral* system was not the result of a coherent philosophical position, but the result of an accumulation of piecemeal, case-by-case judgements favouring the personality argument (Edelman 1989 in Saunders, *op. cit.* 103. see Germany below).

In short, though it is a valid claim that the present-day French copyright law is mainly author-centric, it can certainly be argued that the entire French philosophy of copyright law cannot be reduced to the argument from natural law, and that traces of the initial arguments of Condorcet can still be found in it (Murray and Trosow, *op. Cit.* 24 – 27). That is why it is not entirely accurate to consider the recognition of moral rights in Canadian law as deriving directly and solely from French law, or to view copyright and *droit d'auteur* as completely distinct traditions (Tawfik 2003).

II.1.C Germany

Although Canadian copyright law was not directly affected by the German developments of authorship theory and law, the latter had direct consequences in Europe, especially on the French situation.

As mentioned above, and perhaps contrary to popular belief, a detailed survey of the French law concerning the rights of authors reveals that they did not emerge fully formed as a result of a strong philosophical position or grand legislative reforms rendering authorial personality all at once recognized. The reality of the matter is that it is more the result of “a patchwork of case law” with a strong German theoretical influence. “On a variety of grounds and without any uniform rationale or general theory, case by case the French courts began to develop a jurisprudence on interests and rights relating to authorial personality not property” (Saunders, *Id.*).

Until 1870, Germany was the unity of a group of territorial states, characterized mainly by a common language and literary culture. When these territories were unified as belonging to a nation, counterfeiting literary works became quite profitable, especially when there was no national monitoring of the book market. This was not because the theoretical foundations of the legal system were missing, on the contrary. The problem was that the technical production capacities of the counterfeiters were too advanced for the regulatory abilities of the states. As the printing of books had once been considered a German affair, so was the counterfeiting of books. Books, legally bought or otherwise, circulated in all of Germany, but the laws regulating that circulation were, practically, local (Saunders, *op. cit.* 106).

This situation did not improve significantly until French jurisprudence and German legal theory and philosophy came together in what would be known as the *moral right* of authors. And this is what would provide, in the 1920s, the content for Article 6*bis* of the *Berne Convention*. This was a happy marriage, because, in the eloquent words of Scandinavian observer Stig Strömholm, while Germany's theoretical achievements were an “empty frame in search of a content” the body of French jurisprudence on the matter was a “content in search of a frame” (Strömholm 1966, 254, in Saunders *op. cit.* 120).

II.2 Canada

The Parliament of Canada was given exclusive jurisdiction to deal with the matter of “copyrights” under subsection 91(23) of the *Constitution Act of 1867*. The current *Copyright Act*, based on the *United Kingdom Copyright Act, 1911*, came into force on January 1st, 1924. Before the 1924 *Act* came into force, the governing legislation consisted of various pre-Confederation provincial legislations – such as the *Provincial Statutes of Lower-Canada*

(1832) which were extended in 1841 to Upper Canada – post-Confederation federal statutes, British statutes (going back to 1710) and the *Berne Convention*.

Article 91 of the *The British North American Act of 1867* reads as follows:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say [...] 23. Copyright.

(BNA4)

Yet despite this explicit mention of copyright as falling under the jurisdiction of Canada, it was the *Imperial Copyright Act* of 1842 that remained in effect until 1911, and Canada did not have its own law on copyright until 1924. The reason behind this situation is very important to the remainder of this chapter and thesis, as it is relevant not only to Canada's present interests, but also representative to varying degrees of the situation of many other nations of the world today.

In sum, Canada was unable to make decisions based on its interests because there were greater powers that also had interests in the Canadian situation; while the U.K. openly maintained its legal hold over Canada, the sheer size of the neighbouring U.S. market on the small Canadian colonies was simply too influential. Today, the legal grip of the U.K. has been replaced by that of the World Intellectual Property Organization (WIPO) and the even-more powerful WTO. As a nation, the U.S. has become the only true super-power, and perhaps no other nation understands the implications as Canada, its direct neighbour (Murray & Trosow, *op. cit.* 27-28).

In the 1800s, Canadians were mainly reading American counterfeits of British books, if for no other reason than the significant difference in price. As we shall discuss in more detail later, it is important to note that while British authors were outraged by the lost income resulting from the U.S.'s reprints, the latter were considered perfectly legal in the U.S. In addition, there was also a British concern that this specific exposure to and contact with the U.S. would undermine the loyalty of Canadians towards their Queen (Parker 1985, 109; Nadel 2006).

All of this led the UK Parliament to pass the *(Imperial) Copyright Act of 1842*, which applied to “all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all Parts of the East and West India, and all the Colonies, Settlements, and Possessions of the Crown which now are of thereafter may be acquired” (in Elgar 110-111 in Gendreau 2008). The Act was granting copyright protection for any book published in the British Empire everywhere in the Empire. But perhaps more importantly, it was prohibiting

the importation and sale of any books that were not printed in the Empire, and putting a 35 per cent duty on U.S.-originated publications.

This was causing a complicated problem. On one side of the Ocean, Canadian merchants and residents wanted the much cheaper U.S. books, which did not require importing much more expensive books from Britain; on the other side, British publishers were refusing to allow Canadians to print the books. Britain's position was obviously not sitting well with the residents of Canada: "Incalculable are the benefits that Canada derives from cheap [U.S.] reprints of all the European standard works, which in good paper and in handsome bindings, can be bought at a quarter the price of the English edition" (Susanne Moodie in Parker, *op. cit.* 130). Seeing that their best interest was not the main concern of Britain, the Canadian Parliament commissioned a committee to analyze the repercussions of copyright on Canada's book trade in 1843. The unsurprising conclusions of the committee were that the cultural and economic development of Canada depended on the circulation of British works in Canada at an affordable price, and that this did not constitute a lost revenue for the British authors, because Canadians could not afford the prices that the British were imposing in any case. Moreover, it argued that not having access to the British works would simply mean that the future generations would lose their loyalty to the Queen:

2nd. That the first admission into this Province of American Reprints of English Works of Art and Literature, could not lessen the profits of English Authors and Publishers; because although the reading population of the province is great in number, yet the circumstances of the population generally are so limited in their means, that they are unable to enjoy English Literature at English prices; that owing to that inability to pay for such Work of Art and Literature there has never been a demand for those Works, and consequently no supply.

3rd. That the exclusion of American Reprints of English Literature, if possible, would have a most pernicious tendency on the minds of the rising generation, in morals, politics, and religion; that American Reprints of English Works are openly sold, and are on the tables or in the houses of persons of all classes in the Province; that a law so repugnant to public opinion cannot and will not be enforced; that were that exclusion possible, the Colonists would be confined to American literary, religious, and political Works, the effect of which could not be expected to strengthen their attachment to British Institutions, but, on the contrary, is well calculated to warp the minds of the rising generation to a decided preference for the Institutions of the neighbouring States, and a hatred deep rooted and lasting of all we have been taught to venerate, whether British, Constitutional, or Monarchical, or cling to, in our connection with the Parent State.

(in Murray and Trosow, *op. cit.* 29)

In 1847 the *Foreign Reprints Act* allowed the importation of books, this time for a duty of 12.5 per cent which was usually not collected. That same year, in a daring move, Canada passed *An Act to Extend the Provincial Copyright Act to Persons Resident in the United Kingdom* granting British works protection only if they had been published in (the "province of") Canada. This condition was only later noticed and denounced by the British government (Elgar 111-112 in Gendreau *op. cit.*).

It was becoming clear to the British publishers that Canada could simply not afford to buy their products at British prices, and in 1850 the Commission of National Education in Ireland granted their copyrights to the British North American booksellers in order to minimize the influence of the U.S. on Canada (Murray & Trosow, *op. cit.* 211).

In 1872, as a result of the pressures put by the printers as well as booksellers since the 1860s, the Canadian Parliament passed an act that allowed the reprinting of British books without permission for a standard royalty, putting them on par with the U.S. (Parker, *op. Cit.* 168 - 173).

But Canada was still required to secure an explicit approval from Britain to pass legislation, and this was not easy:

The English publishers would not yield an inch. They said they would not allow any colonial to publish one of their books. Their ignorance of Canada was profound. They treated Canada as if it was part and parcel with the United States. (John Lovell – Canadian printer having participated in the diplomatic mission to England)

(*Ibid.* 174)

The years that followed saw the developments that would lead to *Berne* in 1886, as well as a copyright agreement between the U.S. and the U.K. in 1891. Sarah Bannerman accurately describes the situation:

‘Canada consents to enter Copyright Convention.’ These six words, sent by Canada’s prime Minister in reply to the British government’s inquiries as to the willingness of the colonial government to enter the *Berne Convention*, masked domestic tension that surrounded the issue of copyright in Canada.

(2011, 79)

We will now look at these events with much more scrutiny, given their implications for Canada, then and now.

II.2.A Canada and *Berne*

At the time of the signing of *Berne*, Canada was “a mere” British colony. It was therefore not represented in any independent capacity at the meetings leading to *Berne*, and therefore, its only venue for voicing its concerns was to go through the U.K. which, of course, had a lot to gain from a treaty like *Berne*.

As it will become clear shortly, copyright will always benefit the nations exporting cultural goods at the expense of those importing them. And this has been very well known since the earliest negotiations related to the application of copyright law beyond national borders. When a nation has fewer copyrighted works and fewer internationally renowned authors, its interest lies in having as much unrestricted access to external content as possible. So while France and Great Britain stood a lot to gain from an international copyright regime, for

colonies where there was virtually no copyright industry, such as Canada, this kind of regime represented considerable impediments to economic and cultural growth (Parker 2004).

In other words, the benefits that came with having copyright for Canadian authors publishing in Canada were too little in the face of the genuine concerns of Canadians because they could still not compete with the U.S., which did not recognize international copyright. Not only could the American publishers reprint works without any permission or royalties, but the British, when they did sell rights, sold them to the U.S. printers (Murray and Trosow, *op. cit.* 30). Under Berne, Canadian publishers would have no such luxuries, and would therefore be completely crushed by an already dominating U.S. market.

Many internal communications with Canada's prime minister indicate that Canadians were very aware of the devastating consequences *Berne* was having on authors and the printing and publishing industry (Bannerman *op. cit.* 83). Despite increases in volume, the entire book industry was clearly struggling in Canada (Leroux 2004, 75–87).

By 1886, it had become customary for British colonies – Canada included – to send delegates when international treaties were discussed (Farr 1955, 234-235). However, Canada was not represented in the founding meetings of *Berne*. And on September 9, 1886, the British delegates signed the following declaration:

Plenipotentiaries of Her Britannica Majesty state that the accession of Great Britain to the Convention for the protection of literary and artistic works comprises the United Kingdom of Great Britain and Ireland, and all the Colonies and Foreign possessions of Her Britannica Majesty. At the same time, they reserve to the Government of Her Britannic Majesty the power of announcing at any time the separate denunciation of the Convention by one or several of the following Colonies or possessions in the manner provided for by Article XX of the Convention, namely: India, the Dominion of Canada, Newfoundland, the Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, and New Zealand.

(in Bannerman, *op. cit.* 81)

Despite some attempts by the Canadian government to give the impression that its adherence to *Berne* was going to further enable it to progress, the differences between Canada and the nations that triggered and led the meetings (U.K., France, Italy, Spain, Switzerland and Germany) were too stark to ignore. In comparison, they were all highly developed industrially and economically; they were copyright exporters, housing major publishers; they all had well established literary cultures. Not only did Canada have none of these elements, but the gap was going to grow exponentially wider with *Berne*.

Indeed the situation deteriorated so quickly that by 1889, Canada's joining of *Berne* was seen as an act of “profound [...] almost criminal negligence” (in Bannerman, *op. Cit.* 82) and voices of various interest group calling for an independent copyright system for Canada were growing louder.

For instance, the Canadian Justice Minister considered the treaty very damaging to Canada's printing and publishing industry and the possible benefits were simply far outweighed. He also held that such regulations were better suited for highly urbanized societies with dense populations like the ones in European countries (*Id.*).

Trying to save what was remaining of its book market, from this point on and for many years, Canada repeatedly (1889, 1890, 1891 and 1895) tried to pass a copyright act that would condition the protection of a work on its publication in Canada, but every time British rule intervened and re-imposed the conditions of *Berne* from which Canada was trying to break free. Allowing Canada to leave *Berne* simply meant inconsistency throughout the British Empire, and this was not going to be tolerated from a simple colony.

An International Union, wrote the British delegate Henry Bergne, has only just been accomplished, with great difficulty, and on principles which commend themselves to the civilized world. To this, Great Britain and all her Colonies are parties, with the express and unanimous consent of the latter. Is a British colony, like Canada, for the sake of their infinitesimal interest in the publishing business, or for the supposed benefit of Canadian readers, to be the first to withdraw, and so to raise a hand to destroy the Union, which comprises a population of four or five hundred millions?

(in Seville 2006, 118)

What if other countries followed Canada and withdrew as well? This would potentially result in the whole system of Imperial copyright breaking up, and this was certainly not going to be allowed. Britain therefore simply forced Canada back into *Berne*.

John Thompson, who would become Canada's Prime Minister in 1892, was incensed at London's dismissal of Canada's sovereignty over copyright. After much correspondence, he travelled to the U.K. to discuss, among other issues, copyright law. But before Canada could see the realization of a copyright law that did not harm its interests, Thompson suffered a fatal heart attack at Windsor Castle on December 12, 1894 (Bannerman *op. cit.* 85).

In 1899, Canada was allowed to pass a bill that would disallow the importation of books that had already been printed in Canada. But it was not until 1911, when the U.K. passed a new copyright act, that Canada was allowed to create its own copyright law, which would only become official in 1924.

Although some historians have disputed the view that it was Canada's participation in World War I that led to its independence and self-image as a participant in international affairs (Buckner 2006, 1; Brennan 2005, 261) the general narrative of historians and Canadian media is that it marked the birth of a nation (Nersessian 2007) and they consider it Canada's war of independence (Cook 2008), mirroring the effects of the American Civil War in the U.S. (Stacey 1981, 22).

It is well established that Canada had already attempted to conduct foreign relations with minimal involvement from the British, and even regulate some aspects of its affairs independently of Britain's prior to 1914, as we saw with copyright. So it is safe to claim that even if Canada's participation in WWI did not clearly establish its independence and sovereignty, it certainly accelerated the process.

The relevance of these historical remarks lies in the sudden change in Canada's position following WWI, which mirrored closely that of Britain in matters of copyright (as it did in many others), because it was no longer a rebellious colony trying to protect its identity, but a nation of the world, which did not view its self-interest in standing out as an “outsider in the general community of nations,” or in being a “non-harmonious and non-musical instrument' within the concert of nations” (in Bannerman, *op. cit.* 86).

So when Canada finally passed the *Canadian Copyright Act* in 1924, there were hardly any differences between it and the U.K.'s law (Murray & Trosow, *op. Cit.* 27 – 30). From there, it was only a matter of time before Canada would sign *Berne*, which took place in 1928.

Since 1924, it seems that Canada believes that in matters of international copyright, its interest lies in blending in with the political and legal positions of the most powerful nations³⁵, such as the U.S., which gives the impression that its interests are perfectly aligned with theirs. The reality, however, is that in copyright (as in many other domains) Canadian interests have historically been misaligned with those of major powers.

For instance, when the Americans resisted signing *Berne* to encourage the circulation of works in their growing economy, their authors would come publish in Canada to receive protection, (Roper 1966) much to the dislike of the Canadians, who retaliated by refusing to grant copyright protection to American authors and by incorporating some provisions in the 1924 *Act* aiming to discourage such tactics (*The Copyright Act, 1921*). The conflicts between Canada and the U.S. were only tempered – though never completely eliminated as we shall see – when the U.S. signed the *Universal Copyright Convention* (also signed by Canada) in 1952.

³⁵ As we shall see, power in terms of intellectual property is assessed –in addition to the volume of cultural goods produced – by the ratio of exporting to importing; the greater the ratio, the more powerful the nation.

By aligning itself with the superpowers (or developed nations) of the world, the newly independent Canada was simply moving forward and upward, on the inevitable (Shanin 1977) path to progress, development, and civilization, and distancing itself from the “underdeveloped”, or even the “middle”, nations (*Ibid.* 68). And it is obvious that the behaviours and positions of the “developed” nations must correspond to the social practices and conceptualizations expected from nations in their situation (Escobar 1995, 10-11; Bannerman *op. cit.* 87).

As we shall see (in this chapter and Part II) many countries had strong hesitations about signing *Berne*, mainly because they saw it as profitable only for countries that are exporters of cultural goods, because the others would end up with net financial losses in this market, and loss of access to cultural and scientific works for their citizens. And though Canada had already signed *Berne*, its scepticism became difficult to hide since the 1950s.

In 1957, the Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs considered *Berne* as stemming from the European tradition of protecting the moral rights of authors, and what was needed in Canada was perhaps a more utilitarian/American approach, designed to place the rights of the public in the forefront. In the 1960s, Canada failed to attend many of the meetings related to the revision of *Berne* and in 1967, it refused to sign the revised version, along with many other nations. Opting out seemed to serve the Canadian interests much better, as explained in the words of the Secretary of State for External Affairs:

Successive revisions of the Berne Convention have progressively extended the monopoly rights of copyright holders. The current revisions suggested for the [1967] Stockholm conference are intended to extend these rights still further. Unfortunately, this raises the question of the cost in relation to the value of present copyright legislation as a device for encouraging creativity in Canada before the Economic Council's report is available. An important consideration in the study of this matter is the fact that as much as 90% of the total cost (about \$8 million) of copyright to the public in Canada is accounted for by the protection given foreign works. In turn, compensation to Canadian authors by way of payments from overseas to Canada is minimal. That raises the fundamental question of whether protection of the kind Canada is committed to by adhering to the Berne Union is in the national interest.

(in Bannerman *op. cit.* 89)

The other nations refusing to sign the *Convention* of 1967 found its provisions concerning developing countries problematic, and wanted to see major changes to render works more available and affordable to their populations. The situation reached such a deadlock between developed and developing countries, that it was believed that all the countries of either group might withdraw altogether, and the revision meetings of 1967 were considered a failure (Ricketson and Ginsburg 2006).

This failure, however, was a glimmer of hope for nations in Canada's position, because it meant that the concerns of the less powerful (importing) nations were having an impact when they had none previously, as

mere colonies. The committee put in place to formulate Canada's position on international copyright made a bold statement:

Although Canada is undoubtedly a “developing country” in so far as copyright is concerned (because of the large import imbalance of trade in copyrighted material), nevertheless it is not so considered by the two Conventions. A “developing country” under U.N. definition is considered a country which has an average per capita income per year of \$U.S. 300 or less. In my view [Minister of Consumer and Corporate Affairs, Stanley Basford], any country with a very large export-import imbalance in copyrighted materials should be entitled, like the developing countries, to maintain a somewhat lower level of international copyright protection.

They were therefore recommending that “in so far as international copyright is concerned, the definition of a “developing country” should not be based on per capita income, but on a substantial import imbalance of trade in copyrighted material” (in Bannerman *op. cit.* 90). One can only wonder how this new way of defining “developing country” could have changed not only the IPRs, but all areas of trade and by all countries of the world... but alas, the note on file called this recommendation “utter nonsense” (*Id.*).

Although Canada was clearly not a superpower, it was still quite a stretch to even try to argue that it should have been treated as a “developing country”, when they were considered an industrialized nation, known for importing know-how and having one of the highest GDPs in the world (see www.indexmundi.com). But inside Canada, policymakers felt that the international regime of copyright would not favour their economy or culture.

In 1969, Canada therefore tried to lead a coalition of countries that were in a similar situation (too industrialized to be “developing” countries, but still net copyright importers) aiming to modify the international copyright system so that it would provide different levels of copyright protection to countries based on their national circumstances and interests. Canada failed to attract sufficient supporters for its initiative and simply retracted because it did not want to damage in any way its good relationship with France, the U.K. and the U.S. (*Id.*).

In 1971, Canada participated in the conferences organized to resolve the crisis preventing Berne and the UCC to be revised. And although this time it presented itself as both a developed and a developing country, in the end, it still refused to sign the revised documents, and stated that “we are all developing countries” (in Bannerman *op. Cit.* 93).

No major revisions to the international copyright regime have been attempted since 1971, indicating the awareness of all parties of the difficulties awaiting such an endeavour. Since then, the UN has grouped countries according to their economic development; Canada is part of the G20 (www.g20.org) the G7 or “Major Developed Economies” (UN 2012) as well as other groupings that consistently qualify it with the blanket statement of being one of the most advanced and powerful nations of the world.

The difficulties Canada encountered as a mere colony were replaced by those derived from suddenly belonging to the powerful elite, and having to ensure that good relationships are maintained through conformity with the positions and expectations of being part of those states – Canada's largest trading partners – even at the expense of sacrificing Canada's national interests:

the fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions.

(Keyes & Brunet 1977, 234)

Some have argued that Canada's position of being a middle power can be used by forces on either side of the power equation to broker and advance their plans (Neufeld 2006, 94 – 107). But it seems that until now, Canada's position is consistently dictated, more than anything else, by its desire to conform to the position of the major powers and the highly industrialized nations, or simply to emphasize the importance of flexibility in all matters of policy and law (see George 2009). This was especially evident at key moments over the past decades, such as Canada's opposition in 2004 to radically reviewing WIPO's mandate and operations as proposed by Argentina and Brazil's *Development Agenda* (Bannerman 2007, 190-208).

Today, Canada still actively aligns itself with the most powerful copyright exporters, as it seems to hold the view that its best interest lies in that conformity and association (Bannerman 2011 *op. cit.*, 93). That view, however, might also be the result of direct and indirect external pressures on Canada not only to adopt a certain position on matters of international law and policy, but also to modify its domestic laws and policies.

Though there were some minor amendments to the Canadian *Act* since 1924³⁶, the first major changes were made in 1988, as a result of Bill C-60, also known as “Phase I” of the reforms to modernize the *Act*, following the Canada-U.S. Free Trade Agreement. Further changes were made after the North American Free Trade Implementation Act (1994) and the World Trade Organization Agreement Implementation Act (1996). Phase II of the reforms were completed in 1997, with the enactment of Bill C-32, which affected, among other things, compensation for the utilization of works published and unpublished, private copying and neighbouring rights protection for performers and producers of sound recordings. Canada also signed the *WIPO Internet Treaties* in 1997, specifically addressing important digital copyright issues.

On October 28, 1998, then President Clinton signed the *Digital Millennium Copyright Act* of 1998 (DMCA) to update the American *Copyright Act*. Among other things, the DMCA helps copyright owners protect their digital

³⁶ Ten amendments between 1931 and 1997: 1931, 1935, 1936, 1971, 1988, 1993, 1995, 1996, 1997.

content through its anti-circumvention and copyright management information provisions. At the current time, there are no similar provisions in the Canadian *Copyright Act*; however until very recently there were strong possibilities that this American legislation might serve as an example in Canada and around the world, as nations were beginning to determine how copyright law applies in the digital world.

Regarding anti-circumvention, the DMCA protects against tampering with copyright protection technologies and rights management systems. The DMCA prohibits unauthorized circumvention of technological measures controlling access to or restricting use of a copyright protected work, as well as certain devices and services used for such unauthorized circumvention. The types of technological measures protected include passwords, serial numbers and encryption that copyright owners use to control or restrict access to their work.

In addition, the DMCA prohibits deliberate tampering with copyright management information, including knowingly providing or distributing false copyright management information, “with the intent to induce, enable, facilitate or conceal infringement.” It also prohibits intentionally removing or altering copyright management information, or knowingly distributing or publicly performing works from which the copyright management information has been removed or altered. Further, the DMCA provides a limitation on the potential liability of Internet service providers (ISPs) for certain copyright infringements by their customers and others (e.g. employees and agents).

The year 2005 saw the first reading of Bill C-60, the aim of which was to meet Canada’s obligations towards the *WIPO Copyright Treaty* and the *WIPO Performance and Phonograms Treaty*. A non-confidence vote prevented this bill from reaching the second reading. The subsequent government tabled Bill C-61 in 2008, entitled *An Act to amend the Copyright Act*. This successor to Bill C-60 attracted heavy criticism for a number of reasons, but mainly for conceding too much in favour of the rights holders at the expense of the consumers and following the American DMCA model too closely. This bill also died that same year when the Parliament was dissolved prematurely.

In 2007, the passing of Bill C-59 amended the *Criminal Code* by making it an offence punishable by fine or jail to record a film in a movie theatre without the consent of the theatre owner.

In June, 2010, the government tabled Bill C-32, *An Act to amend the Copyright Act*. It was also received with much criticism for following too closely in the footsteps of the U.S. model, and infringing on the rights of consumers through the criminalization of circumventing digital rights management (DRM) software locks. Following the consultations and lively debates was fascinating, especially for making one realize the public’s increasing awareness of intellectual property and copyright matters. Although the bill was killed by March 2011 because

of the general elections in Canada, the government reintroduced it as Bill C-11 in November of the same year. The *Copyright Modernization Act* received royal assent on June 29, 2012 and most of its provisions have been in full force since about November 2012. Canada ratified the two WIPO Internet treaties (*The Copyright Treaty*, and *The Performances and Phonograms Treaty*) in August 2014, which ensured that it was in full compliance with its international copyright commitments.

While it lists education, parody and satire as exceptions falling under fair dealing as well as allowing the use of previous works to create mashups without permission so long as it is for non-commercial purposes, Bill C-11's main highlight was the introduction of restrictive digital lock provisions.

In February 2016, Canada signed the Trans-Pacific Partnership Trade Agreement. Three of the numerous issues that have already been raised by commentators include the objectives, digital lock rules, and the extension of the copyright term (see www.michaelgeist.ca – “The Trouble with TPP series”).

The objectives

The U.S. and Japan opposed the longer list of objectives provided by a number of countries, including Canada, to ensure that the agreement's stated purpose remains balanced. Instead, the objective was limited to the following article:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

(TPP 18.2)

Digital lock rules

Scholarship surrounding the use of digital lock rules has been negative, especially in Canada, because it is considered to be nothing more than a caving to the pressures and influence of the U.S. That said, commentators have also repeatedly stated that the WIPO Internet Treaties allows for flexibilities in implementation that can well serve Canada. If the TPP is ratified, those flexibilities will be lost, and those rules will be part of Canadian copyright law, including the criminalization of circumventing digital locks.

Term Extension

While the current copyright term in Canada is fifty years plus the life of the author, which is fully compliant with the international standard set by *Berne* as explained earlier, TPP would see this term extended an additional 20 years. Studies in other countries have clearly demonstrated that every additional year of copyright protection costs the economy millions of dollars, in addition to preventing countless Canadian and international works of unique cultural and historical significance from entering the public domain for decades.

II.2.B Canada under the watch of the U.S.

Although technically Canada is not under any obligation to amend its laws, there is constant pressure from south of the border to increase protection and further punish infringement, mostly as a result of trade-related treaties (Murray and Trosow, op. cit. 34). In fact, Canadian IP, along with almost all other states of the world, has been under the surveillance of the Office of the United States Trade Representatives (USTR) for years. Following are excerpts from their annual “Special 301” report, which described itself as: “an annual review of the global state of intellectual property rights (IPR) protection and enforcement, conducted by the Office of the United States Trade Representative (USTR) pursuant to Special 301 provisions of the Trade Act of 1974 (Trade Act).” The description goes on to say that the report “reflects the Administration’s resolve to encourage and maintain effective IPR protection and enforcement worldwide”, and that what it states results from “close consultations with affected industry groups and other private sector representatives, foreign governments, Congressional leaders, and interagency coordination within the United States Government.” Finally, it highlights the commitment of the Administration in “using all available methods to resolve IPR related issues and ensure that market access is fair and equitable for U.S. products” (USTR, 2006).

Before quoting the U.S. assessment of Canadian IP since 2006, it is important to keep in mind that states that are monitored fall under three categories, namely: *Monitoring Status*, *Watch List*, and *Priority Watch List*, which is reserved for the worst culprits of permissiveness in IP.

In 2006, the report stated that

Canada is being retained on the Watch List [...] and the United States will conduct an Out-of-Cycle Review to monitor Canada’s progress on IPR issues under the leadership of its new government. Due to the dissolution of Canada’s Parliament in late 2005 and elections in early 2006, Canada’s legislative progress on IP issues in 2005 was interrupted. The United States looks to the new government to make progress on IPR issues a priority in the coming year. Key areas for action include the ratification and implementation of the WIPO Internet Treaties, amendment of the copyright law to provide adequate and effective protection of copyrighted works in the digital environment [...] improved border enforcement [...] and strong data protection.

(*Ibid.*)

In 2007, things did not improve:

Canada is being retained on the Watch List [...] The United States commends Canada for issuing regulations correcting deficiencies in its system for protecting against unfair commercial use of pharmaceutical data generated to obtain marketing approval. The United States notes our continuing concerns, however, with Canada's failure to ratify and implement the WIPO Internet Treaties [...]. Canada's weak border measures continue to be a serious concern for IP owners. The United States hopes that Canada will implement legislative changes to provide a stronger border enforcement system by giving its customs officers the authority to seize products suspected of being pirated or counterfeit without the need for a court order. Greater cooperation between Canadian Customs and the Royal Canadian Mounted Police would enhance IPR enforcement, as would the provision of additional resources and training to customs officers and domestic law enforcement personnel.

(USTR, 2007)

In 2008, the message was still the same, but Canada was apparently on a timeline measured in months now, and the demand was for Canada to meet the expectations of the U.S. promptly. It is also noteworthy that Canada seems to have remedied elements of concern that had been specifically singled out in the previous report:

Canada will remain on the Watch List, subject to essential progress on key issues in the coming months. Canada embraced improving IPR protection and enforcement as a priority in the Speech from the Throne in October 2007. The United States looks to the Government of Canada to deliver on these priorities through prompt and effective action on key issues, such as copyright reform and enhanced border enforcement of intellectual property rights. [...]

(USTR, 2008)

In 2009, Canada's situation worsened to the point of falling into the Priority Watch List. The executive summary mentioned concerns with Canada numerous times:

The report identifies growing concerns with some trading partners, such as Algeria, Canada, and Indonesia, and with some key challenges, such as Internet piracy. In the year ahead, USTR looks forward to working with our trading partners to address emerging and continuing concerns and build on the positive results achieved thus far [...] The increased availability of broadband Internet connections around the world has made the Internet an extremely efficient vehicle for disseminating copyright-infringing products. Internet piracy is a significant concern in a number of trading partners, including Canada, China, Greece, Hungary, Korea, Poland, Romania, Russia, Spain, Taiwan, Ukraine, and Vietnam. [...] U.S. industry has expressed concerns regarding the policies of several industrialized trading partners, including Canada, France, Germany, Italy, Japan, New Zealand, and Taiwan [...]

(USTR, 2009)

The section reserved for Canada reiterated previous concerns, revealing the continued frustration of the Americans with things like the lack of weapons, or "resources", of the custom officers, and Canada's insistence on giving the courts a say before seizing suspected products.

Canada's situation did not get any better in 2010, according to the report, due to significant concerns with Internet piracy, and the need for "deterrent sentences and stronger enforcement powers."

The executive summary explains that the 2010 report

identifies a wide range of serious concerns, ranging from troubling 'indigenous innovation' policies that may unfairly disadvantage U.S. rights holders in China, to the continuing challenges of Internet piracy in countries such as Canada and Spain, to the ongoing systemic IPR enforcement challenges in many countries around the world [...] Internet piracy is a significant concern with respect to a number of trading partners, including Brazil, Canada, China, India, Italy, Russia, Spain and Ukraine.

The report then states that:

Canada will remain on the Priority Watch List in 2010. [...] Canada has not completed the legislative reforms in the copyright area that are necessary to deliver on its commitments. The United States urges Canada to enact legislation in the near term to update its copyright laws and address the challenge of Internet piracy [...]

(USTR, 2010)

The 2011 report was simply more of the same, with the U.S. urging the Canadian government to make IP reform a priority and simply telling what it "should" do. In 2012, the U.S. was looking forward to studying the final version of the Canadian legislation to see whether it is to its satisfaction –WikiLeaks had already revealed that the draft of the bill had been provided to the U.S. for their input... (see *NDP News Release* 2011-09-06 and *The Star's* technology column on 2011-09-03):

Canada remains on the Priority Watch List in 2012, subject to review if Canada enacts long-awaited copyright legislation. The Government of Canada has given priority to that legislation. The United States welcomes that prioritization and looks forward to studying the legislation once it is finalized, and will consider, among other things, whether it fully implements the WIPO Internet Treaties, and whether it fully addresses the challenges of piracy over the Internet. [...] The United States remains concerned about the availability of rights of appeal in Canada's administrative process for reviewing the regulatory approval of pharmaceutical products, as well as limitations in Canada's trademark regime.

(USTR, 2012)

The 2013 report was significantly more positive for Canada, which not only enacted the *Copyright Modernization Act* in 2012, but also introduced a bill that directly addressed another issue repeatedly mentioned in the *Special Report*. Canada was off the Priority Watch List:

The United States is moving Canada from the Priority Watch List to the Watch List in this year's Special 301 Report [...] In June 2012, the United States welcomed the passage of the Copyright Modernization Act, which, among other things, is designed to implement Canada's obligations under the WIPO Internet Treaties and to address the challenges of copyright piracy in the digital age. In March 2013, Canada also introduced the Combating Counterfeit Products Act to strengthen IPR enforcement, which included provisions that would provide ex officio authority to Canadian customs officials to seize pirated and counterfeit goods at the

border. The United States [...] urges Canada to expand the legislation to also provide authority for its customs officials to take action against goods in-transit.

(USTR, 2013)

The 2014 report reiterated the US's welcoming of Canada's passage of the Copyright Modernization Act, but added that "the United States urges Canada to implement its WIPO Internet Treaties commitments in a manner consistent with its international obligations and to continue to address the challenges of copyright piracy in the digital age." And while it expresses the support of the US in Canada's commitment to address the "serious problem of pirated and counterfeit goods entering our highly integrated supply chains," it "urges Canada [...] to expand its scope to provide authority for its customs officials to take action against such goods in-transit." The rest of the section on Canada is mainly questioning the right of appeal in Canada's administrative process for reviewing regulatory approval of pharmaceutical products, as well as the utility requirement for patents applied by Canadian courts, both of which are related to patents (USTR 2014).

The bulkier 2015 report maintained Canada on its Watch List, while recognizing that Canada's provisions aimed at addressing copyright piracy over the Internet came into force in January 2015, while its ratification of the WIPO Internet Treaties took place in August 2014. The document reports that Canada passed the Combating Counterfeit Products Act in December 2014 but adds that "the United States is disappointed that the new law does not apply to pirated and counterfeit goods in customs transit control or customs transshipment control in Canada." The rest of the section on Canada continues with the same concerns as those stated in the previous years, almost word for word (USTR 2015).

The 2016 report, newly named *Special 301 Report on Protection of American Intellectual Property Rights Across the World* (from the previous *Special 301 Report on Intellectual Property Rights*), repeated the same points stated in the previous reports. In February 2016, the United States signed the Trans-Pacific Partnership along with 11 other nations, including Canada. The report therefore concludes the section on Canada with the following:

Under the TPP Agreement, which sets strong and balanced standards on IPR protection and enforcement [...], Canada has committed to strengthen its IPR regime in many of these, as well as other, areas. The United States will work closely with Canada on TPP implementation.

(USTR 2016)

Most noteworthy from this *Special* report is that the United States feels that it can simply state its interests, and expect other nations to modify their legislations, policies and practices in order to protect those interests. The examples we quoted repeatedly referred to the role of customs officers, the right to appeal the seizing of presumably counterfeited products at the Canadian border, and the utility requirement for patents that Canadian courts apply. It is also important to note that there does not seem to be any observable difference in the reports before and after 2009, when Barack Obama (a Democrat) took over the presidency from George Bush (a

Republican), suggesting that the industry players are the main driver behind the United States' positions on copyright and IP in general.

II.2.C Canadian case law

While the United States continues to push for increasingly stronger IP protection measures, and despite this direct pressure, of which we saw only a glimpse in the *Special 301* reports above, Canadian case law has moved in a different direction over the last few years, with the five copyright rulings of the Supreme Court on July 12, 2012 marking the culmination and the tangible beginning of what may be a shift in policy and legislation that balances users' rights with creator rights. While these five cases clearly establish a new way of looking at Canadian fair dealing (bringing it a lot closer to the American fair use), they also recognize user-generated content as a valid cultural reality. When combined with previous recent copyright cases, such as *Théberge* (2002) and *CCH* (2004), we can safely say that, while the *Copyright Act* has not seen any major changes, Canadian jurisprudence has shown great potential for continuing to consider the interests of the public and other stakeholders in its interpretation of the law and setting the tone for copyright policy.³⁷

This quick overview of the noteworthy amendments to Canadian copyright law since the late 80's highlights a number of important points. Firstly, as we have already seen, the general tendency of governments and legal authorities has been to move towards increasing intellectual property and copyright rights and limitations, with more restrictions, and stronger punishments. While the five copyright rulings of Canada's Supreme Court in 2012 offer much hope in the interpretation of the law moving towards balancing the rights of users and creators, most of the regional and international negotiations taking place seem to be headed in the opposite direction, including the current discussion on the Trans-Pacific Partnership Agreement. Secondly, it is clear that developments surrounding American IP law and policy have a direct and usually unidirectional effect on Canadian – as well as international – law and policy.

II.2.D Conclusion

Studying the history of Canadian copyright law reveals that Canada's policies and positions have significantly shifted over time, but that external pressures have always been an important factor in the equation. While overt colonial power dictated Canada's behaviour on the international scene at the beginnings of *Berne*, the source of major influence today stems from Canada's very powerful neighbour to the South. Despite being listed among other major powers such as the members of the G7, Canada is much weaker than, and therefore very much

³⁷ See Geist (2013) for an excellent overview and analysis of the five cases from various perspectives, including standard of review, fair dealing, technological neutrality, collective management and the scope of copyright.

under the influence of, the major exporters of IP products and laws. In other words, it must still struggle hard to find a balance between understanding and protecting its self-interest, while trying to avoid disappointing the more powerful nations with its national policies and legislation. While Canada may hold the prestige of the powerful nations of the world today, its copyright law is a reminder that it was shaped by imperial power, like much of the rest of the world. While its internal legal system seems to be slowly moving towards a more balanced reinterpretation of copyright, Canada's international negotiations are as much under the influence of the United States as most other nations. These findings further emphasize the urgency and need for an international IP regime that recognizes not only the gigantic disparities between states, but also their intrinsic legal, economic and cultural differences, and allows them legal and policy autonomy.

II.3 U.S.

When U.S. legislators first established a body of law for their new nation, they started with the British *Statute of Anne* as a model but soon developed different legal principles better suited for their particular stage of cultural and economic development. We have already seen how French, British and German laws provided the foundation for Canadian copyright law. To make this overview complete, we must also take a moment to understand early U.S. law, because corresponding discussions in Canada in the nineteenth century lay very much in the shadow of the burgeoning U.S. book industry and its particular legal and philosophical underpinnings. Moreover, early U.S. copyright is also interesting because of the contrast it presents to present-day U.S. law.

Certain key elements of the American approach to copyright are embedded in the U.S. Constitution. Article 1, Section 8 grants Congress power to enact legislation “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writing and discoveries.” This clause enables various forms of intellectual property law, including patent and copyright. As mentioned earlier, the similarity between “promotion” and the *Statute of Anne*’s “encouragement” highlights the utilitarian foundations for copyright. The constitutional goal of copyright is therefore not to establish exclusive rights as an end, but as a means to promote science and the arts. But in addition to the promotion of society’s scientific and artistic progress, and perhaps as a reaction to the censorship that had taken place in England and the possibility of democratic governments abusing their powers, the American Constitution also guarantees the freedom of speech in its First Amendment, because of its necessity for democracy.

As author, landowner, slave owner and a known adherent to John Locke’s philosophy on property, Thomas Jefferson was clearly in favour of protecting private property. Yet his position on copyright was a lot more reserved, because of his fear of seeing power concentrated in the hands of the few, and his dislike for artificial monopolies. In 1788, he wrote in a letter to Madison that “the benefit of even limited monopolies is too

doubtful, to be opposed to that of their general suppression” (in Vaidhyanathan *op. cit.* 23). Again in 1789, in another letter to Madison, he wrote “the following alternations and additions would have pleased me: Article 9. Monopolies may be allowed to a person for their own productions in literature, and their own inventions in the arts, for a term not exceeding ____ years, but for no longer term, and no other purpose” (*Id.*).

As dangerous as monopolies can be when they evolve naturally, they are much more dangerous when they are artificially created and granted by the state, because they can control the flow of ideas as they please. Those who hold such monopolies can add to their power and wealth simply because they are not constrained by the nature of a competitive market. The prices they set are not ruled by offer and demand, especially if the monopoly is over areas that are essential to society. Monopolists can therefore create artificial scarcity by restricting access, fixing prices, establishing licensing, or simply intimidating potential competitors. And if all of this fails, they can always resort to influencing public opinion through demonizing certain activities, the victimization discourse, and using more philosophical means, such as the idea of originality in authorship.

James Madison, who introduced the copyright and patent clause to the Constitutional Convention, argued that copyright was one of those few areas in which the “public good fully coincides with the claims of individuals.” He did not argue in favour of property, but in terms of “progress,” “learning,” and other such classic values as literacy and an informed citizenry. Madison’s constitutional project required that the various branches of the federal government approach the public sphere with reliable information, which means that it is accessible and openly debatable (*Ibid.* 22).

In this regard, the rationale for copyright law was no different from that of George Washington, who declared his support for the Copyright Act of 1790 because it would serve to convince

those who are entrusted with public administration that every valuable end of government is best answered by the enlightened confidence of the public, and by teaching the people themselves to know and value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority.

(*Id.*)

Copyright was therefore a means to protect the people from the possible tyranny of their government.

From the time of the first American copyright law – 1790 – the U.S. was adamant in not providing any protection to non-American works or authors. In other words, the U.S. had created a safe haven for buying and selling cheap counterfeits of foreign books, newspapers, magazines and periodicals. This was part of a clear policy to educate the population of a nation that was poor, but hungry for reading, which in turn, translated

into a strong market for literature. Though it may be argued that this created a disadvantage for American authors who had to compete with very cheap reprints of foreign works, it was the British authors who were really appalled at the idea that their works were being circulated, and that others were profiting from their sale, without their consent (*Ibid.* 26).

The framers of the U.S. Constitution mandated Congress to develop a statute that would motivate authors and scientists to produce works that are beneficial to society. Without any legal guarantee that they would profit from their efforts, the fear was that too few would even contemplate taking on such projects. Without copyright law, publishers and printers would simply sell the works at any price they wished and keep all profits for themselves. But the monopoly granted to authors and scientists must be just long enough to provide an incentive, so that the work enters the public domain as soon as possible, in order to further feed the commonly owned heritage that is used to create new works. The monopoly was therefore considered a sort of tax on the public, and it only makes sense to limit it to the threshold required to encourage creation, not more. This utilitarian argument behind copyright law, explained in depth earlier, summarizes the original spirit of American IP.

In 1903, as the United States were becoming a much greater economic power, the idea of the author's natural rights and originality entered American jurisprudence through the *Bleistein v. Donaldson* case, in which Justice Oliver Wendell Holmes of the Supreme Court argued that all images were "the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone" (in Murray and Trosow, *op. cit.* 25).

As the decades went by, the idea of copyright as a "property right" gained much ground in the U.S., to the point of challenging the utilitarian argument seriously as the main rationale for copyright law, as one can see in many recent statutes, treaties, and cases, in which the interests of authors and content owners seems to have been given precedence over that of the public. Of course, many scholars have highlighted the fact that this trend runs counter to the original purpose of American copyright law (e.g. Vaidhyanathan 2001).

In addition to simply being "un-American", these scholars argue that treating copyright as a property right puts at risk the idea/expression dichotomy, weakens the public domain, constrains fair use, limits open access to information, and makes satire, parody and commentary risky. As evidenced by such policies and legislation as the *Digital Millennium Copyright Act*, the U.S., they explain, continues to move towards increased property rights, thus making copyright about control (as opposed to balance), private interests, and regulated by technology instead of regulating it (cf. Vaidhyanathan *op. cit.* 80, 156).

Right from its genesis, American copyright law was concerned with American interests, regardless of what other states wanted or expected from them; the concern was only with the United States' welfare and progress. In fact, it was not until 1891 that the U.S. signed a bilateral copyright treaty with the U.K., thereby granting copyright protection to English works and authors. In this regard, it is also telling in many respects that the U.S. only signed *Berne* in 1988. That a nation gives precedence to its own interests over those of the rest of the world is not the least bit surprising. It is, however, striking to see the U.S. now preventing any other nation from adopting the same approach it used with regards to international copyright law, as we saw earlier, and we shall see further when addressing copyright law on the international scene.

II.4 International copyright and power relations

Like any other sphere of human activity, copyright law is very much dictated by power relations, both inside the state, as well as internationally. While domestically the power keeps tilting on the side of right holders at the expense of users in most countries, at the international level powerful nations continuously deploy more pressure on developing and least developed nations to get to modify their laws and policies to the advantage of the developed countries (in Tian 2009, 82).

While every category and group of stakeholders is trying to influence opinions and policy to benefit its interests, not everyone is on the same playing field. As one scholar puts it, “both healthcare consumers and pharmaceutical companies lobby in Congress, but it is only the Pharmaceutical Research and Manufacturers Association that has 297 lobbyists working for it – one for every two congressional representatives” (Drahos, 2002, 163). Furthermore, bargaining groups from developing countries do not have the same level of organization and readiness to handle the pressures from developed nations and navigate through the complex processes of international legislative consultations as the groups lobbying on behalf of the developed nations (Tian 2009, 83).

For decades, copyright law has been granting more exclusive rights, in more types of works, for longer periods of time, and punishing infringement with stronger remedies (Landes and Posner 2003, 406; also in Dreyfuss 2010, 55). At first glance, this is surprising because public consensus, including academia, has been steadily growing against stronger IP in defense of the public domain and access to information, as witnessed by movements such as Free Software Movement, Creative Commons, and Civil Society Coalition, which bring together legal experts and scholars, as well as concerned citizens. But while civil society pushes in one direction, the industry and its lobbyists are pushing in the other.

In addition to hurting the balance the IP regime is supposed to be creating, the inequality of power and the tendency of giving in to the demands of lobbyists and placing them over those academics and civil society members has been underlined by many commentators, who observe that this runs counter to the manner in which policies and law ought to be developed, because they end up being imposed extraneously, as opposed to stemming from within (Hansen 1996, 580; also Drahos *Ibid.*).

II.4.A Inequalities of power vs. democratic balancing regime

Beyond simply explaining the lack of balance in IP by lobbying, I must address the lack of a truly democratic legislative bargaining mechanism. Although inequalities of power are inevitable, democratic regimes have a duty to minimize these imbalances through courts and governments. In a frank comparison between the legislative and the judicial processes, Judge Posner explains that even if interest groups can have relative influence on the former, the latter ought to remain neutral:

Legal policy toward IPRs is shaped by judicial as well as legislative action [...] Public-choice analysis has focused on legislation because the play of interest groups in the legislative process is widely acknowledged and it thus becomes plausible to view legislation as a product demanded by and supplied to influential interest groups in exchange for political support, including campaign contribution [...]. The judicial process, in contrast, is structured to minimize the role of interest groups; interest groups can file *amicus curiae* briefs, but judges have little incentive to give much weight to such briefs.

(Posner, in Landes and Posner *op. cit.* 416)

In a healthy democracy, there will oftentimes be sufficient presence from various academic and civil groups to voice the concerns of the masses against the domination of the private interest of the powerful few. But when there are obvious cases of imbalance and inequality, it is to be expected that governments play a role of arbitrator or coordinator in order to strike a trade-off between the stimulation of innovation and the optimization of the public welfare and interest. The truth of the matter is that this type of direct or indirect intervention is taking place internally in many democratic states, at least to some degree (Tian 84).

This is, however, in stark contrast with the international scene, where there is still tremendous work to be done before there is the semblance of an overarching democratic regime in place to play that balancing role. Due to their mandates and the limits in their sovereignty, the international organisations that do exist (WIPO, WTO) cannot be considered as carrying an authority beyond the national governments – who are all seeking to maximize their respective interests. This is in addition to the fact that most developing countries are usually not consulted in the development of international IP laws and standards, which then clearly favour the interests of the developed ones who were the only ones participating in negotiations, often at the expense of the others.

The main concern of large multinational companies in technologically advanced nations is the maximization of their profits, regardless of any effects this may have on others, be they in developing countries or elsewhere – only the challenges and inconveniences this creates in the developed world often become human rights issues in the developing states. The application of the most aggressive business models at their disposal simply imply stronger IP enforcement, and will result in less competition (monopolies even), larger market shares, and, ultimately, greater revenues. The dominant influence of these private interests at the international level clearly hinders the progress and circulation of knowledge and seriously threatens the democratic environment required for objective and fair discussions about international IP, to the point where some scholars have stated that international IP “is no longer competent to strike a sound balance between the private interests of certain countries and the welfare of the international community as a whole” (Tian, 85).

II.4.B International copyright situation

Copyright protection is based on the copyright law of the country where a literary or scientific work is being used. There exists no single international copyright law that protects original works throughout the world. Instead, a minimum level of protection is provided by international agreements, and it is up to each country to implement its own copyright legislation and honour its agreements. The *Copyright Act* incorporates the provisions of Canada’s international treaties. This can sometimes create problems of interpretation and implementation for jurisdictions in our increasingly globalized world. Based on the principle of national treatment, international conventions ensure that authors are protected in countries other than their own. In this respect, Canada is no different from many other countries in that foreign material in Canada is protected only to the extent that the foreign state provides the same protection to Canadians.

Though international legal treatment of IPRs can be considered as an extension of the domestic law applicable to that IPR, international IP is much more complex. International IP institutions not only make IP related laws, they also play a key role in their interpretations and administration. The IP norms being applied domestically used to be heavily shaped by the rules of WIPO; for the past few years, it is the rules of the World Trade Organization that have been most influential, oftentimes along with provisions from regional or bilateral treaties (c.f. in Abbott 2007, 2).

The *Paris Convention* concluded in 1883 was the first major multilateral treaty establishing application rules for patents and trademarks in more than one country, without going as far as creating laws. Establishing much more harmonization, the *Berne Convention for the Protection of Literary and Artistic Works* is still at the heart of international copyright law today.

Until 1998, Canada had only been a member of the 1928 version of *Berne*; in June of that year it became a member of the 1971 version. Though *Berne* has no legal authority in Canada, courts will sometime refer to it – or to jurisprudence from other *Berne* countries – in their interpretation of the Canadian *Act* (Harris 2001, 46).

In the early 1970s, the United Nations created one of its sixteen specialized agencies to address matters related to intellectual property: the WIPO. Based in Geneva, Switzerland, its function is the promotion of intellectual property at an international level by ensuring cooperation between member states and the consistent interpretation of the treaties. The administration of the Paris and Berne Conventions was transferred to WIPO, and the Patent Cooperation Treaty (PCT) was adopted under its auspices in 1977, further establishing it as the administrator of international IPRs. Its self-imposed mandate is to “lead the development of a balanced and effective international intellectual property (IP) system that enables innovation and creativity for the benefit of all” (<http://www.wipo.int>).

Under *Berne*, once copyright protection is secured in one’s own country, protection becomes automatic in other signatory countries without further formalities. This was an easy way to quickly spread a consistent understanding of IPRs. However, certain countries, like Russia and the U.S., did not join *Berne* for a variety of reasons. In order to extend IPRs consistently between *Berne* and non-*Berne* countries, a more flexible convention was drafted: the *Universal Copyright Convention* (UCC), which came into effect in 1955. The U.S. joined *Berne* in 1989, while the treaty became effective in Russia in 1995.

In 1996, WIPO facilitated negotiations and discussions between 160 countries in Geneva to create the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT), which both came into force in 2002.

International copyright was mostly a matter of international conventions and bilateral agreements. But as we shall see in more depth shortly, an emerging trend has been to sign international, regional, or bilateral trade agreements that contain provisions for intellectual property. In the case of Canada for example, the *Canada-United States Free Trade Agreement* (FTA), the *North American Free Trade Agreement* (NAFTA) and the agreement on *Trade Related Aspects of Intellectual Property Rights* (TRIPs) are instances of such agreements (Harris, 46-7).

In the 1970s and ‘80s, while developing countries were demanding more access to technology and a bigger say in international economics, content industry in the U.S., Europe, and Japan was growing impatient with what they perceived as increased infringement and theft of their property in developing countries. While developing countries wanted a weakening of IP protection to provide their populations an opportunity to progress and

bridge the technology and knowledge gaps, the developed countries were trying to find ways to implement stronger protection on those nations. These divergent positions unsurprisingly led to a deadlock at WIPO.

Countries of the developed world strategically shifted IP issues to another forum; the *General Agreement on Tariff and Trade* (GATT), which addressed the regulation of international trade in goods. Countries that have signed GATT are all members of the World Trade Organization (WTO). Since developing countries were dependent on the markets of the developed countries, the latter leveraged that dependency by exerting pressure through GATT to accommodate their demands for stronger IPRs. The negotiations surrounding this initiative began during the Uruguay Round of trade negotiations of 1986, and, seven years of highly contentious negotiations later, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS Agreement, or simply TRIPS) was concluded in 1993, signed in 1994, and came into effect on January 1st, 1995 – the same day as the official commencement of the WTO. TRIPS represents a milestone in the history of intellectual property, because of the radical changes it brought to the rules around the international regulation of IPRs, and the scope of reach that was now imposed in the efforts to harmonize IPRs.

As we have pointed out a number of times already, the impacts of adopting higher levels of IP protection vary greatly between nations, depending on their level of economic autonomy, technological development, and the ratio of their copyrightable imports-exports. This has always been recognized by all parties involved in international discussions, and was voiced repeatedly in the TRIPS negotiations, which only added controversy to the already-sensitive topic of development gaps between the haves and the have-nots. That is why a number of measures were taken to bridge some of those gaps, albeit to a modest extent. For example, in 2001, the WTO adopted the *Doha Declaration on the TRIPS Agreement and Public Health*, allowing government to take more measures to protect public health, and allow for more use of some flexibilities included in TRIPS. The WIPO *Substantive Patent Law Treaty* (WIPO SPLT) is another example of how slow and complex negotiations can be between developed and developing nations, because of their diverging interests.

While the *TRIPS Agreement* laid the foundations for more stringent rules, including potential economic repercussions awaiting non-compliance, this was apparently still insufficient in the eyes of the U.S. and Europe. Given the growing economic importance of intellectual products, the U.S. industry, for example, made it one of its missions to focus on the lack of enforcement of IPRs in China. The superpowers of the IP production therefore began resorting to bilateral, multilateral, and regional trade agreements for even stronger protection rules and more targeted areas. One can safely assume that once virtually every trading partner of the European Union and the U.S. have accepted such agreements, that it will become much easier to present such provisions to the international scene, to incorporate them in WTO or WIPO treaties. A number of important developing

countries have, however, resisted signing such agreements and have, in fact, been vocal about their rejection. These include Brazil, Argentina, India, and South Africa (Tian 2009, 3).

The relationship between WIPO and the WTO is still not well defined, because their jurisdictions over the same areas overlap, which causes inconsistency in the interpretation and implementation of the rules (*Ibid.* 12). Despite possible tensions arising from these problems, there are also clear differences between the two institutions.

WIPO administers numerous treaties granting IP all over the world and participates in IP negotiations at a highly technical level. It also has substantially more staff devoted to IP than the WTO, many of whom serve training purposes for national IP personnel as well as assisting with the drafting of national legislation and policy. The two main functions of WIPO are promoting IP around the world, and ensuring cooperation among all concerned parties. In addition to the fees that must be paid by all states for their membership, a part of the revenues of the International Bureau also comes from the fees paid by private users (*Ibid.* 14).

II.4.B.i WIPO

In an attempt to encourage developing countries to join *Berne*, WIPO drafted the *Protocol Regarding Developing Countries* in the *Stockholm Act* in 1967. The *Protocol* granted much greater access to copyright works than the 1948 revision of *Berne*, and represented the concern of the developing nations in trying to reduce some protections, such as translation and reproduction rights. This would have represented a step in the right direction of balancing interests, but resistance from developed countries prevented its ratification. Instead, the *Paris Act* of 1971 made significant changes to the *Protocol*, while keeping every revision that favoured developed countries, which led to even stronger protection (*Ibid.* 24). No significant changes have been made to *Berne* since the 1971 revisions.

As we have already seen – and will see in much more detail in Part III – the rapid rate of advances in technology combined with the paradigmatic changes in culture and society have stretched the IP system beyond its design and capacity, and their challenges on traditional copyright are constant (*Ibid.* 25).

The answer to these changes has often been much more surveillance, combined with legal revisions that strengthen protection and increase remedies, which has unsurprisingly led to many more cases of infringement. The U.S. and the EU countries, who now have entire sectors of their economies completely dependent on IP, in an effort to protect their competitive advantage and maximize their profits, pushed for additional legislative reforms in the WIPO, besides their efforts at the WTO/GATT.

II.4.B.i.1 WIPO Internet Treaties

The development and spread of a number of new technologies made it significantly easier to reproduce and distribute copyrighted works, which facilitated both the public's access to works as well as online piracy. Though TRIPs introduced additional international protection that included digital items, it was unable to keep up with the challenges brought about by the Internet and various digital technologies. Developed countries thus went back to WIPO, which hosted an international conference in Geneva in December 1996. Their efforts were productive, and the two *WIPO Internet Treaties* were born: the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT).

More of concern to us here is the WCT, which extended copyright protection to computer programs and databases (Articles 4 – 5) and also created or expanded three exclusive rights for authors (Articles 6 – 8); the right of distribution (and first sale) that applies to all categories of works and is not limited to cinematographic ones, the right of rental (of sound recordings and computer programs), and the right of communication to the public which emphasized communications that allowed the public to access works from a place and at a time chosen by them. Finally, *sui generis* rights were established to protect technological measures of copyright infringement (Articles 11 - 12) through legal remedies for such activities as circumvention that may lead to infringement, while providing a safe harbour to service providers for online infringement by their subscribers (Article 8).

That said, the treaty reiterated the right of contracting members in providing exceptions and limitations so long as they will not cause any unreasonable prejudice to the author's legitimate interest (Article 10).

Canada signed both treaties on December 22nd, 1997, and ratified them on May 13, 2014. They came into force in August of the same year.

II.4.B.i.2 WIPO's Digital Agenda

In September 1999, to further address the implications of the Internet and digital technologies on the international IP regime, WIPO launched the WIPO Digital Agenda at the WIPO International Conference on Electronic Commerce and Intellectual Property (WIPO, *Electronic Commerce Programs and Activities*). By broadening the participation of developing countries (Article 1), promoting the exploitation of IP in the public interest in a global economy (Article 6), and responding to the need for improved management of cultural and digital assets (Article 8), the Digital Agenda was an attempt to formulate responses to encourage the exploitation of creative works and knowledge, while protecting the rights of creators.

But like all other international IP treaties before them, the WIPO Internet Treaties were initiated by the developed nations, and mainly represent the economic interests of those nations and their copyright holders (Sylvia *op. cit.*).

Enforcement is also an issue, because those treaties – like *Berne's* principle of independence – do not address enforcement, and instead delegate the enforcement procedures to national law and its provisions against infringement (WCT Art. 14). To counter the lack of sufficient enforcement in the eyes of the IP exporting nations, they resorted to bilateralism and regionalism through trade agreements, which has resulted in a significant reduction in the autonomy of individual nations.

Despite these and other limitations, WIPO's Internet Treaties still represent an important step in that they represent the international IP regime's formal recognition of the realities of the Internet and the digital environment in general.

II.4.B.i.3 UNDP Report

In 2003, the United Nations Development Programme (UNDP) published a report entitled *Making Global Trade Work for People* (UNDP Report 2003). In a special chapter called *Trade-Related Aspects of Intellectual Property Rights* (Chapter 11), the report stated that the TRIPS should be “more development friendly through key changes to the design of the agreement” and be interpreted “in the spirit of balance between rights holders and users (such as the Doha Declaration)” (221). It encouraged governments to “use TRIPS as best as they can to further their social and economic development objectives” (222). In addition to suggesting that alternatives to TRIPS be set up either within or outside the WTO (221-2), it also suggests no longer using trade sanctions to remedy IP infringement and resorting to other IP models, such as:

- establishing an IP ladder, in which the rigour of application of IP laws is a function of the income and technological capacity of the nations;
- maintaining a minimalist agenda at the international level to allow national legislations to decide their own IP terms and scopes;
- allowing partial opt-out clauses;
- creating distinct IP regimes for collectives and individuals.

The UNDP Report of 2003 was a refreshing read because it imposed a realistic reassessment of the philosophy of international IP, not only by highlighting the incoherence of applying a monolithic regime to nations that

are at very stages of development, but also by attempting to bring the discussion back to the human development angle.

In September 2004, at the 31st WIPO General Assembly, Argentina and Brazil, supported by 12 other nations³⁸ -- in addition to the hundreds of individuals and NGOs – submitted a proposal to establish a Development Agenda for WIPO (*WIPO 2004*). Taking the UNDP Report one step further, this proposal not only appreciated the impact of science and technology to “material progress and welfare,” but also recognized the important knowledge gap and digital divide that needed addressing between poor and wealthy nations (see Section II, *Ibid.*). It called on WIPO to view IP not as the end, but as a means to development, and reminds it of its commitments towards the UN Millennium Development Goals (UN.org), which include transfer of technology to developing nations and enabling them to acquire technical capacity. Not surprisingly, while developing nations and NGOs welcomed the initiative, the U.S. and other developed nations rejected it, arguing mainly that WIPO reform should be limited to “the mere improvement of technical assistance to developing country members” and do not agree that “development concerns be reflected in all of WIPO’s activities” (ICTSD, 2004).

Between 2005 and 2007, numerous meetings were held to discuss the Development Agenda, which was finally accepted in September 2007 (see WIPO, *Development Agenda*). As the official site states, its aim is to “ensure that development considerations form an integral part of WIPO’s work.” Member states therefore agreed, in addition to the establishment of a Committee on Development and Intellectual Property (CDIP), to adopt the 45 recommendations, grouped into six clusters, as follows:

- Cluster A: Technical Assistance and Capacity Building;
- Cluster B: Norm-setting, flexibilities, public policy and public domain;
- Cluster C: Technology Transfer, Information and Communication Technologies (ICT) and Access to Knowledge
- Cluster D: Assessment, Evaluation and Impact Studies;
- Cluster E: Institutional Matters including Mandate and Governance;
- Cluster F: Other Issues

Although the UNDP Report and the Development Agenda are not legislation, they are nevertheless very significant milestones reflecting an increasing international recognition that IPRs have far-reaching implications that directly affect the cultural, economic, technological, as well as human development of nations. For this

³⁸ Called collectively the *Friends of Development*, and which now includes: Argentina, Bolivia, Brazil, Cuba, the Dominican Republic, Ecuador, Egypt, Iran, Kenya, Peru, Sierra Leone, South Africa, Tanzania, Uruguay and Venezuela.

reason, their implementation must take into consideration the specific developmental context of every country, so that it may serve to enhance it on the short and long terms. Such initiatives also demonstrate that the relentless pressures exerted by NGOs, civil society groups, academics, as well as certain governments can sometimes drag the discussion closer to a democratic arena between equals, as opposed to the typical hierarchical model imposed by power relations.

II.4.B.ii WTO

Although Berne has been providing the general framework for international IP for decades, a number of factors led to the establishment of TRIPS as a complement and, to an increasingly larger degree, an alternative³⁹. These factors include the economic, cultural and legal implications of globalization, the rapid growth of technology, and the greater importance accorded to knowledge and information as capital that must be produced and protected in competitive markets (see Part III).

In the 1980s, it became apparent to the IP-exporting nations that IP protection was not being consistently enforced throughout the world. Such means as bilateral treaties could only offer temporary and partial solutions, and more drastic measures had to be taken (see Okediji 2003-2004; 1999). Developed nations began collaborating on a global IP regime with enforcement clauses in order to maximize the protection of their IPRs, mainly by supplementing the principles found in Berne, especially where Berne had remained silent, such as protection of computer programs and data compilations. In 1994, the Agreement establishing the World Trade Organization was signed, including the *GATT Uruguay Round Agreement on Trade-Related Aspects of Intellectual Property Rights*, or TRIPS (<http://www.wto.org>).

In order to meet its access condition, the WTO requires that a country abides by the TRIPS agreement, which in turn, requires compliance with Berne – except for the recognition of moral rights. This requirement had a significant impact on the expansion of the scope of copyright protection. During the period of negotiations leading to the establishment of the WTO (1986 – 1995), the number of member states nearly doubled. If today (August 2017) Berne counts 174 signatories, it is in part due to the TRIPS requirement (see Mort 1997).

The TRIPS also raised the minimum standards of IP protection, by setting eight different categories that each member state has to protect nationally, some of which had never previously been addressed internationally: copyright and related rights; trademarks; geographical indications; industrial designs; patents; integrated circuits; undisclosed information; and control of anti-competitive practices in contractual licenses (TRIPS, Part II).

³⁹ Article 68 affirms that the TRIPS aims to establish a relationship of cooperation and consultation with WIPO, which was then reiterated in the *Agreement Between the World Intellectual Property Organization and the World Trade Organization* of 1995.

In addition, and more importantly, the TRIPS Agreement directly addressed acquisition and maintenance of IPRs and related inter-parties procedures (Part IV), as well as dispute prevention and settlement (Part V) and requires all of its members to comply with the decisions of the Dispute Settlement Body of the WTO. To get a concrete idea of what that may mean, Article 41 states:

Members shall ensure that enforcement procedures as specified in this Part 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 infringement and remedies which constitute a deterrent to further infringements

This said, the TRIPS states the following as its objectives (Article 7):

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The implied consideration given to the situations of developing nations is further explicated in Article 8:

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

To further recognize the different situations of its signatories, the TRIPS Agreement allowed different timelines for compliance: one year for developed countries (January 1996); five years for developing countries (until January 2000); and eleven years for the least-developed countries (until 2006) with an additional ten years for standards related to pharmaceutical patents (Part VI).

The TRIPS Agreement represents a significant step in the harmonization of IP at a global level, in addition to expanding it in scope and breadth, and allowed for tangible, trade-related, sanctions to be imposed when need be, on entire nations.

II.4.B.ii.1 Further analysis

It is important to take a moment to remember that the TRIPS Agreement is only a small part of a much bigger regime that regulates trade in general, and that in order to properly assess its significance, one must therefore look beyond copyright or IP in isolation. From that angle, this agreement can appropriately be seen as a trade-

based compromise – a bargaining chip even – between developed and developing nations. While developing nations commit to providing stronger IP protection to the IP goods of developed nations, the latter agree to make concessions in industries that are perhaps more relevant to developing nations, such as agriculture and textiles (Schiappacasse 2004).

But in reality, and upon closer inspection of the “considerations” that seem to have been given to the various needs and contexts of nations, it becomes clear that the TRIPS Agreement provides nothing that can guarantee that a true balance can be achieved, or that all nations are sitting on equal footing, as has been mentioned by countless critics, including developing nations and even the United Nations Development Programme (UNDP 2003). For example, while the concerns of developing nations are mentioned in very broad and vague terms as we just saw, TRIPS establishes very specific descriptions and elaborate mechanisms when it comes to enforcement or dispute settlement.

So although developing nations recognized and criticized TRIPS’s lack of representation of their best interests, and viewed it as implying a “transfer of wealth from them to those countries holding the most IPRs”, they “eventually agreed to avoid unilateral pressure from the United States” (Schiappacasse *op. cit.* 170). Already in 1998, “the high-income countries of OECD accounted for 86 per cent of total patent applications filed [...] earning over 97 per cent of worldwide royalties and license fees. In contrast, the LDCs earned 0.05 per cent of worldwide royalties and license fees in the same year” (UNDP, *op. cit.* 207). Because it did nothing of significance to advance the human development goals, TRIPS only broadened the already significant knowledge gap and digital divide that separated the developed countries from the rest of the world.

A major part of the problem is that the agendas of the developed nations are often very influenced – not to say dictated – by the economic power and negotiation skills of the major IP stakeholders, which not only undermines the democratic setting required for the international process to work equally for all, but it also threatens their national democracy as well (Tian, *op. cit.* 85).

In an insightful article, Peter Drahos (2002) went on to show how TRIPS does not meet any of what may be considered the 3 fundamental conditions for democratic negotiations, namely:

1. the full representation of the interests of all parties;
2. the provision of the full information about possible outcomes and consequences to all parties; and
3. the non-coercion of any parties by any others.

Perhaps the most revealing aspect of TRIPS is the repeatedly mentioned shift in the forum of negotiation from WIPO, UNSCTAD and the UNESCO, all under the auspices of the UN and its humanitarian concerns, to the GATT, where the only preoccupations are those of money and trade, under the clear domination of the U.S.

(Basalamah 2009, Tian 2009, etc.). Moreover, the manner in which consensus was reached during the TRIPS negotiations was through the creation of circles of consensus, where an outer circle would only be consulted after consensus had been reached by the inner ones. The draft of the TRIPS resulted from the negotiations of the first three circles, involving only the Quadrilateral (or Quad) States⁴⁰, and were therefore not representative of developing – much less least developed⁴¹ – nations. In addition to the lack of representation, consequences and ramifications of the TRIPS were obviously not clear for countries that had not taken part in those negotiations.

It comes then as no surprise to learn that, when a senior South Korean official was asked why his country joined TRIPS, his reply was “because we were ignorant” (Drahos, 2006). As for India, Brazil, and other developing nations opposing the U.S. agenda, they only agreed to join the TRIPS after the U.S. placed them on the priority watch list of their *Special 301* report and imposed trade sanctions (cf. Drahos 2002 *op. cit.* 170-1).

When all of these elements are put together, it becomes clear that by shifting the negotiations to a trade-based forum, economic hierarchies and sanction threats became the bargaining tools that would always have the dominant nations see their unilateral agendas dictate the rules of the game on the international scene. And that is how international, regional, or bilateral treaties direct developing nations to implement laws and policies that do not correspond to their situations, but that serve the interests of the developed nations (*Ibid.* 174).

It is also worth mentioning that this forum-shifting strategy has even been used by influential interest groups and governments to circumvent the domestic legal processes in place in the developed nations and force change from the outside.

For instance, in the early 1990s, the Clinton administration issued a white paper entitled the *National Information Infrastructure Report* as a roadmap for expanding IPRs in the US. Because of its strong favoritism towards the industry, this initiative stalled in the House and the Senate, after incurring strong criticism from various stakeholders (Lehman 1995; Boyle 1996). To avoid the domestic resistance, the Clinton administration shifted its efforts to the international arena, and submitted the failed legislation proposal at the WIPO Geneva

⁴⁰ The United States, the countries of the European Union, Japan and Canada: http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

⁴¹ According to some studies, only one member of the LDCs – Tanzania – participated actively in the TRIPS negotiations. According to a recent joint study conducted by the United Nations Conference on Trade and Development (UNCTAD) and the International Centre for Trade and Sustainable Development (ICTSD), “only one LDC at the time [WTO negotiation process], i.e., Tanzania participated actively in the TRIPS negotiations”. See UNCTAD-ICTSD, Resource Book on TRIPS and Development (hereinafter ‘Source Book’) (2005), 715.

Conference of 1995. The WIPO Internet Treaties, which provided stronger copyright protection in the digital environment, were concluded in 1996, and were mainly based on the US proposals.

It may not be clear how the countries of the world allowed for such WIPO legislation to pass. But the reality of the matter is that the Internet, which was still very much a new phenomenon that was not fully accessible to all parties involved, was a U.S. invention. Many parties were simply not sufficiently informed of the cultural and socio-economic potential impacts of such legislations concerning this revolutionary digital reality.

In any case, once the proposals became legislation, the administration pressured congress to pass the proposals, if for no other reason than to comply with the WIPO Internet treaties. In 1998, the Digital Millennium Copyright Act (DMCA) was passed, including a number of provisions (e.g. anti-circumvention) that require higher levels of protection than any dictated by international treaties.

Once the DMCA was passed, the US started imposing similar IP protection in their free trade agreements (FTAs) in bilateral and regional negotiations. The danger with such agreements is that they obviously do not follow the democratic process and mechanisms that are typically required for policy-making and legislation.

Not only is there a clear power differential that favors developed nations over developing nations in trade negotiations, but there is an additional difficulty for developing nations that stems from being second comers trying to negotiate their interests in a world that has been shaped and is still controlled by first comers.

Copyright holders, with stronger economic and bargaining power, are much more influential than copyright users. So copyright law will favour the former at the expense of the latter. In addition, when the legislation results from trade agreements where copyright is but a small part of a much larger trade transaction, one wonders whether all socio-cultural, and even economic, implications are studied sufficiently. And finally, when those agreements take place outside of the general international scene, and involve only two or three nations, then what dictates what ends up on the agreement is much more a function of the power relation than any democratic process. When these layers of complexity are fully understood, one starts to realize the inequality and disadvantage that user groups in developing nations must face, which is compounded by their being under-informed and under-represented.

In any discussion about the philosophy of copyright law, the balancing of interests of the various stakeholders is of major importance. This is also one of the main concerns of democratic regimes, which recognize that, while inequalities of power are simply the result of the finitude of the resources of our world, mechanisms and tools can be put in place so that the influence of the more powerful does not trump the rights of the weak in society. It is of the utmost importance that all legislative activity around copyright law, be it domestic or

international, takes place in a democratic setting that recognizes different tiers and models based on the different contexts and circumstances of the stakeholders.

II.5 Recent developments

II.5.A Regional and bilateral agreements

Although TRIPS and WIPO's Internet Treaties extended the reach of copyright law and made it concretely enforceable, the United States and the EU have been resorting to bilateral and regional trade agreements in which IP is but a small part, to ensure that their wishes are respected and interests are served by other nations (cf. Okediji 2003-2004; Drahos 2003; Correa 2004).

We can think of at least two reasons for more powerful nations to utilize such methods. First, it is simply to the advantage of copyright exporting nations to see IP enforced as much as possible by other nations, especially copyright importing ones. So although TRIPS requires stronger IP protection, bilateral and regional agreements allow such nations to ask for even more protection than that provided by international treaties. And second, while TRIPS has provided more enforcement and a dispute settlement mechanism, IP protection still ultimately rests within the national legal systems of individual nations. Once such agreements are in place, they not only ensure the protection of the developed nations copyrighted works, they also solidify their international advantage legally, politically and economically.

II.5.A.i The US and free trade agreements

Since the Uruguay Round of the General Agreement on Tariffs and Trade (Berg 1995), there has been a tendency to strengthen multilateral agreements with specific regional ones. For example, Chapter 17 (the entirety of Part VI) of the *North American Free Trade Agreement* concluded in 1992, entitled Intellectual Property, covers all matters of IP.

Soon after its conclusion, the US initiated talks about a *Free Trade Area of the Americas* (FTAA).⁴² Already in 1994, 34 countries in the Americas signed the *Declaration of Miami*. To highlight the speed at which these initiatives can trigger far-reaching repercussions, critics wrote that “[d]raft language in the FTAA opened the door to changes in Canadian copyright law, despite the fact that the issues were still the subject of considerable debate amongst Canada's copyright policymakers” (Geist on MichaelGeist.ca, December 14,

⁴² See official website at http://www.ftaa-alca.org/alca_e.asp and the *Declaration of Principles* (Florida, 1994) <http://www.summit-americas.org/miamidec.htm>

2003). The FTAA was considered to be the “most ambitious and diverse IP agreement ever written” and criticized because it “would pose an obstacle to development and improved quality of life for countries in the Americas” (Oliva 2003, 57-8).

The issue with such agreements becomes apparent when one realizes that every time similar points are brought up on the international scene (e.g. at the Doha Development Round), discussions falter. Yet, the same points are brought back in free trade agreements immediately after the collapse of international negotiations (Abbott 2005, 88-9; Yu 2005, 687). The US attempted to pass IP articles as part of trade negotiations in Cancun 2003. When the latter stalled, the US resorted to pushing the NAFTA model of free trade agreements at an impressive speed, always with inclusions of special chapters introducing very strong IP protection. In June 2003, the US and Chile signed the US-Chile Free Trade Agreement (USCFTA) (cf. Woods 2004; Chile FTA short summary; Chile FTA long summary). In August 2004, the US concluded the *Central American Free Trade Agreement* (CAFTA) with El Salvador, Guatemala, Honduras, Nicaragua, Costa Rica and the Dominican Republic (Rajkumar 2005). Other similar free trade agreements that have entered into force include Singapore (2004) (Chiu 2005), Australia (2005), Peru (2006) Columbia (2006), Bahrain (2006) (Donboli, Et. Al. 2005), Morocco (2006), Oman (2009), Jordan (2010), South Korea (2010), and the list goes on.⁴³ In all of these cases, the signing country agrees to harmonize to a very large extent its domestic IP laws to match those of the U.S., in addition to agreeing to implement levels of protection included in TRIPs and the *Internet Treaties*. In the case of *Trade and Investment Framework* agreement signed with Saudi Arabia, Egypt, Kuwait, Bahrain, the United Arab Emirates, Qatar and Oman, in addition to investor protection and transparency in commerce, the agreement also includes requirements on IP protection.

To deal with what the US deemed inadequate IPR protection by the Southern African Customs Union (i.e. Botswana, Lesotho, Namibia, South Africa, and Swaziland) the U.S. signed a *Trade, Investment, and Development Cooperative Agreement* (TIDCA) on July 16, 2008, so that the implicated nations could establish a standard of IP protection similar to U.S. laws, when the markets and economies of those African countries do not share much in common with that of the U.S. (*2009 National Trade Estimate Report - Southern African Customs Union*).

While no free trade agreements exist between China and the US, a number of IP protection agreements are already in place between the two nations (e.g. *China-US Agreement Regarding IPRs 1995*).

On December 14, 2009, the US initiated the process to start negotiating the Trans-Pacific Partnership (TPP) Agreement (Levine 2012), with the aim of involving as many as fifty states in the agreement, although for the

⁴³ <http://www.ustr.gov/trade-agreements/free-trade-agreements>

time being, only 12 countries were actively engaged (namely Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam) (www.ustr.gov/tpp). President Donald Trump has withdrawn the U.S. from the agreement, while the other 11 nations still seem to be committed to it for the time being. While there is conflicting data concerning the net benefits of signing the agreement, there is agreement that its intended purpose was to bring the markets and economies of the signatories closer to that of the U.S., by pulling them away from their dependence on the Chinese markets and trade. Canada has committed itself to a full public consultation on the TPP before deciding on whether to move forward to ratify it.

II.5.A.ii The EU and free trade agreements

The European Union, which includes 28 countries, has adopted a very similar strategy in getting what it needs from other nations through free trade agreements, outside of the international institutions and their mechanisms. For instance, the *EU-Tunisia FTA 1998*, the *EU-South Africa FTA 1999*, and the *EU-Syria FTA 2004*, all imposed on contracting parties standards that were even more expansive than those of TRIPS (Grain 2008).

In addition, the EU has already either passed or is currently negotiating a large number of agreements that all include articles dealing directly with IP, including the following:

- the European Free Trade Association (EFTA), which is composed of Iceland, Lichtenstein, Norway and Switzerland, already has important bilateral FTAs with 16 nations and is currently in negotiations with India, Indonesia, Thailand, Algeria and Pakistan;
- the Cotonou Agreement between the European Union and the African, Caribbean and Pacific Group of States (ACP) [79 members], was signed in 2000 for a 20-year period;
- negotiations for the comprehensive bilateral trade agreement between the European Union and the Association of South East Asian Nations (ASEAN) began in May 2007. The situation in Burma seems to have complicated and slowed down negotiations;
- the European Union and the Andean Community (Comunidad Andina de Naciones or CAN) started working towards a bilateral trade and investment pact in 1993, and negotiations started in 2007. The Andean community is composed of Bolivia, Colombia, Ecuador and Peru. Peru and Colombia have now signed a text that awaits ratification in Europe;
- the Comprehensive Economic and Trade Agreement (CETA) with Canada was signed in 2016 and is in the process of being ratified. The European Parliament approved CETA in February 2017, while the Canadian bill to implement CETA was granted royal assent in May 2017;

- the FTA between the EU and six Central American countries, namely Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama, was signed in June 2012;
- the Economic Cooperation Agreement between the European Union and the Gulf Cooperation Council, for which negotiations were halted completely in 2008. An informal EU-GCC dialogue on Trade and investment was launched in May 2017, involving the EU and Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the UAE;
- a bilateral free trade and investment agreement between the European Union and India. Negotiations started in 2007 and are ongoing;
- the European Union's bilateral FTA with (South) Korea took effect in July 2011 was the first deal between the EU and an Asian country;
- the Euro-Mediterranean Partnership (EUROMED). Along with the 28 EU member states, 16 Southern Mediterranean, African and Middle Eastern countries, it involves: Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria, Tunisia and Turkey.
- the common market between the EU and Argentina, Brazil, Paraguay and Uruguay (Mercosur) for which more trade talks are still required as of March 2018.⁴⁴

In a 2007 report by the United Nations Development Programme, the authors highlight the fact that the least developed countries (LDCs) are signing numerous regional free trade agreements with developed nations, which often “go beyond commitments made multilaterally in terms of level and scope, hence further reducing national policy space” (Malhotra 2007, 28). The same report goes on to mention that 41 of the 79 countries with whom the EU is negotiating the Economic Partnership Agreements (EPAs) are LDCs. The level of protection sought is, once again, TRIPS-plus, which means that all countries, even the ones that have been identified as requiring international aid, are held to the same standards of TRIPS, or more (*Id.* 29).

Article 65 of the WTO TRIPS states that LDCs are to be granted much longer periods of time before having to honour their TRIPS commitments, and the validity of such exceptions is so uncontested that it is very typical to see them extended even beyond the granted exemptions. By agreeing to sign FTAs outside of the international agreements, LDCs usually end up pressured to forego the flexibilities allowed by the international treaties. In addition, such agreements allow the developed nations to ignore or at least delay their commitments in important areas, concentrating instead on solidifying enforcement (*Id.* 34).

⁴⁴ see ec.europa.eu/trade/policy/countries-and-regions and www.bilaterals.org.

While the US and the EU are the biggest users of regionalism and free trade agreements to circumvent the mechanisms of the international institutions, other majors developing nations that are beginning to follow suit include China, India, and many other Asian Pacific countries. 63% of trade agreements involve Asia-Pacific economies, with 78 other agreements under different stages of negotiation for that region (Asia-Pacific Trade and Investment Report 2016).

II.5.A.iii Conclusion

The shift to regionalism and free trade agreements is now a widespread tactic that can pose a serious threat to multilateral negotiations about IP, as was the case during the negotiations for *Berne* and TRIPS for instance. The insistence on such mechanisms is, of course, not a coincidence. They allow the advanced nations to “expand global IPR, particularly at the expense of developing countries whose interests in market access are often of more immediate political and economic relevance to their domestic constituents” (Okediji, *op. cit.* 129).

If such mechanisms continue to be used, balancing between the interests of various stakeholders will become increasingly difficult. Not only does this hurt the bargaining position of copyright-importing nations, it also sidelines many of the key issues of the discussion, such as the public’s access to intellectual works, and the balancing between IP protection, the progress of knowledge and culture, and socio-economic development by pushing for “TRIPS plus” protection that is simply lumped with the rest of the articles on trade between the contracting nations. And as the UNDP Report 2003 stated years ago, these “TRIPS plus” agreements have considerably diminished developing nations’ room to manoeuvre, with “troubling implications for human development” and set a “dangerous precedent” for future IP legislation (UNDP *op. cit.* 219-220).

II.5.A.iv Convergence of the traditions and other trends⁴⁵

II.5.A.iv.1 To purify, or to complement?

It is not surprising, given the crises, problems, and paradoxes that copyright has experienced since the 1960s, as well as the general and natural evolution of a rich and dynamic field like that of IP, that the traditional legal paradigm has become unsettled and uncertain. Although legislators, practitioners, and scholars do not speak with one coherent voice, they do all deviate in some way or another from the nineteenth-century paradigm. Within this group of dissident voices, two poles can be identified.

⁴⁵ I am simply mentioning these points to add to the disciplinary context surrounding any talks of copyright reform. I am choosing not to argue these matters here one way or the other mainly for lack of relevance.

One is the view that traditional copyright law must be purified and updated; the other is the notion that copyright is an integral part of intellectual property law, and that a more liberal and unorthodox approach to copyright law should be adopted.

W. R. Cornish may be seen as a champion of the first view (1991), and Reichman's approach is, in many ways, similar. Reichman's call for a third intellectual property paradigm is based on the assumption that "the real universe of [contemporary] world intellectual property law is inhabited by constellations of deviant protective modalities that violate its key operating assumptions, especially the negative economic premises" (Reichman 1994, 351).

On the opposite end of the spectrum, others have argued for complementing copyright law with notions from other areas of IP. For instance Dommering has suggested that the legal notions and instruments that belong to the realm of law on unfair competition and misappropriation ought to be introduced into copyright (*cf.* Dommering and Hogenholtz 1991). Another legal scholar, Hugenholtz, highlights the need for copyright law to borrow legal instruments from related fields but also redefine traditional notions such as originality (*Id.*).

Both approaches are valid and are not mutually exclusive. While we cannot argue with the claim that copyright law has indeed "deviated" from its original operating assumptions, this is not necessarily a bad thing, because it is a reflection of a changing world that requires law and policy to try to find solutions to real problems by taking into account much more complex considerations in order to be aligned with the practical needs of citizens and the new realities of the world. This act of borrowing from other fields is, in fact, one of the underlying themes running through this entire work, not only as a theoretical position, but in practice as well, as we have demonstrated and will continue to do until the end of the thesis.

II.5.A.iv.2 Convergence of the traditions

While copyright prevents the copying of physical material and follows a remedy approach, *droit d'auteur* follows a rights approach and originates *ex persona*, as opposed to *ex lege*. Both traditions also have their respective strengths.

The copyright system seems to adapt more easily to the demands of new technology (see the difficulties the pure 'droit d'auteur' system still has in coping with films). On the other hand, in coping with the difficulties posed by the fact that more works are produced in employment and by team-work, the *droit d'auteur* doctrine has an important contribution to make.

(Stewart 1989, 10)

Yet, despite these differences, it seems inevitable that “a synthesis of the two philosophies will gradually be achieved which will gradually strengthen the position of copyright as a legal discipline both nationally and internationally” (*Id.*).

The repeated and increasingly more frequent interaction between the two traditions seems to have resulted in the spreading of legal ideas and paradigms from tradition to the other. The continuous flow and movement of legal paradigms and ideas across legal and national borders, or legal transplantation (Watson 1974; Wise 1990) is a borrowing process that can take place even when the social, historical, political, economic and legal frameworks are different (Grosheide in Sherman & Strowel 212).

In fact, it can be argued that one of the successes of *Berne* was its ability to synthesize both civil law’s *droit d’auteur* and common law’s copyright into one regime, perhaps leveraging both systems’ reliance on a free market economy and granting a high level of protection.

But in addition to this historical convergence of the two traditions, a number of scholars who have looked closely at the sources and evolution of both copyright law and *droit d’auteur* have rejected, or at least questioned, the claim that the philosophical starting points of both traditions are fundamentally different. While certainly recognizing the author’s personal right over their creation, France viewed literary property mainly as a means to advance public instruction. Similarly, early US copyright recognized the reward due to the author for their labour, and did not limit their arguments to the utilitarian discussion around the progress of science and knowledge in society as a result of the dissemination of works (Ginsburg in Sherman & Strowel, 158).

Recognizing the similarities between the initial positions of the two traditions may go a long way in seeing advocates of both regimes be more receptive to reforming law starting with such “borrowings” of elements found in the other tradition. Ultimately, this makes it easier to reform the law using elements from outside the discipline as well, because there is only one set of articles to address, all of which form collectively a single coherent, consistent whole. From a different perspective, however, this convergence is perhaps indicative of the far-reaching influence of the more powerful elites, especially in a globalized world, which influence transcends legal traditions and geo-political borders.

II.6 Power of the few

In July 2007, senior policy makers and delegates of international organizations, including those of 47 least developed countries, met in Istanbul to promote South-South cooperation between themselves and with the

developing countries. Their conclusions were presented in a report entitled *Making Globalization Work for the Least Developed Countries* (Malhotra 2007).

The main trigger for the type of globalization the world has witnessed has been the need for new markets and investment opportunities in new territories, facilitated by modern technologies. The very different starting points of the nations of the world has created further unevenness between them, to the point where urgent intervention was deemed necessary to avoid global crises (*Id.* 4). This is completely in line with the 8 goals established by the UN Millennium Campaign in 2002. Millennium Development Goal (MDG) 8 is entitled *Develop A Global Partnership For Development*. While poor countries have a responsibility to work towards trying to achieve the first 7 MDGs, “it is absolutely critical that rich countries deliver on their end of the bargain with more and more effective aid, more sustainable debt relief and fairer trade rules” (www.endpoverty2015.org).

Instead of putting in place stronger IP regimes for the LDCs to implement, and to address the systemic problems causing inequality at the international level, developed nations must, in addition to providing aid, “put in place trade, investment, debt, sustainability, migration, climate change and intellectual property frameworks that systematically and genuinely operationalize special and differential treatment in favour of developing countries” (Malhotra *op. cit.* 13). In fact, “global policy frameworks should disproportionately benefit the LDC and stem the tide of rising inequality between countries” (*Id.* 40).

Since the 19th century, there has been a general tendency across social sciences and humanities to converge towards the notion of equilibrium for various purposes that can be summarized as the attempt to balance the interests of the opposing elements in order to create a stable and sustainable system. This is the case in the theoretical and analytical tools of psychology, anthropology, political science, international relations, sociology, and even law (Story 2003, 788).

In the previous sections of this chapter, I have attempted to emphasize the obstacles that have prevented and which continue to prevent a balancing act to be performed between what may seem to be the mutually exclusive interests of the various stakeholders.

For this chapter to properly transition into the remainder of the thesis, it is necessary to understand the power that the elites can exert in society in general, and in the communications industry in particular, because it constitutes the reality in the confines of which any serious attempt at reform must work.

Given his critique of property in general, his interest in power relations in society, and his focus on the materiality of the means of production, Karl Marx has left us with very relevant analytical and critical tools. A

general application of the main Marxist axioms to law (as Marx himself did in some of his works – e.g. *Outlines of the Critique of Political Economy*) results in the realization that the roots of law are to be found in the material conditions of life. In their struggle, the bourgeois class and the proletariat will both use law as one of their instruments to maintain control over the means of production. Law becomes a tool of power.

According to this theory, the general tendency is that, as society progresses, ideas and information gain importance as tools of power. In fact, the omnipresence of intellectual property is a clear indication that the production and distribution of information is becoming a means of livelihood not only at an individual level, but also at a societal or state level. And if the latter is true, then we fall once again into the power struggle paradigm.

Moreover, rights are granted to owners, not to the originators of the intellectual works, in the sense that ownership will often be assigned or vested to some other party. So in such cases, in the terms of Karl Marx, it is the capitalists, the bourgeoisie, the ruling class who own the intellectual property, not the workers themselves, even though it is their labour. In some cases, the worker may not see any reason for investing time and energy in producing a creative intellectual work, knowing that the employer will be the owner. Again, in Marxist terminology, this would be yet another example of capitalists acquiring labour power by exploitation of labour. Marxism defines exploitation as putting in more hours in the production of goods than required, or from another angle, producing more value than the labour itself is worth. This would mean that the purpose of intellectual property law is none other than extending the control of the capitalists over a specific means of production, namely, abstract objects, and has nothing to do with encouraging the propagation of art and science.

(According to the Marxist interpretation, capitalism takes away the human's free conscious activity, which Marx considers to be the distinguishing characteristic of the human species. All forms of labour, even those that are supposed to participate in the self-realization of the subject, become coerced, alienated labour. But from a capitalistic point of view, competition alone will provide sufficient incentive for creative and innovative labour.)

This same logic was applied to today's technologized societies by McKenzie Wark (2004). He explains that the technological complexities of today's society and its monumental amounts of information are abstractions that order everything along vectors, which are themselves the new means of production. Those who own and control these means are the vectoralist class, whose power lies in dispossessing others, as classes and as individuals, of their intellectual property and monopolizing abstractions by creating "scarcity and margin, not abundance and liberty" (§046). This gradually transforms the world in their favour: "With the rise of the vectoral class, the vectoral world is complete" (§032).

If we adopt a critical approach to the classic study of culture and communication (*cf.* Giddens in Dervin 1989), communication theorists have identified a number of trends, not without implications, that are of special relevance to an increasingly digital and globalized world relying on information as capital. Three such trends are:

- the monopoly over media systems in the hands of a few multinational corporations;
- the reliance of economies on information and knowledge; and
- the weakening of the public control over communication systems. (*cf.* McQuail 1994)

As a result of the social movements of the 1960s, academics (e.g. Dallas Smythe, Herbert Schiller, Thomas Guback) began studying questions of ideology, power, and institutional structures in communication systems. Political economists quickly drew established links between ownership and control of communication, highlighted the bonds between the communication sector and big business, and brought attention to the ties between the communication sector and the government.

The richest members of the capitalist class see their ownership and control over communication systems grow with time, which earns them profits. These profits then enable them to own and control communication systems further, which will, in turn, enhance their wealth. The ownership and control of communication is also conducive to ideological power, in the very concrete sense of controlling the content and dissemination of information. Having stronger property rights to protect and strengthen this control simply goes hand in hand with the ideological and institutional hegemony required to sustain this cycle, while openness to information and access to channels of communications can be seen as posing a threat to it.

In a system where information and knowledge replace the typical material means as the capital, copyright becomes the instrument for capital generation. The very nature of copyright as a monopolistic regime over content makes it the perfect complement for oligopolistic structures of content production and dissemination. If the collective means of communication are viewed as the cumulative pool of ideas of a society, then their limited penetration into the pool and filtered dissemination out of it can only be deemed harmful to the depth and breadth of ensuing cultural works.

The works of Marx, Hilferding, Luxemburg, Lenin and Bukharin provide analytical and critical tools to understand the logic of capital accumulation, identified by some as “driving the need to extract wealth from the productive activities of society in the form of capital” (Heilbroner 1985, 33). The distinctive feature of the capitalist model of economy is perhaps the purpose of wealth, which, we are told, is its reinvestment for the accumulation of more wealth. Capital is therefore always on a quest for unexploited markets and unconquered

territories. Given sufficient time and no obstacles, economic globalization, as we are witnessing increasingly in today's world, is therefore inevitable:

It becomes necessary for capital progressively to dispose ever more fully of the whole globe, to acquire an unlimited choice of means of production, with regard to both quality and quantity, so as to find productive employment for the surplus value it has realised.

(Luxemburg 1913, ch. 26)

Intellectual and artistic activities are not safe from being commodified and subjected to the same expansionary business model. "Precisely because capitalism is expansionary and imperialistic, cultural life in more and more areas gets brought within the grasp of the cash nexus and the logic of capital circulation" (Harvey 1989, 344).

The ideological hegemony will simply derive from this kind of material monopoly over the means of communication:

The ideas of the ruling class are in every epoch the ruling ideas, i.e. the class which is the ruling material force of society, is at the same time its ruling intellectual force. The class which has the means of material production at its disposal, has control at the same time over the means of mental production [...]

and those who control the means of mental production will "rule also as thinkers, as producers of ideas, and regulate the production and distribution of the ideas of their age: thus their ideas are the ruling ideas of the epoch" (Marx, Engels (1845) 1970, Part I).

When the management of the production and distribution of information and culture falls in a very limited number of hands, they also acquire the ability to make meaning, and thereafter to represent their own interests as though they are society's (Bettig 1996, 35). In order to be published, creators must generally transfer their rights over the "intellectual primary material" (Edelman 1979) to those who control the means of communication, leaving the latter with both means and content to be used as investment capital for their own interests (Morawski 1973, 3-47). Studies have now demonstrated that "the means of communication as well as the right to the forms of artistic and literary activity embodied in books, screenplays, songs, films, recording, symbols, images, paintings, photographs, and so on" (*Id.*) are owned by an identifiable socio-economic class, that can simply be described as capitalist.

While many hailed new information communication technologies as enablers of openness and diversity in society, the reality is that they have been unable to rise to the expectations and have at times further restricted access and concentrated ownership and monopoly of information. And in cases where one gets the impression that openness and diversity have indeed taken place, critics tell us that, given the above explanation of the concentration of ownership, such diversity is only marginal or meaningless (Herman 1985).

Since the 19th century, capitalists have been trying to penetrate new markets while at the same time seeking to eliminate competition to maximize profits. One of the manners in which competition is eliminated is simply by controlling the entire chain of production and sale, by buying out competition through mergers, or by buying the suppliers, distributors and retailers. That is why, and perhaps contrary to popular belief, given enough time, there is always a tendency in capitalist markets to converge towards a concentrated power. This in turn translates into economic political power (cf. Fusfeld 1988). In 1985, the structure of the economy of the U.S. was made up of a core of about 1200 very dominant and wealthy firms (Bettig *op. cit.* 36), and the peripheral rest, with very little market power. According to some estimates, in the 1980s, the former owned about 65% of all non-financial assets in the country and made about 70% of all corporate profit (Bowles 1985, 201). Since then, the concentration has only increased, reducing the number of firms, while increasing the market power of the surviving ones.

From the 1920's to the 1970's, conglomeration usually meant an expansion from a company's original business line into all other possible areas, sometimes seeing a single company eventually doing business in 100 other fields ranging from books, cigars and lingerie to jet engines, insurance and sports teams. Since the 70s, however, conglomeration has looked more like a process of regrouping around a certain line of business while establishing international alliances with companies that are dominating the same line of business in foreign markets. In other words, instead of owning a little piece in every kind of pie, companies started owning every piece in a specific kind of pie. By looking at companies like Paramount, Viacom, Walt Disney and Sony today, we realize that communications conglomerates own film and television production and distribution, theatres, broadcasting, cable networks, music publishing, sports teams and their respective facilities, and technological hardware production (Bettig *Ibid.*).

II.6.A Ownership of media

Scholars who have studied media monopoly (Bagdikian 1983, 1992; Schiller 1990, Smith 1991, Tunstall 1991) have been in agreement for decades that a handful of communication companies produce, own and distribute the crushing majority of information and culture. In the early 1980s, Ben Bagdikian found that about 50 companies controlled more than half of all that we see in newspapers, magazines, books, television and theatres (1983). By the early 1990s, the number of owners had dropped to 20 (Bagdikian 1992), while 90.7% of the gross profits were in the hands of the seven firms – Sony, Warner Bros, Disney, Paramount, Fox, MCA/Universal, and Orion pictures Corp (Landro 1992 in Bettig *op. cit.* 39). If we look at box office gross specifically, the top six distributors accounted for about 96% in 1992 (King 1993, in *Id.*).

II.6.B Ownership of wealth in general

Experts have been reminding us that both the Great Depression and the Great Recession were preceded by tremendous income gaps (Rugaber and Boak 2011). As Stiglitz wrote in 2011 “An economy in which *most* citizens are doing worse year after year – an economy like America’s – is not likely to do well over the long haul.” Inequality means less opportunity to get the best human resources producing the right things in society. Moreover, inequality is usually the result of such means as monopoly power and preferential tax treatments, which distort the efficiency of the entire economic system (Stiglitz 2011).

In 1983, the net worth of U.S. households was about \$10.6 trillion, 35% of which was owned by the wealthiest 0.5%, and 70% by the wealthiest 10%. When equity in personal residences was excluded, the wealthiest 0.5% were found to own 45%, while the top 10% held 83% of all net worth (US Congress, Democratic Staff of the Joint Economic Committee 1986, 23, 29). Other studies conducted at various key moments have shown a continuous increase in the wealth of the richest, regardless of the global economic context. Household wealth held by the richest 1% increased from 31% to 37% between 1983 and 1989 (US Federal Reserve 1992 in Sylvia 1992, A17).

In 2011, according to the Internal Revenue Service of the U.S., those at the lowest end of the top 1% were making \$343,927, but on average, they make \$960,000 a year (Luhby 2011). From 2009 through 2012, incomes for the highest earning 1% in the US soared 31%, while they increased by an average of 0.4% for the next 80%, and even dropped for the 20%. A Pew Research Center study concluded that the richest 7% of households in the U.S. grew financially by 28% between 2009 and 2011, while collective wealth fell 4% for the other 93%. Similar figures were found by the Organization for Economic Cooperation and Development, which explains that 17 out of 22 developed countries witnessed widening gaps between high and low income earners (Rugaber and Boak 2011).

In May 2011, Joseph Stiglitz, the 4th most influential economist in the world today (*Ideas*) and one of the most influential people in the world (*Time*) wrote an influential article in *Vanity Fair* entitled “Of the 1%, by the 1%, for the 1%” (www.Vanityfair.com). He explains therein that if the top 1% of Americans control 40% of the wealth it is simply because “the top 1 percent want it that way” (Stiglitz 2011). And it seems that this is just the way things are going to be for years to come, because “what made it possible is self-reinforcing. Wealth begets power, which begets more wealth” (*id.*). He even goes on to reveal that:

Virtually all U.S. senators, and most of the representatives in the House, are members of the top 1 percent when they arrive, are kept in office by money from the top 1 percent, and know that if they serve the top 1 percent well they will be rewarded by the top 1 percent when they leave office. By and large, the key executive-branch policymakers on trade and economic policy also come from the top 1

percent. When pharmaceutical companies receive a trillion-dollar gift—through legislation prohibiting the government, the largest buyer of drugs, from bargaining over price—it should not come as cause for wonder. It should not make jaws drop that a tax bill cannot emerge from Congress unless big tax cuts are put in place for the wealthy. Given the power of the top 1 percent, this is the way you would *expect* the system to work.

(*Id.*)

These trends have only intensified with time. In an article called “The Network of global corporate control” by 3 complex systems theorists at the Swiss Federal Institute of Technology in Zurich (Vitali, Glattfelder, Battiston 2011), the authors analyzed relationships between 43,000 transnational corporations (from a database listing 37 million companies and investors) and concluded that a “super-entity” of 147 tightly knit companies, or less than 1%, controlled 40 per cent of the world’s wealth (also in Coghlan and MacKenzie 2011). This also creates a stability issue because, due to the interconnectedness of these companies, the entire network can collapse from the core if one of the major players suffers a major financial hit. In fact, the threat is such that some have suggested that in order to discourage it, firms be taxed for excessive interconnectivity. In any case, one can be sure that such a concentration of wealth can easily exert political power, act together on common interests, and resist any changes to the network unless such changes will clearly improve it (*id.*). In fact, if we look at the figures from 1979 to 2007 with adjustments to inflation, the top 1% earners in the US have become 275% richer, while the middle 60% have only grown financially by 40% (Rugaber and Boak 2011).

In order to discourage belief in the existence of an elite capitalist class in the U.S., the activities of the top 1% are typically unknown to the masses (Zaitlin in Bettig *op. cit.* 47). While some post-structuralists and cultural scholars have argued that the ruling class is typically marred with divisiveness and fragmentation, some sociological studies aimed specifically at the top 1% – also identified as the ruling class – have concluded that, quite the opposite, they have a very high degree of social cohesiveness, share a distinctive and similar style of life, and are quick to agree with each other on matters of social policy (Domhoff in Bettig *Id.*).

This is not saying that society’s structures necessarily enable and empower the elite further; rather, it is a reflection of their exceptional abilities, resources, contacts, and common interests with other in similar context, which enable them to restructure society to serve their ends (*Ibid.* 48).

The rules of economic globalization are likewise designed to benefit the rich: they encourage competition among countries for *business*, which drives down taxes on corporations, weakens health and environmental protections, and undermines what used to be viewed as the “core” labor rights, which include the right to collective bargaining. Imagine what the world might look like if the rules were designed instead to encourage competition among countries for *workers*. Governments would compete in providing economic security, low taxes on ordinary wage earners, good education, and a clean environment—things workers care about.

(Stiglitz 2011)

Major media companies and the copyrights they own are all owned and controlled by the same elite. Studies on the ownership and management of the largest publicly held American film entertainment companies revealed that the entire industry is controlled by a few individuals, who happened to “share a class interest that shapes their posture toward social resources: how they are used, by whom, for what purpose and in whose interest” (Guback 1986, 17). Herman and Chomsky studied the 24 largest firms in the media sector in 1986 and concluded that it was in the best interest of these families and individuals to keep the status quo, to get involved in shaping policies serving their ends, and hand-picking their top managers from the same socio-economic class (Herman and Chomsky 1988).

This last point is noteworthy, because it means that even with the separation of ownership and control, companies operating in capitalist models will operate by seeking to defend their property, looking for new markets, eliminating competition, and maximizing profits. In addition to this simply being the *de facto* goal of capitalists, studies have shown that individuals occupying the executive positions of the largest firms come from the upper class; that they do have a stake in the corporations they manage in the form of stocks and bonuses; and that they end up being assimilated into the upper class, if not by birth, then by education and interaction (cf. Mills 1956, Herman 1981, Domhoff 1983). One researcher simply concluded that “the behavioral implications of the separation of ownership and control are overstated” (Mintz 1989 in Bettig 61). In the US, a child born in the poorest 20 percent in 1986 (as well as in 1971) only has 9% chance of reaching the top 20 percent as an adult, and by some measures, a child is as likely to inherit his parents’ economic status as he is their height (Rugaber and Boak 2011).

The plausibility – not to say likelihood – of such a scenario corresponding to reality warrants a serious look at intellectual property as a tool for the extension of power (Nicos Poulantzas in Bettig 48). Whether we explain it as the discovery of a new unexploited market or stemming from the necessity of transforming the structure of the market because of declining profits and the weakening of the U.S.’s grip over global economy, society has clearly witnessed a new phase of capitalism in the past few decades, where ownership of intellectual property rights over information, knowledge and cultural goods have become the measuring stick of wealth and power. In a post-Fordist or techno-capitalist world, production, distribution, and sale of goods protected by IP have taken precedence over ownership of material or real estate goods. The centralization of information and knowledge in the hands of the few has been establishing the same kind of hegemonic dominance, through the legal structure of the IP regime, as the concentration of real estate and material goods was once creating in the Fordist era.

That communication and culture are a trans-national phenomenon is a safe statement since the invention of the printing press (cf. Einstein 1979). What is remarkable today, however, is that the entire informational and

cultural output of the world is controlled by so few companies. As acquisitions and mergers continue along business lines, alliances between capitalists of different nations, dealing with goods protected by IP, enable further power by uniting and lobbying in order to secure higher levels of protection and recognition. This power is so far-reaching that, except for some LDCs, the importance of IPRs on the agenda of the Uruguay Round of GATT was never questioned by the international community (Bettig *op. cit.* 195).

Though our main concern was with the industries directly affected and affecting copyright law, we had no choice but to situate the discussion in the broader picture of wealth ownership in general, because the communications industries are simply a representative, microcosmic part of the whole.

During what was dubbed *the Arab Spring*, Stiglitz wrote the following:

we have watched people taking to the streets by the millions to protest political, economic, and social conditions in the oppressive societies they inhabit. Governments have been toppled in Egypt and Tunisia. Protests have erupted in Libya, Yemen, and Bahrain. The ruling families elsewhere in the region look on nervously from their air-conditioned penthouses—will they be next? They are right to worry. These are societies where a minuscule fraction of the population—less than 1 percent—controls the lion’s share of the wealth; where wealth is a main determinant of power; where entrenched corruption of one sort or another is a way of life; and where the wealthiest often stand actively in the way of policies that would improve life for people in general. As we gaze out at the popular fervor in the streets, one question to ask ourselves is this: When will it come to America? In important ways, our own country has become like one of these distant, troubled places.

(Stiglitz 2011)

Part I was meant to provide the more general context in which the translation right operates, and from which it originates. Now that we have understood the various notions of copyright law and retraced their colonial historical and questionable philosophical foundations to their origins, we may look more thoroughly at the translation right, not only by retracing its historical and philosophical foundations, but also from the perspective of translation theory. The remaining chapters of the thesis will expand on the themes of social development and power differentials introduced here, while attempting to unearth the arguments and evidence that ought to be part of the full picture that policy makers study as they grapple with copyright and the place of translation in society.

Part II: Translation in law, theory and practice

This second part of the thesis intends to answer the following questions: What is the translation right (Chapter 5), and how did it come about? (Chapter 6). We will then see how translation views the role of the translator and of translation from the lens of the academic discipline of translation studies (Chapter 7), in order to compare the extent to which this view is compatible with the premises of copyright law in general and the translation right in particular.

Chapter 5: Translation right

The purpose of this short chapter is to present and explain the translation right, as it appears in law, as well as in three key international documents, namely: the *Berne Convention*, the *Nairobi Recommendation*, and the *Translator's Charter*.

I. Understanding the terms: translation rights

An arrangement or adaptation may attract copyright protection provided it meets the general criteria for copyright protection including originality in the form of sufficient skill and labour. An arranged or adapted work has two layers of copyright protection. There is protection in the original work and there is protection in the arranged or adapted version. To use the work, copyright must be cleared in both the original and the arranged or adapted version. Permission must also be obtained to adapt it from the owner of the original.

Copyright dictates that permission must be sought from the owner of a work before it can be translated, because translation is a derivative work, based on the same idea found in the pre-existing work, but expressed in a new manner. Translation is therefore a specific genre of work, one which relies on previous works to produce new ones. This point may seem trivial, but it is not, because authors universally want their works to be attributed to them (Sundara Rajan 2011) – which makes this attribution a true incentive – and there is no individual or social advantage that can result from not recognizing that attribution. The law recognizes translation as an original work itself, and grants it copyright protection, as explained in Article 2 of the *Act*:

“every original literary, dramatic, musical and artistic work” includes every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science.

(Art 2, *Act*)

To be copyrightable, translation must meet the conditions of originality and fixation, which it usually does according to the law. So if the translator is a resident of Canada or a treaty country, copyright protection is automatic for the translation, because it is deemed an original work. The justification for this protection is that a translation is more than a mere copy or reproduction of the original work.

Copyright considers translation a secondary or derivative work, also referred to as “composite” in French law. In Canada as in most other nations, this is because the country providing the protection upholds all the provisions of the *Berne Conventions* (Art 91 (a), *Act*) which explicitly refers to translation as a derivative work.

Although a translation is itself protected by copyright law as an original work, it still requires the explicit authorization of the owner of the copyrighted work before it can be published. Given the above, the resulting translation would be considered a new work with a separate copyright owned by the translator. To translate a translation, for instance, one would have to get the permission of the translator as well as the owner of the copyright in the original work. Because a translation benefits from its own copyright protection, if copyright has expired in a work, copyright protection in the translation remains until the end of its own term.

1.1 Author's moral right – derivative work

As we saw, the author's moral right in their work (Act, 14.1, 14.2) is rather powerful, making it an infringement (28) to translate their work without authorization. Specifically, this is guaranteed by the right of integrity, which prevents the distortion, mutilation, or other modification of a work that the author deems damaging to the honour or reputation of the author. So if the change is not damaging to the reputation of the author, it should not be considered, in principle, an infringement of their moral right. Notwithstanding the difficulty of establishing intent in such a case, I could not find any documented cases where a translation of a work was ever undertaken with the intention of ruining the reputation of the author. Translation is a difficult and time-consuming activity, requiring dedication, energy and skill. That is why, in practice, translations are usually a testament to the author's competence, and the worthiness of their work to be translated, in the eyes of the translator or the one commissioning the work. Moreover, an author will never be in a position to judge the quality of a translation in all languages, to be given the right to decide whether the translation is damaging or not to their reputation. And even if they were in such a position, they would not be able to assess the quality of a translation until it is completed and – realistically – until it is received by critics and the public. Finally, all of this is based on the idea of the invisibility – and therefore unaccountability – of the translator. If the law truly recognized that the translation of a work belongs to the translator, then it should recognize that its quality is a reflection of the competence of the translator. But as it currently stands, it is as though the quality of a translation is only due to the competence of the author of the pre-existing, or original, work.

The law however, does recognize the integrity right to the author in a maximalist manner, automatically granting them as much control over their work as possible, in an attempt to prevent, or at least minimize, the risks of any eventuality leading to a representation of their work that they may deem harmful to their reputation. The right of integrity is a relic from German romanticism. And this halo of sacredness bestowed upon the author and their work is precisely what post-modern thinkers tried to deconstruct – convincingly according to many, including this author.

So, to allow translation to take place without the explicit authorization of the author, the right of integrity (which is usually incorporated in laws that rely, at least in part, on the moral argument, such as Canadian copyright) would therefore have to be modified or loosened. Instead of pre-emptively preventing any derivative use of a work, or leaving it entirely to the author to determine whether their reputation will be damaged by the translation, the law could initially accept, as a premise, that a translation is non-damaging until proven otherwise.

As for the other arguments that may be raised in favour of allowing the author to control their work to the point, they were presented and partially discussed in Chapter 3. Whether the monopoly granted to the author is truly the best incentive to create new works, and whether granting such a monopoly is a fair price for society to pay in return for the incentive, are questionable arguments at best, as we will see as we continue to explore them from different angles over the next chapters of the thesis.

As we shall discuss in Chapter 9, in recent years, technological advances have made it possible to rely on technology to generate translations, and the quality of the translations will only continue to improve over the next years. This is usually done by reliance on computer programs that store information in databases and then retrieve it.

The copyright act does not specifically address the situation of works generated with the aid of computer programs. In general, if you create, control and manipulate an image or any other copyrighted material with the help of a computer program, you are considered the author of the new work. Whether you own that creation depends on the factors that are set out for the determination of ownership. When a copyrighted work is generated by a computer with no human intervention, the author would most likely be considered the person who made the necessary arrangements (i.e. controlled or manipulated the device in order to create the copyrightable work).

A database is an assembly or compilation of facts, data, content or information in an organized format and whose individual components may be individually accessed. A database would be considered a “compilation”, as it is, literally, a compilation of information. Thus, databases are protected by copyright. The fact that the database is in electronic or print format has been irrelevant in determining its protection in court cases. In order to be protected, it has to meet the general criteria of compilations; for instance, there must be sufficient original skill and labour put into the selection and arrangement of its data. Note that it is the database itself, meaning the collection of data, and not the information contained in the database that is protected by copyright. Copyright’s protection of databases is one of the clear instances of its constant expansion. Some kinds of machine translation rely on databases. This topic will be discussed in more detail in Chapter 9.

Let us now take a closer look at three important documents which are key to understanding the spirit and regulation of the translation right internationally. These are the *Berne Convention*, the *Nairobi Recommendation*, and the *Translator's Charter*.

II. Translation right in three key documents

II.1 *Berne Convention*

It may come as a surprise to some that the *Berne Convention for the Protection of Literary and Artistic Works*, which is the legal document *par excellence* for intellectual property law, does not mention the translator once. It does however contain an article on the Right of Translation, which 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” (Art 8, *Berne*).

That the right of translation does not belong to the translator but to the author of the original is perhaps not surprising given the non-existence of the translator’s name or role in the text. From a philosophical standpoint, one legitimately wonders, if the right to translate is not accorded to the translator, then what right does s/he have? (Basalamah 2009, 311-317)

According to *Berne*, the work of the translator does, however, have a right, as a “derivative” work: “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” (Art 2, *Berne*).

There is no contradiction in articles 2 and 8. They simply mean that a translation, and indirectly, the translator of that translation, will have a right if, and only if, the author of the original accepts to give them such a right. Legally, that is all a translator can hope for, for the author or rights holder to see a benefit in granting the translator the right to translate. If the work of the translator is a “derivative” work, as indicated by the title (regardless of the above-mentioned quote qualifying translations “as original works”), then we can derive that, according to *Berne* and all legislation that is based on it all over the world, the figure of the translator is a symbolic derivation as well, stemming from an original, namely, the author.

If it is truly out of fear of seeing the work of the author mutilated or deformed in translation that the freedom to translate is so restricted, why not hold the translator accountable for his or her work by giving them *more* rights? Applying the same philosophy of *droit moral* to the translation makes it an extension of the translator’s person.

How can there be no mention of the agent, the translator, especially when this goes against all recent research underlining the ubiquitous subjectivity of the translator in philosophy and hermeneutics, in anthropology, in literary theories, in gender studies, in post-colonial studies, etc. (as we shall discuss in more detail in Chapter 7). One could maybe argue that such texts are dehumanizing the creative process and concentrating on the final product. But even this argument does not stand, since the situation is quite different when it comes to the original work, where the author suddenly becomes ever-present.

II.2 Nairobi Recommendation

On the 22nd of November 1976, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) met, for the nineteenth time, in Nairobi, and adopted the *Recommendation on the Legal Protection of Translators and Translations and the Practical Means to improve the Status of Translators*, usually referred to as the *Nairobi Recommendation*, for short.

In the preamble of the recommendation, we are told that UNESCO considers translation as an activity that “promotes understanding between peoples and co-operation among nations by facilitating the dissemination of literary and scientific works, including technical works, across linguistic frontiers and the interchange of ideas”. As a consequence, it notes “the extremely important role played by translators and translations in international exchanges” and recognizes “that the protection of translators is indispensable in order to ensure translations of the quality needed from them to fulfil effectively their role in the service of culture and development” (UNESCO 1976).

But once we start reading the contents of the *Recommendation*, we quickly realize that it is nothing more than a repetition, albeit more detailed, of what was already said by international laws and provisions, most of which rely on *Berne*. As a matter of fact, some of the articles of the *Nairobi Recommendation* seem to denigrate the translator more than other texts, precisely because they are more explicit and detailed. (Basalamah 2004)

For instance, note the underlined passages in articles 3, 5(g) and 5(h), which state:

3. Member States should accord to translators, in respect of their translations, the protection accorded to authors under the provisions of the international copyright conventions to which they are party and/or under their national laws, but without prejudice to the rights of the authors of the original works translated.

5(g) stipulate that, subject to the prerogatives of the author of the original work translated, no change shall be made in the text of a translation intended for publication without seeking the prior agreement of the translator;

5(h) assure the translator and his translation similar publicity, proportionately [French translation “Toute proportion gardée”] to that which authors are generally given, in particular,

the name of the author of the translation should appear in a prominent place on all published copies of the translation, on theatre bills, in announcements made in connexion with radio or television broadcasts, in the credit titles of films and in any other promotional material;
(UNESCO 1976)

II.3 The Translator's Charter

The *Berne Convention* and the *Nairobi Recommendation* are both important legal documents having an undeniable role in forming the image of the translator in the collective imagination. They can be both interpreted as stemming from an external authority to the translator, which may explain, though not justify, constantly relegating the latter's status to submissiveness to that of the author. In all of the minutes of the international meetings that I studied where translation rights were discussed over the last century and a half, not once was there a mention of someone representing translators. So it may be justified to view some of the language and provisions of *Berne*, *Nairobi*, and other texts as the result of the absence of an agent representing the interests of translators, when they are in direct competition with other interests that are much better represented at such meetings.

While the status of the translator has greatly varied from one set of circumstances to another (Delisle 1999, 2002) translators have often been relegated to the bottom of the literary pole, or the literary proletariat, as Emily Apter refers to them (Apter 2006, 10).

For instance, the publisher of *Stuttgart*, Robert Lutz, was so appalled that some translators were not respecting copyright law, that he published a note in which he referred to translators as “mostly women, primarily old school teachers or governesses [who] have no knowledge of international arrangements for the protection of literary property or are not particularly careful to observe them.” Two female translators happened to infringe on his rights as a publisher; while the first was translating for pocket money, the second was a widow supporting her children by translating. He lamented their state, arguing that if the widow had any competence, she would be producing her own unique work and feeding her children. Instead, all she could do was to trespass on the work of others by translating them, which he calls “adaptations” (in Hemmungs Wirtén 2011a, 101).

The Translator's Charter was approved by the Congress of the International Federation of Translators (IFT) at Dubrovnik in 1963, and then amended in Oslo on July 9, 1994. Though it does not carry the same legal weight as the *Nairobi Recommendation* for instance, it has the unique merit of being drafted by, and for, translators. Most interestingly, the enforcement of the articles of this document does not involve States and courts, but rather, willfully complying individuals who practice translation. Given that the International Federation of Translators is behind this text, it only seems logical to consider the *Translator's Charter* as the best reference to help us

understand how translators view themselves, and how they wish to be viewed by the rest of the international community (*Id.*).

The first and second parts of the text are our main concern. Section I of the text consists in an enumeration of the twelve obligations of the translator; Section II presents their seven rights. Among the obligations of the translator, we find the following moral and legal one:

“4. Every translation shall be faithful and render exactly the idea and form of the original – this fidelity constituting both a moral and legal obligation for the translator.”
(IFT, Article 4)

We are reminded of the same message a little later:

“11. Being a "secondary" author, the translator is required to accept special obligations with respect to the author of the original work.”
(IFT, Article 11)

This article is not different from those we have already listed from the *Copyright Act, Berne* and *Nairobi*, confirming that the translator is a derivative, or “secondary” author. Only here, it is the translators themselves who are expressing their point of view about themselves, as opposed to an external body or institution. Given all of the above, one wonders how to interpret Article 9, which declares:

“9. In general, he/she shall neither seek nor accept work under conditions humiliating to himself/herself or his/her profession.”
(IFT, Article 9)

If we accept this document as what it is supposed to be, we can safely say that today’s translators see themselves as secondary, subordinated and subordinate intellectual workers. The moment the *Charter* mentions any right to translators, it makes a point of reminding them of their always derivative status. We are told that by virtue of being an intellectual worker, “(E)very translator shall enjoy all the rights with respect to the translation he/she has made” (Article 13), but always with the condition, among others, of never interpreting a text themselves “which would be contrary to the obligations (“with respect to the author of the original work” [Article 11]) of his/her profession” (Article 3).

II.3.A Thoughts on the translator’s self-image

While some translation scholars have called for the emancipation of their discipline from various figures of dominance and authority, such as publishers, the *doxa*, and the author (e.g. Venuti 1995, 1998; Basalamah 2004, 2005, 2007, 2009), little to no attention has been given to studying how the translator's own self-image may have contributed to their current social and legal status. In this section, I will attempt to at least propose some avenues for researching this issue.

II.3.A.i Historical moments affecting the translator's self-image

If we go back in history, can we find the genesis of a professional habitus, in the Boudieusian sense of a predisposition of the translator to hold such a self-image as the one found in the *Charter* above? Considerable work has already been done in this respect in showing how the romantic figure of the author has shaped the modern image of the translator, and this does not require further enforcement (see for instance Berman 1984, 1985; Venuti 1995, 1998; Basalamah 2001, 2004, 2008, 2009). Venuti provides a summary of this idea when he writes:

Contemporary translations, unlike such other derivative forms as dramatic or film adaptations, are bound to a much closer relation to the underlying work, partly because of the Romantic concept of authorship. The dominance of this concept instills in translators and their publishers a deference to the foreign text that discourages the development of innovative translation methods which might seem distorting or false in their interpretations. Today a dramatic or film adaptation of a novel may deviate widely from the plot, characterizations, and dialogue in that novel, but a translation is expected to imitate these formal elements without revision or deletion.

(1998, 61)

I will therefore turn to Daniel Simeoni's approach⁴⁶ of going back much further in history to trace a contour of the figure the translator.

It may be argued that the combination of the social and professional norms on the one hand, and the external instances of authority, on the other, have been conspiring together since the time of Jerome, the patron saint of translators, to keep the translator in a state of subjection and secondarity.

[...] nations have always felt they needed some person or persons they could trust enough to entrust him or her with the task of translating: the Horatian "fidus interpres," or "trustworthy interpreter." It is important to remember that the trust is invested in the producer of the translation, not necessarily in the product itself. "Trusted" translators, like the group of

⁴⁶ Some of the historical points made here are a synthesis of the findings of Daniel Simeoni, as they appear in his 2000 Ph.D. thesis entitled *Genèse d'un habitus sous surveillance*, École des Hautes Études en Sciences Sociales, Centre de linguistique théorique (CELITH), Directeur de these: Pierre Encrevé. I am grateful to Professor Annie Brisset for making her copy available to me.

translators who produced the Septuagint, in fact produced what is generally acknowledged as a relatively “bad” translation, but one that continues to function to this day as the “official” translation used by the Greek Orthodox Church. Trust may be more important than quality.
(Lefevere 1992, 2)

If we go as far back as the Egyptian world in the pre-Christian era, it seems that some translators were of socially equivalent order as scribes – in fact, they were scribes or dictating their translation to scribes. In both cases, the translator was fulfilling an important task for the benefit of the authority in place, the State. We can see how crucial was the transparency of the translator, who was working exclusively to enforce and empower the established order. And yet, in some mural representations, it seems quite clear that the translator, or what we would call today the interpreter, was not allowed to speak with Tutankhamen directly, so as not to trespass his prescribed social class. Instead, he had to talk to an administrator who would in turn dictate what to write to the scribe. A similar, or perhaps higher status, was granted to the translator in imperial China (Hung 2005). But a higher position should not be expected for the translator in the dynastic era, since translators were usually selected among the conquered bordering nations.

Cicero (103 BC – 43 BC)

Marcus Tullius Cicero (106 BC – 43 BC) was a philosopher, a lawyer, a political thinker, a statesman and one of Rome’s greatest orators. He was also a translator, in a time of crisis and turmoil. Of his translation method, Pierre Grimal says:

Nous possédons de longs passages du *Timée*, traduit par Cicéron, une traduction qui nous permet d’apprécier sa grande connaissance du grec et de la pensée de Platon. Il semble que Cicéron n’ait pas traduit la totalité du dialogue, mais seulement les pages qui lui semblaient importantes et de plus il supprimait un certain nombre de questions et de réponses, qui n’étaient pas indispensables pour suivre sa pensée. Il va à l’essentiel.

(Grimal 1986, 364)

Cicero therefore translated freely, as he saw fit. It is an approach that was followed by others, such as Augustine, but it was never really adopted as a legitimate translation method from Jerome onward.

He will set the norm for equivalence, this says. He will write the translation that will become the standard. No church council, as in the Middle Ages; no legislative body or translator organization or critical community, as today: one man, Marcus Tullius Cicero, translator. He alone, the foremost Attic/Roman orator of his day, without benefit of the Holy Spirit (as for Philo or Augustine⁴⁷) or prescriptive rules (as for contemporary translation theory), is able to let Aeschines speak through him with sufficient clarity to establish a norm for equivalence.

(in Robinson 1992, 33)

⁴⁷ In the case of Augustine, he was rather weary of the idea that a simple translator, though he may be as competent and skilled as Jerome, could ever reach the true meaning of the Scriptures.

To Cicero, translation was less of an exegesis, a *hermeneia*, an interpretation (as these terms were used then) and more of a re-creation, a re-writing that is almost indistinguishable from writing proper, as understood today. The relationship between Cicero and the original has nothing of the proverbial modesty of professional translators towards the original (author as well as text). The translator is breaking away from the discipline's incapacity to free itself from the multiple chains of guardianship that history will constantly impose on it. So many masters to please: "As late as 1213 the French compiler-translator of all known source materials about Julius Caesar meticulously names all sources and all switches between sources without thinking once to include his own name" (Beer 1989, 2).

Following the Ciceronian mode of translating freely and viewing translation as a re-writing, a new historic phase came about for translation, one that saw possibilities converge, out of fear of feeding the heretical movements with inaccurate translations of the divine word. This would be the beginning of a translation practice diametrically opposed to that of Cicero.

Jerome (347 CE – 420 CE)

The Church found itself beset by heresies resulting from the tendency of pagan converts to tailor Christian ideas to fit pagan assumptions, whether religious or philosophical (Colish 1997, 6). This meant that Jerome was also translating in difficult times. In fact, all signs point to Jerome being constantly in battle. With Jerome, the history of translation makes a strong turn in a new direction in relation to what came directly before it.

The contemporary reader will be surprised by such a statement as the one we just made here about the novelty of Jerome's translation practice of preserving the true meaning. But that is only because we have so deeply interiorized this notion according to which any distancing from the original becomes a potential heresy. We have much difficulty seeing the originality in subjecting the translation to the authority of an authentic, primary, original text, and in prohibiting any deviation from it. As the centuries pass, the Christian discourse becomes omnipresent in the West. The original will be seen as the expression of a transcendental and absolute truth.

And so does this new mode of translation become fixed in the Western world, starting with Jerome, who would later conveniently become the patron saint of all translators. The fear of making translational mistakes is forever engraved in the heart of the profession. Berman said that translation is a Roman heritage. Perhaps would it be more accurate to say that translation is Christianity's legacy.

When Gregory (540 CE – 604 CE) became pope in 589, all the conditions were in place to establish the figure of the translator as a secondary, derivative author. Though he was not a translator proper, his influence on the

discipline, especially as pope, was clear. Gregory typifies the attitude of retreat, of interiorized invisibility and submission. Though Jerome was always looking for the one true meaning, he certainly never shied away from the spotlight, even if it meant controversy. “Jérôme (...) était réviseur avant tout, Grégoire fournit à la profession sa dimension éthique” (Simeoni 2000, 235).

I would like to borrow Simeoni’s conclusion of a historical split taking place with Jerome and producing two different results. On the one hand, there are Cicero and Augustine, and on the other, we find Jerome and Gregory. The former school of thought constructed what would become the image of the author, whereas the latter formed the figure of the translator (*op. cit.* 234).

Apart from the few instances in which circumstances made it possible for someone to leave a different mark on the discipline, a mark that does not comply with the self-image of the translator today, as in the case of Cicero for instance, the general rule is that authorship has always – since Jerome at least – been refused to the translator in the Western tradition. More surprising is the fact that the members forming the community of practitioners in translation have never really voiced their demand for such a right for themselves, as can be attested with the adoption of the Translator’s Charter.

The Bible phenomena catapulted the figure of the translator to the forefront of the cultural and intellectual scenes. But instead of launching an emancipation movement for the translator, the unshakeable conviction that there is an absolute, divine, invariant truth under the biblical text fixed, once and for all, the framework in which written translation would be thought and practiced from that moment on.

II.3.A.ii The mirror stage and the translator’s self-image

Many thinkers have suggested that human beings are born prematurely, in the sense of being born before they are ready to face the world, for a number of reasons. One of these indications is that at birth, a human being is so unaware of their selfhood that they cannot even distinguish between themselves and their environment. The effect of the surroundings on the development of a notion of the self, of self-image, is a well-established reality, even in the animal world, where mimicry is not a rare phenomenon.

In 1935, Roger Caillos wrote an essay entitled *Mimicry and Legendary Psychasthenia* in which he makes certain links between insect mimicry of their environment and some forms of psychopathological behavior, in which the subject cannot make the distinction between themselves and their surroundings. The truth of the matter is that

this is a phase through which human beings go naturally, in early infancy. The newborn will, for instance, regard their mother as an extension of themselves, and will interact with the world through her body.

When dealing with the self-image of the translator, mimicry of the surroundings may be a heuristic starting point. Translators see themselves as having blended into, and become part of, a greater whole. In his concluding paragraph, Caillos states that:

alongside the instinct of self-preservation, which in some way orients the creature toward life, there is generally speaking a sort of instinct of renunciation that orients it toward a mode of reduced existence, which in the end would no longer know either consciousness or feeling--the inertia of the *élan vital*, so to speak.

(1935, 32)

The Mirror-Stage

Then comes the mirror-stage, which, as Lacan said, is the infant's identification with the (false) mirror image. In the Freudian theory, identification was a component of the ego in which the infant assumes self-hood by identifying with another person, generally the father for male infants during the oedipal phase. Lacan's mirror-stage is also an identification in the Freudian sense, only it occurs at an earlier stage and with relation to the mirror-image, instead of the father or some other person.

Before the sight of the mirror reflection, the infant is jubilant with the realization that he is seeing himself, as a unitary whole, as opposed to a fragmented body. This image becomes "the symbolic matrix in which the I is precipitated in a primordial form" (Lacan 1949). The reason why Lacan says that it is still a symbolic matrix, is that it is yet to be "objectified in the dialectic of identification with the other, and before language restores to it, in the universal, its function as a subject" (*Id.*) It is only later on that the I is formed in relation to another (human being), through such means as language.

Lacan identified this primordial form with Freud's *Ideal Ich*, that ideal identity in relation to which one measures one's actual ego. What is of concern to us here is that this form "situates the agency of the ego before its social determination." In other words, the formation of the I is up to this point independent of any elements of social conditioning.

As I write these lines, I tell myself that the reader must be thinking the same thing I am thinking, namely, that there is always a legitimate reluctance in applying a theory (such as the mirror-stage's formative value for the I) where it should not be applied (the formation of the translators' self-image). So I ask myself: does the mirror-stage truly apply to the translator's self-image? Am I not abusively extrapolating and generalizing the mirror-

stage's formative nature by applying it to the translator's image of himself and trying to make it into a case of homeomorphic identification?

I find the legitimacy of such an application in the writing of Lacan himself. Reporting on a biological experimentation, he says that "it is a necessary condition for the maturation of the gonad of the female pigeon that it should see another member of its species, of either sex; so sufficient in itself is this condition that the desired effect may be obtained merely by placing the individual within reach of the field of reflection of a mirror."

Said otherwise, Lacan is suggesting that both sets of conditions – exposing the individual female pigeon to other pigeons or exposing the pigeon to a mirror – hold the same formative value since they yield similar results.

If that is truly the case, then the same could also hold true for the translator's primordial *imago* being initially formed not by looking in a mirror as a child, but by being exposed to other translators and getting a sense of their own perceived self-image.

II.3.A.iii Suggestion and the translator's self-image

This exposure to similar others is an indication that the person has now sufficiently matured to form not only their internal self-image, but also their social I. They are now open to the power of suggestion, which can be defined as an uncritical acceptance and an almost-automatic carrying out of what is suggested. Normal suggestion is just a dimmed-down form of hypnotism.

By suggestion is meant the intrusion into the mind of an idea; met with more or less opposition by the person; accepted uncritically at last; and realized unreflectively; almost automatically. By suggestibility is meant that peculiar state of mind which is favorable to suggestion.

(Sidis 1898, chapter 1)

After completing over 8000 experiments to determine the effectiveness of four different factors of suggestibility (Repetition, Frequency, Coexistence and Last impressions) as well as their combinations, Boris Sidis arrives at the following conclusions: When it comes to individual factors, that of the last impressions stands out most prominently, with a success rate of 63.3%. "Of all the modes of suggestion,

however, the most powerful, the most effective, and the most successful is a skillful combination of frequency and last impression,” this time with a success rate of 75.2%” (*Idem*. Chapter III).⁴⁸

Another relevant finding of Sidis is that “a suggestion is more effective the more indirect it is, and in proportion as it becomes direct, it loses its efficacy” (*Idem*. Chapter V).

The combination of these three factors would therefore produce the highest level of suggestibility. I am arguing that it is precisely these same factors that are at play in the formation of the translators’ self-image. The last impression factor can be interpreted as the last time the translator translated for instance, and the frequency is simply the ever-presence of the social discourse on the task of the translator and what is expected of them in terms of loyalty, invisibility, equivalence, etc. As for the indirectness of the suggestion, no where do we see or hear anyone explicitly stating that the translator is a secondary author; this is only the implied suggestion, hence its effectiveness.

Studying abnormal suggestibility now (hypnosis), Sidis tells us that there are only two distinct classes of hypnotic states:

1. Incomplete dissociation of the waking, controlling consciousness.
 2. Complete dissociation of the waking consciousness.
- Stating the same somewhat differently, we may say that there are two states:
1. Incomplete hypnosis accompanied by a greater or lesser degree of memory.
 2. Complete hypnosis with no memory.
- In other words, hypnosis has two states:
1. The mnesic state.
 2. The amnesic state.

Amnesia is the boundary line that separates two different hypnotic regions.”

(*Idem*. Chapter VII)

Someone can therefore be hypnotized in two different ways: in a light way where it would be possible for them to remember their state, or in a much deeper way, where memory is not possible. And since memory and consciousness go hand in hand, it follows that hypnosis is simply “disaggregation of consciousness” (*Id.*). When the suggestions being made to the translator are so strong and effective, the translator fails to see that they are under suggestion, and lose their consciousness to the nature and intent of the suggestion being made. But

⁴⁸ For the purposes of the experiments, frequency was defined as showing the same card numerous times, but not consecutively. As for last impression, it is defined as showing a specific card after all the others.

sometimes the suggestion does not have that same stranglehold on the translator. In those cases, the translator is more aware of the suggestion and can try to consciously fight it.

Abnormal suggestibility is a disaggregation of consciousness, a slit, a scar produced in the mind, a crack that may extend wider and deeper, ending at last in a total disjunction of the waking, guiding, controlling consciousness from the reflex consciousness, from the rest of stream of life. Normal suggestibility is of like nature – it is a cleft in the mind; only here the cleft is not so deep, not so lasting as it is in hypnosis, or in the state of abnormal suggestibility; the split is here but momentary, evanescent, fleeting, disappearing at the very moment of its appearance.”

(*Idem*, Chapter IX)

If suggestibility is such a fundamental attribute of human beings, it is to be expected that it operates in a similar fashion at the collective or social level. Sidis, after confirming that it is indeed the case that it operates on the human being's social capacity as well, tells us “[w]hat is required is only the condition to bring about a disaggregation in the social consciousness” (*Idem*. Chapter XXVII). And this, we find in Ideological State Apparatuses (ISA's) and their interpellation of the individual as a subject.

II.3.A.iv Interpellation and the translator's self-image

In his 1970 article *Ideology and Ideological State Apparatuses (Notes towards an Investigation)*, Louis Althusser says that a capitalistic society, in order to maintain itself, must reproduce the means of production, which are not only material, but also ideological: “the reproduction of labour power requires not only reproduction of its skills, but also, at the same time, a reproduction of its submission to the rules of the established order” (1970, 5). Though he is talking about the capitalistic society, what he says is valid for any society, as well as every group of human beings living together.

Specific social institutions (religion; education; the family; law; politics; communications; culture) which apparently belong to the private domain, will ensure that the desired ideology is inculcated in the masses, in each individual according to the ideological infrastructure required of them as a particular subject. These institutions, he calls Ideological State Apparatuses (ISA's): “The foremost objective and achievement of the French Revolution was [...] to attack the number-one Ideological State Apparatus: the Church” (*Idem*. 16), and proceed to replace it by the Educational State Apparatus – the school. The effectiveness of this particular ISA is that

it takes children from every class, at infant-school age, and then for years, the years in which the child is most ‘vulnerable’, squeezed between the Family State Apparatus and the Educational State Apparatus, it drums into them, whether it uses new or old methods, a certain know-how wrapped in the ruling ideology (French, arithmetic, natural history, the

sciences, literature) or simply the ruling ideology in its pure state (ethics, civic instruction, philosophy) (18).

Obviously, the values and know-how taught by the schools “are also taught in the Family, in the Church, the in the Army, in Good Books, in films and even in the football stadium” (19). But no other institution has such a control over such a vulnerable group, over such a prolonged period. And yet, all of this takes place seamlessly, simply because we, as social subjects, are under the impression that that is how things ought to be.

Perhaps the Educational State Apparatus is precisely where we should be looking to see what kind of self-image is being hammered into the psyche of translators during their formative years. This is, of course, an invitation to research and investigate translation training and pedagogy from the perspective of such unconscious sources of influence, as undertaken in part by Marielle Godbout in her 2009 M.A. thesis, *Translation in Canada: Occupation or Profession?* Again, this will most likely be through indirect discourse, given its present effectiveness to the point where the translator may not even be aware of it, if they were not sufficiently exposed to a theoretical reflection on translation.

It is indeed a peculiarity of ideology that it imposes (without appearing to do so, since these are ‘obviousnesses’) obviousnesses as obviousnesses, which we cannot fail to recognize and before which we have the inevitable and natural reaction of crying out (aloud or in the ‘still, small voice of conscience’): ‘that’s obvious! That’s right! That’s true!’ (29)

As the individual progresses in life, these institutions instill into them the ideology required for making them into a subject, a concrete subject, faultlessly performing their role as required by society. “All ideology hails or interpellates concrete individuals as concrete subjects.” (30)

Althusser adds that, in fact

ideology has always-already interpellated individuals as subjects. [...] that an individual is always-already a subject, even before he is born, is nevertheless the plain reality, accessible to everyone and not a paradox at all. [...] it is certain in advance that it will bear its Father’s name, and will therefore have an identity and be irreplaceable. (31)

By the time they have gone through the socializing institutions, the translators know what is expected of them professionally and socially. They (implicitly) understand and accept their role in contributing to maintain the established order of things. They have accepted their interpellation into a subject.

Once an individual has honored the hailing and become the subject they were interpellated to become, there is virtually no need for an external agency to dictate their behavior; for subjects

work by themselves in the vast majority of cases, with the exception of the ‘bad subjects’ who on occasion provoke the intervention of one of the detachments of the (Repressive) State

Apparatuses. But the vast majority of (good) subjects work all right ‘all by themselves’, i.e. by ideology (whose concrete forms are realized in the Ideological State Apparatuses). (34-35)

Once entrapped into the evanescence of ideology

the individual is interpellated as a (free) subject in order the he shall submit freely to the commandments of the Subject, i.e. in order that he shall (freely) accept his subjection, i.e. in order that he shall make the gestures and actions of his subjection ‘all by himself’. There are no subjects except by and for their subjection. That is why they ‘work all by themselves.’ (35)

In very practical terms, this can mean that one of the world’s biggest translation agencies, namely the Canadian *Translation Bureau*, cites as one of its employment admission conditions, its preference for B.A. holders over M.A. holders in translation, under the pretext that M.A.’s are “too theoretical” (see Brisset 2008). However, as already argued (also see Basalamah 2004) translators and translation scholars must hold themselves accountable for this state of self-subjection to a very large extent.

Althusser’s words above are strikingly similar to the definition of the state of suggestibility, hypnosis even: an “intrusion into the mind of an idea; met with more or less opposition by the person; accepted uncritically at last; and realized unreflectively; almost automatically” (Sidis *op. cit.* Chapter I).

II.3.A.v Conclusion

If there is a habitus that reveals itself from studying the history of translation in the West from Jerome onward, it is that every time the translator has to share a space with someone else, the translator willingly submits to the other and gives a share of their own space, of their own rights. The suggestions of the discourse on translation since the 5th century have been continuously interiorized, accepted, perhaps as a result of always being indirect, frequent, last impressions. To understand their identity and form a self-image, translators look at other translators and do as they do. As for that community of translators, it seems to be quite receptive to the suggestions made to it; responding favorably to the ISA’s hailing of the translator as a “secondary” author, producing “derivative” works. There is no need for any external agencies anymore, since translators now carry out what is required of them almost automatically, to the point where, when it came time to produce a prestigious international document about themselves, an international charter to improve their social and professional status, they could do no better than to reiterate the prevailing discourse, submit willingly to their fate, and resign themselves to their secondary status. Much work is required to undertake researching the contributing elements to the translator’s self-image. This section was merely an attempt to lay the foundation for future lines of investigations.

III. Joint authorship for translated works

Joint authorship is an interesting notion to explore for translation, as it could provide an alternative to the current binary model of primary and secondary works and authors.

The Act defines “work of joint authorship” as “work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors” (*Act*, 2).

Some of the factors that might be considered in determining whether a work is one of joint authorship is that each contribution must be substantial, though not necessarily equal. There must also be “joint labour in carrying out a common design”. Providing ideas or inspiration, or involvement in the expression of ideas is not enough, especially if such a contribution did not include any research, compilation or writing necessary to create a work. Joint authorship also does not require the contribution of all contributors to be made simultaneously.

In 1998 a court held, in the *Neudorf v. Netzwerk Productions Ltd* case involving Canadian singer Sarah McLachlan, that whether the contribution of a co-author is significant for a co-authorship depends on both quantitative and qualitative factors, including the relation of the contribution to the work as a whole. The Court decided that in order to be considered joint authors, each author must have contributed significant original expression to the work, must have intended that his or her contribution be merged with that of the other author into a unitary whole, and must have intended the other person to be a joint author of the work. There is only one copyright in a work of joint authorship.

Concretely, this idea would see a joint authorship granted to the translation of a work, in which one copyright would be granted to the translated work to both the translator and the author. However, we can see from the explanation above that it would be challenging to include translation under the category of joint authorship for a number of reasons, not least of which is the insufficiency of contributing to the expression of the ideas, as well as the requirement of having a common design, which may be difficult to establish if the author is not aware of the work of the translator.

While granting a joint authorship copyright to translations does seem to elevate the status of the translator to that of the author, it still doesn’t allow additional freedom; where the permission of the author was required under copyright law to make use of the work, now the permission of both author and translator would be required.

IV. Translation in Drassinower's alternative model

In Chapter 2, we presented Abraham Drassinower's alternative interpretation of copyright law as protection mechanism of authorship, which he understands as being a communicative act. Copyright is concerned with ensuring that everyone has an equal right to express themselves in writing, in their own words, and to decide whether they wish to publish their writing.

When extending his reflection on the nature of copyright to the case of translation, Drassinower is very quick to highlight the paradoxical nature of translation. "On the one hand, an unauthorized translation is an infringement of the copyright in the original. To translate is to copy. On the other, the act of translation generates its own copyright. To translate is to author" (Drassinower 2015, 222). When he applies the logic of his own interpretation to translation, he has no choice but to reject copyright's dual understanding of translation as both a work and a derivative.

Either a translator is an author in her own right, in which case her work generates its own copyright and cannot require permission, or a translator is *not* an author in her own right, in which case her (unauthorized) activity infringes the copyright in the original and can have no independent protection under copyright. No other construal is intelligible.

(*Ibid.* 223)

In the end, however, he concludes that an unauthorized translation constitutes an infringement, because it consists in using someone else's words without their permission. Ultimately, the reason he gives for this conclusion is that "the dignity of translation is of a different order than that of authorship: translation does not generate its own copyright [...] The labor of translation is not a work of authorship. The protection of translation is thus thoroughly derivative" (*Id.*).

And since Drassinower's model leaves him no choice but to reject the very idea of a derivative work, he becomes incapable of recognizing the authorial nature of translation to the extent that was legally recognized to it by the international community over a century ago. While he claims earlier that his model does not mean that "imagining how an author would have spoken in another language partakes of the mechanical commonplaceness of "mere" copying" (*Id.*) in actuality, this is exactly what it means. While the entire argument of his model rests on the idea of ensuring and protecting the freedom of speech, he was unable to extend that freedom to the translator, because he considers translation a repetition of someone else's words in another language. This is exactly what Basalamah (2009) argued against, and which is evident from the play on words of his title, which may be translated as both *The Right to Translate* and *The Translation Right* (or *The Law of Translating*). I believe that if Drassinower had a better appreciation of the agency of translation/the translator,

which will be presented in detail in Chapter 7, he most likely would have granted to the translator the right to speak his/her translation.

Conclusion

In *Roughing It* (1870), Twain wrote of General Buncombe, an educated Easterner serving as U.S. Attorney for the Nevada Territory. The locals decided to play a practical joke on him. One day, a fellow named Dick Hyde came to Buncombe's office to ask for representation against Tom Morgan, who owned the ranch immediately above Hyde's, both being on a steep hill.

And now the trouble was, that one of those hated and dreaded land-slides had come and slid Morgan's ranch, fences, cabins, cattle, barns and everything down on top of his ranch and exactly covered up every single vestige of his property, to a depth of about thirty-eight feet. Morgan was in possession and refused to vacate the premises—said he was occupying his own cabin and not interfering with anybody else's—and said the cabin was standing on the same dirt and same ranch it had always stood on, and he would like to see anybody make him vacate.

(Twain 1872, ch. XXXIV)

Morgan argued that since he had stayed on his ranch as it slid down the hill, and Hyde had moved to avoid the landslide, Morgan retained the property rights over it. Buncombe took the case, argued before the court, and lost. The judge ruled that Hyde certainly had both the evidence and the law on his side, yet

it ill become us, worms as we are, to meddle with the decrees of Heaven. It pains me that Heaven, in its inscrutable wisdom, has seen fit to move this defendant's ranch for a purpose. [...] Heaven created the ranches and it is Heaven's prerogative to rearrange them, to experiment with them, to shift them around at its pleasure

(*Id.*)

As Vaidhyanathan notes (2001, 59), Twain's fictional story raises some important questions for copyright: Is ownership a matter of location or substance? If Tom Morgan is the author, and his property is his work; if Hyde is the user, and if the landslide is the access to the works, then do you agree that Morgan's property now belongs to Hyde? Or does it remain Morgan's forever? Of course, there are many details and nuances that need to be sorted out for a proper judgment. If I accept the analogy of this story to intellectual property, then its purpose is to make us realize that matters of property, including and especially intellectual property, are not always straightforward. And they are matters of convention and agreement, as opposed to Twain's satirical reference to being matters of divine law and heaven's prerogative.

In 1853, Harriet Beecher Stowe and her husband filed a suit against F. W. Thomas, the publisher of *Die Freie Presse*, a German newspaper in Philadelphia, which had translated her novel, *Uncle Tom's Cabin*, into German

without permission, and sold it in the U.S. without payment. She was defending the translation that she had authorized against Thomas' unauthorized translation. The German press accused Stowe's authorized translation of being filled with "entirely un-German expressions, grave language mistakes, or other irrefutable flaws [...] on every page." Thomas's lawyer argued that the harm Stowe had suffered was not a result of the unauthorized translation, but because she had authorized a bad one:

The author's rights are not injured. A translation enhances the value of the original. None will buy the former who are able to read the latter: and the translation attracts the notice of many of the original. If Mrs. Stowe had not thought so, she would not herself have published a German translation. The sale of her translation, indeed, was impaired; but we are not charged with a piracy of it: and the reason why it is injured, is that her translation has less genius than ours.

(*Stowe v. Thomas*, 206)

Without today's statutory instructions on translation rights within copyright law, Judge Robert Grier wrote the following in his decision on the appeal:

An author may be said to be the creator or inventor, both of the ideas contained in his book, and the combination of words to represent them. Before publication he has the exclusive possession of his invention. His dominion is perfect. But when he has published his book and given his thoughts, sentiments, knowledge or discoveries to the world, he can have no longer an exclusive possession of them.

[...] The claim of literary property, therefore, after publication, cannot be in the ideas, sentiments or the creations of the imagination of the poet or novelist, as disserved from the language, idiom, style, or the outward semblance and exhibition of them. Such a claim [to own the ideas themselves] becomes impossible, and is inconsistent with the object of publication.

[...] A "copy" of a book must, therefore, be a transcript of the language in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or "copy" of the same "book." I have seen a literal translation of Burns' poems into French prose; but to call it a copy of the original, would be as ridiculous as the translation itself. (*Id.*)

And finally, "[T]o call the translations of an author's ideas and conceptions into another language, a copy of his book, would be an abuse of terms, and arbitrary judicial legislation" (*Ibid.* 207).

This decision was before the idea-expression dichotomy, which would be defined for the first time twenty-seven years later by the Supreme Court in *Baker v. Selden*. This led the authors to come to the defense of their work, for which they felt they were not being rewarded: "Congress, at the behest of authors and publishers, included translations and dramatic adaptations among authors' rights in a copyright revision law of 1870, opening the first fault in the idea/expression dichotomy" (Vaidhyanathan *op. cit.* 49-50).

Besides the general arguments for granting authors maximum control over their work, which we explored in previous chapters, the strongest argument for the exclusive right of translation granted to the author is the moral right of integrity, which protects the work from unacceptable alternation, distortion or mutilation that may be prejudicial to the author's honor or reputation. This right is even preserved in the copyright exceptions according to which a developing nation can get a licence to translate without the authorization of the author, since the latter can still refuse the licence (*Berne II* (8)). The author is usually not in a position to judge the quality of all translations, and the public's reception of a work is too difficult to predict with certainty. Secondly, the resulting work does not belong to the author of the original, but the author of the derivative work, i.e. the translator. So long as the work is clearly presented as a translation with proper attribution to the author for the original, the public will understand this to be one possible translation among others, all of which will be of varying quality. And a translator may take various liberties in playing their role, including changes to the order of presentation, the length of the work, and even the content, all depending on the intention and function of the new text. However, while these liberties would be granted to the translator, they are also bound with the accountability towards their work.

Chapter 6: Foundations of translation rights

As we go through the main works that give detailed accounts of the negotiations that led to the international copyright law, including translation right (Ricketson and Ginsburg 2006; Lewinski 2008; OMPI 1986; Venuti 1995; Bently 2007; Basalamah 2009; Hemmungs Wirtén 1998, 2011a, 2011b; Bannerman 2013, etc.), we quickly realize that countries debating the translation right for almost a century and a half were fully aware that it was a double-edged sword, allowing circulation of works into new markets, while making it possible for others to appropriate the works by expressing them in other languages. This meant that authors no longer controlled every aspect of their works, including the quality of the works attributed to them in different languages.

The minutes from international meetings discussing copyright law are insightful in that they allow us to see that our present questions about these topics were addressed, often with as many different points of view as we hear today. We also learn that, for the most part, it comes down to power relations and financial gains, despite the very eloquent speeches by some prestigious and well-known literary personalities about values of freedom, equality and fraternity.

From the first international negotiations, translation rights were a source of tension and disagreement. While seemingly advantageous to countries exporting cultural and scientific works, translation rights are seen as an impediment to accessing knowledge by countries who rely on foreign works for their culture and education, as well as countries who have to manage multiple languages domestically.

From 1884 to 1886, many issues had to be discussed by the diplomats and jurists representing different countries and incompatible interests, but none of these issues would cause as much headache as translation (Hemmungs Wirtén 2011a, 88) earning it the label of “*question internationale par excellence*.” These discussions revolved around the author’s exclusive right over the translation, the duration of such a right, well as the right of the translator to their translation.

The beginning of the legal and material independence of the author – made possible through legislation recognizing a new form of property as well as resulting from the authors’ demands for increased political, moral and economic autonomy – also marks the beginning of the expansion of the cultural horizons of translation. Following an English Renaissance and Classicism that were mainly directed towards Antiquity and a French literature of the same orientation, English translation was discovering new literary domains, first from German Romanticism, and then, from the Orient (Kernan 1987, 67). In Britain, the figure of the professional author was surfacing, printing technologies were booming, and translation was venturing further and further away, towards the foreign and the exotic.

Whenever the rights of authors (or copyright) became an international issue, the right of translation took center stage. Early on, every discussion of the rights of authors was also a discussion of the translation right associated with it.

For instance, in the world of theatre, one can see traces of the translation right in the debates that surrounded the author's right to have their own vision of the play translated and interpreted on stage. That is why Beaumarchais, writing on behalf of the drama authors and printers, states, in the first article of his recommendations, that every literary and scientific work, whether original, or translated, is the property of its author (in Boncompain 2001, 309) by which he meant the author of the translation, not of the original (see Basalamah *op. cit.* 95 – 131). That said, Beaumarchais was pushing for the permission of French authors of the originals to be sought before a translation was made in France. As for French works that were translated outside of France, there was no way to control what foreigners did (*Ibid.* 328). His concern with foreign authors and foreign translations was only secondary.

This was mainly due to the generally accepted habit – referred to as “the recognized right” by la *Pétition adressée à l'Assemblée nationale sur la représentation* – of freely borrowing from the works of others, meaning the works of non-French authors (Boncompain *op. cit.*, 329). It was perfectly acceptable to enrich French literature with translations of foreign works, without any concern about the rights of the foreign authors, be they moral or monetary, because this was not considered as causing any harm to anyone (*Ibid.* 328 and in Basalamah *op. cit.* 111-112).

That is because translation was seen as providing a benefit for the target language culture, the translator, as well as the foreign author, who would be gaining increased or new recognition. Present-day legislation, however, gives precedence to the absolute right of the author, at the expense of these benefits.

When it was other nations, besides France, who would be benefiting from translating French literature and science, France viewed it as a clear case of theft. As we have already seen, this double standard has been a running theme in the history of intellectual property in general, and copyright in particular, and continues to be.

I. Translation right internationally

Copyright in the pre-Berne era was becoming more difficult to manage due to the lack of regulation, combined with the proliferation of bilateral treaties.

In 1852, France had unilaterally decided to grant equal rights to the works of all authors, domestic and foreign, without asking for anything in return from the other countries. This started a momentum that was only intensified by the symbolic participation of Victor Hugo on behalf of all authors at the Congrès Littéraire Internationale (Congress on Literary and Artistic Property) and the subsequent creation of the Association Littéraire et Artistique Internationale (ALAI) as we shall see.

The Congress on Literary and Artistic Property that met in Brussels in 1858 revolved around two main questions, namely, the duration of authorship rights, and the translation rights in foreign countries (Vapereau 1859, 471-473). The majority of the assembly spoke against perpetual rights, and opted for a protection of five years following the death of the author. The eighth resolution was to the effect that the author's right of reproduction over their original work includes the translation right, on condition that the author has, for ten years from the time of publication, the exclusive right to translate the work in any language, if this right is exercised within three years from the time of the publication of the original work (Ibid., 476, also in Basalamah op. cit. 191 – 194).

In addition to being the first instance of a distinct article pertaining directly to the translation right at the international level, the Brussels Congress established that the author has three years to translate their work, in which case they would be granted a translation right of ten years – whereas the right of reproduction was of fifty years. The reason for this difference was that translation was generally recognized by all nations as the means par excellence to acquire literary and scientific works that feed the cultural and scientific needs of their own societies.

This Congress, presided by none other than Victor Hugo, also founded, on June 29, 1878, would become the ALAI (Lermina and Ratisbonne 1889). Without going into all the historical details, let us mention the main points of interest for our purposes, as they unfolded.

I.1 1878

The 1878 meeting closed by expressing, among other things, the wish to see international treaties recognize adaptation and translation as the exclusive rights of the authors. But this did not happen without some strong opposition. For instance, the Russian novelist and playwright Ivan Tourgueniev pleaded against granting authors the right over the translation of their work, explaining that a large number of young Russians make their living solely from translating foreign works, and that the Russian government would be indifferent, even happy, to use the translation right to crush them economically (in Basalamah 2009, 229). Of course, this argument still applies today for any nation that consumes more intellectual property than it produces. Wouldn't

the same argument of human compassion that is often heard in favor of the rights of starving authors and artists also apply to translators, especially in the case of IP-poor nations, where many people can and do live from translating? This reminds us that the cultural and economic welfare of the population is not always the top priority of governments. It also highlights the importance of having the right people at the negotiations table at the international scene, voicing the concerns of those most affected by policies and treaties.

Brazil's delegate, a Mr. Peralta, also had questions about translation rights, wondering whether the author truly has the ability to assess the quality and competence of a translator's work (Ibid. 230), as I questioned in the previous chapter. This question also makes us wonder whether an author should be allowed to prevent their own work from becoming alive in another language and for another culture, either by refusing to have it translated, or by unknowingly allowing a mediocre translation. One wonders, in fact, what disadvantage could there be for an author to have multiple translations of their work reach foreign markets? The possibility that a better translation is waiting to be done is always there, is it not? The Brazilian delegate also wondered whether the dissemination of science and literature should be in the hands of the individual author, drawing attention to the social dangers of leaving such matters to the whim and personal choice of an individual.

The questions of these delegates are eloquent examples of the specificities of different stakeholders and nations. But instead of trying to find a way to accommodate these different needs, the French delegate who replied to these concerns simply reminded those present that the only thing that matters when it comes to intellectual property is that the author, and only the author, remains master of their work, as one is master of their land or house. Consequently, the only condition can only be the author's consent. In other words, the only notion of right that can be accepted is the version of the translation right that was born in France, out of its specific economic and political conditions, values and philosophy, following the French Revolution.

The Brazilian delegate summarized his objections in three points, namely: that authors do not have the competence to assess translations themselves; that by impeding translation, more counterfeiting will take place; and that it is necessary to make it possible to disseminate knowledge to those who do not have it. From these points, one can see the importance of these matters to developing countries, but also the seeds of the role Brazil would later play – along with India – in defending the rights of developing countries (GATT), as we have already seen and will mention again later. Following these exchanges, the United States representative, Walt Whitman, said that an author's right over their work was so clear and simple, that he failed to understand why anyone would want to discuss it. A translation, according to him, is nothing more than another robe, usually worn backwards. As for Tourgueniev's concern about young Russian translators, since the Russian government would not mind supporting copyright, why concern oneself with them? He added to Tourgueniev that,

“although we do not find it pleasant to have you leave our company, we simply have to move forward on our way without you, but we remain friends” (Ibid. 233).

This is quite an interesting statement being made the United States, who were known at the time to being the ground for vigorous counterfeiting activities. The US’s position and legislation was always in favor of a utilitarian approach to IP, to promote arts and innovation, as opposed to the natural law argument of property. And yet, Whitman talks of the US and Europe, it seems, as “we”, as though they are one and the same. Perhaps even more revealing is the following assertion: “Other speakers have also voiced the concerns of Brazil, China, and exotic states. I was not thinking that far: so long as we acquire protection in Europe, it is sufficient. China will come later” (Lermina & Ratisbonne, op. cit. 350). And finally, regarding translation, he concluded:

Our minds are set! We want to get rid of this race of harmful literary crooks called translators once and for all, for whom different legislations still have an incomprehensible softness. We want to be able, in the interest of the honorable translators, to destroy this guilty industry (Id.).

After the Romanian delegate’s reminder of the reliance of his nation on translation – a position that will be repeated by a number of other nations over the years – and the insufficiency of translating dead authors, Ivan Tourgueniev finally had a chance to react to Whitman’s comments:

The translators of which I spoke are not thieves. We consider them, to a certain extent, pioneers of civilization. You will say: very well, but what they introduce over there, they take it from us. That is true. But there are precedents. Had Pierre the Great not been a brilliant thief, I would not be speaking before you today (Ibid. 351).

But in the end, despite all the objections and resistance, the principle of literary property was louder and more important, simply because it was more European. And so, it became the wish of the assembly that the author be granted an exclusive translation right. And from that point onward, any translation undertaken without the explicit permission of the author was to be considered a counterfeit harming the system.

Although the aim of this association was to bring together a who’s who of the literary world from all nations, the jurists had a progressively stronger presence over the years, which more often than not, caused the discussions to be redundant with the respective national legislations and perspectives of the jurists, instead of giving a voice to the authors themselves. As for translators, they were not represented in a single one of the international meetings.

Despite the very flowery speeches repeatedly promoting the noble values of fraternity, freedom and universality, and their dissemination through literature and translation, there was never any criticism of the colonial policies and authoritarian attitudes of the European nations towards the rest of the world. This is an indication of the participants' incapacity to treat others as true equals. A translation right really founded on such values would have taken the interests of others into consideration. The actions of the participants therefore betrayed their words, revealing that their utterances were nothing more than good diplomatic manners. As one French author explains in 1888, when copyright is discussed internationally, since there will always be diverging views, it is up to the most advanced state to pull the others towards itself (Bricon in Basalamah 2009, 275). This is a self-given right of domination.

This last point brings out translation's potential for both bringing together foreign entities, as well as subjecting others to subservience and colonization, to which I will come back in Part III. Translation is simply an instrument of human interaction, acquiring its direction from the policies and intentions that give it its concrete application. That translation has constantly been used throughout history as a tool of colonization and invasion is well established. But as we shall soon see in the case of India, that the translation right was also used to solidify power over others can also be easily established. The mistake would be to believe that this is not still happening now, although in more subtle manners, and with additional layers of complexity.

Although translation rights were developed on their own, with distinct questions and debates, what was said about the relationships between different stakeholders in negotiating intellectual property rights in general also applies to translation rights. One must therefore keep in mind the political, economic and cultural positions of France, Britain, Germany and the United States – as the most important players internationally – along the timelines of copyright development over the last century and a half to understand the emergence of translation rights.

Finally, because of the power relations and interactions between unequal partners, it is clear that an ethical dimension must be part of any discussion on the translation right. A public policy perspective must ensure the greater good of society, without giving a privilege to one group at the expense of another, unless there is evidence that is the best manner to ensure the public interest. From an ethical angle, a philosophical understanding and outlook views translation as a welcoming act requiring humility and respect of otherness, and avoiding domination (see, for instance Berman 1999, 73).

I.2 1879 - 1889

Except for the 1882 Roma Convention devoted to creating the Berne Union, from 1879 to 1889, translation always came up as one of the main issues.

The first item to be discussed on the agenda of the 1879 London meeting was translation. One wonders however to what extent there could have been a lively and genuine discussion on the topic, when the wording of the item was more specifically, “how to prevent a work published in England or France from being translated elsewhere without the author’s consent?” (Lermina *op. cit.* 16). This makes it clear that the tone of the discussion was to consider prohibition as the rule, and the permission the exception. At the end of the meeting, the assembly voted in favor of granting an exclusive right of translation to the author, with the condition that the translation be published within five years from the publication date of the original work (Ibid. 21).

In 1880, the general secretary said: “It has been decided that the Congress would deal specifically and completely with the question of translation; the literary question that is truly international, and which we may summarize by two words: exportation and importation” (Ibid. 54).

The Lisbon Congress gave much more weight to jurists instead of authors and diplomats, in order to reach legal resolutions. These lawyers⁴⁹ spoke as though they were themselves literary authors, strongly maintaining that translation was simply counterfeiting, and their arguments had no mention of any other factors but the individual right of ownership of the author over their work. This is not to say that there were no objections, especially from “less important” countries. Poland’s Mickiewicz explained that translation was a necessity for his country, and that translation could not be likened to counterfeiting because their culture held a great respect for literature. The French response by Louis Ulbach, filled with references to morality and Christian values, was not only to remind everyone that this would be giving in to piracy, but also suggested “the urgent and absolute necessity of monitoring translations, to organize this monitoring, and to make it part of the customs and laws” (Lermina *op. cit.* 81). This was because translation is an activity that “injects foreign blood into the veins of a nation, and must therefore be done with all sorts of precautions of knowledge and honesty” (Ibid. 82). It was becoming clear that, on one side, there were the rebel countries (United States, Hungary, Brazil, Russia) refusing to sign any convention for various pretexts, and on the other, the European superpowers, demanding the “Congress’s violent protest... against the states that refuse to associate themselves to our work of solidarity and universal integrity” (Id.). Three years later, the multilateral convention was on the verge of being entitled the “Universal Union for the Protection of Literary and Artistic Property”. It is interesting to note the ambiguous use of the term “universal”, which can mean a truly multilateral effort meeting everyone’s

⁴⁹ Such as Eugène Pouillet, lawyer at the court of Paris, and author of a treaty on artistic rights entitled *Traité théorique et pratique de la propriété littéraire et artistique et du droit de représentation* (1879) (Basalamah *op. cit.* 242-243).

recognized needs and status, as well as forcing upon everyone else one's own hegemonic notions. At the end of one of the four resolutions of the 1880 Congress, we find the provision explaining that the exclusive right of the author implies, or includes, the right of translation (Ibid. 86).

In 1881, although translation was not supposed to be addressed directly, there were two important mentions of it. The first was that the countries refusing to recognize the translation right were named one by one, with a specific emphasis on Russia (Ibid. 116). The second mention of translation was the wish to grant the translation right to the author, without any time limit, and automatically, without the need to mention it on the cover of a work (Ibid. 117).

As mentioned previously, the 1882 meeting was in preparation for the meeting that would take place the next year, bringing together the founding members of the Berne Union. All the talk was to simplify and reduce the various projects into one project of a universal literary convention (Ibid. 120). From the five concluding articles about the Berne Union, the second stated that the authors of every signing country will have an exclusive translation right over their works for the entire duration of their property over their work in the original language. The publication of an unauthorized translation would be deemed counterfeiting (Ibid. 135). This was declared while it was clear that many countries still had serious reservations against the translation right for cultural and economic reasons.

The 1883 meeting was held in Amsterdam, where a Mr. Levy, one of the most important Dutch publishers, spoke out against the translation right. Only this time, his argument was that granting exclusive rights over derivative works was indefensible and impossible to execute. Otherwise, "you could sue almost the entire human race for being counterfeiters" (Ibid. 202). He concluded his discourse by saying that "the translation right does not seem to me to be accessory to the right of the author" (Id.). All what we are told about his intervention, is that it was "pushed aside by the Congress" (Ibid. 203).

In 1884, in order to get a wider rate of approval, the right of translation was suggested to last only for ten years, if the author translated their work within three years – as opposed to being equal to the right of reproduction. That said, the concluding remarks were that "the Association [...] will be pleased to know that most of its wishes from the 1883 project have been satisfied. The only one that has not been accomplished to the measure requested is the one related to the translation right" (Ibid. 231). Let us also note here the use of the anonymous

“Association,” instead of clearly identifying that it was (most likely) France that was displeased with the final result. Otherwise, if the “Association” voted on this, how can it still be unsatisfied with the results?

During the 1884 Berne meeting, the question of the duration of the translation right was not contested by the typically dissenting countries – Russia, Brazil, Poland – but by Sweden and, to a lesser degree, Norway, who were looking for a minimal protection regarding translation rights. When France maintained its previous position, the Swedish delegate reiterated that “the populations of the Scandinavian countries are small, but eager to learn, and therefore need to acquire the literary productions of the great nations.” When the other members rejected his argument, he compromised by saying that the ten years for translation rights is the maximum concession that Sweden was willing to accept (Ibid. 100). Sweden was therefore able to limit, at least temporarily, the duration of the translation right to ten years, despite the efforts of France.

The 1885 Berne conference saw Norway join Sweden more forcefully in its position against granting an equal protection against translation as it is granted against counterfeiting (OMPI 1986a, 120). The German delegate, followed by the Swiss representative, also reminded their French counterpart that by insisting on the translation right, the ultimate purpose of all these discussions, namely, the creation of a multilateral convention, would not be achieved. In other words, translation rights were such a central and sensitive issue, that some countries would have been willing to sacrifice their adherence to the convention if their circumstances were not recognized and their positions not respected. All of this led to a simplified article concerning translation rights that maintained the ten years’ duration, but without any mention of the three years’ timeframe during which an author had to publish a translation to exercise that right. Less than ten days after the signing of the document that would be known as the Berne Convention, the 9th ALAI meeting would be held in Geneva in 1886, and once again, the problematic issue would be translation rights. This time, things would remain the same, although France was still openly voicing its dissatisfaction until the translation right would become assimilated to the reproduction right. Ulbach, whom we encountered previously, was fighting the idea that a nation can compensate for its lack of national literature by acquiring that of another through translation.

If education and learning were really the concern, one would think that translation would be encouraged, not impeded. And it was, but only nationally. If the learning and education were taking place through self-education by acquiring and appropriating foreign knowledge via translation, then, according to Ulbach, this must be considered detrimental to one’s society, because the knowledge is foreign, or at least, that is how he presented the issue. He went on to add that “if the smaller nations, which do not have a literature yet, have insisted on signing this convention, it was not out of self-love or without cause, but because they wanted progress and

advancement, and to warn the bigger states that they want to follow in the footsteps of the European civilization” (Ibid. 274). Ulbach did nothing to hide that his criteria for assessing the greatness of a nation is its conformity to European civilization. And what about “literature”? Could it be an oral tradition, or does it have to fit the model of the written, printed, and distributed book to be worthy of consideration? The speaker continued his argument by asking “Do Tunisia or the Republic of Liberia have any writers? I admit my ignorance while I regret it.” No wonder some scholars who have studied this history in detail have described it as a “[e]urocentric enterprise whose triggering motivations are to be found in the colonial imaginary of those times” (Basalamah 2009, 263).

This said, not all nations were arrogantly seen as incapable of producing their own art and literature. Japanese applied arts, for instance, were considered almost as good as European art. That is why Japan’s joining the Union was seen as an “acquisition” (in Hemmungs Wirtén 2011b, 40).

The ALAI Congress of 1887, held in Madrid, did not address translation squarely, but it did equate the unauthorized reproduction of works with their translation for countries that speak the same language (Lermina Ibid. 284). Since this equation had been repeatedly fed into the minds of all for years, we are not surprised that there does not seem to be any trace of anyone objecting or wondering how the mechanical reproduction of a work can be seen as being the same as translating it in another language, for another culture.

The 1888 and 1889 meetings, held in Venice and Paris respectively, only witnessed France’s insistence on treating translation rights like reproduction rights, and therefore granting them exclusively to the authors (ibid. 320-340). Although this did not happen to the extent France desired, the French report on these meetings clearly states that their ideas were being accepted by an increasing number of nations and that they would not reduce their efforts until this position was held universally (Ibid. 351).

In any case, the ALAI founded the Berne Union which, from 1886 onwards, would be the international legislative institution addressing copyright and, by the same token, translation rights. This rendered its own role administrative and consultative, giving over the legal and executive functions to the Union. As for the Berne Convention, it remained largely unchanged, given its aim to have as many nations join as possible.

In 1896, Article 5 of Berne was modified to extend the translation right to the entire duration of the copyright protection on the original, if the author published a translation within ten years from the publication of the original work.

In the 1908 Berlin Conference, the translation right was finally assimilated to the reproduction right and granted fully to the author. The secretary of the meeting noted however that states had the choice to temporarily substitute this new article with the previous ones (of 1886 or 1896) as they saw fit, in recognition of the different circumstances of each nation (OMPI 1986b, 269). Holland's and Russia's demands to have a transitional process towards translation rights were therefore met in this manner. But the special treatment for which the Japanese delegation asked was perhaps the most surprising and interesting. In fact, Japan wanted to have nothing do with any translation rights or restrictions, mainly because they saw their culture as radically different from European cultures, which required, according to them, more extensive efforts of translation. Their delegate went on to explain that the benefits of translation would be mutual, because his nation's art and literature are no less than the ones produced by the Europeans, and it is only by encouraging translation, not restricting it, that both sides would get to know each other (Ibid. 171-2). He did this by sarcastically exposing the Eurocentrism of the convention, rhetorically and preemptively stating how the Europeans might respond:

We Europeans, one might say, we can congratulate ourselves on being in possession of a literary heritage where the riches are almost impossible to deplete. If we open this treasure chest to you, what will you give us in exchange? Freedom of translation is a fool's market where only you will reap the benefits, because strictly speaking, you Orientals have no literature.

(in Hemmungs Wirtén 2011b, 39)

Although this request did not lead to any grant of special treatment, it was nonetheless interesting to have it on record at the international level for a number of reasons. First, because this was a direct questioning of the Eurocentric bases on which most of the discussions were taking place, as we have repeatedly seen. Second, it was shaking up the notion that art and innovation can only take place by granting an exclusive right to the author over their work, instead implying that less restrictions would lead to more production, especially at the international level. And finally, here was a recognition of the important role played by translators in bringing cultures and peoples together.

Before the matter was put to rest, the German delegate revealed another potential problem for European countries if they wanted to allow the Japanese any flexibility:

I would like to add another word in order to explain the prejudicial consequences that would follow in the wake of adopting the Japanese proposal. Granted, the Japanese language is little known in the Union countries and a translation into Japanese can perhaps not cause any damages to the author or the editor of the original work. I will admit that this is definitely a fair notion. But is Japanese really the only language on the basis of which such an argument can be made? In several Union nations one can find languages or dialects the knowledge of which is limited to a relatively small group of the population: for instance le breton, le picard, le romanche dans les Grisons, le basque, le welsch dans le pays de Galles. If we want to accept the Japanese proposal, we will, with certain logic, find ourselves forced to accord the same benefit to these particular languages, and destroy the very system of the Berne Convention.

(in Hemmungs Wirtén 2011b, 41)

The freedom of translation that the Japanese were asking for is therefore no different, by the German delegate's concession, from what the European nations ought to allow on their own territories, for their linguistic and cultural minorities. But since they had no intention of reopening the door to linguistic resurgence in Europe, this proposal had to be quickly dismissed.

The Secretary then proceeded to assure the assembly that Europeans have no such disdain for the art and literature of Japan, that other nations could make the same argument of being considerably different in customs and language, and then followed by a barrage of arguments, all centered around the idea of the necessity of ensuring the quality of translations by giving exclusive rights to the author. He concluded by dismissively asking the Japanese delegates to take his arguments into consideration and make him happy by no longer opposing the assimilation of the translation right. This seems to have brought calm to the meeting (OMPI *op. cit.* 172). In other words, expressing difference and specificity is unacceptable in an international forum, where the aim is to find a blanket solution that will be applied to all, even if it only satisfies the interests of the most powerful. And that is how the translation right was finally assimilated to the reproduction right, granted exclusively to the author.

Between the Berlin Conference and the Brussels Conference of 1948, many countries signed the Berne Convention, including a group of Commonwealth countries between 1927 and 1928, which seems to indicate an order to do so given from the UK to its "dependents." This group included Canada, which signed on April 10, 1928, nine days after India.

At the 1928 revision conference, the Siamese and Irish delegates both requested provisions allowing compulsory translation licences if copyright holders refused to authorize translation. The Irish representative explained that the translation right, which ensured access to information to the Irish Free State, was "the only

matter before the conference deemed by the Minister to be of importance.” As for the Siamese delegate, a Prince and a career diplomat, he spoke eloquently in favour of free translation for developing countries. While he did not succeed in convincing those in attendance to loosen the translation right, he did convince them of the necessity for countries newly joining the Union to have the option of adhering to the ten-year protection granted in 1896. Greece, Iceland, Ireland, Japan, Siam, and Turkey all opted for this ten-year protection (Bannerman 2016, 104-5).

In 1945, The United Nations replaced the International Committee on Intellectual Cooperation (ICIC) with UNESCO, who linked copyright back to the 1948 Declaration on Human Rights. Copyright according to the newly formed body, was a “barrier” to the “free flow of culture among all the peoples of the world” (UNESCO 1947, 1). In 1952, the Universal Copyright Convention was formed (UCC), offering lower levels of protection than Berne, and thus encouraging countries like the U.S. to join the copyright regime of the rest of the international community. In addition to offering a copyright protection of 25 years plus the life of the author, as opposed to the 50 years offered by Berne, and specifically with regards to translation right, article V stated:

1. Copyright shall include the exclusive right of the author to make, publish, and authorize the making and publication of translations of works protected under this Convention.

2. However, any Contracting State may, by its domestic legislation, restrict the right of translation of writings, but only subject to the following provisions:

If, after the expiration of a period of seven years from the date of the first publication of a writing, a translation of such writing has not been published in the national language or languages, as the case may be, of the Contracting State, by the owner of the right of translation or with his authorization, any national of such Contracting State may obtain a non-exclusive licence from the competent authority thereof to translate the work and publish the work so translated in any of the national languages in which it has not been published; provided that such national, in accordance with the procedure of the State concerned, establishes either that he has requested, and been denied, authorization by the proprietor of the right to make and publish the translation, or that, after due diligence on his part, he was unable to find the owner of the right. A licence may also be granted on the same conditions if all previous editions of a translation in such language are out of print.

If the owner of the right of translation cannot be found, then the applicant for a licence shall send copies of his application to the publisher whose name appears on the work and, if the nationality of the owner of the right of translation is known, to the diplomatic or consular representative of the State of which such owner is a national, or to the organization which may have been designated by the government of that State. The licence shall not be granted before the expiration of a period of two months from the date of the dispatch of the copies of the application.

Due provision shall be made by domestic legislation to assure to the owner of the right of

translation a compensation which is just and conforms to international standards, to assure payment and transmittal of such compensation, and to assure a correct translation of the work.

The original title and the name of the author of the work shall be printed on all copies of the published translation. The licence shall be valid only for publication of the translation in the territory of the Contracting State where it has been applied for. Copies so published may be imported and sold in another Contracting State if one of the national languages of such other State is the same language as that into which the work has been so translated, and if the domestic law in such other State makes provision for such licences and does not prohibit such importation and sale. Where the foregoing conditions do not exist, the importation and sale of such copies in a Contracting State shall be governed by its domestic law and its agreements. The licence shall not be transferred by the licensee.

The licence shall not be granted when the author has withdrawn from circulation all copies of the work.

(UCC, V)

To summarize, this article states that, subject to a number of provisos, a compulsory licence for translation can be issued if no translation in the national language was published within seven years of the original publication (or if the translation had been published within this period but all editions of this translation were out of print after the seven year-term) (Basalamah 2000). The distinguishing nuance is that while the translation right under 1896 Berne expired completely after ten years, the UCC translation right lasted the entire life of the author plus 25 years, unless a compulsory licence of translation was sought after seven years.

Japan, Turkey and Greece led the charge at the UCC for free translation. The Japanese delegate declared the translation right unacceptable, because of the “high cost of translation into a difficult language [which] was liable to place an almost insurmountable barrier between the Western and Eastern civilizations.” The Yugoslav delegate also deemed the limited term of the translation right to be necessary, because his country is “in too great a need of foreign works to contemplate any change in attitude.” Spain believed that any profits generated from compulsory licensing should go to the authors, not the publishers (in Bannerman *op. cit.* 106-7).

While those defending the freedom of translation were successful in winning a majority vote, Italy and the U.S. were so unhappy with the outcome that they asked for a re-vote, which never took place. The American delegate said the U.S. refused to sign such as treaty, and Turkey refused to sign the UCC as a result. The rest was left to the courts to sort out (*Ibid.* 108).

Although developing nations would have been inclined to join the UCC given the lower levels of restrictions, the Berne Safeguard Clause of the UCC, suggested by the U.S., meant that any country leaving Berne would not be protected by UCC in a Berne country. This only contributed to the tensions that would be witnessed at the Stockholm in 1967, as we shall soon see.

II. Divergent Interests

II.1 Scandinavian countries

Legally, Sweden, Denmark and Norway considered their languages as dialects of the same language in 1876. When the Supreme Court of Sweden commented on what would become the country's first copyright law, it clearly stated that translation rights would be detrimental to the dissemination of knowledge in Sweden, given its minority language:

Such a protection received its importance solely through agreements with foreign nations, and such agreements would provide the main advantages to the foreigner, while all of the disadvantages would fall on the Swedish public. For a people whose language is so small and geographically limited as the Swedish, any restriction on freedom of translation could not but have a negative impact on the dissemination of knowledge and education. The need for such a people to complete its own literature by translations of the better works from abroad is infinitely greater than what it is for people with a widespread language and considerably richer literature than the Swedish. On the one hand, one could fear that foreign authors would regularly ask for such exorbitant fees for the rights to publish their works in Swedish translation that our domestic literature during this term of protection would lack access to many valuable foreign works, and that, on the other hand, foreign publishers would generally not extend to Swedish authors the same remuneration for the rights to translate Swedish works.

(in Hemmungs Wirtén 2011a, 92-93)

The law stated that authors from the three countries had two years to publish a translation of their work, as a result of which they would be granted protection for five years against unauthorized translations. In 1883, this law was amended to allow foreign authors to reserve the right of translation to one or more named languages in order to qualify for the same duration of protection.

In parallel with the international meetings already described above, the ALAI convinced Switzerland to host a conference that would create *Une Union générale pour la protection des droits des auteurs sur leurs oeuvres littéraires et artistiques*. The conference was held in 1884. Once the sixteen delegates elected Numa Droz, Swiss minister of commerce and agriculture, as chair, as soon as they heard the word “codification” in his remarks, they promptly asserted, one after the other, that they were merely there as observers, to listen and report back to their respective governments, and not to make any binding commitments.

The next meeting was meant to go through a series of questions prepared by the German delegation to facilitate the discussion. The seventh question read as follows: “Should the duration of the exclusive right of translation be equal to the right to the underlying work? If not, should not this duration be uniformly fixed within the Union as a whole?” (*Ibid.* 92).

The ALAI had proposed in 1883 to completely assimilate the translation right with reproduction rights, as we saw. The Swiss were now offering a second option: that authors would have an exclusive right of translation during the entire duration of the original right, and added, between parenthesis “(possible adding “if they have made use of this right within a ten year delay)” (*Id.*).

Sweden’s delegate, while open to providing foreigners with limited translation rights, said “in no case could [Sweden] accept that the exclusive right of translation would be protected for the same period as the original work” (*Id.*). This triggered the German delegate to say that they would only accept the assimilation of the translation right if all countries in attendance accept it.

After six days of meetings and discussions, Sweden proposed a three-year deadline to publish an authorized translation, to which France replied:

the right of translation cannot and shall not be considered separate from the right of reproduction or as a special form of reproduction itself. In addition, in international relations it is almost always translation that is the standard mode of reproduction. [...] the interests of the author merge with those of the public, who need to be assured of the fidelity of interpretation given to the original work.

(*Ibid.* 93)

In response, the Swedish delegate brought up the specificity of the Scandinavian countries, which are in a phase of development, and requiring the literary production of “the great nations.” He also reiterated that an authorized translation can still be bad, and that the freedom of translation would only benefit the author’s honour by having the public access their work.

This exchange between France and Sweden is representative of the exchanges that continue to take place at the international level, between the producer of the works and the user of the works in translation. For developing countries, granting the translation right to the author only means hampering access to it in translation. In addition, an unauthorized translation of superior quality is not even considered as a possibility in this regime.

France, Haiti and Switzerland were defeated in their attempt to see the assimilation of translation. The chair concluded by saying that the conference had satisfied all of the demands of the ALAI, except the most coveted one.

The 1885 conference saw the presence of a number of states that had not attended the first conference, including the U.S. As we have already seen, the U.S. was mostly concerned with protecting its publishing industry, and its culture of reprinting European works. The significant minority communities living in the US required translations of these works, and this was clearly provided by the U.S. market. Some have gotten as far as saying that any explanation relating the novel to the formation of an essentially monolingual state underestimates the importance of translation to the multilingual American reading public at the time (*Ibid.* 96).

Despite the efforts of Mark Twain, Harriet Beecher Stowe, Walt Whitman, and others to promote copyright for the benefit of authors, the interests of publishers and authors continued to be mainly represented by European diplomats.

In any case, the Swedish delegate confirmed that his country had not changed positions, meaning that Sweden and Norway would not be part of the French position. Article 6 of the 1884 draft convention stated that “to benefit from this provision, the authorized translation must appear no later than three years after the original work.” The objective of the Scandinavian countries was to keep this article intact, while the French wanted it completely removed. After being criticized for inconsistency, the German delegate clearly stated that the project of a unifying copyright law was more important than the principle of assimilation the French were looking for, and that his country did not want to see several nations excluded from it. Though they were in agreement with the French proposal, the Swiss sided with Germany, most likely because of their hosting duties.

The French delegate said that the principle of freedom of translation only amounted to giving a nation the illusion of having its own literature, and therefore damaging its development. This, he said to “countries where literature is poorly developed and which need to borrow from producing nations” (*Ibid.* 98). To break the stalemate, the U.K. proposed leaving it up to each country to decide of the duration of the protection for an authorized translation. This was rejected by all nations save Belgium, Sweden and Norway. France, Belgium, Spain, Haiti and Tunisia voted for complete assimilation, but this was short of one for victory, as Germany, Honduras, Italy, Sweden, Norway and Switzerland voted against. (Tunisia was a French colony, and France had recognized Haiti’s independence in 1825). As for keeping the three-year protection, Sweden, Norway, Germany,

Spain and Honduras lost by one to France, Belgium, Haiti, Italy, Switzerland, and Tunisia. While Sweden and Norway had just given up all they were willing to concede, France's strategy now shifted to convincing the U.K. of its position, in order to get their entire empire on board. The ten-year protection was safe for the time being.

Norway and Sweden did not attend the 1886 conference, which stated that authors had ten years from publication to authorize a translation, which was now protected as an original work.

The 1890 *Rundqvist v. Montan* case before the Swedish Supreme Court underlined the gap in the Scandinavian law. Rundqvist had purchased the translation rights to a French novel, but Erik Wilhelm Montan published an unauthorized Swedish translation in a daily paper. The Court ruled in favour of Montan, accepting his argument that the former had not expressly mentioned Swedish as one of the languages for which he reserved the right, as required by Swedish law.

In 1891, the ALAI wrote a report highlighting the failure of the Scandinavian countries to comply with Berne. In 1897, the law was amended to remove the requirement of stating the language of translation, and extending the protection to all languages, but left the requirement of having to produce the translation within two years to benefit from the ten year protection. This last requirement still prevented Sweden from joining *Berne*.

Swedish authors and publishers started expressing their concerns for not enjoying the same protections for their works as their European counterparts. Sweden finally gave in, and modified its law in 1904, and joined *Berne* (Hemmungs Wirtén 2011a, 97-100). And we already know that France and the ALAI were finally able to see the full assimilation of the translation right at the 1908 Revision Conference in Berlin.

II.2 Russia

It is interesting to note that, before the revolution, Russia granted copyright protection to both author and translators. Russia adhered to the notion of "freedom of translation" which simply required the translator to acknowledge the authorship of the author. But they did not have to get the author's consent before publishing a translation, nor did they have to share any of the profits from their translations with the author (Sundara Rajan 2006, 80).

This Russian approach was aligned with Russia's Imperial policy of unifying the various cultural and linguistic communities by exposing them to each other's literature, while also improving literacy rates (Levitsky 1984). It is worth mentioning that while the use of the Russian language extended to all parts of Russia, it did not go beyond it. So Russian was mainly the target language for foreign works, as opposed to a source language from which to translate Russian works into other languages. In other words, Russia had adopted a policy that benefited its set of circumstances and its use of foreign works, while protecting the interests of its authors writing in Russian.

But not everyone was working in Russian. Minority communities using Russian works would have required translations, and Russian authors writing in the minority languages would have seen their works translated freely, which would have been considered economic and moral losses. Russia started modifying some of its laws to appease such concerns, but even after authors were granted more control over the translation of their work, foreign authors could still be translated into Russian.

Of course, this did not sit well with the practice of copyright in Europe. Most attempts to resolve this tension resorted to bilateral treaties, but the problem was not fully resolved until Russia's accession to the UCC in 1973 (Newcity 1978).

In 1911, some restrictions were introduced to the notion of freedom of translation:

A Russian author or the author of a publication which appeared in Russia enjoyed the exclusive right of translation, provided he printed a reservation clause on the title page or in the preface. This right was protected for ten years provided he published the translation within five years after the publication of the original.

(in Sundara Rajan *op. cit.* 85)

One can clearly see the influence of Article 5 of the 1886 *Berne Convention*, which granted authors a ten-year period to issue translations. But these modifications to Russian law were still slower than the evolution taking place on the international scene. As we just explained, translation rights quickly evolved to being fully assimilated with the author's copyright. Article 8 of the 1908 *Berlin Act of the Berne Convention* granted authors the automatic right to authorize translations of their work for the lifetime of the author plus 50 years after their death. And this was signed by 15 countries, including the U.K., which reflected the change in its own 1911 *Copyright Act*, and which then forced it on all the member states of its commonwealth.

Writers in Russia relied heavily on their national and international reputations, which are significantly shaped by the translation of their works into regional languages. The changes Russia made to the 1911 *Copyright Act*

was received as a strengthening of the moral right of the authors, because it was granting them greater control over the translation of their work (*Id.*).

When the Russian revolution took place, the socialist framework took over all dimensions of life, with the state declaring itself as the owner of all works. In 1947, the law was modified, requiring a payment to be made to the original author whenever a translation of their work was made (Boguslavski in Stewar 1989). However, since 1973, Russia's copyright laws have been virtually indistinguishable from the international regime of copyright, as a result of having signed the *Universal Copyright Convention* (UCC). As already explained, the latter was first introduced by the UNESCO in Geneva, in 1952 (coming to effect in 1955), as an alternative to the *Berne Convention*. The states – including the U.S. – that found the minimal requirements of *Berne* to be too stringent for their own national laws and circumstances, or which found it overly beneficial to certain countries at the expense of others, opted for the UCC (Ringer 1968). As a side note, the U.S., which had signed the UCC, became an implementing member of the Berne Union in 1989. However, because a penalty was introduced against any state that would choose to implement the UCC after having signed *Berne*, the two agreements were brought together much closer in order to discourage desertion of the *Berne Convention*, and the *TRIPS Agreement* now includes virtually all the countries as signatories. These elements have reduced the value of the UCC to virtually nothing beyond what is already stated in the other documents. In 1995, Russia became a signatory of *Berne*.

II.3 India

Despite being under Dutch, French, Portuguese and then British colonization since the 1500s, India has always resisted its colonizers through various means, including legislative resistance.

When the U.K. accepted the 1908 changes to translation rights at the international level, and integrated them into their 1911 *Imperial Copyright Act*, the expectation was to see the colonies implementing the legislative changes brought on by the new law. But instead, section 4 of the *Indian Copyright Act of 1914* (ICA), entitled “Modifications of copyright as regards translation of works first published in British India” read as follows:

In the case of works first published in British India, copyright shall be subject to the limitation that the sole right to produce, reproduce, perform or publish a translation of the work shall subsist only for a period of ten years from the date of first publication of the work; provided that if within the said period the author, or any person to whom he has granted permission to do so, publishes a translation of any such work in any language, copyright in such work as regards the sole right to produce, reproduce, perform or publish a translation in that language shall not be subject to the limitation prescribed in this sub-section.

(Indian Copyright Act, Section 4.1)

This derogation from the imperial regime was very much intentional. It highlights the tension between the trade interests of the U.K., and the development aspirations of India and their need to access European knowledge and culture. As we saw with Canada and other nations, these are attempts to accommodate claims to local difference in international and imperial standards. These kinds of problems still constitute the main challenges heard during contemporary negotiations on copyright law and policy. Particular social and economic contexts will have very different impacts when applied to a different set of contexts, and copyright law cannot be seen as one set of abstract legal norms to be applied “as is” everywhere in the world.

The situation of India in 1914 was no different from that of the other British colonies, in that it was ruled by three layers of law-making: those of the British Empire, those of the Indian Governor General, and those of the international institutions. And these three layers each developed at their own pace. While India was discussing copyright law in the mid-1870s leading to a Bill in 1885, the mid-1880s brought a new international and multilateral model once the *Berne Convention* was signed in 1886. Meanwhile, the Copyright Commission of Britain of 1875-1878 was inconclusive.

Reforming British copyright law was challenging because they were attempting to coordinate the internal needs of Britain, with the needs of their colonies all over the world. When Canada attempted to reform its domestic law, it was told that its proposed reforms were in conflict with the interests of the imperial regime (Seville 2006, 103-106). India was perhaps more polite in its proposals in 1876 and 1885, modelling their proposals on a bill drafted in Britain, and instead of being completely rejected, as was the case with the Canadian proposal, India was asked to hold off taking any actions until Britain could resolve the divergences. Although Britain finally acceded to Berne and revised its laws in 1896, the tensions with their colonies remained high. And nowhere were they as clear and problematic as in translation rights.

During the 1870s and 1880s, jurists and policy-makers in India were opposed to translation rights, because they would be “detrimental to the progress of the country,” and because they would “stand in the way of translations being made, and might thus interfere with the diffusion of knowledge” (in Bently 2007, 1187-8). Granting translation rights was simply not in India’s best interest as a “net importer” of works, and the costs would be significantly more than any gains to Indian markets. But even more importantly than the purely economic aspect, were the social and cultural aspects of no longer having the required access to European knowledge: “A dominant concern of the discourses in colonial public arenas was the superiority of Western ‘useful’ learning

and the possibility of its vernacularisation in order to effect a 'general improvement' of native society” (Naregal 2001, 61).

The idea of the intellectual and technological superiority of the colonists was commonplace, and perpetuated by the colonists themselves, who regarded colonized cultures as backwards and uncivilized. In 1835, British historian Macaulay’s assessment of the ability of Indian languages to even be translated into was the following:

[...] the dialects commonly spoken among the natives of this part of India contain neither literary nor scientific information, and are moreover so poor and rude that, until they are enriched from some other quarter, it will not be easy to translate any valuable work into them. It seems to be admitted on all sides, that the intellectual improvement of those classes of the people who have the means of pursuing higher studies can at present be affected only by means of some language not vernacular amongst them.

(Macaulay 1835, §8)

And as for their own knowledge and education, he wrote:

I have no knowledge of either Sanscrit or Arabic. But I have done what I could to form a correct estimate of their value. I have read translations of the most celebrated Arabic and Sanscrit works. I have conversed, both here and at home, with men distinguished by their proficiency in the Eastern tongues. I am quite ready to take the oriental learning at the valuation of the orientalists themselves. I have never found one among them who could deny that *a single shelf of a good European library was worth the whole native literature of India and Arabia*. The intrinsic superiority of the Western literature is indeed fully admitted by those members of the committee who support the oriental plan of education.

(Macaulay 1835, §10)

In order to pull India into the civilized world, Indians and colonists agreed that European knowledge was needed. Ram Mohan Roy, the father of the Indian Renaissance, wrote to Lord Amherst, the Governor General, asking him to “instruct the natives of India in Mathematics, Natural Philosophy, Chemistry, Anatomy and other useful Sciences, which the nations of Europe have carried to a degree of perfection that has raised them above the inhabitants of other parts of the world” (in Bently 2007, 1189).

Whether educating the Indians was the justification for colonization or simply an opportunity provided by it, it was “perceived in part in terms of the transfer of knowledge, technology, culture, learning, and morals, [...as] Britain’s ‘gift’ to India.” This could then also “justify territorial expansion, political oppression, military atrocities, and economic opportunism” (*Ibid.* 1190). However, the more dangerous form of colonialism, according to Naregal, was using colonial education to reach “an internalisation of adverse judgements against indigenous intellectual traditions and social practices” (Naregal *op. cit.* 58) which perpetuates the authority of the ruling colonists.

Considerable funds went into translating education curricula into some of the many vernaculars, while other strategies included educating teachers in English who could convey the knowledge in the required vernaculars afterwards (*Ibid.* 66-68). The vernacular literature was going to be enriched by the translations of European books, or the dissemination of works from those who had been educated by European knowledge.

Translations from English into regional Indian languages, it was thought, would modernize those literatures. Once this new serum had entered the bloodstream of Tamil, for example, it would, by its very excellence, inspire imitation and thus the language and literature would evolve slowly but steadily out of primitive superstition into a medium of educational instruction capable of producing a reasonable approximation of Western civilization.

(Blackburn 2003, 132)

By the 1870s, translation was perceived as the necessary mechanism to ensure progress in India, as would be the case in the rest of the world.

Denzil Ibbetson, the Director of Public Instruction in the Punjab province, said that “one of the greatest educational needs of the country is wholesome literature in the vernacular; and this can at present only be hoped for from translation.” He then argued that granting any translation right would be “a serious hindrance to progress in India; and under the peculiar circumstances of the country I would impose no restriction upon the publication of translations [...] I am strongly in favor of perfect freedom of translation” (in Bently op. cit. 1192).

As more Indians received their English education, many in the hopes of securing positions in the Indian Civil Service, it quickly became clear that the numbers of qualified Indians far exceeded the numbers of available positions. This was creating a new problem, to which an easy fix was going to be educating Indians in their own vernaculars, instead of English, and recreating class distinctions based on race and language.

In 1910, as political nationalism was growing, a ministry of education was created in India, and headed by a certain Harcourt Butler. This same man would be responsible for copyright reform (*Ibid.* 1194).

Meanwhile, in England, the situation was quite different, with many commentators and jurists being of the opinion that it is only fair to expect that the translation right would belong to the author of the original, and even that authors should have a right of translation irrespective of any explicit provision to that effect. In reference to *Stowe v. Thomas*, Eaton S. Drone wrote that Justice Grier’s decision was

contrary to justice, recognized principles, and the copyright statutes of the United States as judicially construed [and that...] [o]f the reported decisions of England and America, there is none which is more clearly wrong, unjust, and absurd than that in *Stowe v. Thomas*.

(*Ibid.* 1195)

In the same vein, British publishers quickly recognized the potential financial gains they could be making from the Indian market, especially in the educational markets. The establishment of at least 5 universities, the expansion of colleges from 28 to 191, and with more than 5000 secondary schools at the turn of the century all meant that this was a time of economic boom for educational publishers, especially if they could get their books prescribed (*Ibid.* 1197).

In her article “Macmillan in India” (2002) and her book *Empires of the Mind* (2006), Rimi Chatterjee documents the activities of giant British publishers Macmillan and Oxford University Press (OUP) in India. As British publishers expanded their markets into regional languages, they recognized the importance and potential of translation rights for their revenues. Roper Lethbridge, one of the partners of Macmillan wrote to him in 1882:

My idea about such translations [...] is, that you ought to keep the copyrights in your own hands for future use, as they should at some future time become very valuable, as education extends among the millions of India. At the same time, my own experience (as you know) is that the pioneers of these translations are likely to lose money – so it is just as well to allow governments to do the first editions.

(*Ibid.* 1202)

in *Another Country*, Priya Joshi (2003) explores the growth of interest in the market for novels. She meticulously surveys the circulation of catalogued works and argues that the success of the publishers is due to their careful selection of what their Indian audience would want to read. She cites a report from the Calcutta Public Library which states that three fourths of the circulation consist of novels and periodicals, and similar percentages from other libraries (Joshi 2003, 57).

In addition to the education market, the market of translated novels and works of fiction was yet another incentive for British publishers to ensure that the translation rights play in their favour in India, as elsewhere. Bently (2007) however minimizes the share of the fiction market, and explains that the main lobbying that took place was from the educational publishers. This, he tells us, is due to the genre of British literature, which did not meet the taste for melodrama that Indians liked, and also due to lack of regulation that was found for educational works, which means that fiction works were more prone to piracy. “Whatever the reasons, it is notable that the lobbying efforts of British publishers at various times to secure translation rights in India came from the respectable, educational publishers” (Bently, op. cit. 1204).

Beyond the divergent interests of India and Britain, two Indian court cases triggered the ultimate collision between colonist and colony.

The first case, *Munshi Shaik Abdurrubma'n v. Mirza' Mahomed Shira'zi*, took place in 1890. The counsel argued that even if a translated work seems like an identical copy of the original “it is not an infringement of copyright, for [...] it is a translation and not a copy. It is made for a wholly different market and class of buyers, and, therefore, is no injury to the plaintiffs.” The judge agreed, stating that a translation was not a copy, because skill and labour were employed in producing it (*Ibid.* 1206).

The second case, *Macmillan v. Shamsul Ulama M. Zaka*, taking place in 1895, was between the famous British publisher, and a former professor of Vernacular Science and Literature who had been distributing an Urdu translation of 2 books of mathematics. As part of the arguments of the defense, the defendant claimed that translation was not an infringement of copyright.

The judge ruled in favour of the defendant and explained his decision by saying that translations were not copies, not only because of 2 precedents (*Munshi v. Mirza* and *Stowe v. Thomas*) but also because the law does not explicitly mention translation, so it must not be prohibited. Finally:

There is here a conflict of rights and interests; a conflict between the intellectual interests of the persons for whom the translations are intended, and the caprice or possible pecuniary interest of the proprietor of the copyright, if he shall not, or shall, intend to translate the work himself, or cause it to be translated. There is no hardship on him; he can always protect himself by being first in the field with a translation.

(*Ibid.* 1208)

This decision irritated Macmillan, and together with other publishers like OUP, they started lobbying the Indian government, the British Parliament, and the Indian Office. The main concerns they raised were that:

- In India, British authors had been put in a situation of disadvantage in comparison with foreign authors being translated, and they had no way to defend their rights against unauthorized translations in India;
- they only wanted the same protection granted by international copyright law;
- they simply wanted to control the quality of the translation.

When lobbying the Indian Government did not work, the issue was brought before the British Parliament in 1897 under an amendment bill to copyright. Although it was not initially drafted to address translation rights or any issues of colonial copyright, the translation right became the main issue. For 4 years, the lobbying efforts generated all the support required, but legally, the passing of the bill took too long and never came to fruition. “Although by this stage the desirability of the translation right went unquestioned in Britain, all the legislative effort came to nothing” (*Ibid.* 1213).

By 1901, the British government was engaged with the South African war, and it was time to shift the forum of lobbying. This time, the publishers raised the issue of translation right in a letter to the India Office, in which they wrote, among other things that “it is not fair to authors or publishers in an empire where many scores of languages are spoken by millions, the right of translation should not be protected” (*Ibid.* 1214). The matter was raised to the Governor General who requested a list of the instances hardship had taken place due to the lack of translation rights. The publishers, who did not have any evidence of hardship, took six years to finally reply, arguing that evidence was irrelevant. Once again, this was not enough to change copyright law and explicitly mention the translation right that publishers were looking for.

In 1844, the translation right was specifically excluded from British law, but it was amended in 1852 to allow for a translation right of up to five years, with certain conditions. As multilateral negotiations between European nations with different languages were taking place, translation right became “*la question internationale par excellence*” (Ricketson & Ginsburg 2006, 88). Given the complexity of the issues that the British empire was dealing with, it tried to resist being pressured into anything before making sure that it would be in its best interest. In 1886, it agreed with the *Berne Convention*’s compromise of a translation right of ten years for works that meet all the *Berne* conditions (Art. 5).

Once the possibility of signing *Berne* was materialized, the British Foreign Office wrote to the Secretary for India, stating that “it will be desirable for Britain to become one of the signatory parties” and therefore “many difficulties of detail would be avoided if at the moment of signature of the convention a notification were made to the effect that the accession of Great Britain would comprehend all the colonies and foreign possessions of Her Majesty.” At the same time, this accession would not “preclude local Indian legislation where desirable as far as such legislation did not conflict with the terms of the Imperial Acts, or the International Convention” (*Ibid.* 1217). India replied favourably, but once again reiterating what all other developing nations have said regarding copyright and translation:

There are peculiarities in connection with the copyright in Indian books which may require special treatment. Thus India differs from other British possessions in having an extensive and growing vernacular literature. That literature is at present in the stage of abridgments and translation, and special care will be needed with a view, on the one hand to protect authors from the unauthorized abridging and translating of original works and on the other hand, to avoid all unnecessary checks on the production of such abridgements and translations as, it may be hoped, are destined to be the precursors of original literature.

(Ibid 1218)

While *Berne* came into effect in 1886, neither Britain nor India granted their authors a translation right as part of *Berne*, meaning that translation rights would be decided by India for Indian works, and by the *Imperial Act* of 1842 for British works in India.

When the Berlin revisions to *Berne* took place in 1908, they included translation rights with other economic rights granted to authors, as we already saw.

The authors of unpublished works, being subjects 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.

(Berne 1908, Art 8)

In order to ratify these revisions, Britain had no choice but to reform its own copyright law. A meeting of representatives of the self-governing dominions (Canada, Australia, New Zealand, South Africa and Newfoundland) was already taking shape, and an invitation was finally sent to India, though it was not a self-governing dominion, perhaps because the India Office was aware that “the provisions as to extending the term of copyright as regards translations [...] may not be favourably received in India” (Ibid 1121).

The Indian representative at the conference explained the specificity of India and requested that it be given flexibilities to follow where it can, and to customize where it needs to, based on its needs. This was accepted without any opposition from all attendees at the conference. The rest of the conference took place without any noteworthy events, and the representatives of the self-governing dominions all agreed to adopt whatever the British legislative body produces. The U.K. ratified the *Berlin Revision of Berne* in 1912, thus recognizing the full translation right for all works under *Berne* to the author of the original. At that time, this was applicable to Belgium, France, Germany, Haiti, Liberia, Luxembourg, Monaco, Norway, Portugal, Spain, Switzerland, and Tunis, while Denmark, Italy, Japan, and Sweden were retaining the Paris formula.

Surprisingly, while India was supposed to have been explicitly and specifically excluded from the Berlin revisions, it was mistakenly added to the Order in Council of 1912, which revoked all other orders. So if India wanted its name to be removed from the Order, this would have left all works of foreign authors without protection in India, leaving India in breach of both the 1886 and the 1896 version of *Berne*.

A closer inspection of the *Act* of 1911 (as in Bently 2007) reveals that India was never really going to be allowed to be excluded, especially because it was a mere British possession, and not even a self-governing dominion. The British government pressed India to adopt the 1911 Act as soon as possible, and this, India did by proclaiming it in 1912. India was given the right to modify it if necessary at a later time.

Starting in 1912, India started consultations within all of its local governments. Many were in favour of keeping the translation right of three years granted by the 1885 Bill, while others deemed it to be too short. Those resisting the translation right, including publishers and diplomats, raised the same issues once again: India was a country in need of access to European knowledge that it could only reach through translation, and this would be severely impeded if translators now had to obtain consent. Translation rights were equated with a delay of the development of literature and an interference with the growth of education.

Given its relevance to the situation of many countries at that time as well as today, allow me to quote the arguments advanced by Rai Dulal Chandra Deb Bahadur, a Government Pleader in Sylhet:

[W]hile the provisions of the [1911] act are intended to apply to India it is a matter for consideration whether these two countries are equally advanced in civilization, so that a law which may be good for England shall also be good for India. India stands no comparison to England in material and intellectual advancement. England is a country where intellectual attainment has reached its highest pitch and fine art its highest degree of development, whereas India is a country which is still in a period of transition. [...] The best thoughts of its best writers were couched in Sanskrit language which has now become a dead language [...]. Under the British rule, the high education in India is imparted through the medium of English language and the best products of the Indian universities express their ideas and thoughts through the medium of English language. The fact is that the English literature is pre-eminently a literature for the purpose of high education, but is not enough to meet the education demands of this country. Side by side with the English literature there should grow another literature, I mean the vernacular literature in India for the education of the mass, and it should be the aim of the legislature and the Indian public to make these literatures grow, to a healthy growth and before it is done we may not be in a position to assert that India has reached its proper stage of civilization.

(*Ibid.* 1128)

The letter from the government of Bengal inspired the Indian Government to draft a legislation proposing a five-year period of exclusivity followed by a two years notice for translating a work. The letter argued that, given the number of languages in India, “an author cannot be expected to know whether a translation of his work into any particular language is demanded by the public, and he should be given every reasonable opportunity of translating the book himself” (*Ibid.* 1229).

While the India Office authorized the drafting of the Bill because it did not see it as interfering with the preservation of the uniformity of copyright law in the British empire, the Board of Trade expressed concern that this was not in the public interest. The British publishers, led by Macmillan, then heavily lobbied the India Office. The Bill was introduced in India in 1913, generating a new wave of responses. The Bill was then modified by the British Select Committee, extending the period of monopoly over translation to ten years, and it passed as the *1914 Act* (*Ibid.* 1232).

The *1914 Act* would not do anything to help India access the works it needed to access if they were published in Europe. If the modification to the translation right was only going to apply to Indian works, what was the fuss all about, one may wonder. First, this was clearly not the intent all along. The resulting legislation was limited to Indian works, because India realized that it had to choose between fighting copyright law, or fighting the British empire which was seeking unity and uniformity in its kingdom. Secondly, we must not forget the colonial reality of India, which meant that they would resist with the means offered to them, even if it is only in symbolic gestures. They exercised their autonomy over their nation, even though it did not allow them access to foreign works. It may also be seen as a message to the British, and perhaps the rest of the world, expressing what they would have promoted internationally had they had the choice and autonomy to do so.

Finally, this loosening of the translation right must still be seen as a step in the right direction, as it did provide a genuine venue for knowledge dissemination through translation of works within India. As we saw, and will see again, education and development agendas are often means of transmitting political agendas and perpetuating the colonization and imperialism of some nations over others. By allowing works to circulate freely through translation in India, translation allows for nationalist movements and agendas, and the emergence of an Indian culture, to replace the dependence on foreign agendas (*Ibid.* 1237-9).

III. Back to the International Scene

Following the 1948 Conference, things changed in many respects, including the power shift caused by the increasing recognition of the United States as the new superpower, and English becoming the *lingua franca*, instead of French. As the world map was being redrawn and new countries were emerging as a result of decolonization, the liberal capitalism of the U.S. was clearly becoming the new international model, and the only one by which any development would be assessed. Unfortunately, under this model, the only factor that is seriously taken into consideration in any negotiation is the economic one, which significantly weakens the majority of the planet, since most countries are either considered least developed, or emerging and developing – currently, 39 are advanced economies (IMF 2017), 48 are least developed (UN-OHRLLS), and the rest are somewhere in between.

As we saw with Canada and India, copyright law had spread significantly because dominions and colonies were considered signatories once their European colonizing states signed. Once decolonized, nations had the choice of denouncing the *Convention* or declaring their continued adherence to it.

In 1963 in Brazzaville, 23 African countries seeking assistance in formulating their own copyright legislations voiced their concerns that the regime in place was mainly Eurocentric, and did not take into account their respective needs (Johnson 1970-1). This meeting was jointly organized by BIRPI (which would later become WIPO) and UNESCO, and was attended by 6 influential NGOs, in addition to three non-African states and two experts. The Tunisian delegate summarized the African position as follows:

There are two kinds of intellectual foodstuffs: those drawn from the African cultural heritage that should be encouraged, and those that stem from abroad and should be acquired exempt of all rights. It is essential that Africa does not pay too much for the fruits of imported knowledge.

(in Hemmungs Wirtén 2011b, 51)

At that meeting, India also requested special licenses permitting the reproduction and translation of works for educational purposes (which was granted under the UCC (Art V)). Not surprisingly, these suggestions were rejected, for fear that a decrease of the levels of protection would simply degenerate the *Berne Convention*. In conclusion, the meeting ended by making recommendations to protect folklore and consider it for economic exploitation (and therefore exportation), as well as to freely use copyrighted works for educational purposes. These recommendations were to be met with opposition. The injustices of the international copyright regime were reiterated, highlighting the benefit to exporting nations (*Ibid.* 52).

In 1967, Stockholm played host to the fourth revision conference, which represented years of discussions to accommodate the copyright needs of developing nations. No longer the developing nation pleading with advanced nations for translation right to improve its access to knowledge and culture, Sweden had now become a model state in terms of social welfare and development, with a policy of helping developing nations. The legitimacy of *Berne* was being questioned by the existence of the UCC, and the agenda was going to be dominated by the concerns of the developing nations, which now made up 24 of the 57 member states. Four hundred NGOs were also going to be present in Stockholm.

And once again, losing none of its revelatory power, the translation right emerged as a problematic issue.

As mentioned earlier, the Swedish government had prepared a document entitled the *Protocol Regarding Developing Countries* which was sent before the meeting, explaining that developing nations may only express reservations on five topics: “the right of translation; the duration of the protection; the rights in articles on certain current events; the rights relating to the broadcasting of works; the use of protected works for exclusively educational, scientific or scholastic purposes” (*Ibid.* 53).

UNESCO presented data demonstrating the clear gaps between developed and developing nations, especially with regards to the “intolerable shortage of books” (e.g. the book supply amounted to 2,000 pages per person a year in Europe and North America, versus 23 pages in India), and continued stating that “India as a nation ran the risk of dying intellectually and spiritually if the prevailing book famine was not checked” (*Ibid.* 57). It is quite astonishing that the main concern was obsessively about the scarcity of books, as though this not was simply a symptom or a secondary issue to the problems of illiteracy or access to content for instance, which would shift the problem from the object (pages and books) to the humans who have a right to read (Escarpit and Baker 1973, 165).

Led by India, less developed countries tried to renegotiate their rights in the 1967 Stockholm Revision Conference of the Berne Union, threatening to make drastic changes to the copyright regime if they were not accommodated, or to simply withdraw from the Union. India made a proposal to completely end any translation right within a set period of time, along with a compulsory licensing scheme.

Since all talks turned to the economic dimension, and these countries were disadvantaged at that level, their only weapon was their majority. Less developed nations criticized the lack of translation of their own works by

the developed nations. This activity of back-and-forth would have at least improved relations and been a step towards a reciprocity based on more equality and respect.

Just as India was championing the cause of the *Protocol*, so too the U.K. was championing the cause against it, heavily supported by France (perhaps a reflection of the new dominance of English over French as the international language). Both nations insisted that any changes that would undo 80 years of negotiations and progress would be unacceptable. The U.K. rejected these demands, arguing that no support would be given to developing nations at the expense of authors (Ricketson 1987).

The overlap between education and translation was becoming increasingly problematic, since most textbooks were written in English, which could not meet the needs of developing nations. But as we saw, U.K. publishers had already lobbied intensely and invested significantly in markets over which they may lose control. And so long as the law allowed the monopoly to continue, the demand to be met meant tremendous profit potentials.

With six titles per million inhabitants, only 20 of the 34 countries in the region producing books at all, and a per capita of one-thirtieth of one book per person per year, book production in Africa certainly appeared negligible on the verge of non-existent.

(Hemmungs Wirtén 2011b, 62)

On the other hand, if African and other developing countries were not setting up their own publishing houses and continued to rely on the offer or partnership of U.K. publishers, this would only perpetuate their dependence on their colonizers.

Despite the controversies and tensions, in addition to the eventual creation of WIPO, the Conference managed to produce an *Act* and to add the *Protocol Regarding Developing Countries* as an appendix to the *Berne Convention*. The UK abstained from voting, along with Mexico and Uruguay, while France sided in favour. However, very few developed countries accepted it, and developing countries still had major concerns about its content, mainly because the numerous conditions that had to be met before the rights of the *Protocol* could come into play rendered it virtually impossible to apply. In the U.K., critique was not held back against the government to the effect that the conference put ideas into dangerous heads; that the UK had acted with conviction but cowardice; and that any country wishing to be part of the “club” must be willing to play by its rules (*Ibid.* 64). As stated by some commentators, the *Stockholm Protocol* was a confirmation of the lack of interest of the developed nation in the access to knowledge problems of developing countries (Štrba 2012, 83), whose only interest was in providing increased protection for the rights of authors (85).

While developed countries recognize the fact that developing countries have special access needs, the former are not willing to facilitate access by a developing country at the expense of their authors and publishing industries. For this reason, special legal regimes like the Stockholm Protocol were not accepted by developed countries.

(Ibid. 108)

The tensions of the Stockholm conference were generally seen as a crisis in international copyright (Sacks 1969), with one participant stating that the Stockholm conference was “the worst experience in the history of international copyright conventions” (Hemmungs Wirtén, *op. cit.* 49) and others writing that it was “nearly a complete failure” and “grossly defective in meeting the needs of developing nations, while at the same time highly objectionable to the more advanced countries” (*Id.*).

Despite being a positive step, “it would be misleading to assume that the interests of developing countries were the driving force behind the proposed protocol” (Štrba *op. cit.*, 88). The driving force was the desire to keep developing countries from joining the UCC, while ensuring new markets for increasing exploitation of copyrighted works (*Id.*).

The provisions intended for the benefit of the developing countries were useless because the application process is too expensive and the waiting period of 3-10 years is too long a wait for educational material. The developed countries called for a revision of the protocol to minimize the chances of developing nations joining the UCC.

The Paris Revision Conference of 1971 put everything back on the table. The reservations from the 1967 conference were modified, and placed in the appendix of the *Paris Act*, making it longer than the original *Berne*. The administrative and logistic burden that came with the compulsory licencing that was proposed seemed so heavy, that twenty years after its signature, not a single UCC licence had been issued.

The push for the establishment of the *International Code of Conduct on the Transfer of Technology* in the following years, combined with the demand to lower the minimum standards of protection and expand compulsory licensing, led to a stalemate in the 1981 Nairobi Diplomatic Conference between developed and less developed countries.

This account of the events that led to the *Stockholm Protocol* and the *Berne Appendix* was meant to demonstrate that the developed nations were only interested in provisions and agreements that result in increased protection for their content owners and producers, and that the only times they have been open to granting any flexibilities to accommodate the humanitarian issues of the developing world is when their market penetration or legal reach were threatened by countries leaving *Berne*, for instance. We will further explore the usefulness of the exceptions of the *Appendix* in Chapter 10, where the theme of differentiation and the special needs of developing countries will be illustrated with the recognized role of translation for education. There, we will demonstrate how the exceptions granted to developing and least developed countries have been useless in providing access to education (Štrba 2012).

Between July 1st and 22nd of 1944, 730 delegates from 44 nations met in Bretton Woods in the United States to regulate the international monetary and financial order of the world following WWII. This meeting was formally called the United Nations Monetary and Financial Conference, but is perhaps better known as the Bretton Woods Conference. The agreements that were signed resulted in major developments in the world, including the establishment of the International Bank for Reconstruction and Development (IBRD) and the International Monetary Fund (IMF) (Steil 2013). Led by the U.S., developed countries and influential multinational corporations resorted to the General Agreement on Tariffs and Trade (GATT) in 1947, the purpose of which was the “substantial reduction of tariffs and other trade barriers”, which would be the foundation for the World Trade Organization (WTO). After about ten years of talks, intellectual property was going to be treated as part of the trade-agreements whose terms were described in the *TRIPS Agreement*, which came into effect on January 1st 1995.

WIPO proudly states on its website as being a “specialized agency of the United Nations” that is “dedicated to developing a balanced and accessible international intellectual property (IP) system, which rewards creativity, stimulates innovation and contributes to economic development while safeguarding the public interest.” Yet, one does not need to look further than the message of its Director General to see that it, too, has fallen under the influence – not to say grip – of the economic perspective of the all-powerful WTO, always looking for the next commodity: “By providing a stable environment for the marketing of intellectual property products, it also oils the wheels of international trade” (www.wipo.int).

IV. Publishing and translation

As we saw with the development of the translation right in India, the publishing industry played a very active role in lobbying for its interests, and was successful at the end in getting the legislative changes made to the Act. The influence of publishers on copyright law has been evident from its first drafts, and is no less evident today from publishers and the “content” industry in general.

In 1998, the global publishing landscape was controlled by eight media conglomerates (Hearst, Rupert Murdoch’s News Corporation, Pearson plc, Viacom, Advance Publications, Bertelsman AG, Time Warner and Holtzbrink). These top grossing companies have owned the magazines, daily newspapers, television and radio stations, record companies, book publishers, video game developers, and other informational outlets in most of the world’s information-exporting nations (Wirtén 1998, 27-8). Today, this number has gone down to six big companies (namely National Amusements (previously Viacom), Disney, Time Warner, Comcast, News Corp, and Sony), which control more 90% of all media content – when over 50 companies shared this control in the mid-eighties (WebpageFX Inc., morriscreative.com, etc.).

Despite rumours and concerns surrounding the book industry due to corporate amalgamations and digitization, such fears have been mere exaggerations at the level of these large multinationals. Since the time the Internet has allowed consumers to purchase online, books have been the highest selling item of any product on the Internet, in addition to regularly outperforming expectations in global retail as well. Book sales have been growing steadily. Even print books rose another 3.3% in 2016, making it the third straight year of print growth. Total print unit sales hit 620 million in 2013, 635 million in 2014, 652 million in 2015, and 674 million in 2016 (from Nielson BookScan, in Segura 2017). The Federation of European Publishers released the 2017 edition of its report, *The Book Sector in Europe: Facts and Figures*, in which the President Henrique Mota writes that book publishing “is the largest cultural industry in Europe” and that, unlike other cultural industries of the region, publishing is a world leader (FEP 2017, 1).

When these significant figures are combined with the fact that, despite the dominance of English, translation still plays a very important role in the consumption and use of informational and cultural products, be it music, advertising, video games, movies, or books, then we begin to understand the importance of translation rights, and the lobbying that would still take place if these conglomerates felt that they no longer owned the exclusive right over any potential translations of their copyrighted products.

In 2016, the translation industry was worth an estimated \$40 billion, with a projected growth rate of 6.5% - 7.5% annually through 2018, reaching \$45 billion by 2020 (Common Sense Advisory). The Centre for Next Generation Localisation reports that localization is the 4th fastest-growing industry in the U.S., and the estimated worth of the language technology industry is \$33 billion (GALA 2017).

V. Conclusion

Translation is the primary tool by which authors can acquire international notoriety and international readership. While piracy and counterfeiting of works in the same language has generally been controversial, translation, even when unauthorized, raises completely different questions, ranging from the nature of originality, to control over the quality of the translation and its impact on the reputation of the author.

Since its appearance in the initial discussions on copyright law, translation has continuously destabilized the landscape of author's rights, including the idea of an "original" work. Its potential power of disseminating works of science and culture provide the benefit of proliferating the authorship of the author, while creating a tension stemming from the latter's loss of control over the new life that their work will take through translation. Every time it came up, the translation right revealed the weaknesses of the foundations of copyright law, such as the original-copy dichotomy, and reminded all of the tensions between importers and exporters, users and producers, central languages and those at the periphery.

Nations at different stages of development and with different cultures, have different needs. During much of the negotiations leading to the cementing of international copyright law and the translation right, France produced, others consumed, the U.S. was a culture of reprinting, and Sweden a culture of translation. India attempted to pave its own way in copyright law and translation rights to suit its linguistic, cultural and educational needs.

These are only representative examples. For instance, in 1905, Australia, another British colony, had opted for the ten-year protection term of translation rights, after which anyone could apply to the government and get a translation license. However, the 1911 British *Imperial Copyright Act* required the full assimilation of the translation right, and the 1912 version of Australia's copyright law had to align itself with the same term, as was the case with India.

The powerful European countries had found the formula they thought they needed for the interests of their authors and publishers, and through *Berne* they internationalized that formula to the rest of the world. Once Britain decided to join *Berne*, the colonies, such as India which had been resisting imperial pressures for forty years, lost the flexibilities they used to have, and which allowed them to customize the translation right through domestic policies.

[T]he history of translation right in India [...] prompts the question whether there is much substantive difference, as far as intellectual property norms are concerned, between a world dominated by colonialism, and the contemporary world of Berne, Paris, WIPO, and the WTO.

(Bently *op. cit.* 1240)

Today, the cultural industry still lobbies for maximum copyright and translation rights wherever possible. And the laws and norms negotiated by the world's superpowers, as a result of this lobbying, are usually without much concern about the circumstances of other countries. All of this causes and perpetuates the disempowerment of those countries by limiting their ability to develop their own policies in a manner that meets their respective needs.

This historical and foundational overview of the translation right can now be completed, in Chapter 7, with the perspective of translation theory, which will reveal its misalignment with the assumptions of copyright law about translation.

Chapter 7: Agency of translation / the translator

[...] we must note the convergence of convictions that the aim of the translation scholar does not only consist in describing and explaining, but also of attempting to change situations (e.g. touching on the role and place of translations, translation policies, power relations between languages and cultures – Cronin 2004: 134), to offer solutions to certain problems (e.g. concerning intercultural relations, and the status of translators).

(Gambier, 2005 – my translation)

In this chapter, we will be looking at the agency of translation and the agency of the translator as they are approached in translation studies (TS). Be it in the form of simply playing a recognized role, or going further to fall under resistance or engagement, translation (as a practice and in theory) has been endowed with a recognized element of social engagement and change, which we will be referring to as agency. This agency has been overt since German Romanticism, and implied for much longer. And it is all the more surprising to realize that, despite the thorny presence of the issue of translation in all international negotiations on copyright law, on one hand, and the social role and agency of the translator, on the other, translators have been completely absent from all international negotiations.

My use of the term “agency” will be closer to its generic meaning of *making a difference* and *influencing social outcome*. Although I will touch on the idea of social actors or agents as understood by sociological theories stemming from Talcott Parsons and Weber’s works by looking at agency in Bourdieu and Luhmann (see Tyulenev 2016), I also wish to emphasize the role and presence of the individual translator hermeneutically, culturally and ideologically as specific and clear instances of agency.

While the role of translation as mediation has always been recognized, it has traditionally been prescribed a nature of transparency and neutrality. It is as though the audience, while knowing that it is only seeing the other through a medium, believes that the medium plays no role in shaping the image they are witnessing. Agency re-establishes the non-transparency of translation by recognizing its distorting effects. As semiotic codes go through translation, they may be purged and censored, and subjected to selections, substitutions, reductions, augmentations, and shifts. A translator’s behaviour has both conscious and rational elements, as well as unconscious, psychoanalytical, unintentional elements. While we recognize the latter, we will not be addressing them, as they require an independent study.

The social presence and impact of translation has been apparent in the work of a large number of contemporary translators and translation scholars who have adopted different approaches, both theoretical and practical, to

reach those goals of social change in all sorts of areas. They have shown how translation theory and practice can serve such diverse social goals as the betterment of the translator's or translation's status (Derrida 1967-8, 1991; Venuti 1995; Basalamah 2009; Folkart 2007; Tymoczko 1999, 2003, 2007), cultural and linguistic development (Benjamin 2002; Berman 1999/1985; Bermann 2005) post-colonial resistance (Robinson 1997; Simon and St. Pierre 2000; Trivedi 2006; Appiah 2000), understanding power relations and minority representation (Gentzler 2008, Venuti 1998), resisting dominant economies (Venuti 1995) and ideologies (Tymoczko 2003; von Flotow 2008; Simon 1996) and religious conversion (Rafael 1988; Nida 1994), to name only those that first come to mind. As a side note, we notice the interdisciplinary nature of translation studies as we realize that all of these scholars were heavily relying on philosophy, literature, linguistics, ethics, and cultural studies (including post-colonial and gender theories) for inspiration.

One area where translation studies could inspire considerable social change is international intellectual property law. Though pioneering work has already begun within the discipline (Venuti 1994, 1998, Basalamah 2001, 2004, 2005, 2009), more work is required to keep up with the recent societal and technological developments (Part III).

Current systems of intellectual property (international treaties and conventions, US, Canada, etc.) deem translation to be a reproductive activity, copying the contents of an original into a new linguistic form. So although a translation is copyrightable as an original, permission must still be sought and granted prior to translation from the rights owner, who also has the right to halt the publication of the final translated product if s/he so wishes.

These laws, rules and regulations have undesirable repercussions on translators and on society, especially in this age of globalization, information and digitalization. The repercussions on translators start with the obvious financial limitations imposed by the current way of contracting work piecemeal and not paying any honorarium to the translator once the work is completed, regardless of the reception of the work in translation. In turn, this financial limitation also reduces the accountability of the translator vis-à-vis the end-product.

At the social level, these same laws and regulations prevent access to information and the dissemination of ideas, regardless of the translator's willingness to provide services to make cultural and scientific knowledge available. At both the translator's and at society's levels, the legislative frameworks in place seem to have fallen well behind the times, which has rendered the ease and openness of information-sharing a triviality.

Studying the philosophy, history, and development of intellectual property in general, and copyright in particular, as we did in Part I, allowed us to reconsider the applicability of the traditional definitions of the

notions that have shaped intellectual property thus far – such as property, authorship and originality – as well as reassess the classical arguments for the systems that are currently in place – e.g. the economic incentives for competition and creativity.

We are witnessing all over the world, at both international as well as national levels, various forms and mechanisms for circumventing, or at least minimizing the impacts of copyright law on the dissemination of works. This includes such movements as anti-copyright, creative commons, and copyleft. So the question is not whether reforms are needed; rather, it is whether the social, cultural and legal changes under way are sufficient, which, in democratic societies, ought to be measured by the extent to which they are consistent with the wills and realities of the majority of the citizens.

Translation, as an academic discipline, has reflected on itself as an activity, a process, and a product for decades. Its perspective about itself, as represented by the most influential scholars of translation theory, is unsettling for the foundational notions of copyright law, such as originality, fixation, and the idea-expression dichotomy.

I. Agency

Agency may be understood as the expression of an entity's individualism, choice, and will (Barnes 2000, x). As I understand it and as it has been argued by others (e.g. Buzelin 2005), it can therefore be borrowed to study institutions and even phenomenon.

In the case of human beings, there is always a relationship between the individual and the social context which has to be taken into consideration: “[...] it is the inherent sociability of human beings that makes voluntaristic notions applicable to them, and that same sociability that makes it possible for them profoundly to affect each other through the medium of their voluntaristic discourse” (*Id.* Xi). In fact, it may be seen as having a simultaneously dual nature of being individual and collective. However, when it is the collective agency that is the object of study, it is often equated to the notion of structure.

Structure: Rules and resources, organised as properties of social systems. Structure only exists as ‘structural properties’

System: reproduced relations between actors or collectivities, organised as regular social practice.

Structuration: Conditions governing the continuity or transformation of structures, and therefore the reproduction of systems.

(Giddens 1990, 65)

The extent to which individual agency is determined by social structure has been, and will continue to be, debated. Nevertheless, Bourdieu's *Field of Cultural Production* (1993b) and Giddens' *Constitution of Society* have both convincingly argued that the two notions are in a dynamic relation of dependence. The structure of social systems stems from agency, which is, in turn, defined and limited by the context, or structure (*cf.* Meylaerts 2008). Agency is a "relational effect of social interaction" that gains its meaning from being "employed in relation to a particular material context and community" (Kinnunen & Koskinen, 9). In fact, Giddens holds that "the notions of action and structure *presuppose one another*" (*Id.*, 53). This is what he calls the duality of structure:

Structure must not be conceptualized as simply placing constraints upon human agency, but as enabling. [...] Structure can always in principle be examined in terms of its structuration. To enquire into the structuration of social practices is to seek to explain how it comes about that structure is constituted through action, and reciprocally how action is constituted structurally.

(1993, 169)

Structuralism attempts to identify the greater structure formed by the interconnectedness of the different elements. This approach gives me to the parts only as being parts of the whole. Functionalism, in reaction to structuralism, emphasizes the specificity of the distinct role of each social element, which taken all together, produce society. In his critique of functionalism, Giddens⁵⁰ summarizes his thoughts into four points:

One I have already alluded to earlier: the reduction of human agency to the 'internalization of values'. Second: the concomitant failure to treat social life as *actively constituted* through the doings of its members. Third: the treatment of power as a *secondary* phenomenon, with norm or 'value' residing in solitary state as the most basic feature of social activity and consequently of social theory. Fourth: the failure to make conceptually central the *negotiated* character of norms, as open to divergent and conflicting 'interpretations' in relation to divergent and conflicting *interests* in society.

(Id., 26)

Agency, in the case of entities endowed with will, implies an internal conscious disposition to intend a result. It therefore carries a psychological dimension that may be further studied from an ethical perspective. For an act to be intentional, it must be performed with the expectation of manifesting an outcome (*Id.* 83).

⁵⁰ While I will not necessarily refer to his work directly beyond this section, much of my sociological analysis of agency, structures, systems, and power, has been inspired by the works of Giddens.

- Freedom and choice

But perhaps more importantly, agency is a form of power, because it requires a capacity, or ability, to act. Power, when it is observed on its own, can be understood as the general capacity to act on the world.

The notion of ‘action,’ I wish to claim, is *logically tied to that of power* [...] [which] represents the capacity of the agent to mobilize resources to constitute those ‘means’. In this most general sense, ‘power’ refers to the *transformative capacity* of human action [...] to intervene in a series of events so as to alter their course; as such it is the ‘can’ which mediates between intentions or wants and the actual realization of the outcomes sought after.

(*Id.* 116-8)

However, and of special relevance to our purposes, power can also be observed as that which allows some agents to realize their will, even against the opposition of others. “‘Power’ in the narrower, relational sense is a property of interaction, and may be defined as the capability to secure outcomes where the realization of these outcomes depends upon the agency of *others*. It is in this sense that some have power ‘over’ others: this is power as *domination*” (*Id.* 118). He further clarifies that “The exercise of power is not a type of act; rather power is instantiated in action, as a regular and routine phenomenon. It is mistaken moreover to treat power *itself* as a resource as many theorists of power do. Resources are the media through which power is exercised, and structures of domination reproduced” (1990, 91).

Always from a sociological perspective, agency is closely associated with status as it is determined by the context. Finally, agency, and therefore structure and structuration, is relative spatiotemporally (*Id.* 54).

With these preliminary remarks, we can now explore how translation theory has approached these notions, and how it has applied them to its subject-matter.

II. The Agency of translation

An overview of scholarship in translation studies paints a very clear image of translation as a dynamic and creative force that opens new formative horizons (education, philosophy, literature), shapes societies (socio-critique, socio-politics), builds cultural identities (anthropology, culture studies), affects economies (economy), fully utilizes all that information technology can put forward (artificial intelligence, computer-assisted terminography, corpus studies, etc.), and serves as a voice of resistance in the struggle against domination (women’s studies, queer studies, postcolonial studies). Hence, from a translation studies perspective, the discipline carries sufficient autonomous weight to engage actively in any discussions concerning intellectual property reform, not only to represent itself, but as the ideal microcosmic representative of the multifacetedness of the proverbial small global village that we now all inhabit.

With the beginning of the new millennium, the effects of the sociological turn in humanities made their way to translation studies (TS)⁵¹, with a number of scholars taking a serious interest particularly in the works of Bourdieu, Latour and Luhmann. This was not a random coincidence. In fact, it was very much in line with the growing drive to recognize the agency of translation/the translator, and in many cases to see translation as a factor of social change. In order to see how the discipline reached this point, it is worth exploring the main moments of its development and evolution.

II.1 History of translation studies

The success of the scientific revolution that took place in the 17th century, mainly in the empirical sciences, was such that all the other fields attempted to emulate it, which resulted in a loss of the specificity of human sciences, and their substitution with discourses taken from logic, positivism, and empirical science, which often quickly degenerate into trivialities in matters of human relations:

A philosophy that wants to imitate science and its results forgets that scientific insights, which no one wishes to call into question, can never solve philosophical questions where understanding is constantly confronted with its limits. [...] Analytic philosophy wishes to imitate science and do away with unanswerable questions. It satisfies its bad conscience of dealing with overbearing questions by promising to settle with solvable ones. Its tragedy is that it is left without questions for itself since science can eventually take up its own problems, as evidenced by the neuroscience which has largely taken over the traditional mind-body discussions. [...] Philosophy deals [...] with the questions that arise out of finitude itself at the boundaries of science. [...] It is clear that analytic philosophy is uncomfortable with this self-interpreting, hermeneutical model of human existence. It yields almost no security and a host of misunderstandings. Hence the temptation to replace this model by a more rational, more economically oriented version of understanding. This might account for the success of analytic philosophy in the North American environment which is so much forged and fascinated by the demands and mirages of technology.

(Grondin 2000, 81-2)

The emulation of natural science in the humanities created a long-lasting feeling of intellectual inferiority in comparison with mathematics and the sciences. This point has been repeatedly stated by a number of scholars over the decades:

[Arrowsmith] had concluded that educational life in America was "timid, unimaginative, debased, inefficient, [and] futile" because the humanists "had betrayed the humanities." Graduate education was especially reprehensible to him because, in following the example of the German universities, graduate schools had grown indifferent to teaching and adopted a doubtful scientism intended merely to inculcate information. Arrowsmith held that a mastery

⁵¹ I will be using TS to designate the entire academic and professional discipline of translation-related activities, and not in any restricted sense, as one finds for instance in Heilbron and Sapiro (2007) where it is limited to theorists of polysystem theory and Descriptive Translation Studies (DTS).

of scientific method "cannot help man live or die well." Only the humanities could do that. Graduate educators had therefore, for him, betrayed the central "enabling principle" of the humanities: "the principle of personal influence and personal example." He called for Socratic teachers who were "visible embodiments of the *realized* humanity of our aspirations, intelligence, skill, scholarship; men ripened or ripening into realization, as Socrates at the close of the *Symposium* comes to be." Finding few such teachers in higher education, he thought it no surprise to see "the secession of the student from the institutions of higher learning on the grounds that they no longer educate and are therefore, in his word, *irrelevant*."

(Tuttleton 1994, cf. Arrowsmith 1967, 1993)

TS was not immune to this tendency in the humanities, which can still be felt today. For example, when we read an excellent work in TS like Tymozcko's *Enlarging Translation, Empowering Translators* (2007), we notice that all of the examples she uses are taken from the natural sciences, and then applied to TS.

II.1.A The linguistic turn

In 1808, Wilhelm von Humboldt published his *Introduction à l'œuvre sur le kavi*, in which he presented the essence of his linguistic theory. But it was the works of Friedrich Schlegel (1808), Franz Bopp (1816), Jacob Grimm (1819) and Friedrich Diez (1836) that would gain notoriety in the academic world, and this takes linguistics in a very different direction from the one in which Humboldt believed, at a time when it was making a name for itself as an academic discipline. It is not that 19th century linguistics did not praise Humboldt, only that it wasn't before the 20th century that it officially recognized its own roots as having stemmed from his work.

It was mostly his ideas on the nature of the relationship between language and thought that would be retained, and sometimes modified, by American linguists who were focused on studying the languages and cultures of America's first nations. The newly synthesized version of linguistic theories was presented in the form of the Sapir-Whorf hypothesis, which suggests that the structure of language determines the thought and even the culture of the speaker, and not the other way around. Humboldt's influence is clear on this hypothesis, as he was of the opinion that it is possible to explain the diversity of worldviews with linguistic diversity, while emphasizing the mutual effect of language and thought on one another (Humboldt 1974, especially at 200).

According to the tradition of universal grammar, it is the structure of thought that explains the grammatical structures, as was explained in Port-Royal's *Grammaire générale et raisonnée* (1660). However, Kant's transcendental subjectivity, which carries its own a priori structures, prevented this idea from spreading further. It is this Kantian critique that pushed German idealism to reject language as the mirror of thought capable of generating the subject and the subjective world. Humboldt's idea was hence explaining Kant's transcendental subjectivity by replacing it with language. The language philosophy of the Enlightenment intermediated thought through language, this Humboldt kept: "La langue est l'organe constitutive de la pensée" (*Ibid.* 53). But according to this

empirical tradition, language is itself a function of a pre-linguistic experience, which Humboldt rejected, declaring instead that it is the organizing framework for all experience, empirical or otherwise (Leroux 2006).

Although these were the seeds for the linguistic turn, it is mostly Ludwig J. J. Wittgenstein's ideas that are usually mentioned as being the trigger. In his *Tractatus logico-Philosophicus*, the only work he published during his lifetime, he explains that all philosophical problems stem from logical misunderstandings of language. Despite the fundamental differences between this work and his *Investigations*, the latter still maintains the centrality of language, while introducing notions such as language games.

Wittgenstein's ideas were a source of major influence on numerous schools of thought, including analytical philosophy, and the Circle of Vienna in particular; structuralism; poststructuralism; and even in some of the writings of Derrida.

These developments in the philosophy of language, both on the side of continental philosophy as well as analytical philosophy, set the tone not only for philosophy, but all of humanities. The importance of language was becoming increasingly clear in psychology, sociology, and anthropology. While linguistics was the discipline of studying language, in the 20th century, this designation only referred to a specific approach of studying language. The works of Ferdinand de Saussure, Noam Chomsky, Roman Jakobson, Émile Benveniste, and other linguists practiced a new linguistics, which would define the discipline from then on by expanding it.

Of course, all of these developments were reflected in TS. In fact, TS, which no one seemed to have considered as an autonomous discipline yet, was nothing more than a case of applying formal linguistic theories to translation. The most serious texts in TS of the time either belonged to literary studies or linguistics. In "Trajectories of Research in Translation Studies," Maria Tymoczko explains that:

[...] early research on translation centered on linguistic aspects of translation, exploring the nature of translation in relation to language and linguistics. As such it looked at linguistic asymmetries and anisomorphisms in translation interface, the language-specific nature of meaning as a factor in translation, the nature of communication in general and its relationship to the limitations of translation, and so on, all of which tended to delimit or establish the boundaries of the linguistic aspects of the task of the translator. Similarly, literary or poetic approaches to translation constitute another cluster of attempts to define translation, focused on the parameters pertaining to literary questions and questions raised by complex and extended texts, as well as their inter-texts and contexts. Thus, this school of research investigated issues such as how translation gets shaped or determined by the nature of literature; what practices translators use when translating different literary modes, forms, genres, and text types; how texts relate to literary traditions; and how texts relate to their contexts.

(Tymoczko 2005, 1083-84)

Slowly, here and there, university departments and academic programs of translation started appearing, spreading across North America and Europe. It is the institutionalization of a field of study into university programs and departments that grants it its status of autonomous discipline, and this is what happened with TS.

II.1.B The cultural turn

The work of the scholars studying poly-systems theory had already started announcing a change of direction. They were looking to expand the object of study of translation studies and leave behind the limited textual frame and start talking about culture. Itamar Even-Zohar (1978), Gideon Toury (1978) and James Holmes (1978), who were mainly studying literary translation, launched the movement. With that same momentum, Vermeer and Katharina Reiss quickly followed with their Skopos theory (see Nord 1997), according to which it is the function that the translator is trying to perform in the target culture and language that will determine the choices to be made during the act of translation. Susan Bassnett writes:

In 1990, Andre Lefevere and I edited a collection of essays entitled *Translation, History and Culture*. We co-wrote the introductory essay to the volume, intending it as a kind of manifesto of what we saw as a major change of emphasis in translation studies. We were trying to argue that the study of the practice of translation had moved on from its formalist phase and was beginning to consider broader issues of context, history and convention.

(Bassnett & Lefevere 1998, 123)

And if we go back to the collection of essays in question, this is what we find therein:

Once upon a time, the questions that were always being asked were “how can translation be taught?” and “how can translation be studied?” Those who regarded themselves as translators were often contemptuous of any attempts to teach translation, whilst those who claimed to teach often did not translate, and so had to resort to the old evaluative method of setting one translation against another and examining both in a formalist vacuum. Now, the questions have changed. The object of study has been redefined; what is studied is the text embedded in its network of both source and target cultural signs and in this way Translation Studies has been able to utilize the linguistic approach and to move out beyond it.

(Bassnett & Lefevere 1990, 11-12)

This was the change of direction from linguistics to culture that would be referred to as the “cultural turn”. The intention was now to try to understand translation more accurately by taking into account the complexities of the cultural factors that are part of the equation before, during, and after the act of translation, because a translation never takes place in a vacuum, and the constraints lying outside the text are not insignificant. Bassnett continues elsewhere:

Looking back, our introduction appears both naive and simplistic, for translation studies

developed so rapidly in the 1990s and now occupies such a solid place in the academy that there is no longer any need for special pleading. The arguments we sought to present - that translation plays a major role in shaping literary systems, that translation does not take place on a horizontal axis, that the translator is involved in complex power negotiations (mediating between cultures, as it were), that translation is always a rewriting of an original - have been taken much further by scholars such as Michael Cronin (1996; 2000), Edwin Gentzler (1993/2001), Lorna Hardwick (2000), Theo Hermans (1999, 2006), Tejaswini Niranjana (1992), Douglas Robinson (2002), Sherry Simon (1996), Harish Trivedi (1993), Elsa Vieira (1999), Lawrence Venuti (1995; 1998) and many others.

(Bassnett 2007, 14)

What Bassnett and Lefevere wanted to accomplish, keeping in mind that they are but one instance among many albeit quite representative, was to enlarge translation in order to include the cultural component in it.

II.1.C The sociological turn

The cultural turn of the 1990's was then followed by a "sociological turn." Andrew Chesterman explains some of the main reasons why translation scholars needed to turn their attention to sociology after having explored culture:

However, this oversimplified dichotomy [language v. culture] not only overlooked the fact that linguistics itself had at the that time already expanded far beyond mere syntactic analysis, into text linguistics and discourse analysis, pragmatics, and cognitive grammar [...]. Furthermore, much of the work grouped under the cultural turn actually seems closer to sociology than to culture studies. We have, for instance, seen an increasing interest in historical studies [...]. Maria Tymoczko and Edwin Gentzler (2002) speak of the "power turn" in referring to a whole range of research on ideological aspects of translation: this covers themes such as postcolonial issues, gender issues, the manipulation of national identities and their perception, and the illusion of the translator's total neutrality. Here too, the subjects covered are at least as sociological as they are cultural. [...] with respect to translation, this means that we can map out the main regions of our "spatial" context as follows (in addition to the immediate textual context):

Cultural context: focus on values, ideas, ideologies, traditions, etc.; *Sociological context*: focus on people (especially translators), their observable group behaviour, their institutions, etc.; *Cognitive context*: focus on mental processes.

(Chesterman 2006, 9-11)

Chesterman's criticism that linguistics had also moved beyond the text is also reiterated by others.

In literary studies, cultural questions took over long ago from formalist approaches to textual study. From post-structuralism onwards the tidal waves of new approaches to literature that swept through the last decades of the 20 century all had a cultural dimension; feminism, gender criticism, deconstruction, post-colonialism, hybridity theory. Literary studies adopted methods from cultural studies, blurring the lines between what had once been distinct fields of investigation. History too underwent a similar shift, with more emphasis on cultural and social history, and the expansion of what had once been marginal areas such as the history of

medicine, the history of the family and the history of science. Cultural geography led to a renaissance of geography as a subject. As area studies grew in importance, modern languages departments renamed themselves to emphasize the cultural approach. Classics discovered a new generation of students whose interest in the subject was fueled by studying the relationship between ancient cultures and contemporary ones.

(Bassnett & Lefevere 1990, 15)

The explanation for the cultural turn in TS was that linguistics was insufficient to meet the analytical and descriptive needs of the new discipline. The problem is that linguistics had already started incorporating cultural studies in its arsenal:

What is obvious now, with hindsight, is that the cultural turn was a massive intellectual phenomenon, and was by no means only happening in translation studies. Across the humanities generally, cultural questions were assuming importance. Linguistics has undergone a cultural turn, with the rise of discourse analysis and, as Douglas Robinson (2002) has argued, a move away from constative towards performative linguistics. The growth of interest in corpus linguistics, pioneered by Mona Baker, is arguably another manifestation of a cultural shift in linguistics. (Id.)⁵²

Chesterman then gives an overview of the sociology of translation by presenting a number of sociological models. He mentions the poly-systems model, Bourdieu's model (also see Gounvic 1999, 2002; Heilborn 2000; Simeoni 1998; Robinson 1991; Kalinowski 2002, etc.), Niklas Luhmann's model (see Hermans 1999), translation as a historiography (Pym 1998), the pragmatic model (Brisset 1990/1996; Fairclough 1992; Olk 2002; Hatim & Mason 1990; Hickey 1998), the sociolinguistic model (Pergnier 1978; Nida 1964; Peeters 1999; Mason 2000; Berthele 2000) and the skopos theory (Vermeer 1996; Nord 1997).

II.1.C.i Why a sociological turn after the cultural one?

First of all, turning to sociology seems to have been the natural next step for translation studies, given that, generally speaking, the discipline had been moving towards descriptive theories, and considering any prescriptive or normative elements as outdated (Snell-Hornby 2006). Secondly, the group of scholars first united under the heading of Polysystem theory, and then Descriptive Translation Studies, and who had spearheaded the movement of translation studies into more socially relevant areas, had clearly built their conceptual structures using various foundational elements from sociology and cultural studies (in addition to linguistics, literature, and systems theory) (Grutman 2009). While the cultural turn in translation studies had addressed to a large extent the cultural elements of those theories, the sociological elements were still calling for a more in-depth look, to assess their relevance and applicability to translation studies. It was also becoming clear that the polysystem theory was falling short in a number of areas, and new approaches were therefore

⁵² The emphasis here should be on the shift towards cultural analysis in linguistics. Taken out of context, this statement is misleading, as Mona Baker did not pioneer corpus linguistics in general...

needed (Hermans 1999, Lambert 1995). This call was heeded at the beginning of the new millennium, with what is now called the sociological turn in translation studies.

II.1.C.ii Why sociology for TS?

Moreover, theoretically speaking, sociology is the academic discipline that studies and describes society at the micro and macro levels, relying on empirical data and critical analysis, usually with an implied ultimate purpose of social action and welfare (see Ashley and Orenstein, 2005). Hence, while the objectivity of sociology easily meets the aims of objective description now required in Translation studies because of its reliance on empirical data, its drive of improving society obviously resonates with research activities in translation studies, where social change is a ubiquitous theme.

As we have already mentioned, translators and translation scholars have been remarkably absent from the debates on the translation right. Translation theory claims that translation is an autonomous system. In the next pages, we will therefore explore whether this claim can be validated by resorting to sociological theories. If translation is considered its own system, as opposed to being an afterthought to authorship, it ought to be looked at separately when considered from a legal and a policy perspective. The most representative voices of the discipline, both theoretically and professionally, are its academic institutions and departments, which are closely tied with the professional associations of the field. As an autonomous system, with its own dynamics and networks, it ought to be represented at the negotiations table as a stakeholder among others.⁵³

By showing that translation represents a system, sociology will be validating translation's participation as an autonomous, self-representing voice in the current debates on intellectual property reform, having the right to explain its own concerns and preoccupations without being reduced into anything else. Continuing with sociology, the next step would be to see how it can shed light on a number of areas where social change is obviously implied, namely those of:

- the status of translation;
- the status of the translator;
- access to information;
- and (social) ethics of power.

⁵³ My own reading of polysystem theory leads me to believe that its conclusion is that translation is itself a polysystem, autonomous and worthy of study on its own, and not a subsystem. However, a subsystem can serve this purpose as well, as Tyulenev suggests in 2009/2012, especially when considered part of what he calls a megasystem. Although I will not be exploring polysystem theory, I simply wanted to note that any application of it should take into account recent criticism (See Hermans 1999, Lambert, 1995...) in that it is deterministic and too depersonalized; it oversimplifies by claiming that translation is called for because it fills a genuine need, etc.

II.1.C.iii Sample of areas in TS highlighting agency

Although the general discourse of translation studies is now one where the agency of the translator is well recognized⁵⁴, a number of research areas have emphasized that point in their recent developments. Following is a quick selection of three of the most important of those areas.⁵⁵

- Postcolonial translation studies are interesting because they force the scholar to adopt a wider angle, focusing on groups of cultures, both those of the colonized and of the colonizers. The agency of the translator will be encouraged and expressed in nation building and resistance to colonial domination, through a creative epistemological involvement (see Bassnett and Trivedi 1999; Gaddis Rose 2000; Simon and St-Pierre 2000; Fenton 2004; Hung and Wakabayashi 2005; and Hermans 2006.) We quickly see that translation is seldom between two equal cultures as a means of free exchange of information. Power differentials manifest themselves in every level of choice in translation. Postcolonial translation studies have been extended to other areas of translation studies to understand ethics and ideology of translation, revealing the roles of agency and power. The main aim of this area of research is to study the reaction of a cultural group when dealing with colonization in its different forms.
- Cultural translation is another area in Translation Studies where work continues to progress. While one source of inspiration lies in anthropology, the other comes from linguistics and the philosophy of language. While historically translation scholars may have treated this topic too simplistically by being stuck in their personal cultural perspectives (Simon 1996, Tymoczko 2007) treatment of the topic since the 2000s is becoming more encompassing of what constitutes culture (see Katan 2004; Carbonell Cortes 2006; Bachmann-Medick 2006; Wolf 2002; Appiah 2000.) More work can be done here in combining the approaches and findings of anthropology, sociology, cultural studies and cognitive sciences with the language perspective.
- Another area where the agency of the translator is establishing itself quite solidly is that of meaning, where the widespread position of the discipline is now that meaning is a construction, and that translators are important meaning-makers. This position, stemming from post-modern thought, cuts across the entire discipline, and mainly makes use of philosophy, literature, anthropology and cognitive sciences. This area will be further discussed later in this chapter, when addressing the agency of the translator.

⁵⁴ Decisions regarding translation are always ethico-political acts (Tymoczko 2007, Davis 2001, Lane-Mercier 1997, Arrojo 1998). The translator's agency will therefore be proportional to the degree of awareness of the consequences of those decisions at the various levels of choice. This will be further developed later in this chapter.

⁵⁵ Other interesting developments are being made in other areas of research, for example: in interdisciplinary research (Tymoczko 2005, 2007), and the ethics of translation (see Brisset 2003, Bermann 2005, Inghilleri 2008).

II.1.C.iv Sociology of translation

The influence of norms and conventions in shaping the choices and behaviour of translators has been studied since the 1970s in TS by Gideon Toury in “The Nature and Role of Norms in Literary Translation” (1978). Itamar Even-Zohar’s polysystem theory (1990) established the role of translation in a larger national literary system.

Skopos theory and the theory of translatorial action (Vermeer 1996; Nord 1997) also highlighted the agency of the translator because they viewed translation as a goal-specific action determined by the desired function of the final product, which meant that the translator had to determine how best to accomplish that function textually.

However, recent developments in TS have focused on integrating and applying sociological theories and constitute a significant step in equipping TS with a more refined and sophisticated analytical grid to study translation.

The next pages will therefore focus on the sociological advances in translation studies, which are the type of agency that has received the most attention in TS in recent years, and the manner in which they shed light on the elements of social changes. Three sociologists have been explored in TS sufficiently to warrant a mention here: Pierre Bourdieu, Bruno Latour and Niklas Luhmann.

II.1.C.iv.1 Bourdieu

Although one can generally observe that the sociology of translation is the natural follow-up to the socio-political theories applied to translation previously, as done by polysystem and DTS theorists (Simeoni 1998, Hermans 1999, and Heilborn and Sapiro 2007), others consider such superimpositions too hasty and lacking nuance (Gouanvic 2005), explaining for instance that the notion of norms in polysystem theory does not correspond to the notion of habitus in Bourdieu’s system.⁵⁶ To avoid such technical and lengthy discussions, we will present Bourdieu’s theory as it is applied to translation on its own, without delving too much into the possibilities of considering it an extension of another one.

The competition and rivalry between different political states and linguistic communities form the social conditions for the international circulation of the specific cultural good we call translation. The social (or

⁵⁶ Replacing a notion by another, as Simeoni advocated in the case of norms for habitus, entails that they do not correspond entirely, otherwise, the replacement is not justified. But Gouanvic argues that the notion of habitus cannot be borrowed from Bourdieu without the rest of the system, especially the notion of field.

institutional) elements implied in this network are what Pierre Bourdieu would consider the field, representing the set of external instances, in this case, for the production and reception of translation. The field would include the political, economic and cultural power relations, each having their own internal dynamics. The cultural relations of power split into competition between primary and secondary linguistic communities on one hand, and competition for symbolic capital (consecration, prestige) on the other. Proper analysis of these elements would reveal the relations of domination that ensue from the cultural exchanges in question.

The system also provides a clear hierarchy of these relations of domination, which is mainly based on the number of secondary speakers of the language. In the current state of our world where half of the translations are from English (as we shall see in Chapter 10) the latter occupies the hyper-central position, followed by central languages (German and French), followed by semi-peripheral languages (Spanish and Italian for instance), and finally by the peripheral or dominated languages (Chinese, Arabic, Japanese, etc.) (Heilborn and Sapiro 2007). It is possible to drill further into each of these categories, as Casanova (2002) does, dividing the dominated languages into lower ordered categories.

This structure reveals a number of generalities. For instance, transfers between peripheral languages will go through the hyper-central language, from which we can conclude that the level of centrality is proportional to the language's ability to act as an intermediary in the system. If we look at these same relations from the political angle, we would say that dominant states will tend to export their culture, while dominated ones will tend to import culture from the dominant states.

The production and transfer of cultural goods will also be affected by the degree of politicization/commercialization, this duo forming the extremities of the regulation axis.

This entire macrostructure, which is designed to describe cultural exchanges at the international level, can also be applied to much smaller scales, to analyze the power relations between translations/translators of different genres, for example literary or technical. This means that the set of internal instances, or *habitus*, driving the actions of the agents involved must also be accounted for.

The notion of *habitus* was developed by Bourdieu to escape the determinism of structural theses, while still allowing for a mechanism in which all human social action is motivated by “good reasons” (i.e. the acquisition of symbolic capital, according to him). The relationship between the external, institutional field, and the internal *habitus* is one of reciprocal exchange, each affecting, and affected by, the other. The internalized trajectory (*habitus*) of the agent will structure the external institutions (field) which, in turn, structure the *habitus*, and so on.

Himself describing his attempt as a “theory of action” as indicated by the subtitle to his *Practical Reason* (1998), Bourdieu’s sociological frame can represent a serious tool for the description and analysis of cultural exchanges, before (production), during (the good itself), and after (consumption) their creation, and has the ability to reveal to a large extent the power relations between dominant and dominated entities, because it applies the same scrutiny to the structures of both the producer and the receiver of the good. Not only can it be used to explain the exchanges of translation between different social spheres, but it can even be extended to shed light on such matters as the development and evolution of copyright law for instance (as alluded to in Heilbron and Sapiro 2007). In short, it can reveal just how powerful translation can be from a sociological perspective, making and breaking authors, translators, languages, genres, and even national identities. The point can even be made that it looks equally at the extratextual and intratextual dimensions, even though most work in translation studies seems to have missed that point (Gouanvic 2005).

This is, however, a deterministic system (though less so than polysystem theory) which aims at predicting behaviour and outcomes, not only explaining them. That said, some recent work in translation studies has presented the habitus as a zone of resisting norms, and considers the habitus as something contested by the translator, not actualized.

But predicting behaviour and recommending solutions to problems are two very different things, and while Bourdieu’s model certainly does the former, not only revealing but predicting and foreseeing inequalities, it gives absolutely no indication as to what to do about those inequalities, or even whether anything can be done. Though this is in line with descriptive and “objective” models, and can provide empirical data to arguments of a different discourse (such as ethics or cultural studies for instance), it does not itself contribute much to a discourse of social change.⁵⁷ If we come to the realization that translation is not merely a horizontal transfer, what should we do about it? It is as though the theory implied that, not only is there nothing we can do about it, but that this is how things ought to be; otherwise, the system does not work.

It is clear that a lot of these generalizations, in addition to the theoretical framework of the theory, require a lot of empirical data, hence its objective appeal. But one must be careful in dealing with data too hastily, as it can, itself, be problematic; as Pym showed (in 1998) by criticizing Venuti’s reliance on data.

In addition, I find that Bourdieu’s axiomatic and sole reliance on symbolic capital, or “prestige,” as the main

⁵⁷ This criticism against sociological theories is not new. See for instance what has been called the Habermas-Luhmann dialogues and debates on the aim of sociological theory.

This translation of thoughts creates the network, which includes all human and non-human actors; it does not reveal it. Because of the creativity and unpredictability of the network and its elements, it becomes necessary to observe it from the inside while it is taking place, and not try to recreate it, which is why Latour's approach requires an ethnographic methodology, including a careful semiotic analysis of all related textual evidence.

Though the emphasis is usually placed on the differences between Latour's and Bourdieu's theories, from what we have said thus far, it becomes clear that they share two important common premises. First, they both consider science to be constructed by mediators; second, the mediators are in constant competition with each other.

ANT's need for minute ethnographic observation and its disinterest in predicting outcomes represent obvious methodological constraints for some types of research, but it does have the advantages of being able to isolate a system to observe the unpredictable network being built without any assumptions with regards to the behaviour of the actors. Bourdieu, however, would object that this tends to exaggerate the agency of the actors while ignoring the greater structure encompassing the isolated system, and which dictates its behaviour. In other words, Bourdieu would not consider the data collected through Latour's approach truly sociological.

What is certain is that in turning to Latour from polysystem/DTS and then Bourdieu, there is a clear movement towards an increased recognition of the translator's agency, that is, the human factor, perhaps with some realization that human behaviour is very difficult to predict.

Latour's notion of translation as transformation through negotiation is in itself quite interesting from a translation studies perspective, and it in fact coincides with the work of many translation scholars who have argued for foreignizing translation leading to hybridity and *métissage* (German Romantics, Venuti 2008/1995, 1998; Berman 1984; Nouss and Laplantine 1997; Wolf 2000.) It can therefore be seen as a confirmation of the importance of the translator's agency, and therefore his/her role in social change. Given its reliance on ethnography, ANT can perhaps help understand the process of production of translations (*Ibid.* 202, footnote 7), which would in turn provide evidence for reassessing their status. Finally, Latour's sociology was initially conceived to describe the production of science (as in hard, laboratory science). Its generalization or application to an entirely different field must be done carefully, if it is possible at all.

II.1.C.iv.3 Luhmann

The other influential sociologist whose work stands in opposition to that of Bourdieu is Niklas Luhmann, a prolific writer who has applied his model to a great range of fields, including law, economy, politics, education, religion, love, environmental debates, art and literature. His writing, still in German for the most part, is dense

and abstract, slowing down its reception and dissemination, and making it difficult for everyone to consume it and spread it, from translators to German sociologists.⁶⁰

Recently, a number of translation scholars (see Vermeer 2006; Hermans 1999, 2007; Tyulenev 2009a, 2009b; and Alavi 2013, 2014) have explored the applicability of Luhmann's theories to translation. In the following pages, we will quickly survey those elements of Luhmann's theory that have been borrowed by translation studies and which can shed light on translation as social change, and then explore their applicability and relevance.

The first distinction to be made when trying to understand Luhmann's sociological theory, is that between the system and its environment. The system contains nothing but communication. Everything else, be it humans or objects, belongs to the environment.

Secondly, systems are of different types. Each system can only operate within its own strict boundaries. This does not mean that it is closed to everything outside of it, only that it treats all external input in its own way, according to its own rules. In fact, systems will depend on other systems, such as the system in which financial transactions occur, requiring the systems of the mind and the body to exist and allowing the transaction to take place. As for its sustainability, it comes from within. A system will exist so long as the sequence of operations, which are communications, continues. The moment it stops, the system disappears. In that sense, we cannot speak of centres and peripheries, nor of any fixed structural elements.

Systems are made up of communication instances and sequences only, which, of course, must be observed and recognized as such (differentiated from everything else). A human will therefore only be observed momentarily as a construction resulting from a communication, with a lifespan equal to that of the communication that brings him/her to the observer's attention. Moreover, the identity of a human being, for the purposes of social systems theory, is formed by the sum of the different communicative operations in which s/he participates; a human person is always considered from a certain communicative angle, depending on the social systems under observation (political, economical, religious, educational, etc.).

A communication, to be a communication, is always in the "language" proper to the system being observed, and recognized as such in that system. It is differentiated, distinguished, from every other type of communication, which is what places it within this particular system. So a translation must therefore be an

⁶⁰ This is a reminder that while translation rights are an important factor for knowledge circulation, they are not a sufficient condition.

observable articulation recognized as such (publication, presentation, etc.) and which receives some response in the same “language” or metalanguage (if critical or theoretical for instance).

Translation, being a communication, will be made of an enunciation (performance), information (content) and understanding (inference of the other). Every communication will imply selection⁶¹ between all the potential meanings, and a reinvesting of that selection into the communicative chain. Luhmann too, then, rejects communication as simple transfer.

The reinvestment of the selected meanings back into the chain is what will ensure the sustainability or self-reproduction of the system, because every communicative instance will be both recursive and anticipatory at the same time (if it is to be recognized as a valid communication). It is recursive in that, reproducing the past, it will produce the building blocks of which it is made, and which call for a similar response. The recursive circularity in the system will create regular patterns, which we can then identify as structure, that is, a certain degree of anticipatory projection we can call expectations. The system’s reliance on its past for its preservation also means that it cannot operate outside its own closed boundaries – Luhmann refers to this as operative closure.

As different recurrent behaviours generate different expectations, the borders of the system will also change, changing therefore the definition of what to include in the system and what to exclude. Luhmann calls this specific guiding difference of the system its code. The set of rules, conventions, preferences, and censures in the system form its spatiotemporally defined programmes. These dictate the internal dynamics of differentiation, while always governed by the code.

Because every system works in its own way, what goes on in one system should not really matter to another. But sometimes, what goes on in a system happens to correspond sufficiently with what is happening in another, causing sufficient irritation to readjust the structure of the second system. Luhmann calls this structural coupling. The more structural couplings take place, the more a system gains complexity and adaptability.

II.1.C.iv.3.a Luhmann’s sociology and its relevance to TS

Translation cannot be separated from the social and cultural context within which it operates. The translator, the author being translated, and the audience of the translation are all part of social formations that behave in

⁶¹ For this reason, Tymoczko talks about translation as a metonymic process (Tymoczko 1999), explaining that the representation of a culture is done through privileging certain aspects only, and then transposing this to translation, where every aspect of the original text can never be fully transposed. The translator is therefore always making choices in light of what they deem representative of the text.

certain ways across space (geographically) and time (historically), and can be representative of their respective social, cultural and ideological affiliations. After the cultural turn which reminded us that translation is always taking place between encultured individuals, the sociological analysis attempts to answer the why and the how of the selection processes taking place in translation.

In the case of the social system of translation, the recursive behaviour can create a discursive identity for each of the different players involved, namely the translator, the publisher, the author, the reader, etc. This would be very useful for any discourse on the status of the translator.

Though there may not be a consensus on whether translation is technically a stand-alone system (in the sociological sense) or whether it is a sub-system that is part of larger systems, there is no doubt that, when viewed from systems theory, translation does have its own operative closure, code, and programmes. In other words, it is a sufficiently significant and distinct social (sub-)system to be represented in the debates on intellectual property reform.

As behaviours and dynamics in the system change, they will change the code, which will widen or tighten the sphere of what is considered part of the translation system. Since the cultural and sociological turns, the code of translation has widened significantly, taking into its discourse elements that would not have been acceptable to consider as part of translation studies prior to those turns. Perhaps even more significant is the ethical dimension, which is now a fixture in the work of certain translation scholars, and which will only be gaining momentum as the effects of globalization and socio-cultural heterogeneity are felt.

Finally, structural coupling is very common in translation practice, where there are constant perturbations or irritations from different languages and genres (medical, legal, literary, etc.), but no less in translation theory, where the discursive shift towards sociology of translation and translation as social change are perfect examples of structural coupling at play, though Luhmannian programmes (which dictate decision-making) may also explain this shift in large part.

Luhmann's model has impressive depth and breadth, enabling its applicability to a great variety of fields, including translation theory and practice as we just saw. That said, there are certain elements that require a bit of caution before fully generalizing this sociological model, as there were with the two previously presented ones.

Generally speaking, this theory is no different in that it stops short of venturing into any ethical considerations whatsoever, limiting itself to description and observation. It does not seem to leave much space for individual

agency, focusing instead on the system, not its parts. Luhmann's insistence that humans must stay in the environment, that they have no place in the system, shows the lack of importance he gives to will, feelings, or simply the individual.

If we drill deeper into the theory, we also encounter elements that call for more convincing argumentation. For instance, Luhmann's entire system is based on not mixing the code of one system with another, because they are differentiated. Yet, he is the first to do so, by resorting to biology and evolution to implant a certain *élan*, some sort of initial life force, to account for the inherent dynamism of the system. But these matters are on a more technical level, and the above critique of the general theory is sufficient for our purposes.

In *Applying Luhmann to translation studies: Translation in society*, Tyulenev (2012, 2009) using Luhmann's social systems theory, establishes that translation is a system which can act as a subsystem when viewed from the perspective of society as a megasystem. By looking at translation as a system, we avoid being distracted by the psychology and ideology of the individual translator, so as to look at translation as a large-scale activity.

Luhmann's idea of society is a self-referential and self-reproducing one, based on continuous self-observation and feedback. This recursive maintenance and self-reproduction is referred to as autopoiesis. When external elements are introduced into the system as is, they are merely hetero-reference, with which the system has no use. It is translation which will ensure autopoiesis by turning hetero-reference into self-reference for a given culture and society. Furthermore, for a system to let a foreign element enter it, means that, at a prior moment, it identified it as a beneficial phenomenon that may be lacking, therefore generating interest in seeing it borrowed and integrated into its autopoietic structures.

Based on the linguistic, aesthetic, social, cultural, and ideological norms and realities of its megasystem, the translation subsystem may either completely reject something from entering, or modify it sufficiently (addition, correction, change, replacement) to make it acceptable before letting it in. Like other boundary phenomena, however, it is difficult to decide whether it belongs to the system or to the environment. If we consider the boundary to belong to the environment, it provides a different explanation, favoring the influence of the environment on infiltrating the system.

Translation, as a distinctive activity performing a distinctive function in the larger whole, is therefore its own system. When viewed from the point of view of a larger (semiotic) system, it is similar to other activities but also distinct, making it a subsystem. Finally, its location in the system is at the boundary, allowing the system to interact with its environment.

By operating as a two-way boundary phenomenon in the social system, translation exports social information to the outside while exposing society to external influences, which can include the infiltration of new ideas and

an alternative social discourse.

Tyulenev analyzes translation as a boundary phenomenon by critically applying Luhmann's theory to a case study: eighteenth century Russia. In order to modernize itself and be accepted as part of the western world, the Russian Empire resorted to translation as the fastest way of transferring western values and knowledge at large scale to change its official social discourse. By looking at translational activities in their social context, he established the role of translation as a major factor in the westernization of Russia during the eighteenth century.

II.1.C.v Sociology and its relevance to TS

Though their models may differ, Bourdieu, Latour and Luhmann all provide methodological tools for recognizing translation's systemic agency. For instance, a case study involving Latour's ANT would reveal the workings of the isolated system and the negotiations that have to take place for the fulfilment of the project, and remind us of the unpredictability of human actors. Bourdieu's theory would help stress the power relations that underlie all socio-cultural, political and economic transactions, and identify the dominant and dominated entities, while not losing sight of the influence of institutions even at the individual level. Finally, Luhmann's social system could serve to bring up the dynamics within the system, and explain the formation and evolution of the norms and expectations within a system.

Tyulenev's work is but one example among many in TS clearly establishing the agency of translation in this sociological sense (see Casanova 2002; Angelelli 2004; Inghilleri 2005; Wolf 2006; Sapiro 2008a, b; Heilbron 1999). Other works in TS have used other approaches to look at the agency of translation in creating national and cultural identities (Brisset 1990/1996; Gentzler 2008; McElduff and Sciarrino 2011), negotiating linguistic and cultural power struggles (Cronin 1995; Branchadell and West 2005), or contributing to social development (Bandia 2008; Tyulenev and van Rooyen 2013; Marais 2014; Sadek 2016). We will see further examples of individual cultural, hermeneutical and ideological agency below.

If translation systems and networks are indeed in a continuous competitive struggle not only among themselves but also with other systems, such studies would be determining for any emancipation attempts of translators as they would heighten the profile of translation as a discipline and as a system, and by the same token, highlight the agency of the translator. Beyond the discussion on agency, these approaches also feed with evidence the ethical and policy discourse of power balance and translation's potential as an agent of social change. And beyond the rigorous methodology and scholarly analysis that it provides, if social action and welfare are not the ultimate aim of sociology, then what is?

III. Agency of the translator

In 1972, James Holmes published an article entitled “The Name and Nature of Translation Studies,” in which he attempted to map out the very young discipline of TS, which, he argued, was branching out as a new interdiscipline, and where he also proposed a name and definition for this new field.

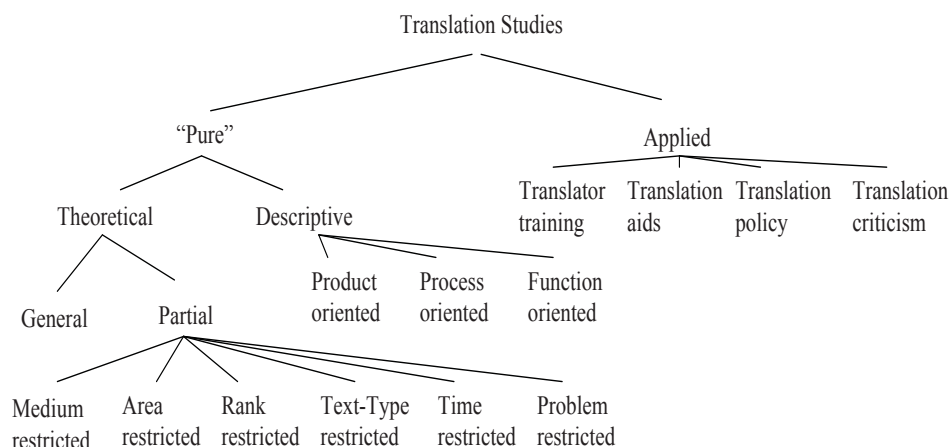


Figure 1 - Holmes' map according to Chesterman 2009, 14

While it is clear that behind every translation there is a translator, especially before machine translations could produce good enough quality translation, the importance of the translator's role has not always been recognized as a factor in translation research. In fact, even some research relying on theories that support the agency of translation – such as Luhmann's systemic model which we just presented – do not look at translators in the processes which generate translations.

Studying the translator, from their personal motivation to get into the field, to their cultural status and public image, to their ideology and professional ethics, are all receiving increasing attention in the field. Chesterman even proposes that this new trend in research be considered as a new subfield called *translator studies*, and which “focuses primarily and explicitly on the agents involved in translation, for instance on their activities or attitudes, their interaction with their social and technical environment, or their history and influence” (2009, 20).

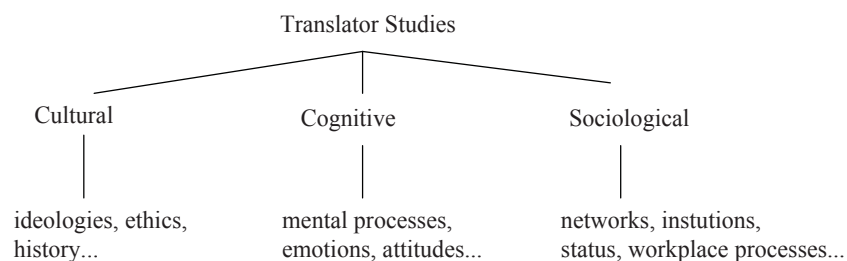


Figure 2 - Proposed map for TranslaTOR Studies by Chesterman (2009, 19)

The brief historical account of TS we gave in the first section of this chapter was meant to highlight the discipline's move 1) beyond the text, and 2) towards a self-recognition of its own disciplinary agency. In this second section of the chapter, we will look at the manner in which the discipline has recognized the agency of the translating subject, the translator, from four angles, namely: intermediation, hermeneutics, ideology, and authorship.

III.1 Intermediation agency: the translator as a messenger

There is no doubt that translators have always played the role of message carriers between cultures and civilizations.

For example, during the first two centuries of their rule (from the middle of the 7th century to the 10th) the Abbasids transformed their newly formed capital of Bagdad into the center of translational activity in the world in an unparalleled manner throughout history. In fact, Muslims, Christian and Jewish translators collaborated together to translate into Arabic, a gigantic corpus of works covering all of the humanity's knowledge at the time, such as natural sciences, mathematics, philosophy, and medicine.

Preceding Toledo and succeeding Alexandria, Bagdad had become the international capital of translation, with a large number of translators working relentlessly under the auspices of the government. This was one of those few moments in history where the entire knowledge of humanity was condensed in one location, before being retransmitted from one generation to another, and from one civilization to another, all of it through translation. In Bagdad, all the astronomers, mathematicians, physicians and philosophers who knew more than one language also seemed to be translators at one time or another.

In addition to translation the works of Galen, Plato and Aristotle, all existing commentaries on them, such as

those of the Alexandria school, were being translated from Greek and Syriac into Arabic.

This metropolis was the focal point of the historical and cultural transmission of previous civilizations. And it is through it that Europe would, centuries later, access the wisdom of the Ancient Greeks for instance. Bagdad is but one example, among many others, of the intermediary role translators played between cultures and civilizations of different times and places. Hunayn ibn Ishaq's (809-873) life, works, and influence are representative of this translation movement (see Libera 1991; Gutas 1998; Salama-Carr 1990).

In reaction to the interpretative model of Danica Seleskovitch (Seleskovitch and Lederer 1984), Brian Mossop presented the role of the translator as one of a carrier, a messenger, a rapporteur, as his title clearly indicates: *The Translator as Rapporteur: A Concept for Training and Self-Improvement*. The role of the translator is to transmit to a reader what an author has written. Translation becomes a social activity, consisting in retelling something to someone. The translator is like a foreigner, an observer standing at a distance, a little removed from the event, witnessing the initial communication of the author to his/her audience, and reporting it to his/her own.

But the translator must also interpret the message, for himself/herself first, and then for his/her audience. Because of his/her linguistic expertise and intimate proximity to more than one culture, the translator is able to access worlds that are not accessible to others. In order to offer a fair rendering of the message, the translator must belong to more than one community, from which and to which s/he will translate. The translator is in the privileged position of being an informed observer of more than one culture. It could be argued that, because of this privilege, the translator must also carry the social responsibility of lending his/her voice when it is needed.

Is it possible to witness an event without participating in it? Gadamer calls this a negative fusion of the horizons, and he tries to argue against it in *Truth and Method*. According to him, a purely negative vision of the fusion of horizons brings comprehension to a methodical knowledge that is suffering from too great of a distance from the object of knowledge. Gadamer views this type of knowledge as a simple imitation of the model of the "methodical" or hard sciences, which can never do justice to truth (see Grondin 2005a).

In the humanities, agents are never completely interchangeable, and there is no such thing as perfect synonymy. Replacing one translator with another will always produce a difference. While the natural sciences may encourage distance between the subject and the object for "better" knowledge, the translator must become a full member of a community or a society if s/he is to translate it to others.

According to Gadamer, it is neither possible nor desirable to leave oneself in order to understand it, as taught by the positivist model. This he considered absurd, because he viewed it as a pretension of not intervening in the process of comprehension, as though it is possible to ever understand without participating in the

understanding. Gadamer's opposition to Dilthey and Schleiermacher stems from their desire to fight subjectivism, relativism, and randomness in interpretation. While Emilio Betti and Eric Donal Hirsch revived the thought of Dilthey, thinkers like Habermas followed in the footsteps of Gadamer. Habermas believes, for instance, that Gadamer's approach can enable the social sciences to free themselves from the grip of natural science and their objectivist attitude:

In seeking a methodological foundation that alone could guarantee their scientific or objective status, Dilthey subjected, Gadamer argues, the humanities to the model of the exact sciences. He would thus have forfeited the specificity of the humanities, where the involvement of the interpreter in what he or she understands is constitutive of the experience of meaning [...]. The humanities do not seek to master an object that stands at a distance (as is the case with the exact sciences), their [sic] aim is to develop and form the human spirit. The truth one experiences in the encounter with major texts and history is one that transforms us, taking us up in the event of meaning itself.

(Ibid, 5-6)

III.1.A. Translation as journey

The translator carries a letter coming from a foreign author, to readers who do not have access to its content. But in order to transmit the message, the translator must start by understanding it himself/herself. The first task of the translator is therefore to go on a quest for meaning. Michel Serres wrote that there is no learning without travel, that no learning avoids travel. Under the instructions of a guide, education is always pushing one to the outside (Serres 1992, 28). Cronin adds:

Travel presupposes, at some level, a quest. The quest can be for the simple abandonment of routine or a more strenuous exploration of personal meaning. The fundamental figures are those of departure and return, but the motion of exploration can only be initiated if there is a primary move away from origin, a move that in turn heightens sensitivity to the question of origins.

(Cronin 2000, 119)

The quest for meaning is a process of discovery. We must leave in order to return, now augmented with meaning. This image of being on a journey, of travelling, is a universal symbol, found in all traditions of the world⁶². Translation establishes a relationship from the self to the other by aiming to make the journey as an act of reaching out to the other specifically as an other. It forces the foreign work to offer what is most true and profound of itself through translation. This relationship of the self and the other that the translator enters every time s/he begins a translation is also a reflection of our own relationship with ourselves and our own other, that which is most deeply buried within us (Berman 1985, 67).

⁶² For instance, "Taoism" is derived from Tao, which means the path. Islam's "Shari'ah" (divine law) and "Tariqah" (esoteric method) both mean path or way, and so on.

Translation is a journey that starts with a quest for the core of the meaning, which goes beyond the sum of the words. The translator must identify the tone, the style and the specificity of the text. To fully understand and access the meaning, the translator leaves his/her world and enters the world of the other. With this meaning in hand, s/he then makes the journey back to the point of origin, back to his/her language and culture, while pondering the best manner in which to transmit this message. Once back, the translator feels like they may have lost their bearings, or rather, that they have carried them in themselves all along. It is not that the translator feels they are lost in their homeland, it is, rather, that they have more than one. This is the *Bildung* that is used by Berman to trace the movement of translation from the familiar towards the foreign, the unknown, and then back to the starting point.

Hegel had already described the notion of experience as an expansion towards the infinite, and a passage from the specific to the universal, a journey (Reise) or a migration (Wanderung). Goethe equates this journey of experience with the notion of *Bildung*, and Berman defines it as an

Self-generating process where the “same” unfolds itself until it acquires its full dimension. [...] But it is also, as a voyage, an experience of the *otherness of the world*: in order to reach that which, under the veil of becoming-another, is in reality a becoming-onself, the same must experience *that which is not itself*, at least in appearance.

(Berman 1984, 74 – my translation)

He then adds that “ ‘conscience’ must live otherness as an absolute, then, at a later stage, discover its relativity” (*Ibid.* 75 – my translation). The idea that translation itself a journey is not new. In his famous letter of 395 A.D., Saint-Jerome wrote to Pammachius:

It is difficult in following lines laid down by others not sometimes to diverge from them, and it is hard to preserve in a translation the charm of expressions which in another language are most felicitous. Each particular word conveys a meaning of its own, and possibly I have no equivalent by which to render it, and if I make a circuit to reach my goal, I have to go many miles to cover a short distance.

(<http://www.newadvent.org/fathers/3001057.htm>)

Translation’s relationship to languages and cultures has been described as a “third space” or an “in-between.” This is because one who travels a lot will no longer feel the same association to their home. As Descartes wrote “lorsqu’on emploie trop de temps à voyager on devient enfin étranger en son pays” (Descartes, *Discours de la méthode* 1637, 1977 28-9). This is the case of the translator, who risks becoming exiled, either because that is what s/he feels, or because that is how they are perceived: “The translator must become the Other while remaining the one” (Cronin 2000, 100). Understanding the other, respecting them, hosting them, going towards them, and becoming them, all the while remaining one’s self. This is the paradox of the translator’s journey,

which can be described by Gadamer's fusion of the horizons, or Paul Ricoeur's *Soi-même comme autre* (1990).

Going further than this decentering to the point of completely sacrificing the idea of origin, however, becomes problematic. The fusion with the other does not entail losing or effacing oneself, but augmenting it, which implies ultimately maintaining it. The journey of the translator is not random, or directionless, or without purpose.

Exposure of false security does not imply relativist free fall. [...] nomadism is not synonymous with aimless wandering. [...] A translator does not wander aimlessly from source text to target text. A given text exists in the source language [...] and it is that text, not any other, which the translator is asked to translate. In the target language, as the polysystems theorists have shown, there is a plethora of norms and procedures that govern the translation of the text into the target.

(Cronin *op. cit.* 105)

But the idea of center or origin does not necessitate fixity. The origin can change; the center can be displaced. When we recognize it and carry it within us, we do not lose it at the encounter with the other (Sibony 1991, 315).

Travelling towards the other, being a foreigner in an unknown world, in a situation of minority, is quite a humbling experience. It makes us experience the distance that separates us from so many other worlds, most of which we will never get to know. When translators describe their own experience, they tell us that translation is not only about getting to know the other, opening up to the them and welcoming them, but also about getting to know ourselves.

The viatorial drive in translation is fundamental. The task of the translator is to seek out what goes on elsewhere, what is unknown, what the other has produced. In common with travel, this work is as much self-exploration as it is the charting of new textual territories. Describing the translation work of Antonin Artaud, Jean-Michel Rey claimed that all translation is 'une façon de revenir à soi par le biais de l'autre, par l'épreuve de l'étranger...' Marc-Alain Ouaknin, in *Bibliothérapie : Lire, c'est guérir* sees translation in therapeutic terms as curative. Illness is enclosure, blockage, the inability to escape from the prison of the self. Translation brings with it an opening up towards another language, culture, world.

(Cronin *op. cit.* 102)

Despite the distance and the foreignness, the journey is possible. Why? For the simple reason that we are able to find enough familiarity. Otherwise, the journey would create nothing but an isolated solipsism, and translation attempts would amount to becoming prisons for the language.

III.2 Hermeneutic agency: the translator as an interpreter

In addition to the external journey required to deliver the message from an author to a reader who are foreign to each other, the translator must undertake an internal journey seeking out a meaning for oneself that can then be reported to others. This is the interpretation role the translator must play.

The Interpretative School in TS begins from the premise that translating consists in interpreting the meaning of a statement in context and according to the communication situation, before re-expressing it as we would if we were stating it in a spontaneous manner. This last part is to ensure that the translator is not translating under the influence of the source language. So translating, according to this school, is analyzing the meaning of a statement taken as a whole, while keeping in mind the information provided by the text (cognitive context), as well as external information (cognitive complements, and notional baggage) (Delisle 1988; Seleskovitch and Lederer 1984).

The implied premise in this theory is that translation is always a translation of the meaning. If it is possible to take something from language to another, it is because the something is located outside of language, but it has the ability to be reincarnated into any language because of its universality. That something is the meaning.

What then is the criteria to determine whether a translation – be it oriented towards the source or the destination – renders the meaning of the original? This question, thus formulated, presupposes a theoretical preconceived notion, namely, that there is a meaning that lives above the work. But if this meaning exists – and the translator has no choice but to suppose it – it must be possible to express it in a third language that represents that parameter of its inspiration, and against which both the source language and the target language are measured. This third language must be a perfect language of sorts, a language that exists nowhere yet hovers everywhere, a language that is perhaps spoken between God and the angels, or one that would have been spoken for a brief moment between God and Adam, in the terrestrial paradise.

(Eco 1993, 199 – my translation)

For those who may have missed it, the third language is obviously translation. Not translation as a product, but as a process and even an approach.

In an article entitled “Qu’est-ce que l’interprétation?” (2004), Jean Grondin explains that interpretation can be understood from different angles: philological, artistic, translational, legal and ontological.

Under philological interpretation, the interpreter may have to clarify a word, a statement, an entire work, a poem, a thought, the spirit of an era, etc. Artistic interpretation is what we encounter when trying to understand the meanings of dance, paintings, theatre, opera and music. Legal interpretation consists in stating what the law says and applying it. Translational interpretation is simply in reference to the work required for the passage of a message from one language to another.

This understanding of translation was called by Roman Jakobson inter-linguistic transfer. However, this notion of translation seems quite restricted when compared to the presented by Steiner in *After Babel*:

interpretation as that which gives language life beyond the moment and place of immediate utterance or transcription, is what I am concerned with. The French word *interprète* concentrates all the relevant values. An actor is *interprète* of Racine; a pianist gives une *intreprétation* of a Beethoven sonata. Through engagement of his own identity, a critic becomes un *interprète*—a life-giving performer—of Montaigne or Mallarmé. As it does not include the world of the actor, and includes that of the musician only by analogy, the English term interpreter is less strong. But it is congruent with French when reaching out in another crucial direction. *Interprète* interpreter are commonly used to mean translator. This, I believe, is the vital starting point. When we read or hear any language-statement from the past, be it Leviticus or last year's best-seller, we translate. Reader, actor, editor are translators of language out of time [...]. Any model of communication is a model of translation, of a vertical or horizontal transfer of significance. No two historical epochs, no two social classes, no two localities use words and syntax to signify exactly the same things, to send identical signals of valuation and inference. Neither do two human beings... part of the answer to the notorious logical conundrum as to whether or not there can be 'private language' is that aspects of every language-act are unique and individual.

(Steiner 1992/1998, 49)

Kant says that humans cannot know noumena, or things in themselves; only through the interpretation as phenomena can they be known. Nietzsche wrote that there are no facts, only interpretations. Gadamer taught that all is but interpretation. And this is the starting point of Grondin's last type of interpretation, or what we called "ontological," meaning interpreting our presence in the world. While this idea can take many shapes, ranging from the cognitive, to the ideological, to the historical, it is specifically through language that it can be understood, especially since the linguistic turn. Language already contains an entire interpretation of the world, and thus forms the matrix for all interpretations (Grondin *Ibid.* 127).

What is common in all of these aspects of addressing interpretation, is that it seems that meaning requires a mediation or a medium for transmission, as though meaning cannot take place without it. Translation is not a form of interpretation, rather, all interpretation is a form of translation.

Since the time Gottlob Frege's ideas were accepted by what later become known as the analytic school of philosophy, philosophers of language have rejected the idea that linguistic meaning can be found in linguistic units taken independently. A linguistic unit, Frege believed, can only acquire meaning from the rest of the statement in which it is found. With the publication of Wittgenstein's *Investigations*, the network to understand meaning was expanded to incorporate all of language. To understand a sentence is to understand a language. Quine and Davidson have further explained this idea by claiming that the meaning of a word or a statement can only be reached in relation with the globality of the language in which it lies. This is referred to as semantic holism.

It is a different way of expressing the hermeneutic circle proposed by continental philosophy:

The hermeneutical method seeks to fit each element of a text into a complete whole, in a process commonly known as the « hermeneutical circle »; individual features are intelligible in terms of the entire context, and the entire context becomes intelligible through the individual features.

(Eagleton 1996/1983, 66)

The textual world becomes a microcosm of the external world. Martin Heidegger takes the interpretative activity beyond the text, so that it takes an existential dimension:

It is more akin to a « know-how », and it always involves a possibility of *myself*: the verb form *sich verstehen* (to understand oneself) is reflective in German. « Understanding » is not primarily [sic] the reconstruction of the meaning of an expression [...] it always entails the projecting, and self-projecting, of a possibility of my own existence. [...] A momentous shift in the focus of hermeneutics has silently taken place in the work of Heidegger: Hermeneutics is less concerned with texts or a certain type of science, as was the case in the entire previous history of hermeneutics, but with existence itself and its quest of understanding.

(Grondin 2005a, 982-987)

Gadamer is following the same line of thinking when he applies his notion of fusion of the horizons to artistic experience. Our encounter with art allows us to step beyond our specificity and discover what Gadamer calls the essence of things. But this truth can only be known if we are willing to change, be shaken even, by this experience. Experiencing art is therefore an encounter with our self in a manner that forces us to step outside of what is customary for us.

In *Truth and Method*, Gadamer uses translation to explain comprehension: comprehending something means being able to translate it into our own words, to apply it to our own situation. It is in this sense that he says every reality is a linguistic reality. But Gadamer goes even further, when he speaks of a fusion between the process of comprehending, and the object of comprehension:

“Being that can be understood is language.” This simple, yet enigmatic dictum can be read in two quite different directions: it can mean, and in light of Gadamer's unmistakable stress on the historical nature of understanding seems to mean, that every experience of Being is mediated by language, and thus by a historical and cultural horizon [... But] the stress can also be put on Being itself. [...] language is not only the subjective, say, contingent translation of meaning, it is also the event by which Being itself comes to light. Our language is not only « our » language, it is also the language of Being itself, the way in which Being presents itself in our understanding.

(Grondin 2005a, 985)

The translator is always an interpreter. This task begins when s/he reads the text to understand it, even before

translating this understanding to a new audience. The translator is more than a reader of a text. S/he may be a reader, but in that case, s/he is not reading to translate. Reading itself is a generative activity that feeds the production of writing. The consumed product creates a desire to produce. True reading is a reading that perceives the multiplicity of meanings simultaneously (Barthes 1984). Reading to translate is therefore a meticulous, analytical reading, implying an exploration of every possibility and every detail of the textual landscape.

[T]he translator must translate the meaning to be understood into the context in which the other speaker lives. This does not, of course, mean that he is at liberty to falsify the meaning of what the other person says. Rather, the meaning must be preserved, but since it must be understood within a new language world, it must establish its validity within a new way. Thus every translation is at the same time an interpretation. We can even say that the translation is the culmination of the interpretation that the translator has made of the words given him. The example of translation, then, makes us aware that language as the medium of understanding must be consciously created by an explicit mediation. [...] Where a translation is necessary, the gap between the spirit of the original words and that of their reproduction must be taken into account. It is a gap that can never be completely closed. But in these cases understanding does not really take place between the partners of the conversation, but between the interpreters.

(Gadamer 1989, 386)

Translation has often been likened to a bridge. But this inter-linguistic and intercultural bridge is not simply to tolerate the other, but to understand them, and accept their truth. This is an act of integration, of an invitation, a welcoming, whose corollary is the willingness to be understood by the other, and to accept their invitation, without expecting that either one sacrifices their identity. Integrating the other does not mean dissolution, disintegration or substitution of their identity or ours by one that is more convenient. Translation is always an opening of oneself to the other. Gadamer, the founder of the modern hermeneutic method, saw in this opening something that goes beyond a simple theoretical position, to reach an ethical principle by which to live.

In his discussion with Gadamer in 1981, [Derrida] challenged Gadamer's rather commonplace assumption that understanding implied the good will to understand the other. What about this will? Asked Derrida. Is it not chained to the will to dominate that is emblematic of our metaphysical and Western philosophical tradition? Hence Derrida's mistrust of the hermeneutical drive to understand (and thus perhaps violently absorb) the other and of the hermeneutic claim to universality. Gadamer was touched by this criticism to the extent that he claimed that understanding implied some form of application, which can indeed be read as a form of appropriation. This is perhaps the reason why, in his later writings, he more readily underlined the open nature of the hermeneutical experience. "The soul of hermeneutics", he then said, "is that the other can be right."

(Grondin 2005a, 12)

Who among us has not felt the limits of speech, whether said or written? How weak and lacking an "I love

you” seems to be when compared with the state of the heart overflowing with the corresponding feeling. No different would be the expressions “I am sad,” or “my sympathies,” which seem almost insignificant when we express the sadness or the attempt to console at the loss of someone dear. Love and loss are simply examples, among many others, to express the shortcomings of our words when they try to rise to that which we truly want them to express.

Perhaps the greatest merit of the hermeneutic theory is its reminder of that which words do not say, but want to say, after they have been spoken or written. Words will always fall short of what they want to express. And more concretely, the hermeneutical agency of the translator in his/her work with words and their meanings, is one whose recognition would certainly shed a new light on the translation right, and compel scholars to revisit the notion of derivativeness on its own, as well as the derivativeness of translation specifically.

III.3 Ideological agency of the translator

I am using the term ideology in the sense of a worldview, a system of values and ideas (often but not always taken for granted) that form the basis for motivation, action, and at times activism. The relevance in studying ideological influences cannot be overestimated in TS, especially in relation to language use and power relations.

[...] selection made during the translation process (not only by the translator but by all those involved, including those who decide the choice of texts to translate) are potentially determined by ideologically based strategies governed by those who wield power. These can be uncovered by analysing the various target text selections that impact on the target reader who, nevertheless, generally and crucially reads the text as though it were a transparent, unmediated rendering of the original, more or less unaware (or at least willingly suspending the knowledge) that it is a translated text. The perceived truth status of the words of the target text can only be uncovered if the source and target texts and their paratextual framings are compared side by side, even though the motivation for any shifts may remain open to conjecture.

(Fawcett and Munday 2008, 138)

Although the translator’s ideological agency can be demonstrated in numerous fields, I will simply illustrate it with examples from post-colonialism and gender studies within TS.

III.3.A The agency of the translator’s post-colonial ideology

The initial endeavor of anthropology was to understand and describe the foreign other “objectively”, from their own perspective, not that of the observer. Despite “the persistence of an ideology claiming transparency of representation and immediacy of experience” (Clifford 1986, 2) the impossibility of escaping one’s interpretational biases became clear across disciplines, and this eventually led to the “crisis of representation” in anthropology and ethnography. How can the anthropological translator describe and represent the other if

they are unable to avoid perceiving them through their own subjective interpretive grid?

All meaning is the product of social and cultural constraints (Arrojo 1998, 39). All research is mediated by subjective elements, ranging from interpretation to judgments to premises to selections. Whether in TS or any other field, “description must be produced within a theoretical framework reflecting a viewpoint; interpretation and values must be involved” (Brownlie 2003, 40).

The overlap between ethnography and translation is obvious in that both write the other and represent them, the former through experience, the latter through text. It is no more possible for a translator to translate other cultures without any bias than it is for an ethnographer to represent them as they truly are. The initial interpretation of the translator as well as the act of writing for a target audience add layers of bias and subjectivity to the final representation being constructed. That is why some have declared that “the traditional view of translation and ethnography as attempts to integrate the Other in an objectifying way is no longer tenable; in fact, each representation can be seen as an act of political oppression” (Wolf 2002, 183).

There is no difference between academic and professional discourse about translation, as both scholars and professionals interpret from their own perspectives, belong to a social system of translation, and produce second-order observations (Hermans 1999, 146; Venuti 1998, 28). The crisis of representation in anthropology was therefore felt very clearly in TS, in reaction to which thinkers like Hermans even proposed solutions such as resorting to Luhmann’s sociological systems theory:

Luhmann [...] posits a de-centred and polycontextual world in which there is no single privileged way of attributing or processing meaning. System theory does not exclude itself from this unresolvable relativism. But at least this postmodern flaunting of epistemological doubt offers the advantage of taking little for granted and of leaving room for paradox, hesitation and experiment. It is one way of dealing with what has become known as the crisis of representation in the human sciences. Once we know that our knowledge is constructed, we can learn to live with the limitations of perspective.

(Hermans *op. cit.* 150)

Following the crisis of anthropology’s writing culture, meanings were no longer perceived as remaining the same across languages and cultures, but as reconstructions from the subjective background of the ethnographer and the translator. This realization has shed light on the agency of the translator.

As a result of the cultural turn in TS, there was an increased awareness that translation is not only a linguistic transfer between two cultures, but that it can itself be a new space where cultures merge, which destabilizes the dichotomy of center and periphery, while proposing “pluricentres” (in Wolf 2002, 187) where difference is always being negotiated.

Descriptive translation studies continue to resist any open prescription or normativity, and to distance themselves from evaluation and norms, while they paradoxically remain caught in them. That is why some TS scholars have promoted the recognition of ideological and political impacts of translation (Hermans 1998, 136) and asked for the study of “questions of value, evaluation, of the translator’s agency, and of the problematic position from which statements about translation are made” (Hermans 1999, 159). While Hermans called this a “critical discipline of translation studies,” Brownlie (2003) called it the Critical Descriptive Approach.

Cultural studies, in recognition of the power and agency of translation, inspired TS to adopt translation approaches that are “more committed” (Hermans op. cit. 157). Prominent examples that underline the ideological, political and social contexts are post-colonial and gender-based approaches. In such cases, the objective is not simply to foreground certain cultural issues, but to use translation to fight, in a socially and ethically engaged manner, colonialism, sexism, racism, or other forms of oppression (Baker 1996:14).

The perspective of cultural studies, which recognizes the multiple centres, further explains the dependence of syncretic and postcolonial communities on translation, as it becomes a forum for intracultural interactions. This is the “between” space that allows those translating to be powerfully affected by other modes of living and thinking.

But there is another way of defining “between”. In the case of minority or oppressed groups, translation becomes one more source of power. Before Foucault wrote about power as a socialized means of repression (1975, 43) colonizers and colonized had understood the power in translation, when used as a means of control and subjection. As explained again and again (Rafael 1988; Niranjana 1992; Bassnett & Trivedi 2002) the colonization of the world could not have occurred without interpreters and translators:

The use of translation to create or amass knowledge can be part of the colonial project, a reflex of panopticonism, which can in the extreme become an intelligence operation, a way of reconnoitering a territory, a mode of interrogating informants, and even, so to speak, a mode of spying. Conversely, when translation is done by the colonized subjects themselves, the possibility of gathering and creating information can be turned to powerful ends, including counterespionage, conspiracy, and mutiny, leading to self-definition and self-determination, in the fullest political sense [...]

(Tymoczko 1999, 294)

Anuradha Dingwaney writes that the “between” can in this case become the space of resistance,

the space from within which the (colonized) native deliberately (mis)translates the colonial script, alienating and undermining its authority [... which] proceeds from an awareness of the “other’s” agency and own forms of subjectivity, which “returns” the “other” to a history from which she or he was violently wrenched.

(Dingwaney 1995, 9)

These uses of translation for resisting colonialism or reclaiming cultural identity have been studied repeatedly in TS, revealing specificity and local nuances, but also general patterns that are the norm, and not the exception. In Tymoczko's exploration of the uses of translation of early Irish literature in decolonization as well as creating and maintaining representations of the national culture, she states that:

The Irish people themselves were cut off from apprehending their own culture in its original linguistic form, and translation was one means by which they came to understand and construct themselves, their identity, their culture, their literary forms — in short their place in the world. In many of these respects the role of translation in Ireland is similar to and even paradigmatic of the role of translation in other countries with a history of colonial and cultural oppression. Not only do oppressed peoples have programmatic political purposes for translating traditional cultural materials, but aside from its specific political agendas, translation is important because it defines national culture to natives and the world alike.

(Tymoczko op. cit., 82)

In *Siting Translation: History, Post-structuralism, and the Colonial Context*, Niranjana argues that by producing hegemonic representations of the colonized Indian, translation was used as a tool for domination. For instance, an influential translator – Sir William Jones – constructed an image of the Hindoo as being naturally socially and politically inferior (Niranjana 1992, 13). By resorting to critical ethnology, post-structuralism and historical materialism, she enables the translator to unveil the power relations and historicity of representations, thus allowing translating to be used to resist the colonial project. This interventionist translation destabilizes the colonizer's version by introducing heterogeneity and hybridity (Niranjana 1992).

In *The Translator's Invisibility*, Lawrence Venuti presents a different approach to committed translation by exhorting resistance to ethnocentric violence, which stems from domesticating translation practice and theory. When foreign texts are translated in fluent (widely used and standard) English, the foreignness of the original text is avoided, eliminated even. By adhering to the norms and values of the target culture and language, the final product is instantly intelligible, but the price of this practice is ethnocentric violence, which perpetuates the domination of the dominant culture. Instead, Venuti advocates resisting this violence through foreignizing translations, which can be done in various ways. For instance, the translator may select texts that are considered marginal by the translator's culture, or apply foreignization in making lexical and syntactic choices that symbolically highlight the linguistic and cultural foreignness of the text. This disrupts the cultural norms of the target language, which restrains or counteracts ethnocentric violence. Whether in theory or practice, this approach in TS is “a form of resistance against ethnocentrism and racism, cultural narcissism and imperialism” (Venuti 2008/1995, 16).

III.3.B The agency of the translator's gender-based ideology

Gender and sexuality have also inspired ideological positioning in both translation theory and practice (Simon 1996; von Flotow 1997, 2008; Santaemilia 2005). The significance of gender has been well known and studied in the humanities and the social sciences since the 1970s, and TS is no exception. Just as was the case with the examples from cultural and post-colonial studies, gender-based studies have focused on the power relations between the sexes, especially as they play out in the arena of language. Perhaps the starting point for this approach was the realization that language is an instrument that has been historically used to oppress, subjugate, and denigrate women, and it must therefore be reformed.

Since the 1990s, gay activism and queer theory have forced readjustments in the feminist discourse in TS, which now accepts gender as a continuum, as opposed to a dichotomy. Given that queer theory and feminist theory have not fully converged, I will limit myself to the latter here, although similar conclusions could be drawn from queer theory with regards to the ideological agency of the translator.

Feminist theory in TS stems from the premise that women have historically been excluded or misrepresented in literature, and history must therefore be revised from the angle of gender and sexuality, in order to restore women's place in history and society, be it in the authoring or translating of religious, literary, or activist texts. The intervention in such cases is done at the level of the selection of the texts, to counter the historical tendency of promoting male authors and translators.

At the practical or applied level, TS has shown significant sensitivity to gender realities, and provided much possibility for the engaged translators themselves to express their committed ideological positions through translation. This can be done by the evaluation and critique of translations that often concentrate on the censorship and misrepresentation of women or feminist authors.

Feminist translators will also intervene directly in the text by feminizing language and the power relations that it carries, to the point of coming up with new spellings, new grammatical constructions, new metaphors; distorting or even inventing terms to highlight their gender, which falls under expressing one's political or personal identity while translating.

Brossard disrupts these power relationships in language by challenging our normal expectations about punctuation, spacing and typography. Attempting to subvert our *passive* consumption of novel or poem, she blurs grammatical constructions, introduces blanks, gaps, ruptures, deconstructing the text so that the meaning is negotiated through a perpetual process of interaction.

(Godard 1984, 15)

In her text “Translating and Sexual Difference,” Godard starts by reminding the reader about the basic premises of feminist theory concerning gender. The first is that “women and men have different perceptions or experiences within the same site or event”, while the second is that “inequality between the sexes is a social construct, not divinely or naturally ordained” (Godard 1984:13). She continues by explaining that there are two distinct linguistic spheres, namely, a male and a female. We are told that these differences result from the different economic, social and political positions occupied by men and women. For example, the inferior status granted to women has resulted in their use of more hesitant speech patterns, as opposed to affirmative ones. Differences in speech are also related to different experience and different ways of being, with gossip mentioned as an example of a specific type of women’s language. Feminist writers want to provide women’s language with written expression. They want to experiment with language, by undermining, subverting and disrupting patriarchal language by creating new forms that foreground the woman’s voice. Feminists want to write about female body experiences. Godard argues that whereas women learn men’s language, men don’t learn women’s language.

When women enter the public domain and speak, they are translating. When men encounter women’s writing they often dismiss it as nonsense, without meaning for themselves, because they have not been taught to understand women’s discourse. On the other hand, women have become ‘bilingual’. (*Id.*)

In other words, men would be unable to fully understand, much less translate women’s texts, because they do not speak their language or share their experience of the world: “women’s texts are accessible only to those who share this private experience” (*ibid.* 14).

Feminists want to reclaim their body and its sexuality, which they see as having been colonized, used and abused by patriarchy. This is done through feminist writing as well as feminist translation, which is to be distinguished from (non-feminist) translation. The aggressiveness of the approach is intentional, because, as Susanne de Lotbinière-Harwood writes, “translation in the feminine is a political act, and an act of women’s solidarity” (1991, 65).

The objective of much of the feminist tactics of translating is to draw attention. This can be done by directly stating that they are women translators, or indirectly, by intervening through the integration of or emphasis on elements such as their personal feelings towards a topic or an expression. In any case, they are drawing attention to their intervention, to their feelings, to their presence and agency, because they view this as revealing the misogynist aspect of language.

When explaining why she took feminist liberties while translating the poems of Octavio Armand, Carol Maier writes “I felt anger. I wanted the mother to be present, wanted her and her mothers to be signing their names along with the father and grandfathers” (in von Flotow 1997, 26). When Suzanne Jill Levine considers the work of Guillermo Cabrera Infante as oppressively male, narcissistic, misogynist and manipulative, she feels that she has no choice but to intervene and feminize the work: “Where does this leave a woman as translator of such a book? Is she not a double betrayer, to play Echo to this Narcissus, repeating the archetype once again?” (Id.)

In Germaine de Staël’s *Mirza*, the main character, by the same name, is a black woman whose noble character is represented by the refinement of her speech. The translator explains the changes she decided to make by resorting to how she felt once again:

I was a little annoyed by the romantic excesses of Mirza. I must say, that in my translation I tried to soften the excesses and wanted to valorize her speech. I wanted to make sure that people reading only the English would get from the text a sense of the power of that voice, as opposed to the quaint or romantic.

(*Ibid.* 33)

In translating the same author, African-American translator Sharon Bell also explains that she made changes to the original because it referred to blacks as “savages” which “offended me so much I could not put down what the sentence actually said” (*Ibid.* 37).

This is quite a divergence from the instructions of the *Translator’s Charter* which, as you will recall from Chapter 5, stated that “[e]very translation shall be faithful and render exactly the idea and form of the original” because “this fidelity constitut[es] both a moral and legal obligation for the translator” (Art 4). In other words, a translator may not take any liberties in translating because “being a ‘secondary’ author, the translator is required to accept special obligations with respect to the author of the original work” (Art. 11) and making any changes that do not fall squarely within the definition of exact and faithful rendering (Art. 4) would be “contrary to the obligations of his/her profession” (Art. 3)

Luise von Flotow emphasizes the point that in feminist translation, “what is important is the woman translator’s repeated reference to herself, her gender and her cultural context as influences on her work” (*Ibid.* 38). Feminist translators “want recognition of the translator’s individuality [...] hence the proliferating prefaces, introductions and commentaries that ‘flaunt’ the translator’s signatures [...] citing biographies, political affiliations, sexual orientations and ethnic backgrounds as aspects of the ‘translation-effect’” (*Id.*).

De Lotbinière-Harwood, for her part, makes a point to state that she is rewriting in the feminine (réécriture au féminin), which is a writing that “puts its cards on the table from the very beginning. Its project is to imbue

translation praxis with feminist consciousness [...] translation thus becomes a political activity that has the objective of making women visible and resident in language and society” (*Ibid.* 27). Elsewhere, she says:

My translation practice is a political activity aimed at making language speak for women. So my signature on a translation means: this translation has used every possible feminist translation strategy to make the feminine visible in language. Because making the feminine visible in language means making women seen and heard in the real world. Which is what feminism is all about.

(*Ibid.* 29)

While there is no unanimity on the ethics and freedom of intervening on a text with or without political justification, the truth of the matter is that committed, feminist translation is taking place every day. Moreover, the case I am making goes beyond feminist translation practices: as was the case with other instances of power struggles, there can be no neutral act of translation. Every translation will feed the power of one stakeholder or the other. The only difference from one translator to the next lies in their awareness of the operation of these dynamics.

Feminist translation is one clear instance of the translator’s agency. It rejects the idea of neutral meaning, and holds that all text carries the ideological and cultural mark of its producer. To highlight difference and cause disruption, feminist translation draws attention to the woman translating, which highlights her agency. Barbara Godard calls feminist translation “transformance,” because of its “focus on the process of constructing meaning in the activity of transformation” (Godard 1990, 89-90). Fully recognizing the hermeneutical and writerly agency of the translator, and in complete opposition to copyright law, she says “[t]ranslation, in this theory of feminist discourse, is production, not reproduction” (*Ibid.* 91).

III.3.C Remarks on the ideological agency of the translator

Tymoczko argued (in 1999) that the metonymic nature of translation allows it to be selective, partial, partisan, without which it would not be able to “participate in the dialectic of power strategies of change” (Tymoczko *op. cit.* 290). While highlighting the power and agency of the translator’s choices, this may also give the mistaken impression that the translator can opt out of this power balance, and somehow translate in a neutral manner. As we saw with the case of anthropological translation as well as feminist theory, it is simply impossible to step outside of one’s subjectivity. As Chesterman writes “surely no human action is ‘value-free’, so how could translation be?” (Chesterman 1998, 94).

In the decisions of the translator – the large decisions such as when to translate, what to translate, what to omit from the translation record, how to render tone, what standards of accuracy to adopt, and how to render a literary form, as well as the small decisions of how to translate specific cultural concepts of how to spell names – can be traced the translator’s response to the text and the framework of the source culture on the one hand, and to the

political, social, esthetic, and ideological context of the receptor culture on the other hand.
(Tymoczko *op. cit.* 293-4)

Although exhorting translators to translate in a certain way (foreignizing, feminizing, etc.) to fight colonialism or sexism may give the impression that the translator has the choice to be socially engaged or not, the truth of the matter is that every act of translation implies ideological choices, and every translation is already an act of social engagement, because it strengthens or weakens someone's power. The unawareness of the translator of the dynamics of power taking place before, during and after the translation may however give the translator the impression that their task is or can be an ideologically neutral one.

The point I am making here is that as we follow the common thread running through the evolution of TS, we realize that as the discipline evolved, its recognition of the agency of the translator has increased to the point where a subfield called *translator studies* is now warranted. I am not asking or expecting translators to be socially and morally engaged in their activity for this or that cause so as not to risk transforming the entire discipline into this or that crusade, stemming from someone's relative moral outrage. The weakness of such a position, Theo Hermans tells us, is that its holder is so convinced by the correctness and worthiness of the cause that they do not question any of its presuppositions. This is precisely what Hermans criticized in Lawrence Venuti's approach:

While Venuti's position has the virtue of consistency, it stands or falls with the righteousness of his cause and the moral high ground of his indignation. If we want to create sufficient and sustainable room for self-reflexive criticism of that or any other position, we cannot very well do it from a practising translator's point of view. We must do it from a theoretical angle, one that aligns itself with the theoretical and scholarly discourses.

(Hermans *op. cit.* 156)⁶³

The problem that we keep highlighting, however, is that this act of activism is at part of a larger cycle of production, from the selection of texts to be translated, to the modes of its distribution, marked by power relations at every step, and completely dominated by the legal framework of copyright law and translation rights.

III.4 Authorial Agency: the translator as an author

III.4.A Etymological considerations

⁶³ Siobhan Brownlie appropriately concludes her investigation by saying: "it seems wiser not to attribute to [Herman's] critical descriptive approach a superior role as the 'critical conscience of translation studies' (Hermans 1999:161), but to consider that different approaches offer different possibly complementary ways of proceeding." (Brownlie *op. cit.* 62)

If the etymology of a term is of any indication of its semantic scope, then looking at the origins of the term “translation” and its equivalent in various languages can be quite revealing of the various types of agency that have been associated with translation by different cultures.

For example:

in the Nigerian language Igbo, the words for translation are *tapia* and *kowa*. *Tapia* comes from the roots *ta*, 'tell, narrate', and *pia*, 'destruction, break [it] up', with the overall sense of 'deconstruct it and tell it (in a different form)'. *Kowa* has a similar meaning, deriving from *ko*, 'narrate, talk about' and *wa*, 'break in pieces'. In Igbo therefore translation is an activity that stresses the viability of the communication as narration, allowing for decomposition and a change in form rather than one-to-one reconstruction.

(Tymozcko 2005, 1090)

In the article *In Our Own Time, On Our Own Terms*, Harish Trivedi tells us that, for languages spoken in India, Prakrit (and Sanskrit) refers to translate by “*chhaya*,” which means shadow, as though one language becomes the shadow of another. Moreover

In a majority of the Indian languages, [Hindi and Bengali for instance] the term now routinely used for translation is *anuvad*, an old Sanskrit word - which may encourage the belief that the practice is as old as the word. But the truth is that *anuvad* has not always meant ‘translation.’

(Trivedi 2006, 110)

And this is the definition of this term according to the *Sanskrit-English Dictionary* of Sir Monier Monier-Williams, published in 1899:

saying after or again, repeating by way of explanation, explanatory repetition or reiteration with corroboration or illustration, explanatory reference to anything already said; translation; a passage of the Brahmanas which explains or illustrates a rule [...] already propounded.

(*Ibid.* 39)

None of these words however contain the notion of translation as we know it in English. Instead, they refer to repetition, imitation, reiteration, or recitation. As indicated by Trivedi (*Ibid.* 111) Monier-Williams commits an anachronism by defining the term with a neologism at the time of his writing. “Anuvada” is an extremely precise repetition of a statement in the same language, especially in a spiritual or religious context. Trivedi adds that “[w]hile ‘translation’ in the sense of ‘carrying across’ is based on a spatial metaphor, *anuvad* in the sense of repetition is, on the other hand, a temporal metaphor” (*Ibid.* 113). In other words, European languages want to carry the language spatially to another, while Indian languages want everyone to repeat the same thing, in the same language, but at a temporally different moment.

Newer Indian words, derived from Sanskrit, emphasize other aspects of translation. “Rupantara” means “changed or new form, transformation; version, rendering, adaptation (of a tale, a work)” (McGregor 1993,

868). In Malayalam, the term “vivartanam” is defined by Monier Williams as “Turning round, revolving... turning, turn, change... transformation [...]; going round, circumambulating (an altar etc.) [...]; causing to turn or to change, overturning...; turned round &c; [...] whirled round (as dust) [...]; removed from one’s place” (Williams 1899, 988).

As for the term “vivarta”:

Alteration; modification, change of form, altered condition or state [...]; 6. (In Vedanta phil.[osophy]) An apparent or illusory form, an unreal appearance caused by *avidya* or human error; (this is a favourite doctrine of the Vedantins according to whom the whole visible world is a mere illusion - an unreal and illusory appearance - while Brahman or Supreme spirit is the only real entity; as a serpent (*sarpa*) is a *vivarta* of a rope (*rajju*), so is the world a *vivarta* of the real entity Brahman, and the illusion is removed by *Vidya* or true knowledge [...]).

(Apte 1970)

These different terms reveal fundamental differences in the manner translation is understood by different languages and cultures. One must be careful not to reduce these notions to that of the English or Western notion of translation, when they can offer a potential to expand translation. Trivedi says:

These terms [...] are not and cannot become synonymous and optional words for the English term 'translation', for to the extent that they are synonymous, they are so only within the language(s) and the cultural tradition they belong to. Before we say that they all mean 'translation' we must remind ourselves that they cannot themselves be so simply translated. To parade them in a comparative context together with the Western term(s) for translation, with all the discriminating care in the world, is still to offer them for inclusion in an alien discourse in an alien language; it is perhaps to sell them short.

(Trivedi *op. cit.* 117)

If we add French, Spanish, Italian, Portuguese, German, Latin and Greek, we get yet other enriching perspectives. For instance, ancient Greek linked the terms associated with translation with the notions of metaphor, interpretation and paraphrase, while the English terms associate it with displacement and transfer. As for German, it implies a reciprocal movement between the same and the other, or the self and the foreign. The multiplicity of these terms, most of which appeared during medieval times, can be explained by numerous reasons. First, medieval writing was literally a writing on top of a writing, often being a series of comments and glosses on authoritative works, which means the boundaries between what one author is saying and what another is saying was more fragile and ambiguous. Secondly, the boundaries between languages were more fragile as well, with some texts and comments being originally drafted in more than one language by the author or the commentator. Finally, different words were used to refer to the translation of specific types of texts, source languages and target languages. Like Trivedi, Berman warns against any reductionist attempts at making these terms notional equivalents (Berman 1988).

If we turn to Arabic, we find the term *ترجمة* (*tarjameh*) whose etymology refers to the act of interpreting language or explaining in another language (al-Zabidi v16, 73-4). This is reminiscent of the term *interpretes*, used by the Romans, and which later gave us “interpret” and “interpretation.” In Arabic, *tarjamaeh* was later used to designate biography:

the association of *tarjama* with a narrative genre, biography, to me indicates that the role of the translator is seen as related to that of a narrator, suggesting in turn the powerful potential of the translator’s agency. Syriac translators eventually turned to other subjects as well, becoming major conduits of Greek science and philosophy to their contemporaries, and it is perhaps relevant that a second meaning of *tarjama* is ‘definition’. This meaning may be related to the later involvement of Syriac translators with Greek learned texts, especially scientific and mathematical ones, for such texts are heavily oriented to defining and explaining objects of the natural conceptual worlds. This meaning may also be relevant to early Syriac and Arabic translation practice, for the translators did not merely transmit Greek texts unchanged; when scientific and mathematical knowledge had progressed, translators augmented the Greek texts with their own culture’s supplementary frameworks and advances, merging and recasting the Greek material so that the subject matter became better articulated and better defined in the translations.

(Tymozcko 2007, 70)

The definitions and etymologies of the terms used to refer to translation in different cultures reveal the participatory role of the translator that goes beyond the mere repetition or mechanical duplication. The etymological samples we provided view translation as deconstruction; shadow; making explicit or explanation; adaptation; transformation; going around; modification; illusion; metaphor; hermeneutics; paraphrase; transfer; interpretation; biography; and definition. In all of these cases, we can clearly identify an extension of the English notion of translation into areas that are not intuitively linked with translation to the non-speaker of those languages. While etymology is not the only determining factor in the meaning of terms, it is nonetheless illuminating because it allows us to understand the origins and evolution of the terms being studied, as well as gaining an appreciation of the different semantic spheres surrounding notions and terms in different languages and cultures. What is clear is that various types of agency have been associated with translation in different languages and cultures, and policy-makers ought to be sensitive to these specificities, and inclusive in their approach of studying the place of translation in a globalized world.

III.4.B Translation as writing

For a long time, learning to write was done through translation. Translation was seen as the beginning of writing. Writing does not only begin with translation, it keeps recalling it and coming back to it, as Derrida described when writing about the debt of the original towards translation (Derrida 1985). During the Renaissance, translation was the main genre of writing, because it was, for all authors, the locus where one’s language was formed (Berman 1988). The formative role of translation, individually or culturally, cannot be denied.

In *Second Findings*, Barbara Folkart criticizes any reduction of translation to imitation or repetition of the original,

promoting instead the idea of originality in translation:

Translation, of course, has an intimate relationship with the already-said. This is inevitable, and legitimate, since the already-said is by definition its point of departure. Far less legitimate is the mindset that continues to pervade the field: what Jacques Brault so aptly referred to as “l’épistémologie du pareil au même” reigns virtually undisputed, driving nearly all practice and, implicitly or explicitly, a significant amount of theoretical discourse. Outcome, according to this mindset, is measured by the extent to which the target-text repeats, or replicates, the source-text [...].

(Folkart 2007, 5)

For instance, poetry can illustrate the potential of originality, because it allows for the highest form of literary creativity. Yet, because of the limited view of translation as a mere repetition, this potential cannot be actualized:

The vocation of the poem is to break out of the already-said, to force its way through the wall of language and to put us into more or less unmediated contact with fragments of world. And this, as I see it, stands in contradistinction to both the practice of translation and the practice of translation theory, mediated modes of writing which all too rarely transcend the already-said.

(*Ibid.* 1-2)

This reductionist view of translation is not only held by the collective mind. It permeates what she calls the formalized structures or “ad hoc academic models”:

they are readerly, retrospective, after-the-fact constructs that have little or nothing to say about making text. From the creative standpoint, they are dead ends rather than points of departure. Preoccupied with the already-said, they have little commerce with the poem-to-come, the à-dire. Until such time as they are metabolized into an active, writerly impulsion, they have no future. *Writing, though, is future.* Writing is forward-moving, in-augural [...].

(*Ibid.* 13)

While Venuti and Berman controversially encouraged the use of “foreignizing” translations, which replicate microstructural elements of the source language into the target language in order to highlight its alterity and make the translational act more visible, Folkart considers this insufficient, not going far enough in appropriating an original work before translating it. “My approach involves appropriating both the source text and the target idiom, treating the multiple layers of the idiom as raw material that is *mine*—every last layer of it—mine to do with as I want” (*Ibid.* 22). This way of seeing translation takes the notion beyond its reading or interpretative role, and into being a writing or re-writing:

fixating on the already-said is no way to produce a translation that will in itself have value as a piece of writing. True admiration for the source text, true openness to otherness, involves recognizing the full of the text—the creative forces innovating in the author’s use of the source-language idiom, the pulsions and dynamics at work before and behind the finished product, the forces that come into play in making text. The fact is that texts, whether scientific or poetic, have to be *made* in the target language, written and re-enacted, rather than replicated, or repeated.

(Ibid. 7)

That is why she says that “the thinking translator does *as* (not *what*) the source-language author did” (Ibid. 22). This point of view is not the exception in translation theory. Meschonnic wrote that a successful translation is a writing, not an anonymous transparency, or the effacement and modesty of the translator that is taught during the instruction of professionals” (Meschonnic 1999, 85). While this view may not be openly stated by all those who hold it, numerous are those – theoreticians as well as practitioners – who make a point to state it with conviction:

I believe that poetic translation – I would call it an imitation – must be expert and inspired, and needs at least as much technique, luck and rightness of hand as an original poem. [...] All my originals are important poems. Nothing like them exists in English, for the excellence of a poet depends on the unique opportunities of his native language. I have been almost as free as the authors themselves in finding ways to make them ring right for me.

(Lowell 1961, xii)

According to these translation scholars, for a translation to be “successful,” it must be itself a writing. But there is not step-by-step process or precise instructions to follow to achieve it. It is rather an organic, intuitive process:

Above all, I want to stress that my renderings embody **instinctive choices**. When I speak of making the most of the native textures of the French language, or building in intertextuality, I am talking **after the fact**. For me, the translation of poetry is very much a matter of *ear* (in Guillaume’s sense of the word) rather than analysis; to work best it has to stem from the translator’s gut reaction to the source poem. Intuition is a function of experience, and gut reaction may in fact be based on a good deal of metabolized theory and criticism [...] but they nonetheless kick in sponte sua.

(Folkart, *op. cit.* 21)

As seen previously, this is in line with the approach of the Seleskovitch and Lederer interpretative model of the 1970s, which also relied heavily on the intuition of the translator to produce a text that is idiomatic and natural-sounding.

And similarly to the pleasure of reading and the possibilities it generates (see Barthes 1984, 42), she also sees in the act of translating, or writing a translation, the same desire:

Little of the canonical discourse on translation has anything to do with the actual business of making text. Nothing in it has anything to do with the *pleasure* of making text. Where the readerly, reverential approach stresses duty, authority, the law of the already-said, writing operates on the pleasure principle. To translate as a writer is to pleasure in the act of making text, moving forward with wonder and infinite respect for the possibilities of your raw material.

(Folkart *op. cit.* 30)

Today’s translation theory very much agrees with Folkart when she writes that “[w]riterly translation, in a word,

demands the very set of aptitudes, attitudes, and skills that writers work directly out of' (*Ibid.* 23).

Based on everything that we have discussed until now, we can see two opposed views of the author. On one hand, the author can be seen as a completely original creator to whom belongs, in a very ontological sense, all that s/he produces. On the other hand, the author is viewed as a synthesizer, whose originality is limited to the manner in which s/he puts the things inherited from others together.

As discussed in Part I, the work of an author can never be more than a reorganizing, a synthesis, a reworking of pre-existing material, without ever becoming a creation in the *ex nihilo* sense (see Paz 1992; Borges 1926). The entire notion of authorship is based on the idea of originality, which was severely criticized by Derrida (2007-8, 1994), Foucault (1969), and others. Yet, it persists in the general culture as in the philosophy of copyright law. And that is why it continues to be criticized:

The concept of the 'original' may not only be essentialist, as Jacques Derrida and other deconstructionists have argued it to be but, whether essentialist or not, it may simply not be a concept of any significance in other cultures which have, among other factors, a shorter history of both anti-communitarian romantic individualism and crass print capitalism.

(Trivedi *op. cit.* 120)

And the position of translation theory has been made clear again and again: every writing is a re-writing; every creation is a recreation; every telling, a retelling...

It is a curious fact of contemporary literary studies that very different branches of literary theory have converged on the same insight: every telling is a retelling. In studies of folklore and oral epic it is agreed that the content, form, and performance patterns of any given song or tale all belong to established traditions that the teller or singer inherits and in turn passes on to succeeding tellers or singers. Albert Lord, following Milman Parry, the framer of the theory of oral composition of epics such as the *Iliad*, *Beowulf*, and *La Chanson de Roland*, has summarized succinctly, "the picture that emerges is not really one of conflict between preserver of tradition and creative artist; it is rather one of the preservation of tradition by the constant re-creation of it. The ideal is a true story well and truly retold" (Lord 29, cf. 99 ff.). Every creation is a re-creation. [...] Deconstruction, as well as its critical progenitors, has also been at pains to point out that writers do not simply create original texts: to a great extent any literary text is dependent on literary texts that have gone before [...].

(Tymozcko 1995, 11)

If the "original" work of the author is already a re-writing, then we can expect the product of the translator to be a rewriting:

a literary work like a translation depends on previous texts: neither is an "original semantic unity," both are "derivative and heterogeneous" (see Lawrence Venuti 7-8, 68-69, 161 and sources cited). Every writing is a rewriting. Polysystems theorists, notably André Lefevere, have stressed that translation is a form of rewriting. Though translations are "probably the most radical form of rewriting in a literature, or a culture" (Lefevere, "Why Waste our Time" 241), they are to be grouped with other modes of processing primary texts, including film

versions, children's versions, criticism, literary histories, anthologies, and the like, all of which shape the evolution of literature and culture (see Lefevere's discussions in "Why Waste our Time" 232-411 "Literary Theory" 12-20; Translation, Rewriting, chs. 9-12). In "Why Waste our Time" (234), he notes that translation is generally also accompanied by other sorts of rewriting, notably "by an introduction, which is a form of criticism cum interpretation.") Texts do not exist simply in their primary form; rather texts are "surrounded by a great number of ... refracted texts" (Lefevere, "Literary Theory" 13; cf. "Mother Courage's Cucumbers" 4-8, 16-19). Processed for various audiences or adapted to a particular poetics or ideology, refracted texts are responsible in large measure for defining, maintaining, and redefining a canon. Translation is one form of refraction, a form of writing that is rewriting.

(*Ibid.* 12)

Saying that every writing is a rewriting, and every creation is a recreation does not equate to negating any element of uniqueness, novelty or originality:

[...] while a marginalized text is a retelling or rewriting for its original audience, it is neither for the target audience. The translator is in the paradoxical positions of "telling a new story" to the receptor audience, even as the translator refracts and rewrites a source text—and the more remote the source culture and literature, the more radically new the story will be for the receiving audience.

(*Ibid.* 13)

But this originality or novelty does not mean *ex nihilo* creations, such as those implied by the romantic figure of the author. This is the idea that Tymoczko tried to put forward through the notion of metonymy:

John Foley (192 ff.) has argued that when a traditional oral tale is told, the telling is metonymic. For a traditional audience each telling evokes metonymically all previous tellings of the tale that the audience has participated in and, further, the telling instantiates and reifies metonymically the entire tradition that the audience and teller share. [...] All literature works this way and the metonymic aspects of texts are not restricted to content. Aspects of poetics, specifically literary form, are also metonymic. Thus, for example, any single English sonnet evokes all the sonnets of Shakespeare and Petrarch, as well as the entire tradition of sonnet writing. This is so because any writing is a rewriting. The special group of rewriters called translators grapples with the metonymic aspects of literature all the time. In translations of works from literary systems that are related to the receptor literary system—for example, literary systems that with the receiving language system form a megasystem, such as French and English literature do—most of the metonymic aspects of the source text are transparent to the target audience.

(*Ibid.* 14-16)

It is in this sense that I consider the product of translation as a rewriting, as is the writing of the author. In a sense, we may say that every writing is a translation, a retranslation, and a rewriting.

Every translator adds a specificity to their translation that cannot be replaced by another translator. This brings us back to the specificity of the humanities, which rejects the complete interchangeability of agents, not only because of the subjectivity required to reach unison between subject and object, but also to validate the historicity of the testimony.

There is nothing new in asking to what extent the translator is an author. But if there is still a need to ask the question, it is because it has not been answered, or because the answer has not been heard. The status of translators is still very much tied to their visibility and presence, or lack thereof. To address the question more comprehensively, the relationship between translators and editors must also be taken into consideration (as in Pym 2010 for example), because it reveals a power balance that goes beyond the individual translator and editor, to reach a global scale of political economy. Of course, this would require detailed studies of national and international markets, and their contribution to a certain image of translation, as well as the economic and political forces that direct that selection, operation and publication of translations. Depending on how we view the status of the author in relation to that of the translation, we may hold a different position on issues such as whether the author should have the right to decide what becomes of the translator's work, and whether it is normal for the translator's name to only appear in smaller font, if at all, on the cover of his or her translation, as is implied by the *Translator's Charter*.

Throughout history, the scale always seems to have leaned on the side of the author in this relationship. Today, copyright law continues in the same tradition by granting the author the right to decide on the life or death – so to speak – of the translation of their works.

If we remain stuck in the author-translator duality, attempting to improve the status of the translator can be done by one of two ways: elevating the status of the translator to that of the author by considering the translator an original creator, or lowering the status of the author to that of the translator by considering every writing a rewriting or a translation. If we had to choose one of the alternatives, it would have to be the latter, as it is much more consistent with the scholarship of translation studies.⁶⁴

However, both of these views suffer from the same problem of reducing one reality to another. Despite the parallels and similarities, authorship and translation remain two distinct activities, even if it is clear at times that one cannot perform one of them without also performing the other. The fact that the boundary between the two can be blurred to the point of conflation is proof that they are indeed two different tasks, because it implies the existence of two entities, albeit converging when studied under a specific lens.

While the myth of the semiotic transparency has fizzled out, and while we know that the translator leaves a trace in the text, we must not conclude from this that a hypostasis of the translator will take place, replacing the theological place of the author, left vacant since structuralism and post-structuralism dislodged him out of it. After the death of the author (not to say that of the human), is it possible to resuscitate, for translation, the notion of work, implying a recognition of authorship, with a strong and singular identity, while the

⁶⁴ The originator of this idea is Salah Basalamah, who has repeatedly taught it to his students over the years, especially in his M.A. and Ph.D. seminars on translation theory. Although I could not find it explicitly stated in any of his published works, there is no doubt that it must be attributed to him. Though the idea itself is not expressed in this manner, some of its ramifications can be found in 2009: 178-179 as well as 361-387.

contemporary subject knows that he is an identity flow, a permanent construction subjected to the multiplicity of its diverse appearances?

(Nouss 2001, 562: my translation)

Furthermore, elevating or lowering one task to the other would only lead to the effacement of the specificity of at least one, if not both, of the tasks.

The specificity of translation will always be its intermediary nature, representing the interpretative journey, and symbolizing the *bildung*. This is the identity of translation which highlights the presence of the other, and the necessity of moving from the self to the other and back. This cannot be fully rendered simply by reducing translation to writing, which does not automatically recognize the presence of the inaccessible foreigner, be it a language or a culture. It would be failing to recognize our debt.

If we turn our attention back to the pragmatic documents of the documents and reports produced by the United Nations and the European Union, we find that it is customary to reduce translation to authorship, by omitting any mention of translation, so as to hide the power balance between the language and culture in which the document was originally drafted and that in which it was translated. The irony is that the omission renders the power balance more obvious, in addition to highlighting the hierarchy between authorship and translation. The objective should therefore never be one of reducing one of the agencies to the other, but to preserve the identity of both agents. This would not only be beneficial to the status of both professions, but also a symbolic gesture representing a refusal to reduce languages, cultures, legal systems, etc. to each other, when they are in fact irreducible.

The accountability of the author towards their translation stems from their recognition as the translator. This does not necessarily require a foreignizing translation which distorts the target language with various imports from the source language. Simply identifying a work as a translation, with a clear identification of the translator's name, are steps in the right direction of enhancing the image of the translator. When translators dare produce a "writerly translation," this does not automatically make the work "unfaithful," because it smells of "translationese."

Robert Lowell's poem *Skunk Hours* ends with the following image:

*I myself am hell,
nobody's here--*

*only skunks, that search
in the moonlight for a bite to eat.
They march on their soles up Main Street:*

*white stripes, moonstruck eyes' red fire
under the chalk-dry and spar spire
of the Trinitarian Church.*

*I stand on top
of our back steps and breathe the rich air--
a mother skunk with her column of kittens swills the garbage pail
She jabs her wedge-head in a cup
of sour cream, drops her ostrich tail,
and will not scare.*

This is the story of a dark night, pierced by moonlight, during which a mother skunk and her little ones look through trash, finally to be rewarded with something to eat. This is symbolic of the translator, fighting to survive, in the dark, looking through someone else's leftovers, hoping to find a bite to eat. But the skunk is not ashamed or afraid of what it is doing. And anyone who comes by will know that a skunk was here, because it leaves its scent. The translator is perhaps not so invisible after all.⁶⁵

When the liberties of translating freely are sometimes graciously granted to the translator, they are often limited to the very literary texts. But the task of the translator is what will determine how the text will be translated, whether it is a poem, a law, an instruction manual, or a medical textbook. In these and any other cases, the translator will read, interpret, and rewrite the message in another language and for another culture, in a manner that they deem best suited to the new audience, and with the choices required for the purpose of the translation.

So long as translators announce that their work is a translation, the author (and their works and reputation) is protected, because the audience will understand that this is a rewriting, by another agent, of a foreign work, which implies choice and reinterpretation. If the translated work is well received, the author of the translation ought to be credited for *their* part of the work; if it is not, they are to be held accountable, because they played a role in *their* work as well.

Despite all of these references to the agency of translation as a social phenomenon, and of the translator as a social agent, it remains that translation in itself cannot be considered good or bad on its own. By failing to understand their agency within the macrostructures of society, translators may simply perpetuate and even enforce structurations that they deem to be unjust or leading to subservience of themselves or of others. The aim of the preceding discussions was therefore to raise the awareness of the reader to the potential roles that may be played by translation and translators, and ensure the public policy experts include them in their considerations.

⁶⁵ Comanescu 2003.

Part III: Translation and the New World Order

This part examines the new realities of the world from the lenses of knowledge societies, technology, and globalization, in order to understand the current, as well as potential, role translation in modern networked societies.

In Chapter 8: Knowledge society and the translation right, I establish that the translation right impedes translation's role in allowing citizens and societies to participate in the knowledge society as consumers and producers of knowledge, which is the new capital of the world.

In Chapter 9: Information and communication technologies and the translation right, I show that the translation right impedes the macro-structural role of translation by hampering collaborative translation projects, while lacking the necessary updates to address the microstructural and technological changes that have taken place in the translation profession as a result of the integration of translation technologies.

In Chapter 10: Globalization and the translation right, I demonstrate that translation can play a significant role in the preservation of linguistic and cultural diversity, both online and offline. The chapter also explains the specific needs for differentiation, particularly with regards to the translation right and its role for education in the developing world.

Overall, Part III highlights the tremendous gaps between the haves and the have-nots, and demonstrates that the translation right is outdated and unsuitable for the new realities of the world, and that instead of enabling the dissemination of knowledge and culture, it impedes the potential role of translation in performing those functions.

Chapter 8: Knowledge society and the translation right

Information is power. But like all power, there are those who want to keep it for themselves. [...] Large corporations, of course, are blinded by greed. The laws under which they operate require it—their shareholders would revolt at anything less. And the politicians they have bought off back them, passing laws giving them the exclusive power to decide who can make copies.

There is no justice in following unjust laws. It's time to come into the light and, in the grand tradition of civil disobedience, declare our opposition to this private theft of public culture.

We need to take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that's out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access.

With enough of us, around the world, we'll not just send a strong message opposing the privatization of knowledge—we'll make it a thing of the past. Will you join us?

(Swartz 2008)

All physical and virtual interactions between human beings are informational. The access to information and control over its circulation and exchange are the most essential foundations of societies and states, and have always been at the center of the theorization of democracy. For instance, Habermas, in his model of an effective democracy, proposes an idealized space, outside of state power and corporate influence, inside which information can flow freely, feeding discussions and debates of public interest and civic concern. That is because, according to him, without open communication, access to information and neutral exchanges, there can be no healthy democracy (Jaeger 2010, 25).

When the Internet was introduced for mass usage, many saw it as that autonomous space, outside the bounds of regulation, where information could finally be free. In 1996, John Perry Barlow published his *Declaration of the Independence of Cyberspace*, in which he wrote that “legal concepts of property, expression, identity, movement, and context do not apply” (Barlow 1996). That was perhaps the closest formulation to the public sphere Habermas has been looking for.

As we saw in Parts I and II and will continue to see in the chapters of Part III, the distribution of wealth and power in today's world keeps getting more uneven with every passing day. This is clearly witnessed in various dimensions of society, such as economy, technology, and knowledge. Specifically, the knowledge divide is at the root of many problems. Those who do not have access to information and knowledge will not be able to acquire the cognitive infrastructure required to take advantage of technology, even when that technology is made available materially. In addition, nations lacking the material and cognitive infrastructures will also lack the expertise required to negotiate matters of IP on equal footing with developed nations.

Yet another vicious circle emerges when there is a sufficiently strong demand for information to be available, in which case citizens will tolerate illegal activities that make such information accessible (Hu 1996). In turn, this will lead to stronger IP protection and monopolistic offer, thus rendering the information even less accessible. This dynamic keeps feeding and contributing to the unevenness of informational distribution. If the IPRs were adequate, the information would be more accessible, the system would become more sustainable and the distribution of information more even (Tian 62).

Most postmodern and poststructuralist thinkers have emphasized the reciprocal, generative and inseparable dynamics of power and knowledge. To have any power in the networks of a knowledge society, one must participate in the control and construction of knowledge (Lyotard 1984).

Nothing controls information like intellectual property, and specifically copyright law. Fully anchored in colonial history, international power relations, and the lobbying of multinational corporations, copyright is quite removed from such an idealized, “neutral” space. Today, we live in the information age, in information societies, where information use has become ubiquitous, thanks in large part to information and communication technologies. It is therefore of the utmost importance to understand this new context, in which the same copyright law of the 1800’s still operates, to determine how best to use it, if at all, for the betterment of today’s and tomorrow’s societies.

I. Terminological remarks

The lack of comprehensive and widely accepted theoretical definitions of the notions we seek to explore are a source of confusion for any researcher attempting to clearly define the object of study. The literature on the topic includes numerous term combinations, including “information economy”, “knowledge economy,” “knowledge society,” “information society,” “knowledge-based economy,” among other terms.

“The weakness or even complete absence, of definition, is actually pervasive in the literature [...] this is one of the many imprecisions that make the notion of ‘knowledge economy’ so rhetorical rather than analytically useful.” (Smith 2002)

While the terms “knowledge society” and “information society” were mainly constructed by academics, “knowledge-based economy” seems to have been mainly developed by international political organizations, such as the OECD, to focus the discussion on economic growth. Perhaps it is this terminological vagueness that has led some scholars to define knowledge as *everything that is regarded as knowledge in and by society*, and

therefore define knowledge societies (or k-societies) simply as “what they are defined by the actors creating them” (Hornidge 2007: 66). For the purposes of this thesis, these terminological considerations will be ignored. I will be using the term “knowledge society” to cover all of these notions.

II. What is an information society?

Knowledge and information are not only contributing to economies, they have become their most important capital and drivers. While economic theory has classically only recognized labour and capital as the factors of production, endogenous growth theory – mainly that of Paul Romer (1986; 1990) – now considers knowledge to be the third factor of production in leading economies.

Knowledge, productivity, education, and intellectual capital were all considered factors falling outside the economic system. By studying the causes for long-term economic growth, a number of economists proposed considering knowledge and technology intrinsic, or endogenous, factors for growth. This new economic theory breaks away from classic economic theory in the following elements:

- The basic form of capital is knowledge, meaning that an accumulation of knowledge results in economic growth. Knowledge is the basic form of capital. Economic growth is driven by the accumulation of knowledge.
- Investing in knowledge and education increases the probabilities for technological breakthroughs, which in turn provide the ground for further innovations. This cycle in itself is a key driver of economic growth.
- Contrarily to traditional economics, which state that returns on investment diminish with time, investing in knowledge and ultimately technology will continuously provide positive returns on investment because of non-rivalry of information and knowledge, as well as the dynamics of the cycle mentioned in the previous bullet.
- Investing in technology increases its value, which in turn increases the value of the investment. This cycle means that a country’s economic growth can become permanent. This is not possible to reproduce in labour markets.
- Finally, this new theory still holds, in full agreement with the assumptions of IP, that it is necessary to grant a certain monopoly as an incentive for companies so they keep investing in research and development in order to innovate. Of course, this is in opposition to the idea of perfect competition in a free market.

With all of this said, the most important driver in this theory remains human capital: in order for this “virtuous cycle” to keep yielding results, constant investments must be made in the education and training of citizens. (ITAG 1999, 4)

The determining role of knowledge and information for economic growth in today’s societies is well established. The *World Development Report 1999* stated that:

[f]or countries in the vanguard of the world economy, the balance between knowledge and resources has shifted so far toward the former that knowledge has become perhaps the most important factor determining the standard of living—more than land, than tools, than labor. Today's most technologically advanced economies are truly knowledge-based.

(World Bank 1999, 25)

Knowledge circulation and distribution are now determining factors for economic growth. Consequently, IPRs, which control the circulation, distribution – both of which include translation – and cost of knowledge, and which form a large part of the 75 – 80% of the capital on Wall Street (Ullberg 16, in Meredith 2006) must be developed and managed in a manner that is consistent with the new role of knowledge in society.

II.1 Difference between information and knowledge

Although information and knowledge are often used interchangeably, very useful distinctions have also been made by a number of theorists.

Bertam Brookes's equation $[K(S) + \Delta(I) = K(S + \Delta S)]$ is one such example. Starting from Karl Popper's ontological scheme (Popper 1972, 4) of the physical cosmos, the world of subjective human knowledge and mental states, and the world of objective knowledge – which is made up of products of the human mind as recorded in artefacts – Brookes proposed that information science is the interaction between the second and third worlds. In non-mathematical terms, he was suggesting that a person's knowledge structure $[K(S)]$ changes into a new knowledge structure as the information at their disposal changes $[\Delta I]$ (Brookes 1980a, 125-133).

Professor Michael Buckland tries to resolve the ambiguity of the concept of information by distinguishing information as process, information as knowledge, and information as thing (Buckland 1991 a, b).

In "Defining Information: An Approach for Policy-Makers," Sandra Braman presents a four-part hierarchy of information policy which increases in scope and complexity, in order to resolve the issue of allowing the economic value to overtake the entire discussion. From the lowest they are: information as resource, information as a commodity, information as perception of pattern, and information as a constitutive force in society (1989, 233-242).

Continuing in this hierarchical pluralism approach to understanding information and contributing to information policy, some thinkers have added three "aspects" which, when combined, highlight the interrelatedness of morality, power relations and legal regulations. This holistic approach is made up of the following aspects: The first consists in synthesizing components of information policy that are usually isolated (e.g. intellectual property, censorship, and privacy). The second aspect takes into consideration the different

levels of decision-making (e.g. local, provincial, federal, international...). The third aspect consists in bridging the ethical/normative issues with the positive legal analysis (Trosow in Meredith, 404-5). These are the elements on which I have generally relied in this thesis as a guiding model.

II.2 DIKW (Data, Information, Knowledge, Wisdom)

Machlup, an important contributor to the theory and principles of knowledge societies, chose to ignore the difference between information and knowledge:

I propose that we get rid of the duplication “knowledge and information” [...] Webster’s Dictionary defines “information” as “knowledge communicated by others or obtained by personal study and investigation”, or alternatively as “knowledge of a special event, situation or the like”. Hence, in these ordinary uses of the word, all information is knowledge.
(1962, 12)

As explained by Wersig (1973: 16) given Machlup’s influence on the measurability of the knowledge sector on the American economy, his terminological choices had a lasting influence on most thinkers who were aware of his work, and this offers a good explanation for today’s interchangeable use of “information society,” “knowledge society,” and “knowledge-based economy.” But there are other factors contributing to this terminological confusion, such as academic vs. political discourse, and the parallel yet independent evolutions of the terms and theories.

However, the majority of scholars do differentiate between information and knowledge (see Wersig 1972: 28). Luft (1994), Davis & McCormack (1979), Bellinger et al. (2004), Kuhlen (2004, 9) and others generally agree that there is a hierarchy leading to knowledge and beyond. Data is the raw material for information; information for knowledge, and knowledge for wisdom. This is sometimes referred to as the DIKW chain (or Data-Information-Knowledge-Wisdom Chain) (Hornidge 2007, 28).

Farradane (1979) explains that the human brain processes information, while knowledge is the internal cognitive structure that is not directly accessible. Zeleny (2005: 25-29) considers the movement from data and information towards knowledge and beyond as irreversible. Others see knowledge as the human ability to process information and make something with it. Stehr writes that: “Information is merely the resource from which knowledge is made. Yet, it is knowledge that furthers contemporary societies, not merely information” (1994, 12).

In her *Knowledge Society* (2007), Hornidge explains that while political discourse chose “information society” to emphasize the role of ICTs, and “knowledge-based economy” to highlight the potential economic growth of

increased knowledge production, the academic discourse generally uses “knowledge society” to study the process and outcomes of increased knowledge production and education in society:

it can be stated that the concept of the ‘knowledge society’ has its origin clearly in the academic field, while the concepts of the ‘information society’ as well as especially the concept of the ‘knowledge-based economy’ have some roots in the academic field but were strongly further developed and used in the political sphere.

(2007, 30-31)

II.3 Building the Knowledge Society

Robert E. Lane, the father of the notion of knowledge society, writes:

“‘Knowledge,’ of course is a broad term and I mean to use it broadly. It includes both ‘the known’ and ‘the state of knowing.’ Thus a knowledgeable society would be one where there is much knowledge, and where many people go about the business of knowing in a proper fashion” (1966, 649).

Stehr explains that society is shifting from having an economy that is driven by material inputs and outputs, to one where symbolic or knowledge-based inputs and outputs are the determinant trait. He adds that today’s dominant form of knowledge is objectified knowledge, which he explains as: “the highly differentiated stock of intellectually appropriated nature and society which may also be seen to constitute the cultural resource of a society. Knowing is, then, grosso modo participation in the cultural resource of a society” (1994: 92-93). This of course, is directly related to the idea of participatory society or democracy that we have already encountered throughout this thesis, and towards which we must strive.

Evers *et al.* explain that knowledge society is characterized by knowledge work, which itself requires a constant production of new knowledge, which “needs to be systematically organized and institutionalized to be productive” (2000, 6). And according to Willke (1998) and Gibbons *et al.* (1994) we can only recognize a knowledge society once all of its sectors are producing their own knowledge and therefore sustaining that society.

II.4 Knowledge, Information, and Society

Recognizing the role of knowledge for the development of society is not itself revolutionary. In his *Republic*, Plato had stated that intelligence is the most important quality of a political leader. However, the shift towards a coherent political economy and socio-cultural model in which knowledge plays a determining role is a much more recent development in the history of thought. In 1863, Mill explained that intellectual and moral educations are more important than industry and wealth for the development of a society (Mill 1974).

II.4.A Umesao

Under the influence of Japanese economist Tadao Umesao (1963), Japan can be considered as the first country to undertake the construction of an information society. Drawing inspiration from biological evolution, Umesao argued that if employment was increasing in the production of intellectual goods and decreasing in the agricultural sector, it was because, like a living organism, it was evolving from merely digesting material goods to planning and controlling their production (Dordick / Wang 1993; Steinbicker 2001).

II.4.B Lane

In 1966, Lane developed the notion of a “knowledgeable society” in which knowledge creation, consumption and furthering are “present to the greatest degree.” He writes: “Just as the ‘democratic society’ has a foundation in governmental and interpersonal relations and the ‘affluent society’ a foundation in economics, so the knowledgeable society has its roots in epistemology and the logic of inquiry” (1966, 650). He also insisted that “if professional problem-oriented scientists rather than laymen come to have more to say about social policy, the shift in perspective is likely to occasion some differences in policy itself” (1966, 659). Clearly, this criterion was not held in the definition of “knowledge society” used in the political sphere, where the emphasis is on economic growth. About this criterion, Hornidge comments accurately: “Rational decision-making, based on scientific knowledge and not the interests of certain lobby groups are rather rare in most countries even if the scientific community takes part in expert commissions influencing these processes of decision-making [...]” (2007, 33).

II.4.C Machlup and Bell

Though there were overreaching postwar attempts to express information in mathematical terms in *The Mathematical Theory of Communication* (Shannon and Weaver, 1949), it was Fritz Machlup who really introduced information and knowledge as economic factors in *The Production and Distribution of Knowledge in the United States* (1962), even prophesizing their rise in the economic sense. In addition to agriculture, industry, and services, he talked about the “knowledge industry” as a fourth economic sector, and used data to assess its contribution to the American gross national product (GNP), concluding that a knowledge economy was in fact emerging at the time of his writing in 1962.

Peter F. Drucker (1958, 1969) suggested that knowledge became the foundation of the modern economy when society shifted from economy of goods to a knowledge economy. According to Drucker, the role of the state is simply to put in place the infrastructure required for the industry to keep developing ICTs. In fact, he sees the future of knowledge societies as being led by multinational corporations as opposed to national

governments. It may very well be argued, based on some of the findings presented earlier in this thesis, such as Chapter 4, that societies are indeed heading in that direction.

Many theorists were significantly influenced by Machlup's works, including American sociologist Daniel Bell, who had been publishing articles on the topic since the 1950s. In *The Coming of the Post-Industrial Society: A Venture in Social Forecasting* (1973), he introduced the notion of post-industrial society, explaining societal transition towards a post-industrial age led by information and based on service, as opposed to manufacturing. Therein he declares that "The post-industrial society, it is clear, is a knowledge society" (1973, 212). In order for it to evolve from being an industrial to a post-industrial one, society must make theoretical knowledge the source of its innovation and policy formulation. The technological intelligence of the knowledge class, according to Bell, gains economic, social and political influence and the service sector therefore represents a larger share of employment and revenues. In the 1980s, Bell writes about the development of ICTs as the third revolution, after mechanization and technology (Kubler, 2005, 26). This can perhaps be seen as the beginning of the emergentist point of view of technological determinism, which believes that the presence of technology causes the emergence of knowledge society, which I will argue against in favor of a constructivist hypothesis of knowledge society. Contrarily to Drucker, Bell believed that the industry will rely much more on the state to keep producing ICTs. Like Lane's predictions before him, Bell's assumptions about the central place of universities and research institutions did not hold true. Many authors (Evers 2000; Heidenreich 2003; Knorr-Cetina 1999; Willke 1999, etc.) have argued that the importance of academic work since the 1980s is nowhere what it was during the cold war. Again like Lane, Bell does not explain how scientists ought to move into the centers of power in society, and his prediction that academics and technologists will rule society is no more true today than it was 40 years ago (Gershuny, 1978, 37). Collins (1981, 307) also criticizes Bell's claim that education certificates are indications of knowledge transfer, and highlights that they are also means to identify status groups.

Zbigniew Brzezinski's *Between Two Ages: America's Role in the Technetronic Era* (1970) also hypothesized about a transition away from industrialism, this time to become a "technetronic" society, one that is shaped culturally, psychologically, socially, and economically by the impact of technology and electronics – particularly in the area of computers and communication" (Brzezinski 1970, 9).

II.4.D Touraine

French sociologist Alain Touraine directly addressed knowledge "haves" and "have-nots" in the *Société postindustrielle* (1969), but this was with regards to the relationship between capital and labour, and the reduced role of labour movements as drivers of social change. This Marxist urban sociology was the starting point of the work of Manuel Castells, who considers Touraine as his intellectual father.

II.4.E Nora and Mink

In 1974, Simon Nora and Alain Mink published a report that will be followed by a number of other works describing the positive effects of the *informatisation* of French Society. Informatisation is a process that combines telecommunications and automatic data processing (together called *télematique*) to drive the development of hardware and software, which in turn trigger growth as a result of ICTs becoming the infrastructure of the nation. This work was influential on French politics and policy.

II.4.F Stehr and Böhme

In 1986, Stehr and Böhme published *The Knowledge Society*, in which they emphasized the defining role of scientific knowledge in societal transformation. They argued that it is the penetration of scientific knowledge in all aspects of life that is the constitutive mechanism of the historical emergence of knowledge societies (1986, 4-8). Kreibich agreed with much of Stehr and Böhme's conclusions, and even proposed to name the societies of the future "science societies" (1986).

In opposition to Stehr and Böhme, Willke (1998, 1999) as well as Gibbons *et al.* (1994) argue that with time, science actually loses its dominance over other areas of knowledge production, which produce their knowledge independently. These include the cultural, the judiciary, the economic, and the health sectors. It is this independent knowledge production that is constitutive of knowledge societies. This debate between Stehr and Willke highlights the varying degrees of monopoly attributed to academics by various models. The decentralized model generates a new way of producing knowledge that slowly replaced the first. It goes beyond the traditional, disciplinary, academic methodology. Instead, this model is driven by problem-solving, is transdisciplinary, and done within a framework of application, as opposed to theory. Of great relevance to us is the condition that in a knowledge society, knowledge production and consumption is so decentralized, that it enables most citizens to participate therein, which brings us back to the notion of a participatory society.

II.4.G Castells

In *The Gutenberg Galaxy* (1962), Marshall McLuhan coined the term "global village", in which the electronic interdependence and the instantaneous movement of information will allow humankind to move from individualism and fragmentation to a collective identity that is no longer dependent on the physical city. Manuel Castells relied on this premise in his *Informational City* (1989) to explain the links between informationalism and capitalism and introduce the notion of space of flows, which is "made up first of all of an technological infrastructure of information systems, telecommunications, and transportation lines" (Castells 2000, 19). He then published *The Information Age* trilogy (which he republished in 2000 with 40% difference in volume 1)

where the evolution from industrial society to informational society is detailed, always with the dialectics of the Net and the Self in mind. In *The Rise of the Network Society* (1996) he analyzes the structural changes to the global, informational economy following the revolution of the information technology. Moving to a network organizational structure enables this transition towards informational economy and a culture of real virtuality, organized around electronic media. The development of ICTs forces governments to restructure capitalism based on new policies, leading to the global information capitalism. In *The Power of Identity* (1997a) he explains the tensions between traditional and new social institutions. Movements of social resistance (environmentalism, feminism, LGBTQ+... anti-patriarchalism) to the process of globalization in the name of humanity or one's country, and overwhelming pressures on the welfare state have resulted in the current crisis of political liberal democracy. The state as well as civil society lose their identity, and social movements may provide the only hope for alternative sources of identity. In the *End of Millennium* (1997b) the author emphasizes social exclusion resulting from the rise of informationalism. He uses the collapse of the Soviet Union to demonstrate how a superpower can quickly fall into being part of the fourth world (stateless, poor, marginal nations) because of its inability to adapt to the new technological and economic conditions, especially once communication was allowed more freely under Gorbachev. All social entities that entered the Information Age in a position that enforced their exclusion progressively lost their access to the means for meaningful survival, and formed the fourth world: social black holes where there is no escape from deprivation and suffering. The rest of the network sees no value in these elements and therefore circumvents them and switches them off. Some of these fourth world actors leverage technology and come together as criminal networks that are sometimes more advanced than multinational corporations. They can completely penetrate all aspects of legal economy and state institutions, as has happened in Japan, Russia, Italy, etc. and disrupt politics and economy at large scale. He elaborates on the concept of the "developmental state", which presents its legitimacy on its ability to promote and sustain development, like the Pacific Rim of Korea, Taiwan, Singapore and Hong Kong, and highlights once again the tension between local and global meanings and interests. Finally, he uses the unification and integration process of Europe as an example of the development of a network state; a defensive project organized around a limited set of mainly economic common interests.

While there might have been a time when academia seemed to hold the monopoly over the production of knowledge, in a knowledge society, there is a decentralization of knowledge. For instance Hans-Dieter Evers (2000, 2005) argues that the production of knowledge is now mainly a dynamic, polycentric output of science, industry and university. Heidenreich extends the innovation and knowledge production role to all sectors of society, including economy, technology, mass media and even family. This tendency of decentralization is highlighted by other scholars as well (including Knorr-Cetina 1999 and Willke 1999).

II.5 Attention economy

In pre-industrial as well as industrial societies, physical power and material goods drove the economy. People were first paid for output produced then for time spent on the job. In the information age, power comes from controlling information and knowledge production. Some thinkers now suggest that “as flows of unnecessary information clog worker brains and corporate communication links, attention is the rare resource that truly powers a company. Recognizing that attention is valuable, that where it is directed is important, and that it can be managed like other precious resources is essential in today’s economy” (Davenport and Beck 2001, 17).

As the amount of information increases, so will the demand for attention. “What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention” (Herbert Simon in *Id.*, 11). This relationship between information and attention is the main object of study of an entire field of research now called *attention economy*, which tries to look at the issue from various disciplines and points of view. Attention as a psychobiological faculty and a psychosocial good (service?) undoubtedly plays growing cultural and economic roles.

Access to means of production, to markets, to customers, to information... used to be the main limiting factor to success. The Internet has completely changed this by providing this access. But this has meant that there is an over-abundance of offer, so the offer must compete for the attention of the consumer. Those who understand this will therefore invest in all the means necessary to attract and retain attention. While it is a lot cheaper to diffuse information, the cost of getting past the filters and to the consumers rises exponentially. The amount of attention that a person, an idea, a product or a company can attract is becoming one of the main measures of success. Attention mediates all activities in such a world (*Id.* 219).

Attention economy can have far reaching consequences . As collective attention shifts from one topic to another, so does collective knowledge exchange (Ciampaglia et. al. 2015). It may also be studied as a power apparatus, according to Foucault’s notion of societies of security (Foucault 2009), where the main function of human attention shifts from a role of imposing continuous surveillance, to becoming a source of data (Bueno 2016). It has also been solidly argued that “the digital media environment that has supposedly put attention to democratic use – for both buyers and sellers of scarce attention capital – paradoxically incorporates attention more completely and illegibly into the machinery of capitalism, and makes it harder, not easier, to assert ownership of one’s attention” (Albanese 2014, 192).

In “Big other: surveillance capitalism and the prospects of an information civilization,” Shoshana Zuboff (2015) analyzes the institutionalized practices of Google, as representative of this new phenomena, to reveal an implicit logic of surveillance capitalism that results in a new power she calls “Big Other.”

It is constituted by unexpected and often illegible mechanisms of extraction, commodification, and control that effectively exile persons from their own behavior while producing new markets of behavioral prediction and modification. Surveillance capitalism challenges democratic norms and departs in key ways from the centuries-long evolution of market capitalism.

(Zuboff 2015, 75)

Zuboff further explores this in “The Secrets of Surveillance Capitalism,” (2016), which she begins by declaring “Governmental control is nothing compared to what Google is up to. The company is creating a wholly new genus of capitalism, a systemic coherent new logic of accumulation we should call surveillance capitalism. Is there nothing we can do?”

In the field of translation studies, the question of attention has been a recurrent theme, well represented by Lawrence Venuti’s iconic *The Translator’s Invisibility* (1995). While Michael Cronin’s *Eco-Translation – Translation and Ecology in the Age of the Anthropocene* (2017) casts a wider net than attention economy, he is the only translation scholar who has directly addressed the topic of attention economy in its recent formulation. In this work, he manages to integrate the notion and its surrounding issues with the ecological discussion at large.

As translation battles for recognition in the increasingly crowded attentionscape of late modernity, how are we to think about what it means to be attended to and what might an ‘ecology of attention’ mean in terms of what translators do or aspire to do? One of the reasons for desiring the attention of others is to make work visible or have it valued. The difficulty in the contemporary moment is that the products of translation may be visible but not the process. Taking a key concept from social anthropology, the ‘logic of inversion’, [Cronin] looks at how the means needed to bring about a translation – human, social, cultural – are often sacrificed to the ends of immediacy, transparency and instantaneity. This tyranny of ends over means relates to the more general concealment of the earth’s resources that have made human action possible.

(Cronin 2017, 3)

Inspired by the ecology of attention proposed by Aurélien Gamboni (24), he proposes to make the commons of language an ends in itself (29) and to resist the constant acceleration of the production-consumption cycle as it relates to translation, which makes it invisible, instantaneous, and automatic (28) by replicating the Slow Food movement in the language industry (4, 51) and viewing translation as a craft (6, 117).

Cronin's valiant synthesis of ecology, attention economy, and translation theory is masterful. I deem his discourse, however, to be too activist for the purposes of this thesis, and therefore out of scope here.

I do, nevertheless, entirely agree with him that we must be careful in ensuring that we recognize translation as a driver of political, economic and cultural systems, and therefore, questioning practices that result in making it complicit in the same extractivist patterns we have criticized under the pretext of modernizing and developing society.

III. Emergence or Construction?

While most academics speak of information and knowledge societies as though they emerge naturally as a result of a certain level of ICT development, no evidence is offered to support the claim. It is therefore legitimate to wonder whether knowledge societies emerge as a result of the natural maturation and evolution of societies from industrialism and capitalism, or whether they have to be constructed. Very few scholars seem to have addressed this question directly, and the evidence they provide supports the construction theory, as opposed to the emergence theory.

In 1988, David Lyon published *The Information Society: Issues and Illusions*, in which he attempts to identify how the development of a knowledge society "is orchestrated, by whom, to what purpose and with what methods and effects" (1988, 20). He highlights the potential conflicts resulting from the unequal access to information in the world, as well as internal conflicts stemming from the transition itself, such as the commodification of knowledge and its impacts on libraries. While he recognizes society's ability to shape and influence the discourse on the role of knowledge in societies, he does consider the emergence of information society as a natural phenomenon.

In *Theories of the Information Society* (1995), Frank Webster outlines and analyzes many of the theories of knowledge and information societies, showing the common threads of the importance of information and knowledge in the modern era, as well as their being causes for social change. He does not agree with Bell, Castells, Baudrillard, etc. that information societies are the result of a revolution. While he sides with the view that they are the result of continuity, held by Habermas, Giddens, etc. he strongly warns against putting too much emphasis on technological development, as it leads to desocializing social change and being blind to its construction.

Armand Mattelart (2003) criticizes the notion of technological determinism and states that "information society" is an imperial, ethnocentric, geopolitical construct serving political and economic interests, and leading to important diplomatic, military and developmental repercussions. Hornidge also argues that knowledge

societies are constructed in the political sphere by social actors, and that the concept is utilized ideologically in order to justify political action (2007, 67).

Once the theoretical foundations and concepts of knowledge societies had been explained by academics, national governments launched major technological and economic initiatives and programs to create societies labelled as such for the sake of development and to justify political action. The vagueness around the notion of knowledge society gives governments and institutions the flexibility to define, restrict or expand the concept to suit and legitimize their political programs, and thus the notion becomes something of a self-fulfilling prophecy. Each country embarking on such a developmental journey will work within its own structural circumstances, come up with its own vision and definition for what it wishes to accomplish, and choose and create the path to get there (Hornidge 2007).

K-societies are not merely the result or logic consequence of technological, economic and social changes, i.e. the development of information and communication technologies, the growth of the service sector and the increased economic dependency from knowledge and information. Instead, [...] k-societies are [...] actively and with enormous efforts taken, constructed by collective actors in society.

(*Ibid.* 291)

If knowledge societies are constructed, then the processes and actors have to be studied.

The process of construction of k-societies seems to go through the three following stages:

1. *The construction of the concepts by the academic community.* This is still a very theoretical exercise at this stage, which will at one point have to enter the political sphere if the concepts are to ever be implemented. Some of the intellectual frameworks and theories put forward by economists, sociologists and other theoreticians will be retained and perhaps modified, and start evolving, complemented by the work of others. At this stage, a definition of knowledge for that society must start taking shape. This will be determining for the future, and will become apparent in the implementation stage. The broader, more diverse and more plural the knowledge definition will be, the more that society will have the ability to produce broad, diverse and plural types of knowledge. Developing countries with immature economies will most likely focus on knowledge areas and applied research and development where the investments will directly generate revenues (medicine, engineering, natural sciences), while economically advanced countries will have the luxuries of doing more fundamental research and development, as well as investing more in art, social and human sciences, and culture, which will then become knowledge-generating hubs, further widening the gap with less advanced economies. Naturally, this will create many different types of knowledge societies, on different evolutionary paths. (The idea of multiple

knowledge societies is similar to Eisenstadt's notion of multiple modernities (1998, 2000, 2002) which are shaped and determined not by subsystemic structures but by culture.)

2. The academic and political actors will then jointly create a vision of how the knowledge society will come about. Once there is enough unity and momentum, the vision gains legitimacy socially, which will be crucial for gaining support for investing in this vision, which will take place in the last stage. The investments, however, will not be sufficient to maintain or shape the type of k-society a nation will become. All investments will do is to provide short term incentives that will perhaps accelerate the process.

[...] Government programmes and action plans [...] will have no long-term effect, as long as the prevailing structural realities don't support the aims of these programmes. [...] [I]f the state wants to realize a type of k-society in which certain aspects shall flourish, i.e. the production of a wide range of knowledge including critical, state of the art and high-tech knowledge, the creation of incentives is not sufficient. Instead [...] the structural realities in the respective country have to be changed accordingly, i.e. that they not only allow, but foster, this development.

(Hornidge *op. cit.*, 297)

3. Finally the implementation of the economic and social developments start unfolding, which are often presented as platforms and action plans by political parties, especially during elections. At this stage, the society that is being created will have to be customized to the structural realities of its subsystems, even if the ultimate aims are similar, such as economic growth. In other words, every k-society will be different, shaped by its history, its abilities, its stage of development, etc. One of the most determinant structures at this point is the society's definition of knowledge. This is important for many reasons. Firstly, no two countries should be expected to follow the same path and reach the same outcome, so nations must understand their own specificities and plan accordingly, instead of simply emulating (or imposing it on others, in the case of imperial superpowers). Secondly, one cannot expect the proliferation of knowledge societies to result in one regional or global uniform knowledge society, because of the internal variances.

On an international scale this finding of each country-specific k-society being shaped by the structural realities and definitions of knowledge in the respective country, means that a global k-society would not be the sum of many equal or similar types of k-societies; that there is not a specifically characterized stage of development than can be reached and would look in every country the same. Instead, [it] will be an amalgam of multiple, widely varying and country-specific k-societies. Or rather, due to the differing speeds of development, an amalgam of widely varying k-societies, industrial, less and least developed societies.

(Hornidge 2007, 292)

My interpretation of the preceding findings leads me to emphasize that the recognition of the specificity and circumstances of every society must be internal and external to societies. Internally, a society must equip itself with the tools and competence required to assess its strengths and weaknesses, and autonomously determine an action plan for its growth. The conditions for such growth must also be assertively stated and negotiated at the international level. Externally, the specificity and circumstances of societies must be recognized and respected by other states. It is to the collective advantage of the international community to see the tremendous developmental gaps between economically rich and poor countries closed by policies and agreements, especially in a globalized world where the impacts of underdevelopment in one part of the world will eventually find their way to every other part. Almost all developed nations also have a historical accountability towards the nations and cultures they colonized and the lands they pillaged, creating situations that led to the path dependencies we witness today.

IV. Monopoly in a knowledge society

Let us now revisit the notion of monopoly as incentive in the context of a knowledge society.

As explained in Part I, in order to ensure that society – or the market – keeps producing intellectual goods, IP theory tells us that incentives in the form of a monopoly must be provided to creators, who are investing resources without any guarantee of return on investment (Bollinger 2004). However, the exclusive rights granted to the creators introduce the risk of monopolistic pricing. “Weak property rights lead to under-provision. Strong property rights create monopoly distortions” (Nordhaus 1969, in Romer 2002, 213). In other words, all the ingredients are present for creators to charge, in return for access to their works, prices that are much greater than what they would charge in a free competitive market.

Economic theory explains the many problems monopolies can trigger. For instance, there is a loss of income or a “deadweight loss,” that never makes it to the economy again, because of monopoly pricing; Production becomes inefficient, because the prices being charged can be much greater than marginal revenue, and there is less output than would be the case in a competitive market; a monopoly causes unequal distribution of the wealth and does not contribute in a proportionate manner to the costs of production. Another problem is the concentration of power in the hands of the monopolists, which leads to all sorts of abuse, including lobbying to further strengthen their monopoly through such means as legislation, or restricting the activity of potential competitors.

But in addition to these well-known and well-studied problems, monopolies can deepen the knowledge divide, and as knowledge takes a more important role in societies, this problem will continue to grow. This is not only

a problem at the international level where countries are at very different stages of economic development, but also inside the developed nations themselves.

The monopoly of multinational companies like Microsoft gets a lot worse in developing countries. For instance, in 2004, while China's GDP per capita was around \$5,600, that of the US was \$40,100. Yet, Chinese consumers had to pay between 2 and 8 times more for the same computer software (Tian, 74). When monopolies drive prices beyond the range of affordability, then they must be taken into consideration as a factor contributing to piracy and its tolerance in certain societies. In the pharmaceutical industry, these kinds of monopolies have been called "crimes against humanity" by health ministers (South Africa's Health Minister, in Evans 2002), and the United Nations has recognized that the death of millions of people annually may be preventable if they had access to life-saving medicines (UNDP 2003b, 48).

There is a dire need to provide greater access to knowledge and technology in developing nations. Instead of remedying this situation, the IP regime further exacerbates these kinds of monopolies and contributes to transferring wealth from the non-developed nations to the developed ones. For example, in 1998, high-income countries of the Organization for Economic Co-operation and Development (OECD) earned 97% of all IP royalties and license fees, while Least Developed Countries earned 0.05% (UNDP 2003c, 203-7).

Unfortunately, every time an attempt is made to rectify this kind of divide, the approach taken is mainly one of economics, attempting to optimize free markets in a globalized world. When all worthwhile concerns are dominated by the development of commerce and competition, the outcomes become nothing more than additional regulatory policies that do not address the root causes behind the "fundamental global differences and inequalities" (Paliwala 2004, 16).

To remedy such gaps, the solution does not lie in additional regulation and economic policies to control the market, but in recognizing the need for a social policy whose purpose is to balance power relations and take into account human rights. "The proper promotion of equity therefore requires a concerted push against 'permission culture' particularly in its regulatory aspects. Such a push requires loosening the boundaries of the rules which construct the domination of corporate globalism. [...] This has to go beyond a balance between intellectual property rights and creative innovation in favour of [policies akin to] creative commons. There is need to address the fundamental structural issues of power and these can only be resolved by resort to concepts of human rights and social justice" (*Id.* 36).

There is an undeniable causal relationship between social development and technology. But it is important to understand that technology is only part of the equation, and that it can play the role of either the chicken or

the egg. While it is clear that the access to technology will enhance development, a more empowering and longer term approach seems to indicate that enabling further development will resolve issues at a more fundamental level (Mutula 2004).

That is because the gaps are not only at the level of access to technology, as determining as that may be, but in all that is required to fully participate in public life. “The global divide refers to the divergence of Internet access between industrialized and developing societies. The social divide concerns the gap between information rich and information poor in each nation. And finally within the online community, the democratic divide signifies the difference between those who do, and do not, use the panoply of digital resources to engage, mobilize, and participate in public life” (Norris 2001, 4).

Simply providing the technology without ensuring that a society has the cognitive and social infrastructures to support the leveraging of that technology will not pull that society into the information age (see Strange 1988 for a detailed discussion of the structure of knowledge and its relation to the structures of security, production and finance).

[A]ccess to ICT is embedded in a complex array of factors encompassing physical, digital, human, and social resources and relationships. Content and language, literacy and education, and community and institutional structures must all be taken into account if meaningful access to new technologies is to be provided.

(Warschauer 2002)

V. Access to knowledge

Information and knowledge have always been important for technical, technological, scientific and cultural progress and economic growth. But a key feature that must be understood about knowledge is the result of its effect on itself, which generates productivity. In other words, the more information and knowledge enter a system, the more they accelerate the feedback loop of progress and innovation through the processing of information. Although not every economy has leveraged this power yet, there is such a thing as a world economy that works as one unit, and in which international trade and the financial markets carry significant weight.

Economic growth, however, requires specific forms of knowledge, namely technical and scientific. These forms of knowledge have enabled certain societies to store, process and codify information in such ways that it enabled them to find new, even revolutionary paths to economic growth. The printing press, the telegraph, and the new ICTs are technologies that created or accelerated informational and knowledge feedback loops in the societies that adopted them. In turn, these forms of generating, managing and accessing information trickle down to

every aspect of life, such as agriculture, health and leisure, thus dramatically improving the quality of life. Domestic policy also reflects a shift to focus on knowledge production and innovation. The technology also allows for networking possibilities which compound abilities, experience and expertise, and open the door as much to communities of practice as to political activism.

The importance of copyright, as the main tool for managing and controlling information, reaches much higher proportions when viewed in this light. It will shape who is reading what, what is being written, and will dictate to a large extent our learning and thinking.

While the narratives created by combining information economics with the principles of the Chicago School of Economics focus on individual property and exclusive rights, it is an incomplete narrative. Two key notions are worth highlighting to make this point:

Public domain

Though we may first think of the public domain as works that are not or no longer covered by IP law, it is worth reminding that it includes resources such as the languages we speak and the entire corpus of scientific theories. These foundational resources to humanity and civilization were never protected by intellectual property, yet scholars and scientists have dedicated their lives to develop and improve them, proving that private property rights are not the only incentive for the production of scientific and cultural information and knowledge. Moreover, these resources should always be the counterargument to the romantic notion of originality, explored in Part I, which implies that originality can stem from nothing but the individual, as opposed to growing from pre-existing scientific and cultural ecology. No permission is required to access the public domain, no one can deny another's wanting to access it, and no payment is required before taking something from it.

[Cultural] hegemony can be sustained by the rulers only by the constant exercise of skill, of theatre and of concession. [S]uch hegemony, even when imposed successfully, does not impose an all-embracing view of life; rather, it imposes blinkers, which inhibit vision in certain directions while leaving it clear in others.

(Thompson 1991, 86)

The blinkers of copyright steer our sight in the direction of exclusive private property, and away from the public domain. A vacuum will not inspire anyone, and without participating in a culture that others have developed over time, we cannot produce anything (Hemmungs Wirtén 2006, 282-4).

Commons

Unlike the public domain or private property, the commons is owned and governed collectively. Like any other property, one needs to secure permission from the collective, and possibly pay a price, for use. The idea of the commons can create prosperous and stable regimes, as shown by the work of Elinor Ostrom (Verzola in Krikorian and Kapczynski 2010, 253-276), and can highlight the inadequacy of resorting to the tragedy of the commons argument (discussed in Chapter 2) when addressing immaterial goods. The commons can be used as an alternative to the private property model of copyright, and can contribute towards the of democratization of knowledge by resorting to participatory decision-making and community thinking, instead of markets and governments dictating laws and rules.

According to the UN's *Millennium Development Goals Report 2009*, at the end of 2007, only 4% of the population of sub-Saharan Africa had access to the Internet. Movements such as A2K (Access to Knowledge) greatly contribute to the theorization of alternatives to IP law, but perhaps more is required to secure exchange of information between the peoples of the world and allow for a more participatory environment. As Krikorian writes "there is a primary and prominent set of problems that are not technological, but political" (Kapczynski in Krikorian and Kapczynski *op. cit.*, 44).

The political powers of the world need to agree on a more equitable and just distribution of informational goods for things to start improving. Certainly, there is more that needs to be done than theorization to move towards living beyond scarcity and providing the required materials that would allow nations to do more for themselves. Our contention is simply that in this respect of knowledge and access to it, some actions need to be done to improve the situation, not that these actions will solve every aspect of the problem (*Ibid.* 17-55).

Various principles of access to knowledge have at different times been covered by copyright. They were referred to as user rights, limitations, and exceptions to copyright. The reproduction of scientific articles and copying for education purposes were allowed under early copyright law. As for translation, it was initially allowed after only ten years from the time of publication. But as time went by, such limitations were eliminated (or allowed as exceptions for developing nations) in favour of expanding the exclusivity rights granted by copyright (Bannerman 2016, 16). "The history of international copyright can be seen as an erosion of the principles of access to knowledge" (*Ibid.*, 3).

Despite the difficulties of taking on the powerful institutions supporting increased copyright protection, the A2K movement has been able to create concrete impacts. WIPO is considering exceptions for educational, research and disability purposes, and countries in the African Group have submitted many proposals, demonstrating increased ability for influencing agenda setting (*Ibid.*, 50).

V.1 A2K and activism

The A2K movement was initially a reaction to the incessant extension of the notion of property by the WIPO and the WTO. The access to medicine movement had achieved relative success, especially for HIV and AIDS, so it was deemed realistic to address a broader range of issues, including access to educational and scientific materials (Krikorian and Kapczynski *op. cit.* 99-125). Since the 1990s, numerous groups and individuals around the world seemed to be mobilizing to form a general movement calling for increased access to knowledge for all human beings (*Ibid.* 57). In 2003, when WIPO rejected the request of a group of public intellectuals, including three Nobel Prize winners (Joseph Stiglitz, John Sulston, and Harold Varmus) who wrote asking them to consider exploring open models to academic journals, it only confirmed to many that the organization was not as interested in public policy goals as it was in protection of property. These public intellectuals view the dangers of expanding intellectual property rights as a very serious threat to societal advancement, especially now that all economic growth seems to be dependent on the production and circulation of knowledge:

On the scale of the global economy, what is at stake in exclusive intellectual property regimes is nothing less than the control of existing stocks of information and knowledge and of their flows, along with the management and harnessing of the innovations that such information and knowledge can allow to produce.

(*Ibid.* 58)

In addition to requiring the material and infrastructure for accessing knowledge, people also need the cognitive tools that are usually acquired through education. Lacking these resources means that it is not possible to participate in the knowledge economy, which will simply perpetuate the inequalities. Access to knowledge can mean access to the sources of knowledge; access to the institutional processes of creation, circulation and regulation of knowledge; and access to the participation in knowledge determination and agenda setting (Bannerman *op. cit.*, 10).

Though knowledge goods are easily transferable electronically, intellectual property ensures that ownership and control of knowledge goods is as protected as possible, thus preventing transfers that would otherwise be simple and inexpensive. These practices have been called new forms of enclosure by some scholars (May 2010 [2000], Benkler 2006, Boyle 2002), in reference to lands previously held commonly by villagers that were suddenly turned, from the 15th to the 18th centuries, into private property by the erection of fences and the

securing of ownership titles through courts. They have also been called a threat to fair culture and innovation by Madhavi Sunder in *From Goods to a Good Life*; a ratcheting up of intellectual property by Susan Sell; and maximalist trajectories in copyright law by Debora Halbert (all in Halbert 2014, 12)

These growing inequalities have caused tensions that keep emerging in elections, court cases, and demonstrations, which are all in response to the expansion of intellectual property rights. Powerful right owners try to persuade society that the current IP regime guarantees equality and fairness of opportunity while encouraging progress and economic growth. Those who organize the mobilization for access to knowledge activities try to expose the inequalities, power relations, and contradictions that are not always obvious. This kind of activism brings attention to the unmet needs and reveals the hegemonic means used to acquire and maintain power by those who have it. Finally, an important mandate of the A2K movement is showing ordinary citizens how they are directly impacted by these tensions and battles (Krikorian in Krikorian and Kapczynski *op. cit* 57-98).

The movement's aim is to continue making proposals that encourage the following outcomes:

- publicly funded research that is made available to the public free of charge within twelve months of its fixation;
- use of copyrighted works for scientific research (including use or reuse of data) subject to attribution not deemed to be an infringement;
- elimination of the ability of contracts to override the limitations and exceptions proposed.

(Bannerman *op. cit.*, 50)

V.2 Education and Access to Knowledge

On January 6, 2010, internet activist Aaron Swartz was arrested for having broken into MIT and having downloaded millions of articles from the famous JSTOR database. He was intending to post it all for free on the internet in what seems to have been an act of philosophical and moral revolt against the commercial and private ownership of scientific and educational works. He was offered a plea bargain after being charged with multiple felony offenses that would have probably seen him get the maximum \$1 million in fines and thirty-five years in jail. He declined, and then took his own life on January 11, 2013. In his 2008 *Guerilla Open Access Manifesto*, he wrote:

Information is power. But like all power, there are those who want to keep it for themselves. The world's entire scientific and cultural heritage, published over centuries in books and journals, is increasingly being digitized and locked up by a handful of private corporations [...]

Those with access to these resources – students, librarians, scientists – you have been given a privilege. You get to feed at this banquet of knowledge while the rest of the world is locked out. But you need not – indeed, morally, you cannot – keep this privilege for yourselves. You have a duty to share it with the world [...] But all of this action [...] is called stealing or piracy, as if sharing a wealth of knowledge were the moral equivalent of plundering a ship and murdering its crew. But sharing isn't immoral – it's a moral imperative. Only those blinded by greed would refuse to let a friend make a copy [...]. There is no justice in following unjust laws. It's time to come into the light and, in the grand tradition of civil disobedience, declare our opposition to this private theft of public culture. We need to take information, wherever it is stored, make our copies and share them with the world... We need to download scientific journals and upload them to file sharing networks.

(Lessig 2013, also in Bannerman *op. cit.*, 33)

If the main purpose of copyright law is the promotion of the progress and dissemination of science and the arts and the encouragement of learning, one would think that the best place to find indications of its success – including the proper use of fair dealing – would be the education sector. Every year, students buy hundreds of millions of dollars' worth of copyrighted materials. Excluding photocopied course packs, Murray & Trosow report in 2007 that Queen's University Campus Bookstore sold \$7.8 million in textbooks, amounting to about \$400 per student (Murray & Trosow, *op. cit.* 116). They remind publishers that “education institutions are not only markets: they are major incubators for future creativity and economic growth [...] we might expect copyright to make things easier for people working in learning environments” (*Ibid.* 117).

As a side note, I would like to remind the reader of a caveat that I have directly and indirectly mentioned throughout this thesis: systems and activities in themselves are neither good nor bad, they just are. What is required is an in-depth understanding of their repercussions and operation in order to assess their effectiveness and worth for an individual, a class, or a society. Access to educational resources in itself is empowering but as is the case with any other system or activity, can become a tool to perpetuate existing power relations.

When capital requires “hands” to do its dirty work, education merely trains useful hands to tend machines, and docile bodies meant to accept as natural the social order in which they find themselves. When capital requires brains, both to run its increasingly complex operations and to apply themselves to the work of consuming its products, more time spent in the prison house of education is required for admission to the ranks of the paid working class. When capital discovers that many tasks can be performed by casual employees with little training, education splits into a minimal system meant to teach servility to the poorest workers and a competitive system offering the brighter workers a way up the slippery slope to security and consumption. When the ruling class preaches the necessity of an education it invariably means an education in necessity. The so-called “middle-class” achieve their privileged access to consumption and security through education, in which they are obliged to invest a substantial part of their income, acquiring as their property a degree which represents the sorry fact that “the candidate can tolerate boredom and knows how to follow rules.” But most remain workers, even though they grep information rather than pick cotton or bend metal. They work in factories, but are trained to think of them as offices. They take home wages, but are trained

to think of it as a salary. They wear a uniform, but are trained to think of it as a suit. They only difference is that education has taught them to give different names to the instruments of exploitation, and to despise those of their own class who name them differently.

(Wark 2004, § 050-051)

With this caveat in mind, I return to the importance of access to educational resources for self-empowerment and agency in today's world. Many scholars have expressed concern as privatization and commercialization take over academic work and scientific research. "Since the 1980s [...] increasing privatization of university and scientific research has led to increased pressures for broader intellectual property rights over research findings and for protection of the databases in which they are contained" (Bannerman *op. cit.*).

Education, like science, research and the arts, is funded in part at least, by taxpayer or citizen dollars. Schools, universities, libraries, museums and galleries are crucial for an informed citizenry, which is required for healthy and productive democracies. The creativity and innovation required for future works of science and art must be fueled by resources and materials provided by them to all citizens equally. There are many benefits for a society to opt to use tax dollars to support knowledge and culture, instead of relying on private-sector funding, but this funding bestows on these institutions an added layer of responsibility to the public. That is why some scholars have been critical of the cost-recovery strategies employed by such funded institutions, thus discouraging citizens from benefiting from that which they have already paid for. It has also been strongly recommended that they focus on serving the public by making digital archives and collections freely available for non-commercial use (*Ibid.* 195).

V.4 Academic Journals and Access to Knowledge

Academic work is of particular interest in copyright law, because by definition, it should fall squarely with the aims of copyright. While the main purpose of copyright is to promote the progress of science and useful arts while providing sufficient incentive to produce new work, most academic work is not incentivized by monetary gains derived from publishing in academic journals. The majority of scholars rely on research grants stemming from public funding, or university salaries that may or may not be funded, in full or in part, by public funds. One then wonders how come there is not more open access or at least affordable access to academic journals, which has been promoted by some in the scientific community (e.g. see Withers 2006). Concerns have also been raised around the restricted access to scientific research:

Although IPRs are needed to stimulate innovation and investment, commercial forces are leading in some areas the legislation and case law that unreasonably and unnecessarily restrict freedom to access and use information to carry out research. The restriction of the commons by patents, copyright and databases is not in the interest of society and unduly hampers scientific endeavor.

(Royal Society 2003, 30)

In Dreyfuss 2010, Bergstrom and Rubinfeld (137-148) present some puzzling facts about academic journals. They explain that between 1984 and 2001, the price of library subscriptions for business and economics titles rose 393%, while inflation could only account for perhaps 70% of that increase. The general tendency they discuss is that of extremely rapid increase of for-profit academic journal pricing from the 1990's to the time of writing their chapter in 2010.

The academic community is seen as providing journal publishers free labor. Scholars value access to academic journals, which translates in citations leading to potentially improved academic status and salary. At the time of writing their chapter, "[t]he estimated effect on salary of a single citation to a scholar's work is on the order of \$50 per year." In addition to providing articles for publication, many authors also referee manuscripts, sometimes in the range of two or three for every paper they publish in that journal (Bergstrom & Rubinfeld in Dreyfuss, *op cit.* 140). Because they are trying to stay away from recommending a full reform of copyright law, they conclude by offering an alternative solution, stating that "it is essential that individual scholars maintain some control over their copyrights" (*Ibid.* 148)

Carroll (in Dreyfuss 2010, 149-157) also notes that "growth in digital technologies and digital networks should be driving down the price of access to the scholarly journal literature, but instead those prices have steadily increased at a rate greatly in excess of inflation" (*Ibid.* 149). He also raises other questionable tendencies of the academic journal market: "commercial journal publishers successfully charge significantly more than non-commercial journal publishers, such as scholarly societies, even when the commercial offerings make less valuable contributions to the progress of science and knowledge as measured by citations." He goes on to explain that normal competition in the market should lower the cost with time, but this will never happen because "copyright law is directly responsible for propping up journal prices and for transferring wealth from academic libraries to inefficient or highly profitable journal publishers. The question then arises whether this is the proper role for copyright law" (*Ibid.* 152). He answers with an unequivocal no. He agrees with Bergstrom and Rubinfeld, however, that "it is within the power of scholarly authors to take action to correct the market for scholarly journals by self-archiving their work on the public Internet" and that "self-archiving is not harmful to the subscription model" (*Ibid.* 153).

The values at the core of copyright law are the promotion of scientific progress and culture by disseminating works and making them as broadly accessible as possible. Beyond this noble drive, it is to the advantage of academic authors to take steps that make their works as widely available as possible, because this increases the influence and impact of their work, as well as increasing its chances of being cited. And innovation and progress will come if the works are made widely available, instead of being limited by exorbitant pricing and institutional affiliations.

Such is the story of Sharon Terry who independently researched medical journals while attempting to find a cure for her children's illness. Her biography on her Genetic Alliance site reads:

As 'just a Mom' with a master's degree in Theology, she cofounded PXE International, a research advocacy organization for the genetic condition pseudoxanthoma elasticum (PXE), in response to the diagnosis of PXE in her two children in 1994. With her husband, she co-discovered the ABCC6 gene, patented it to ensure ethical stewardship in 2000, and assigned their rights to the foundation. She subsequently developed a diagnostic test and conducts clinical trials. She is the author of 140 peer-reviewed papers, of which 30 are clinical PXE studies.

(<http://www.geneticalliance.org/about/staff/sterry>)

If scholars such as Bergstrom, Rubinfeld and Carroll are encouraging academic authors to take ownership of their writing and make it widely available through open access, it is because they see copyright in such cases as an obstacle to the promotion of scientific and cultural progress, as opposed to being its driver, as is supposed to be its intended purpose.

V.5 Democratization of knowledge

Democratizing knowledge is as much a matter of policy and legislation as it is a matter of personal choices by citizens and users of works and of technologies, as we just saw with the case of academic scholars encouraged to take advantage of open access, take the initiative, and share their scholarly works themselves.

As a critical mass of these personal acts takes place in a society, and if the cognitive and technological means are available, then that society may start recycling, mashing up⁶⁶, and innovating from the information and knowledge that have been made available. Instead of relying on manufacturers, users of products and services in such societies will take the lead and innovate for themselves, to the great advantage of everyone involved (except manufacturers and service providers who are unable to change their delivery models to take advantage of this); of users who are getting customized products and services that better meet their needs, and manufacturers who are getting innovation, R&D, market research, surveying and piloting, all for free.

Based on the traditional private investment model of innovation, investors and innovators will do what they can to avoid revealing any information related to their innovation (von Hippel 2005, 80). User innovators, on the contrary, usually reveal publicly part or all of the information, so that others may learn, imitate, modify, or innovate. Because research has confirmed the difficulty of keeping innovations secret for long, (Harhoff,

⁶⁶ “Digital media content containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources, to create a new derivative work” (Wikipedia.org 2012).

Henkel, von Hippel 2003) the real question is not whether to reveal or protect the innovation, but rather whether to reveal, usually at very low (social) cost, or reveal later at a much higher (social) cost, while using trade secret, patents or copyright law.

In order to engineer (or reverse engineer), what is usually required are not the specifics – which can, and should, vary – but the principles and general outlines. Many sources can know and share this information, because people talk, and some work for more than one firm, and we live in a networked society.

As for copyright, its protection is automatic, but it only applies to the writing itself, not the underlying idea that it expresses. For this reason, so long as the combined form is not replicated, anyone can replicate the same function performed by the original, be it literary, communicative, or technological (such as the function of a copyrighted software). On the positive side of the argument, openly sharing can help one make gains in reputation and popularity, which can then translate into market value. For instance, academic scholars who opt for open access witness a significant increase in the reuse of the information contained in their writings, ranging from 45% in philosophy, to 91% in mathematics (Antelman 2004).

Effective social policy is a balancing act between the various aspects of social life, including economic growth as well as social welfare. The sharing of information and knowledge in a manner that allows users to innovate accelerates the innovation cycle and can produce high quality products and services at low costs. Properly looking at economic growth cannot be done only in cumulative and absolute terms. In other words, how income and growth are distributed must be part of the factors taken into consideration. Researchers who have looked at the topic of innovation have concluded that “social welfare is likely to be higher in a world in which both users and manufacturers innovate than in a world in which only manufacturers innovate” (von Hippel *op. cit.*, 107).

Economists have long thought that intellectual property rights are good for innovation and bad for competition. In *Economics of Knowledge* (2004), Foray argues that there are too many instances where the monopoly granted by IP is having detrimental effects on innovation and society must therefore question the traditional model. There are too many users and consumers who are freely innovating and contributing, and this tendency is flourishing. That is why von Hippel instructs that, as a general principle, intellectual property rights grants should not be offered if innovators will continue innovating regardless of those grants (2005, 113). As has been repeatedly emphasized by numerous scholars, strong protection will discourage innovation (see Benkler 2002, Lessig 2001, Boldrin and Levine 2002, von Hippel 2005).

VI. Stronger or weaker protection in a knowledge society?

In Chapter 1, we presented the arguments of the advocates for both strong and weak copyright. It may be worth returning to the topic here, so that we look at protection for the purpose of developing and maintaining knowledge societies.

Stronger copyright protection, we are told by its advocates, results in further investments being made for the creation of intellectual goods by both those already holding such rights, as well as by others who have not yet entered the market. This will benefit society as a whole, not only because there will be more numerous works being created, but also because it will create a more competitive environment which will lower prices and thus render the products more affordable (Farber and McDonnell 2003; Netanel 1996). It comes as no surprise to learn that proponents of stronger protection are major copyright industries, leading technology companies, and countries that are massive copyright exporters (Hansen 1996).

As companies began realizing that their main assets were not in real estate and capital but rather in knowledge and information, they demanded measures to maximize their wealth by protecting and amplifying it. From trademarks, to databases, to geographic indications, to patents, all aspects of intellectual property received a push for expansion. Copyright law had to be expanded in duration as well as the objects it covers, to include digitized products (Dreyfuss 2010, ix).

Those who oppose strong protection (typically, users of copyrighted works, consumer groups, creators of derivative works, academics and lawyers concerned with the public domain, governments of developing and copyright-importing nations (Hansen *op. cit.*)) argue that there is no need to legislate stronger protection; that the one-size-fits-all approach is completely inadequate; that the foundations of copyright law rest on an unfair past; that they are currently still unfair, and that they are doing more harm than good for social development, as well as the dissemination of knowledge and the promotion of humanity's progress (Dogan 2006). New technologies became a source of creativity for artists and writers, and mashups were quickly accepted as a new form of expression. The Internet made possible new collaborations in arts and science, and to user groups, libraries, research centers and schools, intellectual property rights seemed to be nothing more than very costly barriers preventing the accumulation, augmenting and dissemination of knowledge. Of course, countries who are net importers of copyrighted works experienced rising intellectual property expenses as the prices of protected works soared (Dreyfuss *op. cit.*).

While some attempts to protect the public domain and shift the balance in favour of the social benefits that are intended from IP appear here and there, expansion of IP has not stopped. In fact, new forms of protection are

demanded regularly. These range from traditional folklore and knowledge to protect the cultural heritage of indigenous communities, to celebrity rights to protect the financial gains derived from fame (Dreyfuss *Ibid.* x).

It is clear that the different nations of the world are at very different stages of progress, and that what may be beneficial to the development of some may be detrimental for others. As we pointed out in Parts I and II, when countries are in the early stages of economic capacity, when they are still importers of cultural and intellectual goods, then they ought to implement policies of weaker IP protection if they wish to strengthen their markets. Failure to do so simply results in an inability to create a strong, competitive and accessible market for such products both domestically and internationally. But copyright law is, to a large extent, being implemented as an international blanket, and exporting countries are pressuring other countries to accept stronger laws as part of bilateral or regional trade agreements, as explained in Part I. This creates a cycle in which the flow of wealth is always unidirectional, going towards those who hold the wealth and who control the legislative instruments to enable that flow. What is needed, according to advocates of weaker IP rights, is an approach that takes into consideration the human and political dimensions of the problem, that recognizes the importance of a strong public domain for innovation and free speech, and that redirects the focus on society and the public, instead of giving in to the economic arguments of the rights holders. As James Boyle states, the “intellectual property regime has enormous importance in terms of distributional justice, free speech and public debate, market concentration, scientific research, education, bio-ethics... the list goes on and on” (Boyle 1997, 115).

VII. Tensions between information society and capitalism

Inherent in the idea of an information society are the ideas of participation, inclusion, collaboration and cooperation, enabled by information technologies, which we have already mentioned throughout the thesis. Citizens would feel – and truly be – included in the decision-making in participatory societies. However, a capitalism that favours monopolies and the concentration of wealth and power in the hands of the very few contradicts these ideas because they are premised on the opposite notions of competition, exclusion, exploitation and domination, which assume that benefits are derived at the expense of others because resources are limited.

Modern societies are built on the structure of capitalism, and will therefore not automatically embrace transitioning towards participatory democracies (Fuchs 2008, 7). The logic of competition necessarily dictates that actors continuously acquire more economic, political, and cultural capital, which in turn, enables the accumulation of more monetary capital, eventually leading to its asymmetrical distribution. In other words, a minority ends up holding the ownership, decision-making, and definition-setting functions of society’s structures, as we saw was the case in Chapter 4 and elsewhere. There is therefore a way to interpret the

restructuring of society into post-fordism, in the sense of informatization and globalization of society, as being a new strategy of capital augmentation and concentration. As opposed to considering every node in this networked society as equal to every other node, (whether they are individuals, enterprises, states, political actors, etc.) the structure of global network capitalism is premised on inequalities in property, power and skill stemming from this exclusive concentration of capital in central hubs (e.g. transnational corporations, certain political actors, regions, countries...) (*Ibid.* 340).

The paradox of new technologies is that they allow, on the one hand, further accumulation of money and power, while, at the same time, their global and decentralized nature puts at risk the complete control that used to be possible in previous systems (*Ibid.* 341). Those who own rights wish to take advantage of the technologies by commodifying all the information they can own. But these same technologies have now made it unbelievably cheap, easy, and fast to share information. Free sharing of information however, can negatively impact profitability in exclusivist models, and the tension between commodity and gift economies is perpetuated.

The populations of societies which have understood the ease and affordability of Internet access expect to be provided with goods and services without any expectation for immediate, or even future, rewards; i.e. gifts. And big corporations realized this early on, and started providing gifts, and free access and distribution in order to ensure profits through mechanisms such as advertisements provided to higher numbers of users. This is especially the case of interactive 2.0 platforms which depend on user-generated content to survive; their owners have found ways to instrumentalize cooperation to further advance competition.

In such a society, everything will generate a profit to the ultimate owners of wealth, who already possess the wealth and power because they control the structure of society. The goods (knowledge, communication, education, skills etc.) that generate the wealth are produced by all, and can be considered the commons of society, but it is only those ultimate owners who can appropriate this common and extract a profit from it.

Information can be used to create relations of participation or domination, usually through electronic means. In fact, beyond using it for structuring society and its direct financial instrumentalization, it can be used as a strategic and military weapon. This can be referred to as information warfare. It has now become an important strategic factor to intimidate, attack and control enemies by targeting the psyche of their military forces and populations, influencing mass media, gathering and manipulating data, and destroying or manipulating their information infrastructures (*Ibid.* 344). The behavior of various groups can simply be controlled or altered through surveillance, because they know that their movements, actions, and even ideas are being electronically

monitored. Once again, the use of information in this manner is controlled by a minority, which leads to domination, as opposed to participation.⁶⁷

Since 9/11, these kinds of information use have been expanding greatly. So far, societies seem to be tolerant or accepting of the exchange of civil rights for national security for example. Resistance movements have realized the potential allowed by participatory technologies, and sometimes resort to the same tactics through cyber-protest, by providing alternative information sources, organizing protests through social media, or simply expressing their frustrations in cyberspace. Information technologies can be used to create societies of competition and domination, which require social classes, borders, and means of domination, as well as societies of cooperation and participation, which rely on sharing and collaboration in network models. While the former are based on the ideal of the individual and attempt to ensure the achievement of their basic human needs, the latter are based on the ideals of diversity and multiplicity, and attempt to ensure the achievement of their basic human needs.

As we shall explore in Chapter 9, network technologies allow for a flattened, dehierarchized, decentralized and even eroticized societies (in the terms of Marcuse), blurring the lines between work and leisure, and giving workers a feeling of liberation from the authoritarian and at times oppressive Fordist workplaces of industrialized and standardized mass production. While workers will feel more liberated from the alienation of work conditions, their personal time will be colonized and exploited for further productivity (see Fisher 2010, 81 – 105).

Both competition and cooperation may create social systems with happy human beings inhabiting them. But while the latter creates more equitable conditions, the former means that some will be happier at the expense of others. A networked world certainly seems to provide many more advantages to society than a hierarchical one, but it also represents serious risks for the profitability and dominance of the few. If society keeps evolving through the model of competition, the few will constantly require new territories to exploit, and new spheres to colonize, in order to sustain the systems that are in place. If society moves towards more cooperative and participatory models, this would constitute an enormous cultural revolution that some have called an “overall paradigm shift” (Fuchs, op cit. 353).

VIII. Relationship between privately owned rights, public interest, and commodification of knowledge

⁶⁷ Phenomena such as WikiLeaks should be further studied in this regard, but would definitely fall more under the possibilities offered under participatory democracy.

In *The Postmodern Condition: A Report on Knowledge*, Jean-François Lyotard presciently wrote, in 1979, that knowledge was becoming a commodity to be transmitted, produced to be sold and exchanged, and that the development and worth of a nation-state would be measured by its capacity to produce such commodified knowledge.

Ideas themselves do not cause outcomes. It is therefore one thing to claim that ideas (and institutions) matter. It is another to explain how those ideas that are 'out there' take a particular institutional form at a particular time, or to specify explicitly how ideas matter given the overdetermined nature of dependent variables and the importance of other independent variables. Moreover, these ideas themselves arise out of social, economic and historical factors that may themselves be important explanatory variables.

(Gorges 2001, 141)

There is an obvious tension between private ownership of intellectual rights and the general interest that lies in what is accessible in the public domain. This tension stems from the power that comes from the control and ownership granted by IPRs over intellectual goods to certain agents. This power allows the agents to protect their interests and enhance their advantage by legitimizing them through legislation and political power.

The emergence of knowledge societies is in large part due to the commodification of information and knowledge, which is a “new imperialism” over previously non-commodified relations (Harvey 2003).

To establish the historical tradition of this point, John Perry Barlow quoted Thomas Jefferson:

If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is deployed, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it.

(Barlow 1993)

Through the construction of scarcity (where there is none) IPRs commodify knowledge resources by establishing market power. “Intellectual property laws produce an artificial restriction that is the scarcity problem and then are used to allocate scarce resources through a complex web of private property controlled by intellectual property owners” (Ciro 2005, 6). This socially constructed scarcity therefore replaces the initial condition in which knowledge can be exchanged at little or no cost.

To own an object as property, it is not sufficient to control it; property is a right to “*control the actions of others* in respect to the objects of property” (in May 2010, 16, my emphasis). This is precisely the aim of intellectual property rights, which “grant control over valuable processes or expressions and deny others the capacity to use them unless the owner's consent is obtained, or unless some legal privilege of use is established that grants access” (*op cit.* 33).

One would think that, given its central role in economy and social structuring in developed nations, that someone would have studied the following issue by now, raised by Pamela Samuelson over quarter of century ago:

A world in which all information is its discoverer's property under all circumstances is unthinkable. Before we start labeling information as property, we need a coherent theory about when information should be treated as property, and when not. This is a task to which little thought has been given, it must be.

(Samuelson 1991, 19)

When a right is not natural or obvious, it requires the construction of a narrative. In *The Great Transformation* (1957), Karl Polanyi explained that for the notions of labor, land and money to be viewed as property that can be sold, a commodity fiction was required to allow for the transformation to take place from feudalism to capitalism. This fiction or narrative is not linked to historical events or factual descriptions of production, because its purpose is to present a convincing story, and this has been called the socialization of consumers (Tyler 1997; May 2010, 22).

The same logic can be applied to intellectual property, which can be argued to serve social justice from a Rawlsian perspective, for example:

Patents and copyrights stimulated the development of new technologies and creative works which eventually benefits of the least advantaged members of society. Although it seems unfair that only rich people can afford new inventions when they are first developed, these inventions soon become affordable as a result of expiring patents, increasing competition and improvements in manufacturing.

(Resnik 2003, 330)

As has been pointed out by Jeremy Waldron, this story would sound “a lot less pleasant if instead of saying we are rewarding authors, we turn the matter around and say we are imposing *duties*, restricting *freedom* and inflicting *burdens* on certain individuals for the sake of the greater social good” (Waldron 1993, 862). Transnational corporations (TNCs) are the ones reaping the lion's share of the benefits.

TNCs are unified by the belief they will all do better in a world where states and citizens have embraced an ideology that favors hyper-strong intellectual property rights (IPR) because that ideology enables those TNCs to invest in turning knowledge from a public good into a private good and to set the terms of access to it.

(Draho in Krikorian and Kapczynski *op. cit.*, 211)

So when we learn that TRIPS was mainly drafted by the legal experts of 12 US corporations (Sell 2003), we can assume that their legal tradition and discourse, their American background, the interests of their employers individually and collectively, had something to do with producing a narrative that justifies IPRs and tells a convincing story about the great benefits of commodifying knowledge for economic prosperity and growth.

Intellectual property is therefore a manifestation of government intervention, and the market for intellectual property makes this very clear, because it requires considerable effort to maintain its well-rehearsed narrative of being socially beneficial as opposed to mainly serving the interests of specific powerful groups. But this effort is justified, and even necessary, because it can generate revenue where none was there before by including knowledge under goods that can be trade-related – in the terms of the WTO – and expanding capitalist markets. “Much of what is called growth in capitalist societies consists in this commodification of life [...] the continuous search of business for areas of social activity that can be subsumed within the capital generating circuit” (Heilbronner 1985: 60, 118).

Knowledge can also generate significant power in the international political economy. Christopher May (in 1996 and 2010) applies Susan Strange’s tripartite knowledge structure (*op cit.* 1988) to intellectual property and identifies the following three areas to highlight the power of knowledge in political economy:

- changes in the distribution of and access to data and information sources, encompassing technical issues of infrastructure development and technological diffusion;
- changes in the distribution and availability of the theoretical or symbolic knowledge required to make full use of information including the availability of expertise and scientific methods; and
- changes in the rules governing the ownership and characterization of property in knowledge resources, keeping in mind that the use and benefits that might flow from knowledge and information depend on the rules of distribution, i.e. intellectual property (in 2010, 38).

Strange (1988) recognizes that whoever controls information and knowledge will also carry the structural power to set the agenda, and May (*op cit.* 1996) adds that this also allows them to retain maximum benefits while transferring risks. The power of agenda setting lies in its ability to define problems and hide conflict and tensions, and proposing solutions. Existing problems can disappear, and unwanted solutions never make it for consideration. If agenda setting of the international political economy is the ultimate indication of power because it will shape outcomes by including and excluding items based on self-interests, then it is only logical to conclude, as May does (2010, 39) that knowledge is the primary structure that serves as the foundation for the other structures of security, finance, and production. I will add that, in fact, in a knowledge society where big data and information are the basis for everything else, knowledge can be considered to already be included in the structures of security (e.g. information warfare), finance (e.g. big data and behavioral economics) and

production (because knowledge is commodified), thus highlighting even further its centrality to political and economic power.⁶⁸

In addition to needing the material infrastructure and cognitive tools to participate in the knowledge economy, there is a need for nations to develop serious expertise in matters of intellectual property, in order to negotiate while fully aware of the ramifications of each option and decision being discussed. Without appropriate legal and economic expertise, no negotiation can be said to be between equal stakeholders. And yet, nations with severely underdeveloped legal and regulatory capabilities are seemingly part of the negotiations, and signatories of major international treaties and agreements. As the implications of the TRIPS agreement were becoming clear, WIPO reported to have provided the following support to developing nations between January 1998 and June 2001:

- 2087 intellectual property officials from developing countries received training and awareness building;
- 34 developing countries received assistance in building up or upgrading their intellectual property offices with adequate institutional infrastructure and resources, qualified staff, modern management techniques and access to information technology support systems;
- 32 developing countries were beneficiaries of the WIPO assistance on legislation in the areas of intellectual property, copyright and neighboring rights and geographical indications;
- in close cooperation with other international organizations, the WIPO organized frequent national, regional, and interregional meetings for the developing countries on the implementation of the TRIPS agreement.
- Subsequently, during 2003, the WIPO reported that more than 17,000 representatives from 98 developing countries participated in 228 meetings, seminars and other training sessions, while staff of the WIPO undertook around 300 missions to developing countries to offer support and assistance in implementing various aspects of IPRs

(in May *op. cit.* 2010, 101)

This level of activity has been maintained in subsequent years, as can be attested from WIPO's Annual Reports. If this degree and kind of technical assistance is required for a country to understand TRIPS, one wonders on what basis those countries became signatories. Going back to the early drafting of TRIPS by experts representing 12 major US corporations, one cannot fail to see the enormous gap in expertise, while wondering how such mismatched negotiations can be tolerated and accepted as valid and binding.

⁶⁸ This reflection leads one to think that the knowledge-based superstructure is taking over the material infrastructure, which can be viewed as the continuation of the toppling down of Marxism's historical materialism.

The economic purpose of constructing knowledge societies is to extend the reach of capitalist markets to realms that lie outside the grip of exchange relations. This is mainly enabled by intellectual property, which has forced knowledge into a set of parameters that had already been defined in capitalism for material property (see May 2002, Carlaw 2006).

And although it is outside the scope of this work to address contractual law, contracts began to be very common in the world of intellectual property in the 1990s. At that time, the benefits of going even further than the law allowed were advertised to companies with significant IP assets:

The purpose of well drafted contracts [...] is to establish the employer's ownership of intellectual property valued by the Corporation. [...]
 Second, contracts may expand the rights of the intellectual property owner beyond those otherwise provided by law [...] Such a confidentiality agreement may also protect information that is not otherwise protected from disclosure under the uniform trade secrets act.
 Third [...] A carefully drafted contract can make the often arcane defenses raised in intellectual property litigation irrelevant.

(in May 2010, 60)

As we have now seen repeatedly, nations that are at different stages of development require different measures to develop and grow. If knowledge societies are beneficial, then constructing more of them would only compound the benefits globally. But without customized measures and flexibilities, developing nations will not be able to catch up, because they no longer enjoy the same advantages that were enjoyed by the developed nations when they were still in development.

It is necessary to recall that a couple of years ago, perhaps the developmental aspects of intellectual property were more interesting to the United States than the trade aspects are at the present time. Now that the United States is at its present level of technological development, the trade aspects of intellectual property become more important for it to than the developmental aspects.

(Gakunu 1989, 364)

A different set of measures needs to be put in place so that a nation can build its social infrastructure, which can be measured by having an educated workforce, basic industrial capacity, domestic entrepreneurial ability, and domestic capital mobilization (Brenner-Beck 1992, 103) among other things. In addition, the intellectual property regime should also ensure a balancing between economic growth and social development when looking at the outward activity of nations, and not limit itself to looking at inward activities.

Until such measures are implemented, the lobbying of what some scholars have called the knowledge cartels made up of oligopolists like the ones who drafted the early version of TRIPS, will determine to a very large extent what governments will regulate and how. These corporations “depend on sales of existing innovation,

[so] they push their governments to regulate the global market in ways that lock in temporary advantages without necessarily advancing the global public interest in innovation among competition, or the provision of complementary public goods” (Maskus and Reichmann 2004, 295).

IX. Knowledge equilibrium

The incentive argument has never been fully satisfactory, as we explained in Part 1 and earlier in this chapter. In its best light, copyright law is considered a necessary evil. In fact, a number of scholars have attempted to circumvent the challenges copyright poses by proposing alternative approaches. Such alternatives vary from economic approaches (Yoo 2004; Thurow 1997) to IP Taxation (Calandrillo 1998), to contract and anti-trust law to replace or complement copyright (Hayslett III 1996; Marschall 1997). Of special interest to us is what I consider to be the more balanced approach proposed by Tian, which he has called the knowledge equilibrium framework.

This framework aims to strike a balance between the different stakeholders’ capacity of accessing and using knowledge, with the ultimate aim of reaching an equilibrium between them, consequently creating “a more equal and democratic bargaining environment for IP standard setting.” He goes on to explain that a society shaped by such principles would be one “with a powerful innovative capability, strong knowledge-distribution justice and equal innovation opportunity. In such a civil society, a sound balance of benefits of different stakeholders in copyright law would be struck and a harmony of copyright protection and development would be achieved” (Tian 92-93).

In order to establish a knowledge equilibrium society in which IP protection and development are in harmony, Tian proposes 4 guiding principles:

1. ***Capability of accessing intellectual resources (both software and hardware) and goals of international communities***

Promoting access to intellectual resources is the first fundamental goal of creating knowledge equilibrium societies. This however, is rife with challenges. In addition to the obvious problems of lacking the infrastructure, the software and the hardware to access digital information, developing nations are always in a situation of fighting policies and legislation designed to strengthen restrictions on their ability to access the knowledge and technology of advanced nations. Moreover, the monopolistic nature of intellectual property usually means that even if the rights owners are willing to sell, their prices will simply be out of reach to developing nations (Gantz and Rochester 2005, 235).

The capability of accessing intellectual resources is a well-known factor for social development in all societies. UNESCO's 1945 *Constitution*, still in force, explicitly states in its preamble that

[...] the States Parties to the Constitution, believ[e] in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other's lives;
(UNESCO 1945, np)

Article 2 (c) continues by stating that, in order to contribute to peace and security through education, science and culture in a manner that furthers justice, law, human rights and fundamental freedoms, UNESCO will:

Maintain, increase and diffuse knowledge:

- By assuring the conservation and protection of the world inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;
- By encouraging cooperation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;
- By initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.

(*Id.*)

Other major organizations have drafted similar mandates and wordings, such as the United Nations Industrial Development Organization (UNIDO), the World Intellectual Property Organization (WIPO), and the Massachusetts Institute of Technology's One Laptop Per Child Project, revealed in 2005.

In responses to the original Google Library Project, The European Commission reported positively when it was petitioned to support the creation of a European digital library, both ensuring the availability of information, as well as preserving European languages (see Forster 2007).

Improving access makes IP works more affordable for more users and should even help decrease widespread copyright piracy generated by unaffordable prices.

2. *Self-determinant innovation capability and promoting the progress of science*

As explained previously, knowledge, culture and technology developments create platforms and provide the raw material for further innovation, which in turn can drive economic growth.

It is only expected that nations wish to maintain their competitive advantage and their leading positions in the international IP market, thus abstaining from transferring any of their core technologies to others. But if a

nation seriously wants to improve on its disadvantageous state and economy, it has no choice but to improve its self-innovation capability – and a free flow of translation can certainly contribute to stimulating the cultural, scientific and industrial research and innovation sectors.

Without self-innovation and sufficient funding for scientific and technological research, no nation can simply import results into their own research and innovation abilities. Nations with potential for autonomy understand the significance of self-innovation for economic growth. For example, China – which has identified the improvement of self-innovation as a top strategic priority – often demands the sharing of technology from companies intending to enter the booming and coveted Chinese market, such as Boeing and Reuters (Gantz and Rochester 2005, 235-236). In 2005, after signing a 150 aircrafts order of AirBus 380, France agreed to set up an assembly plant in China (see Hephher 2006).

The improvement of self-innovation ultimately depends on the individual country. Since a country's ability to innovate is determinant of its competitiveness and economic autonomy, improving self-innovation will help correct some of the inequalities in economic power relations by strengthening the position of copyright importing nations, which would eventually contribute to a more balanced international IP landscape.

3. *Capability to industrialise IP assets and promote the use of arts*

As we explained at length, copyright was never put in place to benefit everyone everywhere. It has been called been described as an ideology created by the North, perpetuating the injustices it claims to address, only exported to the South in order to take advantage of it and dominate it (Drahos 1996, 101).

Without question, the international copyright arrangements were drafted to protect the interests of the major publishing nations and many industrialized countries accepted copyright only when it was in their interest; copyright did not originate in a desire for the free flow of knowledge and ideas.

(Altbach *et al.* 1992, 6)

But if IP and copyright are here to stay, then all countries must equip themselves with the ability to engage in its markets. Whether nations have the ability to innovate in science and technology and play an international leadership role or not, it is important for them to explore and foster their own competitive advantages in the international IP market, and to find ways to convert these advantages into socio-economic returns. In addition to science and technology, such advantages should at least include specific exports from their culture, art, food, and tourism. Of course, this requires building sufficient expertise in IP law, and investing and marketing appropriately. But the potential returns are the creation of new or competitive niches of economic growth where they would be less at the mercy of the developed nations, while enriching humanity's heritage. This also

counters cultural imperialism, which has been defined as: “the systematic penetration and dominance of other nations’ communication and informal systems, educational institutions, arts, religious organizations, labor unions, elections, consumer habits, and lifestyles” (Snow 2010, 11). This systemic penetration can be very subtle, as is the case with economic and social development efforts, but so long as it is perpetuating the legal and economic superiority of one nation over another, or of its policies and ideas, it is still colonialism and imperialism.

4. *Capability of equally participating in international IP trade and the process of IP standard-setting*

Due to their weak economic power, inadequate bargaining skills and poorly organized alliances, developing nations often do not carry the bargaining power required to fully participate in international IP standard-setting and express their demands in a manner that can generate policy reform (Drahos 2002, 2006). In addition to criticizing the non-democratic behaviours of the US, the EU, Japan and Canada (referred to as the Quad states), developing nations can replicate some of their successful strategies, such as those identified and explained in Booz *et. al.*’s *The World’s Most Effective Policies for the e-Economy* (2002) and use them to their own advantage where applicable.

To recreate conditions that allow them to participate with increased engagement and presence in international IP processes, nothing prevents developing nations from creating alliances and collating with other nations encountering similar challenges. Brazil, China, India and South Africa led the G-22 nations to successful rounds of negotiations at the WTO to counter the Quad. They can approach NGOs, private sector agents, and industrial groups to join their coalitions, including groups residing in the developed nations, and which have expertise, experience, and networks in the field. Strategic coalitions can help nations collectively improve their negotiation skills, acquire expert knowledge, and put forward strong group proposals.

By coming together, developing nations can also apply some of the same forum shifting strategies used by developed nations to influence standards in a direction that is more favourable to their needs and realities. They can concentrate on domestic, bilateral and regional legislative agreements, instead of relying solely on international fora where they do not have much influence. In any case, as explained in Part I, international treaties are meant to be enforced by domestic laws and policies and only serve as a consistent benchmark. By ensuring that their domestic policies are moving them in the right direction, and by creating bilateral and regional consensus, countries can at least organize themselves domestically and regionally, which will greatly help them acquire more influence and power at the international level.

These four principles can help nations build policies that enable them to build their capacity, and establish measurable standards to assess their progress and the effectiveness of their programs, as well as determine to what extent they should implement international treaties.

The role of translation is quite clear for the first, second, and third principles. But so is the impeding role of the translation right. There is no need to elaborate further on the benefits of translation for allowing or increasing access to intellectual resources, which has been identified by the UNESCO and most international and national development agendas as an objective and a commitment. Translation also grants access to the developments taking place elsewhere in the world, with the added luxury of studying them in one's own language, which inevitably leads to an increased capacity in self-determination and internal progress. In *Understanding Knowledge Societies*, drafted by the United Nations' Department of Economic and Social Affairs (2005), it is explained that knowledge dissemination produces new meaning by externalization and combination. While the latter refers to the ability of integrating and editing information with existing information and making it more usable, the former is directly linked with translation: expression of 'new meaning' and its translation into comprehensible forms that can be understood by others" (United Nations 2005, 24). Dissemination of knowledge and information through translation also greatly multiplies the number of those working to solve problems, innovate, and advance research in every field, which is a tremendous social benefit for the whole of humanity. Finally, the freer flow of translation would create cultural exchanges and are beneficial to all parties, because most nations can be, to some extent, greater exporters of their domestic cultural and artistic goods. This in turn, feeds the culture and art of other nations, and the outcome is more richness and variety in humanity's culture.

IX.1 Translation, Access to Knowledge, and Copyright

Sara Bannerman's lively account of the minutes from *Berne* conventions and the *Universal Copyright Convention's* records (Bannerman 2016, *passim*) can be used to highlight the significant place of translation rights in international negotiations, as well as a reminder of its role for promoting science through increased access and dissemination.

The foundations of *Berne* were laid in a series of meetings that took place from 1884 to 1886, and during which Louis-Joseph Janvier eloquently and passionately made a case for the principle of access to knowledge in the interest of disseminating science throughout the world, despite being the independent representative of Haiti, one of the less powerful countries participating in the meetings. As a result, the original 1886 formulation of *Berne* explicitly allowed copying "for use in publications destined for [...] scientific purposes" (Berne 1886, Art. 8) which included works like scientific articles. By 1908, however, this exception was limited to news articles

only, and in 1928, news was further narrowed to “articles on current economic, political or religious topics” (*Berne* 1928, Art. 9), thus completely excluding works of scientific nature. By 1952, scientific works no longer carried any distinction from other works in the eyes of copyright law, and were treated exactly in the same manner as “literary and artistic works.” In fact, the Canadian delegate questioned the need to even include the word “scientific” in addition to “literary and artistic” during the 1952 negotiations establishing UNESCO’s *Universal Copyright Convention*. While this was done with the intention of highlighting the importance of scientific works, which were no less worthy of the law’s protection than other works, it did reveal that those drafting copyright law were more interested in its protective aspect, as opposed to its benefits to public interest.

The UCC negotiations opened the door to questioning the notion that a work is a work, whether scientific or otherwise. The delegates brought up the point that, because of science’s continuous progress, scientific works become outdated much faster than other types of work, which justified granting them a shorter protection over translation rights than other types of works. The delegates of a number of countries noted the difficulty of having to define “scientific works” and distinguishing them from other types. For instance, India’s delegate proposed to apply this exception to the translation of all works to avoid the confusion that would ensue from trying to determine what is scientific and what is not (*Id.*).

Still feeling that they could overcome these difficulties, some representatives continued openly supporting shorter translation rights for scientific works, including Greece, Italy, Argentina, Chile, El Salvador, India, and Liberia. Mexico and the Netherlands accepted a broad definition of scientific works, such as the one proposed by France, limiting science to the fields of the physical, mathematical and social sciences. Canada suggested granting compulsory translation licensing, with shorter licences for scientific works. But West Germany, Japan and the United Kingdom opposed any special treatment given to scientific works, and a measure that had potential to significantly improve the dissemination of science was never adopted (*Id.*).

The *Stockholm Protocol* of 1967 would have allowed developing countries to benefit from looser translation rights for all works along with shorter copyright terms, but it never came to fruition, and was soon replaced by the *Berne Appendix* which specified that such exclusions were to be used for teaching, scholarship and research. These exclusion “were seldom implemented” and “did little to address the ‘information famine’ in access to scientific and medical works” (*Ibid.* 43-44), as we have already mentioned in Chapter 6, and as we shall explain in more detail in Chapter 10.

The loosening of translation rights would have been a simple and cost-effective solution with far-reaching social and cultural benefits for the ultimate aims of copyright law, yet it was ultimately rejected. On the opposite end, as new technologies allowed for even easier distribution and access to knowledge, copyright law quickly

expanded its protection to maximize private rights and the revenues that accompany them. While the Internet has certainly made a tremendous amount of information available, academic journals and databases continue to lie outside the affordability reach of those who do not have the institutional affiliations or the financial resources, whether they are in developed or developing nations.

X.1 JSTOR as a case-in-point

[Corporate] Concentration is considerable. In music, the “big five” is now the “big four,” which together own 75 percent of the world’s music. In publishing, six primary entities control virtually all scholarly publications, and non-academic publications have also become increasingly concentrated. The American movie industry is dominated by six movie studios, which control virtually all movie production in the United States. [...] The production and distribution of news, from newspapers to television to radio, have been highly concentrated, with entire media markets often served by a single corporation. Americans have long lived under the mythology that they have a free press, but it is a system so concentrated in terms of media monopoly as to undermine the very idea of freedom, and this is the system that is exported globally. [...] While Google still advocates for the free exchange of information, Google’s increasing control over digital copies and cloud-based knowledge suggest it too may become an advocate for more copyright laws at some point in the future. Copyright law is designed to protect the products of this industrial complex within a legal system where an adequate defense against copyright infringement is well beyond the reach of virtually everyone, rich and poor alike, especially when lined up against the corporate attorney’s [sic] of these global monopolies.

(Halbert 2014, 9)

JSTOR is one of the most well-known databases in the world. In exchange for a registration fee, it provides access to 10 million academic journal articles from almost 2000 journals, in addition to books and other documents (<http://about.jstor.org>). Most of its licences are granted to academic, research and public institutions. MIT Libraries have the following disclaimer on their site:

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(<https://libraries.mit.edu/research-support/notices/jstor-restrictions/>)

JSTOR does not own the copyright of any of the material in its database. Many of the works included in it have in fact entered the public domain, with some of their material having been published before 1870.

Following a number of incidents that harmed their reputation, including the above mentioned Swartz incident, JSTOR started making some public domain content available to the public. Referring to it as “Early Journal Content”, this included about 500,000 documents, or 5%, of their database. Since then, they have said through the FAQ on their site that they do not intend on making any more public domain content available with the following explanation: “We do not believe that just because something is in the public domain, it can always be provided for free.” As Lawrence Lessig (2013, at 44:40) points out during a lecture entitled *Law and Justice in a Digital Age*, in this business model, copyright is not even benefitting a single one of these authors or content creators. Then he goes on to that part of what had triggered Aaron Swartz to break into and download JSTOR’s content is that he heard at a conference that JSTOR had been asked what would they have to be paid to make the content of their database publicly available, and they said \$250,000,000.

In a short opinion piece in the Guardian entitled *Academic publishers make Murdoch look like a socialist*, George Monbiot states that

[t] his is a tax on education, a stifling of the public mind. It appears to [contravene the universal declaration of human rights](#), which says that “everyone has the right freely to [...] share in scientific advancement and its benefits.”

(Monbiot 2011, np)

Monbiot cites relevant figures and data, helping to reach the following realizations:

- It costs \$42 to access a Wiley-Blackwell article, \$31.50 for an Elsevier article, as compared to £1 for 24 hours of access to the *Times*;
- Profit margins of Elsevier and others have been around the 36% since 1998, so this is not a new phenomenon;
- Elsevier, Springer and Wiley account for 42% of all published journal articles, and they are always buying smaller publishers:

After which he states:

Academic papers are published in only one place, and they have to be read by researchers trying to keep up with their subject. Demand is inelastic and competition non-existent, because different journals can’t publish the same material [...] Far from assisting the dissemination of research, the big publishers impede it, as their long turnaround times can delay the release of findings by a year or more.

(*Id.*)

The protection granted to databases clearly limits access to published research, and creates a significant problem for anyone who does not belong to the knowledge and academic elites of the world. As explained previously, access to the information and knowledge is one problem, while participating and creating knowledge is another.

In reference to the first problem, we know that:

Researchers [...] often have little or no access to the published research literature due to the high cost of journal subscriptions and inadequate and expensive distribution mechanisms. According to a recent survey conducted by the World Health Organization (WHO), in the 75

countries with an annual GNP per capita of less than US\$1000 some 56 per cent of medical institutions had no subscriptions to journals over the previous five years; in countries with a GNP between US\$1000 and US\$3000 34 per cent had no subscriptions and a further 34 per cent had an average of two subscriptions per year.

(Chan, Kirsoph and Arunachalam 2005, 2)

As for the second problem of participating in knowledge generation and representation, the US, the EU, the UK, Germany, Japan, France, Canada and Italy, taken together:

produced about 84.5% of the top 1% most cited publications between 1993 and 2001 [...] Moreover, although my analysis includes only 31 of the world's 193 countries, these produce 97.5% of the world's most cited papers. The political implications of this last comparison are difficult to exaggerate. South Africa, at 29th place in my rank ordering, is the only African country on the list. The Islamic countries are only represented by Iran at 30th, despite the high GDP of many of them and the prominence of some individuals, such as Nobel prizewinners Abdus Salam (physics, 1979) and Ahmed Zewail (chemistry, 1999).

(King 2004, 314)

Many translation scholars have already presented ample evidence that translation enables both the spread, as well as the generation of knowledge (Susam-Sarajeva 2006; Sturge 2007; Gentzler 2008; Milton and Bandia 2009, etc).

In addition to translation's potential for the diffusion and generation of knowledge, it can also serve to destabilize or break down political and economic path dependencies, which are "thick institutional tissues aiming at preserving existing industrial structures and therefore unnecessarily slowing down industrial restructuring and indirectly hampering the development of indigenous potential and creativity" (Hassink 2005, 522).

The notion of learning region (developed in OECD 2001; Boschma & Lambooy 1999) has been put forward as set of conditions in which policy-makers avoid path dependencies because of their willingness to learn from past mistakes, but with an emphasis on entrepreneurial learning and innovation. The OECD explains that a learning region is "characterized by regional institutions, which facilitate individual and organizational learning through the co-ordination of flexible networks of economic and political agents" (OECD *op. cit.* 24). More specifically, the following adaptable policy principles have been identified for their determining role in developing learning regions:

- carefully coordinating supply of and demand for skilled individuals
- developing a framework for improving organizational learning, which is not only focused on high-tech sectors, but on all sectors that have the potential to develop high levels of innovative capacity
- carefully identifying resources in the region that could impede economic development (lock-ins)

- positively responding to changes from outside, particularly where this involves unlearning⁶⁹
- developing mechanisms for coordinating both across departmental and governance (regional, national, supranational) responsibilities
- developing strategies to foster appropriate forms of social capital and tacit knowledge that are positive to learning and innovation
- continuously evaluating relationships between participation in individual learning, innovation and labour market changes
- developing an educational and research infrastructure for knowledge society
- encouraging openness to impulses from outside
- fostering redundancy and variety
- ensuring the participation of large groups of society in devising and implementing strategies (Hassnik op. cit. 522⁷⁰)

When these principles are combined with other parameters of development and power, such as language and ICTs (see Chapters 9 and 10), then the role of translation for creating such learning conditions become more obvious. For instance, translation policies can contribute to the coordination of supplying the need for skilled individuals, depending on the language of business required; translation can allow exchanges with the outside and encourage openness while preserving linguistic and cultural identity, for both learning and unlearning; and translation can also ensure the participation of large groups of society in the development and implementation of such strategies.

Shortening or loosening translation rights not only improves access to content generated by developed countries, but also improves the ability of developing nations to create their own learning regions, as well as participate in knowledge generation by getting published in the North, as well as enabling developing countries to share knowledge with each other more freely. These are similar benefits to the ones that would derive from open access (Sell 1998; Willinsky 2006, 94). It is moreover unfortunate and unfair that in developing the intellectual property regime, the West has done everything it can to protect its intellectual output, while at the same treating traditional knowledge of the rest of the world as though it were part of the public domain, to be used as the raw material for its own work and creativity, without attribution, while generating revenues by holding exclusive rights to selling it, sometimes to the originator (Sunder 2007).

X. Cultural dimensions of access to knowledge

It is difficult to pin down exactly what culture might be—expressions, languages, music, art,

⁶⁹ Unlearning consists in being able to let go of that which you have already learned. This has become increasingly important in a fast changing environment, in large part due to technology. It represents the ability to adapt cognitively with agility in order to remain innovative and competitive (Lee 2002-2003).

⁷⁰ Hassnik proposes to use the term learning cluster, instead of learning region, to avoid the methodological fuzziness and weaknesses that he associates with the former term. Despite his well-argued case, the minute differences between the two terms/notions are out of scope for the present work.

literature, and social structures are all considered part of a cultural milieu. The symbols of culture—the play, the piece of music, the oil painting, or book, while having been “fixed in a tangible form” to use the language of American copyright law, are in actuality not easily defined. These tangible representations of what we call culture might also be understood as multiple sites where knowledge is produced and categorized in such a manner that everyday life and commonly shared values are expressed through a discourse of who we are as a people.

(Halbert *op. cit.* 124)

While many of the points we have made so far apply as much to cultural and artistic works as they do to scientific works and research, culture and art have their own specificity in society, and deserve a bit of space in this discussion.

Rosemary Coombe writes that it was only once a critical component to cultural studies was introduced in anthropology that the Eurocentric biases in understanding art and culture were revealed. “Thus, any discussion of culture rests upon an already politicized foundation [...]” (*Id.*).

Copyright law deals with culture and arts as it deals with objects, as things that can be made, manufactured, sold, bought and owned. This may serve an important purpose, for instance, in protecting the works of individual inventors, scientists or artists against unauthorized appropriation and commercial exploitation. But when it becomes the main obstacle against the circulation of cultural goods, and when the maximalist position seems to be gaining ground, one may wonder about the future of culture in societies where copyright has taken over the cultural landscape.

As we have already seen, in today’s world, the United States lead the charge for implementing their maximalist version of IP and spreading it to the rest of the globe. Yet, it was these same U.S. that promoted the free flow of cultural goods during the Cold War for strategic reasons, as part of an ideological campaign to win over the rest of the world (*Ibid.* 86-117).

While numerous reasons are given to explain the collapse of the Soviet Union, the focus is often placed on military expenditures and economic competition. The importance of cultural exchange and the ways in which capitalist culture filtered through the iron curtain to provide the citizens of Soviet Russia with a vision of life substantially different from their own is less often discussed, at least within the discipline of political science. The “soft power” effect of Western culture is relevant [...] because the Cold War was at its heart an ideological battle over the minds of people. As such, cultural resources were mobilized to argue for the superiority of one system over the other, not only as a way of governing, but a way of life. [...] political leaders have found the promotion of American cultural values abroad to be an important part of American foreign policy.

(*Ibid.* 90)

The circulation of art and cultural goods transcends any legal boundaries that can be set by copyright law. Human beings will be inspired by an idea or a work regardless of its origin, and they will integrate it into their cognitive infrastructure and heritage, before mashing it up and reworking it into something more or less new. This instinctive, natural process, does not align with the legal structure and regulated process of copyright, where transformation must be preceded by authorization (Halbert *op. cit.* 118-142).

In “Stealing beauty: How much did Picasso’s paintings borrow from African art?” Andrew Meldrum (2006) writes that at 26, Picasso was looking for new sources of inspiration. When Henri Matisse showed him a newly purchased African sculpture, Picasso was fascinated, so he went to the Trocadero Museum of Ethnology (now the Musée de l’Homme) after which he wrote:

A smell of mould and neglect caught me by the throat. I was so depressed that I would have chosen to leave immediately," Picasso said of the museum. "But I forced myself to stay, to examine these masks, all these objects that people had created with a sacred, magical purpose, to serve as intermediaries between them and the unknown, hostile forces surrounding them, attempting in that way to overcome their fears by giving them colour and form. And then I understood what painting really meant. It's not an aesthetic process; it's a form of magic that interposes itself between us and the hostile universe, a means of seizing power by imposing a form on our terrors as well as on our desires. The day I understood that, I had found my path. (Meldrum *Ibid.* np)

That visit turned Picasso into an avid collector of African masks, sculptures and art, and inspired him for the rest of his career. The exposition visited by Meldrum brought together 84 Picassos along with “29 African pieces similar to the 100 or so he collected, giving the viewer a chance to see at first hand the crucial links between African art and Picasso’s creations. [...] One’s eye is drawn from one to the other, and the parallels are evident” writes the author. “Faces are symbols. Eyes, mouths, noses and genitals are placed for impact, not naturalistic representation. Human figures are flat planes and geometric shapes” (*Id.*).

It is not too broad a stretch to say that the cubist tradition, was “borrowed” from African art, and hybridized by Picasso. In 2006, an exhibit held in South Africa placed Picasso’s work next to examples of the African art that inspired him. While the original African artists are unknown, Marilyn Martin, the Curator of the Iziko South African National Gallery, notes, “This gives us a way of validating an anonymous artist—we pay tribute through this exhibition to those artists.”

(in Halbert *op. cit.* 127)

Halbert then comments that:

[c]entral to the narrative of original creativity is the idea of fundamental transformation. However, under current copyright traditions, such transformation is not sufficient and it is likely that Picasso would not be able to appropriate so freely, or at least could have been

challenged in the courts for his appropriation.⁷¹

Finally, whether copyright exists or not, people will transform and recreate what they see, what they like, and what they can. Copyright only impedes this transformational drive that enriches cultures and generates inspired art. This is the entire premise of the user-generated content, which proves that people do not only consume, but also create, works when given the chance. And they will do so even if the law will not protect their creations, but it allows them to express themselves and enjoy the feelings of having created and shared cultural and artistic works (*Ibid.* 181-212).

User-generated content can be found everywhere on the Internet, and obviously raises the same issues of creativity, ownership, and unauthorized use of copyrighted works as those raised by any other work. As we have already explained, copyright is premised on the idea that no one would ever publish a work without the economic incentive of the exclusive monopoly they are granted for publishing their work. User-generated content is itself the evidence that this premise in copyright law is flawed, and that people will create to express themselves, and yes at times to make money, but not always, and not always in the traditional model of copyright.

It is when American soldiers brought their comic books with them to Japan after World War II that Japanese artists appropriated this art form and created the now-famous Manga, which is a form of telling a story through images. In 2007, Japan created a Nobel Prize of Manga to indicate the importance of this art form to their culture and economy, and elevate its status from one of a subculture to one of sanctified and legitimized culture. Today, despite linguistic and cultural differences, American artists are reworking this Japanese art to create new works and forms. However, as Manga became increasingly commercialized, it lost its ability to generate the same level of passion and enthusiasm it once had. This is when Dojinshi appeared on the scene. Dojinshi is Manga, with the specificity of having appropriated the Manga characters of others without authorization, in order to create spin-offs. It is fan fiction that is entirely based on what should be considered infringement and piracy. Instead of considering this as shameless violations of both Japanese and American law, some authors have proposed that “dojinshi are creating a market base” and they might be the saviour of this lagging industry (*Ibid.* 132-133).

Steven Vander Ark, a librarian and *Harry Potter* fan, produced an online “compendium of information” called *The Harry Potter Lexicon*. J. K. Rowling acknowledged its existence, used it herself as a reference, and even gave

⁷¹ Sculpture Koons lost a case to photographer Rogers when his sculpture was found to be substantially similar to the photograph. See *Rogers v. Koons* 960 F. 2d 301 (2d Cir. 1992) (in Halbert *op. cit.* 140)

it an award. When the publisher RDR Books worked with Vander Ark to produce a hard copy of the book, Rowling and Warner Brothers initiated a lawsuit arguing that too much of the original was being reused. While the work was online, not only was there no intervention, but it seemed to be viewed very favourably and encouraged, even. Moreover, Rowling must also have been fully aware that such a work could only be the product of the most passionate of her fans, and that she may be viewed in a negative light by her fan base – which is actually what happened. Yet, Rowling and Warner Brothers sued as soon as the fan work seemed to be in potential competition with them, and the court sided with them against RDR Books, which no longer exists today. A revised version of the *Lexicon* was published after considerable changes were made to it (*Ibid.* 133-134).

Dojinshi and the *Harry Potter* fan work represent two different ways copyright owners have dealt with what copyright would consider piracy. While the Japanese Manga industry has basically decriminalized dojinshi by ignoring it, Rowling and Warner Brothers decided to enforce their IP rights. Both cases make us wonder about the compatibility of copyright with the creative act, and the doors that it closes to future creativity (*Ibid.* 135).

Conclusion

Knowledge societies do not emerge on their own simply because of the integration of ICTs into social systems; they must be constructed by social and political agents. The process of construction starts from the academic and scientific communities, which must develop the theoretical or notional framework. Once this framework penetrates the political system, it can start gaining social legitimacy if it is shared as a vision for the future of society. For the vision to be implemented in a sustainable manner, it must stem from the specific structures of the society itself in a manner that customizes the notion of knowledge society to its own realities and vision. The manner in which a society structures and defines knowledge itself is quite determining of the kind of knowledge society that it will become. Due to the variance in structures and subsystems, widely varying knowledge societies will therefore evolve. Knowledge societies are therefore socio-political constructions, in which social, cultural, economic and technological developments stem from the structures of knowledge.

Knowledge and power seem to be in a binary dynamic relationship, structuring much of what goes on in society. But knowledge societies do not emerge on their own; they require planning and investing, but also a context of easy access to, and participation in, knowledge.

Knowledge has become the new capital of developed nations. Whoever controls its generation, circulation and regulation will hold the power. Intellectual property is the tool to control and manage all intellectual products,

and copyright specifically covers information and knowledge because of the format and medium in which they are generally captured and distributed.

While the aim of copyright was initially the promotion of science and art through their dissemination to the public, the commodification of knowledge led to the rise of an industry completely reliant on an exclusive proprietary business model, which has been dominating the agenda of international copyright ever since.

The information famine that has resulted in certain areas of scientific research goes beyond the divide between developed and developing countries to reach the core of developed societies, where the majority of citizens cannot access publicly funded research because they do not have the institutional affiliations or the monetary resources to access scientific journals and databases.

That is why some scholars have argued for the complete elimination of certain parts of intellectual property, with a special emphasis on copyright (Smiers 2000).

In the face of ever expanding copyright protection, the proponents of the A2K movement have been pushing for minimizing protection, while maximizing exceptions, effectively challenging many aspects of the copyright discourse, especially with regards to educational purposes. In fact, “the open access movement has been able to accomplish what the negotiation of complex rules under the *Berne* and *Universal Copyright Convention* had failed to secure: fuller access to scientific works” (Bannerman *op. cit.*, 52).

In 2014, the report of the UN’s special rapporteur on cultural rights made the following recommendations for copyright policy and the right to science and culture:

Copyright laws should place no limitations upon the right to science and culture, unless the State can demonstrate that the limitation pursues a legitimate aim, is compatible with the nature of this right and is strictly necessary for the promotion of general welfare in a democratic society.

(Shaheed 2014, 20)

In 2012, in the *Right to Enjoy the Benefits of Scientific Progress and Its Applications*, she underlined:

the need to guard against promoting the privatization of knowledge to an extent that deprives individuals of opportunities to take part in cultural life and to enjoy the fruits of scientific progress, which would also impoverish society as whole.

(Shaheed 2012, 18)

She also noted that legal experts:

have increasingly questioned the economic effectiveness of intellectual property regimes in promoting scientific and cultural innovation. Scholars have found no evidence to support the assumption that scientific creativity is only galvanized by legal protection or that the short-term costs of limiting dissemination are lower than the long-term gain of additional incentives. (*Ibid.* 17)

As can be attested from the minutes and reports dating back to the 1800s, which we have summarized in Chapters 5, 6 in addition to earlier in this chapter, translation has always been recognized by all nations negotiating international copyright as one of the main sources of education and publishing. Unfortunately, translation rights were fully assimilated under *Berne* in 1908, and this has not been reversed ever since. The shortening, loosening or elimination of translation could have constituted easy solutions to important aspects of the access to knowledge problem, but instead, copyright was further expanded, for example to include databases, which now monopolize very large portions of all published academic research.

As we shall see in the chapters on the digital economy and on globalization, translation still carries a tremendous potential for destabilizing and perhaps rebalancing the current systems, by countering the restriction on the information flows and opening a space for other languages to surface, thus weakening the crushingly dominant grip of English.

Chapter 9: Information and communication technologies and the translation right

This chapter intends to examine whether current translation rights have taken into consideration the new technological realities of the world, or whether they can be considered outdated.

With the advent of copyright's protection of computer software in the 1970s, the lines of intellectual property rights started to blur, and today, we can wonder whether they are all still relevant. Moreover, the Internet has rendered national boundaries irrelevant in many respects, and the development and application of copyright law in such an environment raises further questions. Finally, the continuous advances in technology only compound these issues: "While courts have been receptive to applying traditional copyright doctrine in the Internet arena, and while treaties and national legislation have been adapted, copyright holders face continuing challenges from evolving technologies" (Abbott et al. 2007, 413).

This chapter will be structured in the following manner:

In the first part of the chapter, we will try to understand the place and role of technology in today's world. This will include an explanation of how technological advances and IP advances have always run in parallel. We will then discuss what present-day technology has meant for collaboration and business, which mainly addresses the open movement. This will allow for a better understanding of the potential for translation projects that rely on collaborative and open models.

In the second half of the chapter, we follow the evolution of technology in the discipline of TS, in order to better understand the manner in which translators do their work. If the work of the translator today is so different from what copyright law had in mind when its provisions were initially drafted (and which are still in effect today), to what extent are those provisions still applicable to translation?

I. Copyright and technology

There has always been a close relationship between technology and IP. Historically, major developments in technology have usually been closely followed by expansions and updates to IP law, including copyright. This statement can be further demonstrated with a closer parallel look at the developments of technology and copyright law since Gutenberg, to see what kind of relationship has existed between copyright and technology.

In fact, one way to understand copyright specifically is to view it as a reaction to technological development. As Justice Stevens of the U.S. Court of Appeals wrote the Betamax case, *Sony Corp. of Am. V. Universal City Studios, Inc.* "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology." And he added in the footnote:

Thus, for example, the development and marketing of player pianos and perforated rolls of music, see *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908), preceded the enactment of the Copyright Act of 1909; innovations in copying techniques gave rise to the statutory exemption for library copying embodied in 108 of the 1976 revision of the copyright law; the development of the technology that made it possible to retransmit television programs by cable or by microwave systems, see *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), prompted the enactment of the complex provisions set forth in 17 U. S. C. 111(d)(2)(B) and 111(d)(5) (1982 ed.) after years of detailed congressional study, see *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 129 (CA2 1982).

(*Sony Corp. of Am. v. Universal City Studios* 1984, 430)

This dynamic between technological progress, globalization, social and economic life, and international IP has been going on for centuries. Around 1450, Johannes Gutenberg invented the metal moveable-type printing press, allowing to efficiently reproduce works in large quantities (Brendan 2001). The access to printed works fueled social and religious discussions that led to religious conflict, while also creating a real publishing industry that would eventually require copyright protection. Over the next two centuries, the publishing industry continuously voiced concerns over the protection of their publications, which ultimately resulted in the 1710 *Statute of Anne*, with its long-lasting effects on modern copyright law.

That is why Justice Stevens continued his above opinion by writing that “[i]ndeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection,” while adding the following quote from Kaplan’s (1967) Foreward:

Copyright protection became necessary with the invention of the printing press and had its early beginnings in the British censorship laws. The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.

(Kaplan 1967, Foreward)

The photocopier, film, radio, audiocassettes, television, VCRs, satellites and cable television significantly enriched society’s culture by allowing a large scale broadcasting of copyrighted material. But as these inventions multiplied from the nineteenth century onward, so did the concerns of those owning them. The broadcasting, sound-recording, and movie industries formed groups to voice their concerns and protect their interests domestically and internationally, and in response copyright laws were continuously expanded in scope and strengthened in enforcement. Copyright law, which was initially put in place to protect the printing press, was now including photography, visual arts, sound recordings, choreography and performance, broadcast, transmission, adaptation and rental of copyrighted materials. The Rome Convention’s *International Convention for*

the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1964 ensured the recognition of copyright as a serious international issue.

As explained on www.computerhistory.org, the quick succession of innovations to computer technology from the 1970s made the home computer possible. In the 1990s, it became possible to connect computers together in a network, which led to the establishment of the national information infrastructure (NII), which was a significant step in getting to a global information system platform. Once the Internet became a household convenience, socio-economic life was profoundly changed, from the way people interact with information and one another, to the way large multinationals do business.

While these developments were welcomed socially and culturally for their revolutionary potential benefits, the copyright industries were reacting to the realization that these changes were significantly threatening every aspect of the production of copyrightable material.

Every aspect of copyrighted works (text, image, sound) could be easily digitized, stored, converted, modified, and transmitted. New works can easily and cheaply be created, simply by manipulating existing works or merging them with each other. The convenience with which incredibly large amounts of data can be stored and disseminated over a high-speed, broadband, interactive system accessible through various personal devices is not only menacing for the copyright industry because of the technical difficulties surrounding protecting their rights, but also because of the technological revolutions that it constantly generates. For instance, various industries are quickly converging to allow the connection of previously unconnected sectors, from cameras, personal phones and computers, to homes and cars. This also translates into business mergers and acquisitions, such as Google buying YouTube and Media Inc. – which included MySpace and Photobucket (Park 2007; Knemeyer 2004).

While rights holders may feel as if the current laws are insufficient to protect their works in such an environment, citizens feel entitled to freer consumption of these works given the ease with which they can be accessed.

Policy writers and lawmakers therefore feel a continuous need to be updating their laws in recognition of these new digital realities, and most nations have already modified their agendas, policies and laws in this direction, and will continue to do so (see e.g. Geist 2013), because they see the links between the digital progress and socioeconomic impacts, especially at the international level. Countries feel as if their access to the global knowledge-based and the growth of their civil societies are determined by their IP policies. To be competitive

in the digital global market, companies must adopt new business models that recognize the nature of the globalized knowledge economy and how to participate in it. Friedman calls this Globalization 3.0:

Because it is flattening and shrinking the world, Globalization 3.0 is going to be more and more driven not only by individuals but also by a much more diverse – non-Western, non-white – group of individuals [...] this empowerment of individuals to act globally is the most important new feature of Globalization 3.0.

(Friedman 2006, 11)

I.1 New world

There is no doubt that information and communication technologies have changed the world we live in, redefining our relationships not only with each other and the world, but even our understanding of space and time. The infiltration of technology into the lives of the citizens of technologically advanced societies has meant that the boundaries between work and leisure, between waged and volunteered labour, between employer and employee, have been significantly blurred. Very different activities, ranging from personal amateur interests on online forums to professional work, all feed into the production of capital in one form or another.

In *Multitude: War and Democracy in the Age of Empire*, Antonio Negri and Michael Hardt (2000) argue that the Empire, which represents the ruling powers is maintained in power and existence by the multitude, which is an active social subject that acts on the basis of what the singularities share in common (Negri and Hardt 2004, 100). “The creative forces of the multitude that sustain Empire are also capable of autonomously constructing a counter-Empire, an alternative political organization of global flows and exchanges” (*Ibid.* 15).

The success of the free and open-source software (F/OSS) has been considered indicative of “the inadequacy of capitalist relations in organizing labour in the information sector” because it is a system based on the economic incentive argument which has “little support in economic history, it is contradicted by empirical data, and it cannot even be convincingly argued in theory” (Söderberg 2008, 9). Instead, user-centric models based on less strict licensing schemes have started appearing which are “reskilling non-employees” and allowing them to partially re-appropriate the means of production while tools and skills spread to the rest of society. This said, control over the circulation is still very much in the hands of the few, because they control the legal and technological infrastructure for its production and dissemination of information, as we already saw, especially in Chapters 4 and 8.

In the hacker community, in order to find an alternative to information being controlled by either the market or the state, they have resorted to the notion of “gift economy” found in anthropology. The file-sharing networks often combine the impersonal nature of market exchange with the non-coerciveness of gifts.

Over the last few decades, movements of resistance have lost a lot of their strength, as witnessed when the millions who marched the streets against the invasion of Iraq in 2003 failed to change anything; and many protests and marches since then have amounted to similar outcomes. In fact, many resistance attempts are quickly isolated, and then reused to generate increased power for those who already hold it. If the aim is resisting the current system, then this resistance must be done differently. “When every point in the circulation of capital is productive to capital, it becomes hard even to see what [...] resistance could mean” (*Ibid.* 188). That is why the hacker community has opted to resist not by marching directly against what they wish to change or improve, but rather by walking around it, by not resisting when it is possible to circumvent.

Hackers do not attack an information market directly; by making the same product available for free elsewhere, the market becomes superfluous. In this thesis, I have been advocating to use translation as a means to decentralize the flows of knowledge and information in society where possible to counterbalance the power differentials and loosen the grip of exclusive monopolistic models, whether in economy, information, or in linguistic and cultural domination (more to come in Chapter 10). This is precisely what the hacker community has done. “In their challenge against intellectual property law, the preferred strategy is to decentralize the flow of information and leave authorities without any targets to pursue” (*Ibid.* 189). My intention is not to go as far as present translation as hacking, but there are lessons to be learned from the hacker culture that can be – and have been – used by other communities. Hacking is about overcoming barriers and limitations by relying on creativity, intelligence, and expertise.

1.2 The Open model and its significance

Before arguing in favor of an open model, we must understand what it entails. In other words, it is important to understand the philosophy, history, and technical aspects of the current open models, to see what lessons can be drawn and generalized to society in general, and translation in particular. The best example of an open model that we currently have is that of the open source, or open code movement (also called free/libre/open source software, or FOSS/FLOSS or F/OSS).

While open-source businesses have never had the same level of economic success as that witnessed in proprietary giants, it is nonetheless widely used even by major companies from IBM to Apple and Oracle. And while these companies traditionally rely at least partly on closed, proprietary code to stay competitive, open-source undermines monopolistic practices.

To get an appreciation of the scale of open source development, one can examine the major open project websites, such as *The Free Software Directory* (directory.fsf.org) and *Sourceforge.net*. When last consulted in June 2017, the latter’s About page reads as follows:

[SourceForge](https://sourceforge.net/about) is an Open Source community resource dedicated to helping [open source](#) projects be as successful as possible. We thrive on community collaboration to help us create a premiere resource for open source software development and distribution.

With [the tools we provide](#), developers on SourceForge create powerful software in over [430,000 projects](#); we host over 3.7 million registered users. Our [popular directory](#) connects more than 41.8 million customers with all of these open source projects and serves more than 4,800,000 downloads a day.

(<https://sourceforge.net/about>)

Surveys of participants in the open-source movement indicate that personal need, curiosity, having fun while doing “something that matters” (as Linus Trovalds says) and doing work that is interesting and challenging are the main drivers. Others explain that in order to be employed to write code, many participate in the community to establish themselves first. But the main factor that comes up in every survey for 80% and 90% of the responders as the dominant reason for participating in open-source activities is knowledge acquisition and the opportunity to learn and develop new skills, while half of responders mention their desire to share their knowledge and skills with others as motivation (Deek and McHugh 2008, 164-5).

I.2.A The licenses

A free software license grants the recipient rights to modify and possibly redistribute that software. Copyright law does not allow this, but the author of the software removes the copyright’s restrictions with the software license, granting these rights to the recipient. As conferred by the copyright holder, software using such a license is free software (or free and open source software).

There are two major organizations today that seem to be defining the landscape of open and free software: The Free Software Foundation (FSF) and the Open Source Initiative (OSI).

In 1974, the U.S.’s Commission on New Technological Uses of Copyrighted Works deemed that “computer programs, to the extent that they embody an author’s original creation, are proper matter of copyright” (Lemley et al. 2011, 34). In 1983, *Apple v. Franklin* confirmed that computer programs were no different than literary works and were therefore copyrightable.

The FSF was founded in 1985 by Richard Stallman to “promote computer user freedom,” which implies the freedom to study, distribute, create, and modify software. It explains to the visitors of its website that

[f]ree software is about having control over the technology we use in our homes, schools and businesses, where computers work for our individual and communal benefit, not for proprietary software companies or governments who might seek to restrict and monitor us.

(<https://www.fsf.org/about/>)

The non-profit foundation Open Source Initiative (OSI) was established by Eric Ramond and Bruce Perens in 1998 to promote open-source software commercially. It also clearly states the standard and criteria for OSI-certified open source licenses and approving them:

To comply with the Open Standards Requirement, an "open standard" must satisfy the following criteria. If an "open standard" does not meet these criteria, it will be discriminating against open source developers.

1. **No Intentional Secrets:** The standard MUST NOT withhold any detail necessary for interoperable implementation. As flaws are inevitable, the standard MUST define a process for fixing flaws identified during implementation and interoperability testing and to incorporate said changes into a revised version or superseding version of the standard to be released under terms that do not violate the OSR.
2. **Availability:** The standard MUST be freely and publicly available (e.g., from a stable web site) under royalty-free terms at reasonable and non-discriminatory cost.
3. **Patents:** All patents essential to implementation of the standard MUST:
 - be licensed under royalty-free terms for unrestricted use, or
 - be covered by a promise of non-assertion when practiced by open source software
4. **No Agreements:** There MUST NOT be any requirement for execution of a license agreement, NDA, grant, click-through, or any other form of paperwork to deploy conforming implementations of the standard.
5. **No OSR-Incompatible Dependencies:** Implementation of the standard MUST NOT require any other technology that fails to meet the criteria of this Requirement.

(<https://opensource.org/osr>)

The main difference between the two organizations is that while the FSF prefers the use of copyleft, or “share alike”, licenses, the OSI prefers permissive licenses. Only "public domain software" and software under a public domain-like license is restriction free. Examples of public domain-like licenses are, for instance, the [WTFPL](#) (Do What the Fuck You Want to Public License) and the [CC0](#) (Creative Commons, which releases material directly into the public domain) license. Permissive licenses, preferred by the OSI, might carry small obligations like attribution to the author, but allow practically any use of the code. On the other hand, copyleft licenses, preferred by the FSF, include stronger restrictions to guarantee that derivative works do not fall back into the proprietary category protected by copyright.

Despite this difference, FSF founder Richard Stallman focuses on the commonality, as opposed to the difference, when he writes:

The term “open source” software is used by some people to mean more or less the same category as free software. It is not exactly the same class of software: they accept some licenses that we consider too restrictive, and there are free software licenses they have not accepted.

However, the differences in extension of the category are small: nearly all free software is open source, and nearly all open source software is free. We prefer the term “[free software](https://www.gnu.org/philosophy/categories.html)” because it refers to freedom—something that the term “open source” does not do.

(<https://www.gnu.org/philosophy/categories.html>)

Before 1998, the FSF was there with its goals and projects, but there was no movement. After 1998, free software was something that needed to be defined and theorized. There was now a choice of two different sides: Open Source, or Free Software? On one side, there was Stallman, charged as a communist idealist stubbornly preventing open source from being integrated by business; on the other side, there was Eric Raymond, denounced for having sold out the ideals and values of this philosophy of freedom and autonomy. Both sides collaborated a lot, but they were also clearly in a fierce rivalry (see Keltz 2008, 99-120).

The flagship license of the free software movement is the GNU General Public License (GNU GPL or simply GPL) and is most representative of copyleft. This license grew out of the GNU project, whose purpose was to develop non-proprietary code that could be copied, modified, and redistributed while being UNIX-compatible.

To sustain the project financially, Richard Stallman founded the FSF in 1985 and produced copyleft software licenses. In 1989, version 1 of the GNU GPL was published, followed by version 2 in 1991, which would become the most widely used free software license, setting the following parameters:

1. running programs without any restriction on use (including commercial and military)
2. allowing for the source code of the program to be viewed and studied
3. allowing the source code to be modified and improved if desired
4. allowing for the redistribution of the program or any of its variants
5. however, redistributing the same or derived works must be done under the same conditions as the original GPL

The last condition is the one that was put in place to ensure the perpetual or recursive promotion of free software. It is therefore a restriction, but one that is put in place to ensure the freedoms of the other four elements. This self-perpetuating feature of the GPL explains its successful spreading and establishment of a software commons that is always growing.

F/OSS has been studied extensively from various angles. Some of the well-established benefits of F/OSS products are the following:

- Open source products are usually free in production, acquisition as well as updates to newer versions;
- They are often of equal or superior quality because they can be publicly scrutinized for defects (with five to six times fewer defects than comparable proprietary systems (Tong 2004; Valloppillil 1998; Wheeler 2015));

- This peer reviewing process is superior because it is done by many more people;⁷²
- The quality assurance and review of open products takes place at any point during the lifecycle of the product, and is not limited to limited stage in the project because its code is always open;
- This makes F/OSS products more secure and more reliable than proprietary products. The scrutiny will identify vulnerabilities and allow for product customization or improvement. This is especially important for government security agencies who will want to audit the product before using it (Stoltz 1999);
- They often offer superior portability for use from one platform to another, and this solves the vendor lock-in problem, which usually comes with considerable costs;
- Their code can be modified, which allows for localization, adaptation and customization
 - because its code is exposed,
 - and because its licensing allows it (see Rosen 2005 for a discussion on the various licenses and their implications for users and developers.)
- Open source products represent as much, if not more, innovation than proprietary products (see Wheeler 2012, 2016):

open development has also been incredibly innovative in developing products for the Internet environment, from infrastructure [...] to hugely successful peer to peer file distribution software like bit torrent. Much of the innovation in computing has traditionally emerged from academic and governmental research organizations. The open-source model provides a singularly appropriate outlet for deploying these innovations: in a certain sense it keeps these works public.

(Deek and McHugh *op. cit.*, 7)

By contrast “Microsoft's strategy as a business was to find innovative ideas elsewhere in the software marketplace, buy them up and either suppress them or incorporate them in its proprietary products” (Moglen, 1999).

- At the macroeconomic level, open source products can theoretically represent a reduction of effort duplication, because companies in the proprietary competitive market are often duplicating the same products: “It has been estimated that 75% of code is written for specific organizational tasks and not shared or publicly distributed for reuse” (Stoltz, 1999);
- Open source products offer educational benefits for students by providing them the unique opportunities to access and study world-class practices: “Indeed, the opportunity to learn is one of the

⁷² “Given a large enough beta-tester and co-developer base, almost every problem will be characterized quickly and the fix obvious to someone. Or, less formally, ‘Given enough eyeballs, all bugs are shallow.’ I dub this: ‘Linus's Law’” (Raymond 2000).

most frequently cited motivations for participating in such development. The model demonstrably embodies a participatory worldwide engine of invention” (Deek and McHugh *op. cit.* 8);

These benefits are well summarized by David Wheeler (*op. cit.* 2016) who concludes his paper by saying:

FLOSS has significant market share in many markets, is often the most reliable software, and in many cases has the best performance. FLOSS scales, both in problem size and project size. FLOSS software often has far better security, perhaps due to the possibility of worldwide review. Total cost of ownership for FLOSS is often far less than proprietary software, especially as the number of platforms increases. These statements are not merely opinions; these effects can be shown *quantitatively*, using a wide variety of measures. This doesn’t even consider other issues that are hard to measure, such as freedom from control by a single source, freedom from licensing management (with its accompanying risk of audit and litigation), Organizations can transition to FLOSS in part or in stages, which for many is a far more practical transition approach.

The novelty of the GPL license is in protecting “copylefted” works from being appropriated by proprietary products, in part or in whole, as is or in a modified version. Copyright limits the redistribution of copyrighted works and their derivatives, so copyleft was put in place to specifically grant the right to redistribute the work or any of its derivatives, with the caveat that this distribution replicates the same copyleft conditions. In this manner, not only is the work replicated, but the copyleft license itself is also recursively propagated, all the while preserving the copyright ownership of the author of the original work.

Eben Moglen (2001) of the FSF further argues the effectiveness of the GPL by highlighting the lack of court cases. The FSF frequently handles compliance cases without ever having to resort to the courts. And in case anyone doubts the legal arguments of its validity, he writes: "look at how many people all over the world are pressuring me to enforce the GPL in court, just to prove I can. I really need to make an example of someone. Would you like to volunteer?" (Moglen 2001).

I.2.B Open source business models

The big question regarding open source business models is how to make money off a product or service that is “sold” for free? Who is paying for the costs of developing this product and maintaining its marketability? There are a number of approaches that have been successful. These include dual licensing, consulting on OSS, or adopting hybrid proprietary-open models, in addition to revenue that is not directly related to the product, such as advertisement. A dual licensing model could differentiate between individual users and commercial users. Consulting services can be provided to help identify best products, systems and business models, or simply to customize open-source products. The most profitable approach has been to combine proprietary software with open source platforms and components. Yahoo and Google are both companies that have developed their environment on top of an open source infrastructure, while keeping their specificity, such as

Google's proprietary search engine. Neither of these companies distribute their software (Fogel 2005; Deek and McHugh, *op. cit.* 265-293).

The benefits of moving to open-source products or combining them with proprietary products have been recognized by many governments around the world. While some have mandated a move towards open software, like Venezuela, others have made it mandatory to consider open products when evaluating products for acquisition, as is the case in of the European Union (Deek and McHugh *op. cit.* 309-324).

The infrastructure of the internet itself is open source, and much of open source was originally created under federal programs. It is therefore very appropriate to learn that some of the educational potential of open source has been actualized. Countries like Brazil and India are now considered hotbeds for open source and educational resources (<https://opensource.org/node/528>) and the UN has openly advocated the use of open source, especially for developing countries in order to become less reliant on large-scale software manufacturers (UNCTAD 2012). Resources and materials supporting teaching and education are widely available for every age, grade, subject and level of education. These range from personal pages (librarianchick.com, web20guru.wikispaces.com) to university platforms (MIT open courseware ocw.mit.edu, Cambridge's Open Educational Resources oer.educ.cam.ac.uk, the Open University's OpenLearn open.edu) to websites solely dedicated to providing open education resources (Futurelearn.com, SchoolGorge.net, oseb.org (open source education foundation), KhanAcademy.org, curriki.org, schoolofopen.p2pu.org, and many others).

Deek and McHugh (*op. cit.* 323-4) are puzzled at the continued dominance of proprietary environments especially in academic settings, and attribute it mainly to lack of public awareness of the benefits of open source. That is why they praise studies like the one conducted by the British Educational and Technology Association which showed that secondary schools could reduce their IT costs by 25% and primary schools by 60% by using open source frameworks.

I.2.C The history of the open movement

The focus of this section will be to follow the major events of the open software movement, from the 1970's until today, and explain its major accomplishments. Though it will not be limited to it, the development of UNIX will carry a significant weight. The approach will mainly be historical.

*The case of copyright and software*⁷³

⁷³ See Coleman 2013; Kelty 2008; Merges et al. 2003; Litman 2001; Cohen et al. 2001

UNIX was first written in 1969 by Ken Thompson and Dennis Ritchie at Bell Telephone Labs as part of an MIT project partly funded by Bell called Multics. When Bell pulled its support, Thompson and Ritchie were left without any work. They creatively repurposed discarded equipment and over the next two years, they developed an entire operating system, the programming language C, and other elements that are still in use to this day. Their system was called UNIX, a pun referring to their product as a castrated Multics.

While it was completely proprietary, Bell Labs and AT&T (which owned the rights after Western Electric) allowed for UNIX to be installed for very low licensing fees, which until 1982 was mainly for the use of academics and engineers. So long as the software was not revealed, distributed or used to create any commercial products, users were allowed to modify the product as they wished. And so the system kept evolving quite informally all over the world at the hands of its originators and users.

Despite not benefitting from any formal distribution system nor being supported by the company that owned it, the spread of UNIX was phenomenal. This was attributed to its aesthetics, size, design, low cost, performance and modifiability. UNIX came with the source code, which was an open invitation to maintain it and modify it, while feeding any changes back to Thompson and Ritchie. This globally distributed group of users sharing an interest in maintaining an operating system was an early example of a recursive public (Kelty *op. cit.* 128).

In 1975, the users from Canada, Europe, Australia, the U.S. and Japan formed USENIX, and started circulating tools and applications among each other. AT&T was trying to find a balanced position between allowing the innovation to continue while keeping its secrecy around it. “By 1980 [UNIX was] without a doubt the most widely and deeply understood trade secret in computing history” (*Ibid.* 129).

When users reported fixes to Thompson and Ritchie, it produced a sense of obligation to share the fixes as widely as possible. As for Bell Labs, this process completely by-passed any need for new contracts, licenses and releases. Instead of releases, they accepted the idea of a continuum of constant improvements. All of this was, however, quite challenging for their legal teams, which were no longer dealing with one license for one piece of software developed by people who were employed by Bell Labs.

The success of UNIX was due in no small part to the fact that it was adopted by universities first, not businesses, which allowed it to become part of the core pedagogical practice of programmers. In the early 1970s, a senior lecturer at the University of New South Wales by the name of John Lions convinced his colleagues to purchase a license of this product with which he was very impressed. Lions used the system to teach operating systems to his students, and eventually produced a text book consisting of the entire source code of UNIX version 6

(V6), along with elaborate, line-by-line, commentaries and explanations. Generations of students in computer science and professionals working with computers were trained on photocopies of Lion's text. Access to software that allows to understand how a real system operates was almost unheard of, but UNIX changed all of that. As for Lions's commentary, which clearly stated on its cover page that AT&T considers its distribution illegal, after years of lobbying from their own UNIX people, the rights holders finally authorized its release in 1996. One of the UNIX engineers who had lobbied for its official publication was Berny Goodheart, who writes:

It is important to understand the significance of John's work at that time: for students studying computer science in the 1970s, complex issues such as process scheduling, security, synchronization, file systems and other concepts were beyond normal comprehension and were extremely difficult to teach—there simply wasn't anything available with enough accessibility for students to use as a case study. Instead a student's discipline in computer science was earned by punching holes in cards, collecting fan-fold paper printouts, and so on. Basically, a computer operating system in that era was considered to be a huge chunk of inaccessible proprietary code.

(in Kelty *op. cit.* 133)

This newly formed recursive community considered itself as comprised of the technical elites, but one that is rejecting the official power governing the distribution of this tool which they believed in. They were well aware that they were breaking the law, but this was not enough to deter them, as explained by Peter Reintjes:

We soon came into possession of what looked like a fifth generation photocopy and someone who shall remain nameless spent all night in the copier room spawning a sixth, an act expressly forbidden by a carefully worded disclaimer on the first page. Four remarkable things were happening at the same time. One, we had discovered the first piece of software that would inspire rather than annoy us; two, we had acquired what amounted to a literary criticism of that computer software; three, we were making the single most significant advancement of our education in computer science by actually reading an entire operating system; and four, we were breaking the law

(in Kelty *op. cit.* 134)

Andrew Stuart Tanenbaum, a computer scientist and professor who had worked with the UNIX group, was also using UNIX with Lion's book in the classes he taught at Vrije Universiteit Amsterdam. However, in his textbook *Operating Systems: Design and Implementation*, he explains how AT&T changed position in 1979 with their subsequent release of UNIX:

When AT&T released Version 7, it began to realize that UNIX was a valuable commercial product, so it issued Version 7 with a license that prohibited the source code from being studied in courses, in order to avoid endangering its status as a trade secret. Many universities complied by simply dropping the study of UNIX, and teaching only theory.

(Tanenbaum 1987, 13)

But he refused this option. So instead, he created MINIX (MINI-UniX), a free UNIX clone operating system that did not use a single line of AT&T's code, for teaching purposes. Within three months Tanenbaum's

uploading of the code on his site, a virtual group of over 40,000 subscribers was discussing the new system and improving it.

Tatenbaum himself explains that he was not the only one to have re-written UNIX independently, there were at least five others (Tatenbaum 2004). One of those who had bought the textbook and floppy disks containing the code of MINIX was a young Linus Trovalds, who would develop from scratch a “fork” of MINIX: Linux. Both programs perform the same functions, but the means used are different.

In an insightful short piece entitled “Some Notes on the “Who wrote Linux” Kerfuffle, Release 1.5”, in which he defends Linus Trovalds against allegations that he copied or stole his code, Tatenbaum writes:

Of course it is always true in science that people build upon the work of their predecessors. Even Ken Thompson wasn't the first. Before writing UNIX, Ken had worked on the MIT MULTICS (MULTiplexed Information and Computing Service) system. In fact, the original name of UNIX was UNICS [...] After too many bad puns about EUNUCHS being a castrated MULTICS, the name was changed to UNIX. But even MULTICS wasn't first. Before it was the above-mentioned CTSS, designed by the same team at MIT. Thus, of course, Linus didn't sit down in a vacuum and suddenly type in the Linux source code. He had my book, was running MINIX, and undoubtedly knew the history (since it is in my book). [...] The six people I know of who (re)wrote UNIX all did it independently and nobody stole anything from anyone. [...] Six different people did it independently of one another. In science it is considered important to credit people for their ideas, and I think Linus has done this far less than he should have. Ken and Dennis are the real heros [sic] here. But Linus' sloppiness about attribution is no reason to assert that Linus didn't write Linux. He didn't write CTSS and he didn't write MULTICS and didn't write UNIX and he didn't write MINIX, but he did write Linux. I think Brown owes a number of us an apology.

(*Id.*)

Another forking of UNIX happened when its source code was modified so as to run Pascal programming language, and incorporate TCP/IP protocols, which basically allow networks of computers to connect to each other, which as estimated 98% of UNIX users adopted thereby gaining access to Arpanet – the ancestor of the Internet.

Although this was only meant to be a very brief overview of the some of the developments that have taken place since UNIX was developed show that sharing produces its own social dynamics. UNIX forced the community of users to develop relations and organize themselves in a manner that suits the development and improvement of the system. These relations required the implementation of a moral as well as a technical vision.

While these often promising interactions were taking place between users and companies, copyright law was influencing some of the stakeholders in the opposite direction, by reminding the rights holders that maintaining

secrecy could make them more competitive. The systems that were put in place prior to openly sharing code could not work on different computers: specific code had to be written for each. Without openly shared code, there could not have been operating systems that are interoperable, which are necessary for networks to connect with each other. Or as Keltz puts it “without portable applications that can run on any system, open markets are impossible. Without open markets, monopoly power reigns” (*op. cit.* 142).

This is what IBM did, by selling machines in isolation which could never be operated using programs not written specifically for them, nor could they communicate with other computers. And you can never use technologies offered by a competitor because you are now locked in with IBM and at the mercy of their updates and releases. This highlights the fact that the opposition is not between open and closed products, but between open and proprietary ones. As though the openness is a reference to the idea of an open market, where consumers get to examine various commodities performing similar functions, judge them based on quality (which will usually eventually be comparable – if there is healthy competition) and select one, which will feed the competition cycle. And this is beneficial to and in the best interest of society.

On the other hand, through the promise of monopoly control, the intellectual property narrative leads rights holders to keep information from the public and from their competitors, by whatever means are made available by trade secrets, patents, and copyright law. From a financial point of view, open models can therefore be considered models that are free from monopoly control. That is why promoters of open models will often bring up a moral argument into the equation: “For most supporters of open systems, the opposition between *open* and *proprietary* had a certain moral force: it indicated that corporations providing the latter were dangerously close to being evil, immoral, perhaps even criminal monopolists” (*Ibid.* 150).

As time went by, more and more versions of UNIX were developed, their number exceeding 100 by 1984, with incompatibilities appearing between them. With Microsoft’s domination of the computer market, DOS, Windows and Intel semiconductor chips triumphed over the openly shared UNIX. Intellectual property creates an environment where there is only benefit to be gained for investors from monopolies of large corporations over their products. It was too difficult for decentralized groups of people openly sharing source code with each other and constantly creating new versions of a product to compete with the corporate model. But this loss to the proprietary model allowed those promoting open source to clearly realize that intellectual property was their blind spot, and that dealing with it would have to be a central preoccupation if they ever aspired to successfully creating open systems.

The subsequent endeavors of creating a competitive open source operating system, like the GNU project which became the main focus of the FSF, must be seen as the open community’s experimentation with various

licensing structures that would “hack” the intellectual property system in place, while ensuring the availability and modifiability of the licensed product. This includes not only the legal aspects of the matter, but the economic ones as well.

Richard Stallman wrote the first version of the GNU General Public License himself, simultaneously inspiring reverent optimism from advocates of the open movement, as well as scorn from those whose interests were threatened by it. As of June 20, 2017, I have counted 82 licenses approved by the OSI, and 92 listed on the FSF’s site (in addition to the numerous non-free licenses). Without any doubt, being a hacker today also necessarily implies having a very in-depth knowledge of intellectual property (Coleman 2013).

The wording of the licenses themselves reveals a deeper outlook on these matters. For instance, the preamble of the very popular GNU GPL v2 license begins in this manner:

The licenses for most software are designed to take away your freedom to share and change it. By contrast, the GNU General Public License is intended to guarantee your freedom to share and change free software--to make sure the software is free for all its users. [...]
When we speak of free software, we are referring to freedom, not price. Our General Public Licenses are designed to make sure that you have the freedom to distribute copies of free software (and charge for this service if you wish), that you receive source code or can get it if you want it, that you can change the software or use pieces of it in new free programs; and that you know you can do these things. To protect your rights, we need to make restrictions that forbid anyone to deny you these rights or to ask you to surrender the rights. [...]
Also, for each author's protection and ours, we want to make certain that everyone understands that there is no warranty for this free software. If the software is modified [...] we want its recipients to know that what they have is not the original, so that any problems introduced by others will not reflect on the original authors' reputations.
Finally, any free program is threatened constantly by software patents. [...] To prevent this, we have made it clear that any patent must be licensed for everyone's free use or not licensed at all.

(GNU General Public License, version 2)

Copyright law automatically grants the author of software code the right to copy, distribute and change their work. The aim of these copyleft licenses is to “hack” copyright by using these same rights, annul the effects of copyright, and allow others to use the work without some or all of these restrictions. Free Software did not start out with the intention of circumventing copyright restrictions.

The appearance of the Free Software licenses triggered a number of other initiatives based on the same idea. Creative Commons, as both an organization and license, falls in this category. While none of its members were involved in the Free Software projects, they were lawyers and activists who were already aware of the challenges copyright posed to the public domain, information freedom, and the commons. Since the law could not be

changed⁷⁴, the next best thing was to give people tools to work around its restrictions and fight the “control of culture” that was taking place.

Copyright was now automatic, leaving authors with no option of placing their works in the public domain, and even if they did declare their work as being in the public domain, there was no way to verify this in some central database before using the product to modify it for instance. According to the many lectures, articles and books of Lessig on the topic (e.g. 1999 and 2001c), Creative Commons is a way to save our culture, which has been taken over the content industries. In 2006, there were 140 million works licensed under Creative Commons. Today, there are over 1.2 billion (CreativeCommons.org):

Taking inspiration in part from the Free Software Foundation’s GNU General Public License (GNU GPL), Creative Commons has developed a Web application that helps people dedicate their creative works to the public domain—or retain their copyright while licensing them as free for certain uses, on certain conditions.

(CreativeCommons.org/about/history)

Every day there are new and creatives initiatives to make information available with a conscious preoccupation to preserve the public domain and take ownership of culture as a society, and not let it slip into content owned by corporations. Creative Commons, A2K, F/OSS... These are current reactions in response to what many see as a current problem, and they have provided “living counterexamples” (Coleman 2013, 185) on the “theatre of proof” (Latour 1993, 87) that economic incentives and exclusive monopolies are not the only ways to stimulate society to produce creative works and innovate on existing products. Not only did F/OSS inspire people to innovate programming code and start a cultural movement, it also inspired many other groups outside the domain of software to follow in their footsteps and extend their logic to promote open content, while also finding legal means to feed the public domain in perpetuity.

As more people participate in the production and licensing of open content, the argument that creativity can only result from the economic incentive stemming from exclusive monopoly dissolves. The idea of free software and freedom are endowed with a semiotic flexibility that allows them to be re-appropriated and redirected as needed. F/OSS became a transportable symbol for collaboration, alternative licensing, and openness.

In 2001, IBM started to sell the GNU Linux operating system instead of its proprietary AIX. It then ran a multimillion dollar marketing campaign to win over the population, which included spray painting the icons for peace, love and Linux on sidewalks in major cities.

⁷⁴ Lawrence Lessig was fighting the *Eldred v. Ashcroft* case at the Supreme Court, arguing against the constitutionality of the 1998 *Copyright Term Extension Act* (Lessig 2003).



Figure 1. Peace, Love and Linux⁷⁵

This controversial move from IBM is an instance of how the network of social meanings can extend through people, objects, and institutions, and gradually recruit and enroll additional agents, even ones that seem outside the reach of the network. IBM's bold move was demonstrating corporate agility, while recognizing consumer preference and helping its own bottom line.

In *Multitude*, Hardt and Negri use the concept of open source to clarify the democratic underpinnings of the political category of multitudes:

We are more intelligent than any one of us is alone. Open source collaborative programming does not lead to confusion and wasted energy. It actually works. One approach to understanding the democracy of the multitude, then, is an open-source society, that is, a society whose source code is revealed so that we can work collaboratively to solve its bugs and create new, better social programs.

(2004, 340)

While this may look like political activist work, people like Lessig prefer to see it as ensuring constitutional rights (Lessig 1999, 2001c) or cultural preservation (Keltz 2004). And while the work of Lessig has significantly raised the credibility of free software, the latter has also helped initiatives like the Creative Commons by providing live examples that this model can work. In *Hackers and the Contested Ontology of Cyberspace*, Helen Nussbaum explains that our interest in hackers lies in the fact that they “represent a degree of freedom, an

⁷⁵ Available at <https://www.pinterest.com/pin/472315079641409257/> (accessed June 2017)

escape hatch from a system that threatens to become overbearing” (2004, 212). The debate on copyright law and its limits has not suddenly ceased with the appearance of free software and the open movement, quite the opposite. But what F/OSS has provided are concrete examples and data that there are alternatives, while also proving to be a transposable model.

1.2.C.i The present state of the open movement in software

This section will look at the way the open model of software works, and compare it with the proprietary model in software development. One of the main purposes of this sections will be to see whether it is possible to generalize this model to other fields, outside of software development, to which we answer yes, illustrating with the example of the Creative Commons movement.

Numerous studies have appeared recognizing open practices and promoting the advantages of models of open innovation that do not fit those based on traditional IPRs for different sectors of society, extending from education to literature, and from clothing to music (Benkler 2006; Von Hippel 2005; Weber 2004; Ingo 2006). And “although such developments represent minority interests in some of the sectors, the dynamics seem to be towards expansion of the logic of openness” (May 2010, 133).

In their famous book *Wikinomics: How Mass Collaboration Changes Everything*, Don Tapscott and Anthony Williams (2007) argue that the combination of mass collaboration and open-source technology will transform innovation in society. They do not propose to modernize or circumvent intellectual property, only to adopt openness where it makes sense to do so. Assuming that there will be enough willing collaborators, one of the limitations of this model is that works protected by copyright will not enter the openly accessible world, which means that there will always be two distinct systems, with the open system being incomplete because of the restrictions of intellectual property. Finally, as already mentioned, wikinomics assumes that the participant has access to the Internet, which does not help those who don’t (see Lim 2008). Despite their title’s claim that wikinomics will “change *everything*,” the notion is still a valid contribution to the movements of collaborative openness that allow for some options besides exclusive ownership and control.

Recognizing open models of work and business does not necessarily entail entirely replacing existing models, but simply loosening structures sufficiently to allow for the open models to prosper while their legitimacy is fully recognized, which has already started taking place in certain sectors like education for instance. This would counterbalance the excessiveness of intellectual property rights. In this way, both ownership and openness could influence the other and be influenced by it, while keeping in check the rampant, yet unnecessary,

information capitalism. By failing to recognize the challenges that open models are posing to IPRs, society's natural evolution is hindered, and an opportunity to rebalance power, interests and social needs is wasted.

Free software represents a significant shift of power with respect to creating, disseminating, and authorizing knowledge on the Internet. Movements like Open Access or Free Software produce what Christopher Kelty calls recursive publics, which is "concerned with the material and practical maintenance and modification of the technical, legal, practical, and conceptual means of its own existence as a public" (2008, 3 and *passim*) The distinguishing feature of such publics is their awareness that they can self-determine their existence in many of its details through the use of technology, with the ultimate goal of creating a legitimate public sphere where everyone is being properly heard.

Although there is something political about open source code, it would be a mistake to think that it is simply an anti-IP position.

While speech, writing and assembly may define a regular public, a recursive public is one that reflects on the layers of technological and legal infrastructure that allow them to exist, or at least exist in a certain manner. Various decisions by different stakeholders will determine what the infrastructure will look like, what it will allow, and what it will not. An example of such decisions is the fact that there is only one, unique, Internet when there could have been multiple, disconnected networks.

Recursive publics are not satisfied with offering opinions or voicing their concerns when they want to see change, they directly engage in activities that will modify the infrastructure. They may confront or resist forms of power and control, but it is with the aim of leveling the field, which usually advantages governments and corporations. Discussions on source code and licensing standards are not due to some inherent importance in these topics, but because they are directly related to governance, freedom of expression, and consent.

Shifting of power and controlling knowledge is based on two key notions. The first is that of availability, and includes things such as transparency and freedom of information. The second notion is that of modifiability, which includes actively transforming for renewed use in renewed contexts. Modifiability is necessary when we want to build for the longer term.

Building on the work of Habermas, Charles Taylor (2003) says that while topical spaces can allow people to come together physically, public spheres transcend this physicality by bringing together ideas, writings and discussions. A recursive public needs to secure both the availability of the information and its free circulation, but also its modifiability as needed.

1.3 Translation and openness

By applying the notions and lessons of the open software movement to translation, a number of collaborative and open translation projects have begun around the world. That said, because of the important place of translation and its potential for social development and access to knowledge among other goals, as discussed in the previous chapters, more needs to be done.

Not only does translation breathe new life into works by rewriting, reframing, and reinterpreting them, it also extends them towards cultural horizons that were never within their reach (Derrida 1987). But in this way, translation is perhaps not so different from other types of “reproductive” or “derivative” activities.

As explained in Chapters 1 and 2, the two most important ideas in copyright law are those of authorship and originality⁷⁶. And it is precisely those two ideas that have been most challenged by translation since the birth of copyright law, and, more recently, by the proliferation of user generated content (UGC) on the Internet. Translators cannot freely contribute to UGC content because their activity is restricted by the translation right granted exclusively to the original content’s rights holder. At the same time, the role of translation for developing cultures and economies has always been recognized internationally and is even explicitly stated in the Appendix (WIPO 2012) to the *Berne Convention*, entitled “Special Provisions Regarding Developing Countries.” There is obviously an incongruity between these two positions.

In addition to casting doubts on the notions of authorship and originality, translation also raises issues with the important foundational notion of idea-expression dichotomy. Translation is usually understood as the changing of the form, the linguistic container, of a work, while faithfully preserving the idea or content. So, if copyright protects the expression and not the idea, and if translation is a change of the expression, then shouldn’t this change in the expression of a work not be deemed sufficient to warrant copyright protection for a translation? (*cf.* Venuti 1998).

The relationship between a previous and a subsequent work, or an original and a derivative, has always been front and center in debates about copyright law. Borrowing, adapting, abridging and mashing-up (manipulating a digital media to create a new derivative work) are transformative practices that define the era of user-generated content (UGC). They are all cases of re-appropriation, and all imply copying. And translation has always fallen in this category of works, hence its problematic nature for copyright law. What needs to be realized, however,

⁷⁶ According to both the utilitarian argument of the “sweat of the brow,” as well as the moral philosophy argument of considering the work an extension of the personhood of the author.

is that they are all historically situated practices, and the law and public policy must take that into consideration when assessing how to strike a balance between the interests of various stakeholders in society.

Recent scholarship in translation studies, consistent with the linguistic turn that has swept across all the humanities, has questioned this simplistic understanding of translation as being a mere change of form. Form and content are not so easily disentangled. The language we use serves as a grid to analyze and express reality, and the seemingly linguistic transfer from one language to another carries with it historical, cultural, psychological, ideological, and even cognitive implications that necessarily modify the content, and even the receiver of that content, be it a language, a history, a semantic network, or a society, as explained in detail in Chapter 7.⁷⁷ Accepting the conclusions of such scholarship would mean that a translation is not only the modification of the expression and the preservation of the idea, but rather, the modification of *both* expression and idea.

As antagonistic to our modern individualistic and romantic ideas of authorship and originality as it may seem, science, art, and culture have always progressed by further developing the works of the past and, in the words made famous by Newton, “standing on the shoulders of giants” (Turnbull 1959, 416). As Aristotle wrote over two thousand years ago:

...the instinct of imitation is implanted in man from childhood, one difference between him and other animals being that he is the most imitative of living creatures, and through imitation learns his earliest lessons; and no less universal is the pleasure felt in things imitated.
(Aristotle 2009)

But this is perhaps even truer today, in the digital context of the 21st century, where most cultural activities involve some form of copying, borrowing, transforming something into something else, or simply, “mashing-up.”

When copyright laws were first negotiated, the only other possible author besides the “author proper” was the translator, whose work was eventually recognized as copyrightable. That is because the very idea of translation questions the stability of the “original.” But in today’s world of blogs and YouTube, everyone may be an author and a producer, and, as a result, notions of originality and authorship are more unstable, more contested than ever before in history. Mash-up activities and all forms of UGC were never foreseen by those who put the IP regime in place, at a time when access to materials depended mainly on slow and costly printing mechanisms. It is therefore not surprising that, as technology makes things faster and cheaper by freeing us from the shackles

⁷⁷ See parallels with the “merger doctrine” in copyright law for instance, where expression and idea are merged.

of the physical realm through virtual access, the foundations of the old system start to crumble, and their applicability to such new realities become questionable.

In 2006, *Time Magazine* selected “You” as the person of the year, to express society’s general understanding of what Web 2.0 means. Every individual was now a potentially major player in a decentralized, post-Fordist world, able to produce, create, and share content with the rest of the community—a community now at one’s fingertips, literally. From this point on, any person could have a significant publishing or intellectual property impact, because the Internet made large scale distribution and sharing of content cheap and accessible.

When companies realized the business potential of leveraging UGC for financial gain, they made available various specialized platforms, such as MySpace, Flickr, Amazon, and YouTube, for users to share and distribute content as they liked. Users appreciated the ease and efficiencies of these platforms which made it possible for them to both produce and consume, opening the door to potentially countless collaborative endeavours. This has since become a social phenomenon, leading to a number of major collaborative projects, such as Linux and Wikipedia. Everyone was now a potential producer-consumer (prosumer), an “independent unit of production” (Toffler 1980; see also Tapscott 1995; Ritzer and Jurgenson 2010).

One would think that these technical and technological strides would be viewed in a very positive light. But that was not the case universally, because the typical industrial producers of content—who established copyright in the first place—were now in competition with users and their UGC. The latter were threatening to transform business models and cultural practices, including copyright law.

The platforms mentioned above depend on the information content generated by prosumers for their success. They will therefore promote and enable the free exchange of “non-exclusive” information and provide the tools and space for users to take advantage of these functionalities. In other words, their business model stands in contrast to the model of traditional content producers (publishers, broadcasters), who have typically relied on exclusive control over content for their viability (Benkler 2006). Evidently, copyright law is at the center of these social transformations, because they have emerged as a reaction to the restrictions it imposes, and because it is still the main regulator of information flows in society.

It is, however, difficult not to argue for a reform of copyright law that would take into account these collaborative realities, instead of hindering them. Copyright law was originally designed to provide incentives for producing content by monopolizing information, instead of sharing it. Regardless of the validity of this line of reasoning and its applicability to intangible, intellectual goods which we explored in depth in Part I specifically, it is clear that its *raison d’être* is contrary to the increasingly collaborative nature of work done in a

knowledge society. Since its beginnings, the Internet has always been a source of hope and inspiration for a more open, democratic society in which information flows unobstructed on the World Wide Web, everywhere, and to the benefit of everyone (Elkin-Koren 1996, 2002; Litman 2004; Cohen 2005).

If we look at the publishing and broadcasting of news for example, the quality of the information provided by publishers and broadcasters usually serves the interests of the owners and advertisers and has a primary purpose of garnering the highest ratings possible. In concrete terms, the news may not be as impartial or complete as one would hope, and marketing strategies usually aim advertisement strategically to shape consumer choices, instead of catering to their needs and preferences (Baker 1997, 2007). UGC provides alternatives, and breaks free from the grip of the sole source model, moving society closer to decentralized sources of information and cultural production, even though the platforms themselves are still controlled by very few entities comparatively, as already discussed in previous chapters. The absence of intermediaries would in turn make the information more diverse, more authentic, and more representative, be it in politics, the arts, or anything in between (Skirky 2008). The choice of what to translate, and when and how, has always been controlled by the same content producers who controlled original content, with the same self-serving intentions. By opening up the right to translate, instead of keeping it exclusively in the hands of the original's author (or rights holders), translators can join the UGC movement more fully⁷⁸, as amateurs as well as professionals, and help democratize society and disseminate knowledge across borders.

Society has witnessed many cultural and societal changes with the adoption of Web 2.0 practices that have extended to all areas of life. As the past two decades have shown, there are other business models beyond the monopolistic selling of copies and the one-to-many model that can be successful without resorting to exclusive control over content. But instead of seeing copyright adapt to the technological and cultural realities of our world, lobbying efforts by traditional content and rights owners are still able to keep copyright laws moving in the opposite direction, adding restrictions and creating barriers by always extending the scope of copyright laws and strengthening their enforcement. That said, there have been important instances of case law since then where courts have clearly re-emphasized users' rights and recognized some of the new technological realities of society (see Geist 2013).

I.3.A Collaborative translation projects

There is some ambiguity in TS around the terminology used to differentiate between the various types of collaborative, user-generated, community-based, and crowdsourced translation projects. While Cronin (2010)

⁷⁸ As opposed to being limited to what Raul Ernesto Colon Rodriguez has called collaborative activist translation (2016 and elsewhere), which is limited to activism and always operating within the bounds of copyright, I am trying to go beyond these by pushing them out, if it is not possible to remove them.

uses “crowd-sourced translation,” “open-translation,” and “wiki-translation;” Pym (2011) defines the following terms as part of his entries for a “tentative glossary for moments of perplexity and dispute”: “Collaborative translation,” “community translation,” “crowdsourcing,” “lay translation,” “natural translation,” “paraprofessional translators,” “translation vs. [...] localization,” “unprofessional translation,” “user-generated translation.” Baker (2012) defined “altruistic action;” Olohan defines “volunteer translation,” “pure and impure altruism;” McDonough Dolmaya (2012) reviews many of the definitions as well, and adds the industry’s “CT3” which refers to community, collaborative and crowdsourced translation, also mentioned in Kelly 2009. “Crowdtranslation” (Kageura et al. 2011) and “hive translation” (García 2009) have also been suggested. Any of these translations may be done by amateurs or professionals, and may at times be remunerated.

When the translation is done by the prosumers, or end-users, it is a user-generated translation (UGT). When they have been solicited by a call to the community, as is sometimes done by Facebook, Twitter (Jiménez-Crespo 2011, 2013; Mesipuu 2012) or Rosetta Foundation (Anastasiou and Schäler 2010; O’Brien and Schäler 2010) they are called crowdsourced. In other cases, the translation results from users self-organizing without solicitation, which may be called community or volunteer translation, the latter specifically referring to the non-remunerated nature of the work, which is usually for the benefit of others. This is quite typical of translation work done for humanitarian causes (Rosetta Foundation, Kiva, Ashoka, etc.), political activities (Babels, Tlaxcala, etc.), localization of open source (Crowdin) and social networking sites (Facebook, Twitter) (Olohan 2012, 194).

Collaborative translation refers to projects where multiple agents collaborate to produce a translation. This also emphasizes the increased recognition of the non-translators who also take part in the work, including publishers, editors, programmers, graphic designers, etc.

Due to lack of consensus in the field and the available alternatives, I will be using the term collaborative translation as the generic to refer to these various practices, since it best describes them.

As early as 2011, Common Sense Advisory published a report listing 100 large organizations, such as TED, Kiva, Twitter and Facebook, resorting to collaborative translation projects for their translation needs. This confirms that that nature of translation projects has been changing significantly, from the use of technology, to the involvement of non-professional translators. This has been recognized early on by both TS scholars (O’Hagan 2009, Perrino 2009, Cronin 2010), as well as observers of the industry (Depalma and Kelly 2008; Ray 2009; Baer 2010; Guyon 2010; Malcolm 2010; Stavrinidis 2010; Dodd 2011) (see McDonough Dolmaya 2012).

Countless collaborative translation projects have been coming together over the past few years. Some noteworthy ones include TraduXio, TED Open Translation Project, Project Lingua, the World Wide Lexicon, Cucumis, and WikiProject Echo.

These few examples among many others demonstrate that collaborative translation practices that are enabled by the interactive nature of the web are on the rise. As of March 31st, 2017, the internet had 3,740 billion users (Internetworldstats.com) with 4.46 billion indexed pages as of June 2017 (worldwidewebsite.com). According to DePalma et al (2013) less than 0.1% of new content that is added to the Internet is translated by professionals. Collaborative translation projects represent the demand that the professional translation industry cannot meet. As Gambier wrote a few years ago: “translation volume clearly surpasses the total work capacities of professionals who have received appropriate training in the field” (Gambier 2012, 27).

The quality of the output of such projects can range from high-quality crowdsourcing through crowd expert selection, to poor quality. There is a misconception that most of the content provided on UGC platforms is of lower quality. And though this is obviously not the case, as numerous studies have shown, the relevance of this point to translation is perhaps to be found in the increasing automation of the translation process. With the booming demand for translation, it is only logical to expect providers to find efficiencies, such as resorting to automating the process. This is consistent with translation scholarship which encourages the setting of various quality standards, representing the various needs and purposes of translation projects. Sometimes a translation of machine quality is actually sufficient, and sometimes it isn't. Translators must concentrate their efforts to be utilized where their work adds value, not where a machine can do the work (see Bowker 2009, 123-155; 2011, 211 – 236; Bowker and Ehgoetz 2007, 209 - 224). With regards to machine translation, most algorithms make all language pairs go through English given its current ubiquity. More work has to be done so that this intermediation is avoided, and translation is actually done directly from the source to the target language (Cassin 2007).

“Free and open machine translation (FOMT) (Gaspari 2014), post-editing of MT by users (Mitchell 2015), crowdsourcing translation in social networking sites (Jimenez-Crespo 2011, 2013b, 2016), or even “paid translation crowdsourcing,” initiatives in which participants are normally paid below market rates (Garcia 2015), are expanding the possibilities of access through translation to this immense “embodiment of human knowledge,” in the words of the creator of the WWW (Berners-Lee et al. 1992: 52). Users are now taking part in the translation of the content they create or that they would like their peers or language communities to access, producing a diverse patchwork of quality, adequacy, and usability (Jiménez-Crespo 2017, 2).

TraduXio is a participative platform for translators of cultural texts. In describing the project, the website

explains that:

Although machine translation and translation memories are frequently used in business, they are inadequate to translate a text from a culture to another one. When faced with philosophy, literature or ancient texts, professional translators have to cope with the fact that the most important things to "translate" are often in the style, in details, or even unwritten.

The design of our open-source software is based on the observation of translators' working sessions. The resulting human interface allows to confront different points of view on the same opus (several translators in several languages) and to foster intertextuality between opuses from the same time or genre.

(<https://github.com/Hypertopic/TraduXio/wiki>)

The project is therefore a collaborative work, on a participative platform (a wiki), leveraging open-source software that also offers special technical features, such as allowing translators to translate original texts individually or as part of larger teams, to view and compare multiple translations of the same texts, etc.

TED is a nonprofit organization that spreads “great” ideas in the form of short talks covering almost all topics, in more than 100 languages. TED Translators are the volunteers who subtitle TED Talks to help ideas spread across languages and borders. As viewers around the world watched TED Talks, they asked the organization if they could translate them in order to share them with others, with many sending their finished translations for TED itself to share. In trying to meet this demand and allow translators to continue volunteering, they set up a system to organize the translation projects.

The program launched in 2009, with 300 translations in 40 languages, created by 200 volunteer translators. Today, more than 107,000 translations have been published in 113 languages (and counting), created by more than 26,000 volunteers. In 2012, the program expanded to include the transcription and translation of TEDxTalks, the translation of TED-Ed lessons and the translation of content distributed by worldwide partners who help grow TED’s global footprint.

(<https://www.ted.com/about/programs-initiatives/ted-translators>)

As of June 2017, the official stats counter on the same page indicated that they had 27,842 volunteer translators, covering 115 languages, and they have completed 114,386 translation projects.

Camara (2015) and Olohan (2014) studied the motivation to collaborate in TED Open Translation Project. A combination of drivers was discovered in both cases, including supporting TED’s cause of working on “ideas worth spreading,” as well as the opportunity to belong to a community.

Global Voices Online is a largely volunteer community that curates, which verifies and translates trending news from the independent press and social media in 167 countries, with a focus on marginalized and misrepresented communities. The writers and editors share an entirely virtual non-profit newsroom. The *Lingua Project* is an online community made up of hundreds of translators that began in 2007, and whose aim is to

extend the reach of Global Voices Online by translating stories in languages other than English (<https://globalvoices.org/lingua/>).

The **Worldwide Lexicon** is an experimental project whose goal is to “erase the language barrier on the web by creating translation communities around popular websites.” A website would be published in multiple languages by enabling its own readers to translate it. “The system combines automatic translation (which is fast, but inaccurate) and human volunteers (who can improve or replace the rough automatic translations)” (<https://worldwidelexicon.wordpress.com/about/>).

Cucumis is a website that was founded in 2005, where it is possible to submit texts for translation, volunteer to translate, as well as share expertise and perform peer reviews, all of it free of charge. At the time of writing this (June 2017), they had 259,115 registered members (http://www.cucumis.org/translation_1_w/).

Wikipedia also proposes a few projects where collaborative translation is the main driver. Their Cross-language Editing and Learning Exchange allows users learning a new language to write or revise Wikipedia entries, which are then reviewed by an editor who will also provide feedback. The user will then review what the editor has submitted in their dominant language and also provide feedback. Intertranswiki is another collaborative project which allows users to complement English entries by translating foreign entries, or simply creating English entries if the entry is only covered in a foreign language. (https://en.wikipedia.org/wiki/Wikipedia:WikiProject_Intertranswiki and <https://en.wikipedia.org/wiki/Wikipedia:Translation>)

McDonough Dolmaya (2012), conducted research on the motivations to volunteer in translating for Wikipedia. Again the motivations were varied, including significant importance given to making content available in other languages and supporting the initiative (intrinsic), but also recognizing the importance of gaining status and possibly clients (extrinsic). As seen when discussing the open software community, gaining experience and learning from the feedback of others are important drivers for participants in such projects, and this was confirmed for translators as well, who also attribute different status levels to different initiatives (Lakhani and Wolf 2005; McDonough Dolmaya 2012).

Professional translation makes up about 17% of the volunteers in both TED and Wikipedia translation (Camara 2015; McDonough Dolmaya 2012) and their recognized professional status usually means that they are assigned hierarchically superior tasks, including reviewing, supervising and managing the work of others.

In the case of 139 participants who contributed to the non-profit Rosetta Foundation, they identified the main incentive was “the desire to support the causes to which the organization was committed. Typical with the finding from the rest of the open movement, the study also found the participants to be motivated by improving their translation skills and listed getting professional feedback as the most popular response for incentives for repeated future engagement (O’Brien and Schäler 2010).

Open Educational Resources (OER) are freely accessible, openly licensed products that are used for teaching, learning and research. OER is the leading trend in distance learning, as witnessed by initiatives such as oercommons.org, and are recognized by UNESCO, especially in domains like health and ecology. One of the barriers of using these products is language (OLnet 2009) because English is the main language for only around 375 million people, while approximately another billion people can use it (Graddol, 2000). The Department of Language at the Open University UK ran a massive open online course (MOOC) specifically on Open Translation Tools and Practices (coded OT12) in which participants could explore online open translation tools that can be used for collaborative translation projects. Over the years there have been numerous initiatives to translate and adapt OER into various languages and different cultures, as was the case with the OpenLearn courses of the Open University, MIT’s OpenCourseWare, Khan Academy, open.michigan at the University of Michigan, and the TESS-India project.

Given the well-established success of crowdsourcing translation in high-profile open projects such as Wikipedia and TED, the eight-week MOOC was piloted to introduce participants to open translation tools and practices, but also to “explore whether a MOOC format would be appropriate to bring together a distributed community of potential or existing volunteer translators, and to point them to existing open translation communities they might want to join” (Beaven et. al. 2013). The organizers of the project concluded that translation and localization are not important to increase the portability, visibility and reach of OER, but that “crowdsourcing could be the only feasible, affordable solution to the huge challenge of translating open educational content into the many languages that potential users speak” (*Id.*). While they recognize that MOOCs can significantly help in achieving some of these objectives, they recommend a system for prioritizing translations, as well as a translation hub “along the lines of some of the well-established crowd-sourced large-scale translation projects (Wikipedia, TED Talks, Global Voices)” (*Id.*).

While OERs are already under open licenses allowing their use and reuse, experimenting with the MOOC provided evidence that there is too much work to handle by the volunteers, which is an indication of how much more there is to do to make copyrighted material accessible for educational purposes.

From these examples, we can see that participation in collaborative and volunteer translation projects often takes place in the fields of humanitarian aid, social activism, website and software localization, and the open movement in general. They are often motivated altruistically because of their desire to increase access to scientific knowledge, while deriving internal satisfaction from helping others. This does not exclude gaining the benefits of improving self-esteem and social status, especially when there is public recognition of their volunteering. When the work is done by users or consumers of a product, there may also be a sense of responsibility resulting from the feeling of identity towards services they value and believe in (Olohan 2012).

We have also seen that the community of translators participating in the open movement shares many characteristics with the community of the open software movement. Given these and many other collaborative translation projects taking place, we can safely state that translators have embraced the benefits provided by interactive technologies, which allow user-generated, crowdsourced, open translations.

However, all of these collaborative translation activities will remain very restricted so long as translators must secure permission from the author of the original for any translation they wish to make public. The very significant macrostructural (or social) potential of translation, which can certainly be leveraged to feed recursive communities and destabilize current power relations, is clearly impeded by translation rights.

For the time being, translators can concentrate on some of the possibilities offered by copyleft and open licenses. There is an increasing number of works that are protected by some of the Creative Commons copyright licenses allowing derivatives. Translators can therefore reproduce these works, and licence them with the Share Alike option, which ensures that others can retranslate them under similar conditions. Such practices are in line with the collaborative environment of the digital age and the information society, and will highlight the obvious tensions between our new realities and the outdated central governance mechanisms of copyright law, which aims to concentrate power in the hands of a single owner.

Copyright reforms of translation rights can be tiered and take various forms. One of the most practical seems to be limiting the author's translation right to say three years from the date of publication, if they choose to exercise the right. This would be a "use it or lose it" clause. We live in an information society in which information is *doubling* very fast (every 18 months, according to the American Society of Training and Documentation; every 5 years, according to Bill Clinton; or every 11 hours, according to IBM). This is yet another reality that ought to be reflected by legislation dealing with access to information.

Of course, this could also be part of a larger reform of copyright law which would require registration of works for copyright protection, instead of granting protection automatically. This would provide the double benefit

of only protecting works whose authors have deemed it worthwhile to protect, as well as keeping a centralized repository of all protected works, which would further facilitate the translation of such works.

The bottom line for translation is that a reform is required to free it from the author's permission to publish the translation, so long as it is clearly presented as such. Just as anyone is free to publish a commentary, summary, or interpretation of any work without seeking permission, so anyone should be free to publish their translation of any work. If an author so wishes, s/he could further endorse this or that translation of their work as the "official" or "author-approved" version. Such measures would help the case of translation and translators, but wouldn't result in any destabilization of the system, as would be the case if the translation right were to be completely abolished.

But until copyright policymakers realize that current IP trends need to be moving in the opposite direction, that more harm than good is done by pushing for policy that goes against consumer expectations, and until they start relaxing the structure of copyright law and opening it to allow for collaborative and interactive work schemes, translators must resort to such measures as copyleft licensing if they want to see translation participate fully in today's world, with its many needs. Open and collaborative translation projects are still possible, providing good opportunities to participate, even if only partially, in the democratizing of knowledge and the fomenting of creativity.

II. Translation and technology

This section aims to present an overview of the main elements of technology present in translation as an academic discipline and as a practice. This will establish the fundamental differences that have taken place between the practice of translation as it is understood today, and the manner in which it used to take place when translation rights were initially drafted. Given the significant changes that have occurred to the nature of translation mainly due to the incorporation of technology, I will argue that translation rights must be revisited.

II.1 Machine translation⁷⁹

When someone hears the terms "technology" and "translation," their first thought will most likely be: machine translation. This is quite reductive of the state of technological integration in translation. Despite the significant advanced in the field, computers (or "machines") are still unable to produce translations from one natural language into another of a quality comparable to that of human translators. Depending on the audience and

⁷⁹ See Hutchins 2014, 2012, 2004, 2001a, 1997, and 1986 for historical details related to the development of machine translation, which have been synthesized in this section.

function of the translated texts, human intervention may therefore be required to varying degrees for pre- or post-editing.

As we shall see, when expectations from machine translation were managed, it became possible to strike a better balance between tasks that are best performed by human translators, and tasks that are more efficiently handled by technology. Today, machine translation (MT) often means that the machine performs the translation with human assistance (which usually takes place after the translation). Human translations that are assisted in some of their parts and aspects with computer software are referred to as computer-aided translation tools, or CAT tools.

In a letter dated November 20, 1629, René Descartes already mentioned a mechanical dictionary that would use a universal code number for lexical equivalents that would work for all languages. The philosopher Gottfried Wilhelm Leibniz and others added the idea of a single universal language to Descartes' mechanical dictionary. Such were the beginnings of using mechanical means to conquer language difficulties (Mounin 1964, 16).

But it was not until the 1930s that the material and technological means allowed scientists to realistically start envisaging translating machines. In 1933, two separate patents, one in France to a Georges Artsrouni, the other in Russia to a Petr Petrovich Smirnov-Troyanskii, were granted for mechanical dictionaries (Hutchins 2004). In the case of the latter, he foresaw the possibility of not only mechanizing the dictionary – which he had already done – but the process of logical analysis required. Although he continued to work on his pioneering ideas until his death in 1950, they seem to have been too advanced for Russian scientists of his time, and they had no direct influence on later developments.

From this point on, and based on the general attitudes prevalent in the sector, we can say that the history of machine translation went through one phase that lasted from 1940 to 1957, a second phase from about 1957 to 1970, a third from 1970 to 1983, fourth from 1983 to the 2000's, and a last phase that has extended since then to the present.

II.1.A From 1940 to 1957

This period is one of naïve optimism and great efforts to produce concrete results in MT. The idea of formalizing translation was very exciting and hopes in success were ambitious. At that time, the first computers worked mostly like big calculators.

In a letter from Warren Weaver, the director of the Natural Sciences Division of the Rockefeller Foundation, to the cyberneticist Norbert Wiener, we can read the first clear expression of the idea of machine translation:

Recognizing fully, even though necessarily vaguely, the semantic difficulties because of multiple meanings, etc., I have wondered if it were unthinkable to design a computer which would translate. Even if it would translate only scientific material (where the semantic difficulties are very notably less), and even if it did produce an inelegant (but intelligible) result, it would seem to me worth while. Also knowing nothing official about, but having guessed and inferred considerable about, powerful new mechanized methods in cryptography [...] one naturally wonders if the problem of translation could conceivably be treated as a problem in cryptography. When I look at an article in Russian, I say "This is really written in English, but it has been coded in some strange symbols. I will now proceed to decode." [...] as a linguist and expert on computers, do you think it is worth thinking about?

(in Hutchins 1997, 15)

Wiener would reply to Weaver that the difficulties of developing such a computer program were simply too great. Weaver then turned to Andrew Booth in 1948, to work on the idea of a computer program that can perform word-to-word translation from one language into another with the intermediary of an electronic dictionary. On July 15, 1949, Weaver wrote a memorandum that he distributed to some 200 acquaintances, and in which he cautioned that "Perfect translation is almost surely unattainable," but he was still optimistic, because he was convinced of having found the "most promising approach of all" to machine translation, which he explained in the following manner:

Think, by analogy, of individuals living in a series of tall closed towers, all erected over a common foundation. When they try to communicate with one another, they shout back and forth, each from his own closed tower. It is difficult to make the sound penetrate even the nearest towers, and communication proceeds very poorly indeed. But, when an individual goes down his tower, he finds himself in a great open basement, common to all the towers. Here he establishes easy and useful communication with the persons who have also descended from their towers.

Thus it may be true that the way to translate from Chinese to Arabic, or from Russian to Portuguese, is not to attempt the direct route, shouting from tower to tower. Perhaps the way is to descend, from each language, down to the common base of human communication – the real but as yet undiscovered universal language – and then re-emerge by whatever particular route is convenient.

(*Ibid.*, 18)

This memorandum inspired and encouraged research and funding that would trigger a domino effect propelling MT as an area of intense activity in the U.S., Europe, Asia and Russia. It seemed that everyone was now working towards the ultimate goal of using electronic computers as translation machines, with hopes in the potential of getting results from the statistical analysis of language, the logical basis of language, and universal language categories.

Instead of trying to teach computers language rules, statistical approaches will let computers discover the rules for themselves simply by analyzing very large quantities of translated texts and finding statistically significant patterns.

During this period, two approaches for automating language were researched. The first includes Shannon's probabilistic models. These models mostly work by eliminating the noise that is present in communication, and by correcting spelling and pronunciation mistakes. This is done by using decoding processes that recognize and associate communication with the correct string of characters. The second approach relied on the automaton model. Rational or regular expressions are formulae in a special language used to specify the classes and categories of character strings. Looking for rational expressions requires a pattern to look for in a corpus. Finite-state machines (or automata) use algorithms to model, recognize and capture rational expressions.

II.1.B From 1957 to 1970

By the end of the 1950s, as the complexity of natural languages was becoming apparent, researchers were losing their optimism that their work could amount to actual MT. In the 1960s, Yehoshua Bar-Hillel, the first chair of MT at MIT, expressed doubts that high-quality, automatic, machine translation would ever be possible. By the mid-1960s, the field was greatly disappointed and completely stagnating. The fact that most researchers and scholars were not language specialists was already a big problem, but it was not the only one. It was now clear that cryptography was not appropriate for translation, and that there were serious material and technological challenges to overcome. The state of the field was in decline.

Both at the theoretical and experimental levels, new approaches were proposed between 1957 and 1970 from electric engineers, statistics and linguists, pushing forward previous work, but without any major breakthroughs. This is where we first encounter systems of syntactic analysis (parsers) that rely on Chomsky's generative and transformational grammar. In parallel with these two approaches, the first large corpus, the Brown University Standard Corpus of Present-Day American English, or just Brown Corpus, was compiled.

Given the general skepticism and impatience of investors and funding organizations regarding MT research, the Joint Automatic Language Processing Group (JALPG) established, in 1964, the Automatic Language Processing Advisory Committee (ALPAC) in order to provide a status report on MT.

That ALPAC report, entitled *Language and Machines: Computers in Translation and Linguistics* only contained 34 pages (to which 20 annexes were added) and was mandated to "advise the Department of Defense, the Central Intelligence Agency, and the National Science Foundation on research and development in the general field of

mechanical translation of foreign languages” (ALPAC). The report talked generally about electronic linguistics as a field, and only a single chapter of 5 pages (and 4 annexes) addressed automatic translation.

While the conclusions of the report were catastrophic for machine translation as a field of research, it cannot be held solely accountable for the subsequent state of MT, as is often claimed. The ongoing projects did not cease immediately in 1966 (with some continuing until 1975 for example), and other projects had already been cancelled before the publication of the report. In this sense, the report was more of a reflection of the general state of the discipline, as opposed to being the single trigger that created the subsequent state. The report concluded that automatic translations were of very poor quality (slower, more inaccurate, and more costly than human translations); that there were already enough translators for the amount of work needed, that there was no cost-benefit advantage, and that the lack of progress meant that MT was undeserving of more funds. Below are their final recommendations:

The Committee recommends expenditures in two distinct areas.

The first is computational linguistics as a part of linguistics – studies of parsing, sentence generation, structure, semantics, statistics, and quantitative linguistic matters, including experiments in translation, with machine aids or without. Linguistics should be supported as science, and should not be judged by any immediate or foreseeable contribution to practical translation. It is important that proposals be evaluated by people who are competent to judge modern linguistic work, and who evaluate proposals on the basis of their scientific worth. The second area is improvement of translation. Work should be supported on such matters as:

1. practical methods for evaluation of translations;
2. means for speeding up the human translation process;
3. evaluation of quality and cost of various sources of translations;
4. investigation of the utilization of translations, to guard against production of translations that are never read;
5. study of delays in the over-all translation process, and means for eliminating them, both in journals and in individual items;
6. evaluation of the relative speed and cost of various sorts of machine-aided translation;
7. adaptation of existing mechanized editing and production processes in translation;
8. the over-all translation process; and
9. production of adequate reference works for the translator, including the adaptation of glossaries that automatic dictionary look-up in machine translation.

All such studies should be aimed at increasing the speed and decreasing the cost of translations and at specifying degrees of acceptable quality.

(ALPAC, 34)

These recommendations resulted in the elimination of almost all funding associated with MT, which drastically reduced all activities in the field and affected its status.

With today’s hindsight, we know that the report was problematic. Firstly, the expectations of its authors to see high-quality machine translations were simply not realistic, when we know that even human translations are not

always of high quality. Secondly, it doesn't seem that much thought was given to the future possibilities of MT given the progress that had been made. Finally, no considerations were given to using MT for industrial or commercial uses, because the only focus of the authors was for military and scientific objectives. In the U.S., it took about 20 years for the MT to heal from the damage inflicted by this report.

On a more positive note, the report's main impact seems to have been limited to the U.S., the Soviet Union and Europe, while research continued in Canada, France and Germany. The report did recommend the development of computer tools that would help translators perform their work better, instead of computer tools to replace translators. And this recommendation was an important direction for research in translation technologies in the following years. Finally, as mentioned, some programs, such as L'Université de Montréal's MÉTÉO system (translating weather reports), were never interrupted.

II.1.C From 1970 to 1983

Research in MT during this period was based on four approaches, which were simply an evolution of those encountered in the previous phases. These were the stochastic approach, the natural language approach, the logic-based approach, and the discourse modeling approach.

In the stochastic approach, research and experimentation simply continued, but with hopes of being able to integrate hidden Markov models, which are useful for voice recognition, for instance. The new natural language approach analyzes natural languages in order to imitate them to the extent possible. Most of the work is based on a background of semantics and human cognition. The logic-based approach continues its work by relying on grammar and formal languages in order to automate language. And the discourse modeling approach, as its name indicates, analyses discourse mainly to find solutions such as the correct reference to grammatical antecedents.

Following the period of great disappointment, there was a period of intense activity and renewed interest, whose reasons will continue to drive the field in the next period as well, following 1983. A first reason comes from the very fast pace of progress in the IT field, with the appearance of personal computers that are fast and powerful. This changed the way the work of the translator is performed. Secondly, important developments took place in computational linguistics, which improved techniques of syntactic analysis, semantic analysis, and combining different methods simultaneously. The exponential growth in the number of texts to be translated, due to cultural, economic, and socio-political reasons, meant that there would now always be too much work for the number of translators available. In an attempt to meet this need and save in the long term, the private sector made substantial contributions to the field of MT and revived many of its research initiatives. Finally, the expectations of translators and researchers from computers became much more realistic. All of this

reoriented research in specific domains, and created new or modified tasks and job descriptions in the project management cycle of translation, such as pre-editing and post-editing.

II.1.D From 1983 to early 2000's

Since 1983, there have been a lot of efforts to combine the tools and methods of different approaches in order to take full advantage of their respective benefits and strengths. Algorithms of natural language processing introduced statistical and probabilistic models for more accurate tagging, reference resolution, and syntactic analysis. The success and growth of the Internet led to the appearance of artificial intelligence that allows the recognition and extraction of linguistic information, as is used in most search engines. Due to the competition between rival products, tools such as voice recognition and spellcheck started becoming more common.

By the end of the 1980s, IBM and Japanese companies published promising results of what is now called “example-based” translation, an instance of corpus-based MT that did not require syntactic or semantic analysis. The early 1990s also saw the development of the translator’s workstation and translation memories, and work on terminological domains. By the mid and late 1990s, the areas of software localization and MT for personal computers (for non-professionals) grew significantly (Esselink 2003). Automatic translation for direct Internet applications that does not necessarily require high quality was in large demand from that point on. This is also the moment that online MT services such as Babelfish and then Google Translate were introduced for mass-market use.

II.1.E Since the early 2000's

What is now clear is that, apart from some targeted systems in private industry using controlled language, most systems until the 1990s were either purely experimental or produced lower-quality output, thus requiring extensive revisions. Another noteworthy change in MT research is that up to the 1990s, it took place in large institutions that are bound to countries and their governments.

Given the availability of large corpora as well as open source tools to align, filter and reorder them, MT was largely dominated by the statistical approach from the 2000s until recent shift towards neural MT. The statistical approach has the added benefit of not always requiring much, if any, knowledge, of the languages of the corpora. This has meant that research is now less bound to specific institutions and countries. Natural languages still present considerable challenges that are best addressed by combinations of approaches. Some of these challenges include languages having different typographies (e.g. English v Arabic), languages that are morphologically rich (e.g. Russian), and transliteration (e.g. Chinese) (Hutchins 2012).

MT continues to spread to new areas of applications. Translation service providers often rely on MT with some pre-editing and post-editing to get higher efficiency output from their translators, who seem to have adapted their work to incorporate these tools. There is still much work to be done in developing evaluation metrics for MT to properly assess its quality, and human assessment is still the norm (Hutchins 2014).

Corpus analysis, collocation, statistical alignment, disambiguation of meaning, syntactic analysis, and even problems of plagiarism are still very much present in MT research. In TS, academic programs and training are mainly concerned with CAT, as opposed to MT, with much of the effort centered on teaching students to be more efficient by testing and identifying the best tools for various tasks (Macklovitch and Russell 2000). Pedagogically, calls are made to adopt approaches that empower translators further, incorporate terminology management, controlled authoring, post-editing, and engine tuning into translation courses in order to prepare students for their jobs (Kenny and Doherty 2014, Mellinger 2017).

As for the industry, to name one example that is representative of the current state: Google Translate introduced a new system called Google Neural Machine Translation (GNMT) in late 2016, which allows it to continue improving the quality of its translations by taking into consideration the broader contexts of the appearance of sentences, according to Google's own description. Their continued improvements to their systems are not only an improvement on the quality of translations, but also of the ability of computers to better address challenges of semantics, which is referred to as deep learning.

As a final point, let us mention collaborative translation and MT research have overlapped since the 1980s, when volunteers were sought to improve instant online MT (Shimohata et. al. 2001). In 2014, Google Translate launched Translate Community, which allows volunteers to help improve the quality of the translation of more complex phrases. This was followed by Google Crowdsourcing App in August 2016, which offers specific translation tasks to interested volunteers. Much work has since taken place to build and test systems that improve MT by relying on collaborative translation (Zaidan and Callison-Burch 2011). When MT systems benefit from crowdsourcing post-edited feedback designed to teach them, research has shown that the result can be translations of a quality similar to professional level, at 20% of the cost (Zbib et. al. 2013). Online platforms that allow collaborative translation are a growing field of research (Bey et al. 2006; Désilets et al. 2009) and are being used as much for community translation (Anastasiou and Schäler 2010; Kageura et al. 2011) as for training translators (Babych et al. 2012).

II.2 How technology is changing the work of translators – microchange

There are many tools that could be addressed under the heading of translation technologies, including means to capture data in electronic form (scanners, optical character recognition programs, voice recognition programs), corpora and corpus-analysis tools (including monolingual and bilingual concordancers), terminology management systems and term extractors, and translation memory systems, and translation environment tools (which sometimes integrate all the previous tools as well as machine translation systems) (see Bowker 2002). In this section, we will provide a quick overview of the extent to which some of these tools have had an incidence on the manner translation and terminology work are performed (practice) and understood (theory), limiting ourselves to the most significant points. We will conclude with a closer look at the impact of corpora on both disciplines.

As we just saw, attempts of completely automating machine translation failed, with the realization that human language is too complex (even for us to understand fully (Arnold 2003)). As expectations changed and the focus shifted to translation technologies as aids to a human who is in control of the task at hand (Kay 1980/1997), and finding other uses for machine translation, the consequence was the emergence of new jobs and job descriptions.

II.2.A Impacts on translation

There are translation jobs that will not require a high quality end product, and where machine translation can be used, such as producing a rough draft of a translation of an updated technical report. Efforts were therefore made to identify different levels of quality and translation jobs that could possibly fall into each level (Church and Hovy 1993; Bédard 2000; Hutchins 2001b; O'Hagan and Ashworth 2002). From a commercial point of view, identifying a good niche for MT requires using fair evaluation criteria for these tools and targeted marketing strategies (Church and Hovy 1993).

An incremental approach to the introduction of technologies in the translator's workspace was proposed over thirty years ago. This is indeed, more or less, what seems to have happened.

Today, translation memory systems usually provide an integrated environment linking to terminology-management systems, including term extractors and concordancers, as well as translation memories (Bowker 2002, 2010). The integration and combination of these tools obviously aims at, and leads to, potential increases in productivity. But using these tools requires training, as well as a time and effort investment.

By trying to automate the process of translation, we have gained a better understanding of the limits, strengths and weaknesses of both human and machine translation, thus informing our decisions on how and when to use the technology.

It has also forced us to look at natural language more closely, and ask questions which have kept philosophers, engineers and linguists busy for the past half-century. For instance, to what extent is it possible to represent languages symbolically? Arnold (2003) explains that there are three basic MT architectures, namely: direct, transfer and interlingual, the two latter ones requiring a partial or a full symbolization of natural language (especially the interlingual, which is reminiscent of generative transformational grammar). If the symbolic representation of language is possible, what does that tell us about the human process of understanding languages and translating them? Of course, there are deeper implications than can also be explored from the viewpoint of the language-culture links.

II.2.B Impacts on terminology

It is generally accepted that term banks were among the first linguistic applications of computers (Bowker 2003). Yet, advances in technology have not only affected the way terminology (terminography) is practiced, but also forced scholars to resort to completely different theoretical frameworks.

The main benefits of working with terminology management systems and technologies is that they allow for more storage, better retrieval of terms and information and are easily integrated with other computer-aided translation tools. These benefits can lead to increased terminological consistency, a higher speed of creation and retrieval of information, more flexibility in creating and modifying entries, and the possibility to share all of this information with others (Bowker 2002).

Advances have been made in the automation of term extraction. While one approach relies on purely statistical and probabilistic information, the other uses linguistic information (lexis and grammar) to identify terms. In addition to sharing some challenges resulting from the complexity of natural languages, both approaches also have their own strengths and weaknesses. More recent efforts have therefore tried to combine elements from both approaches to achieve better results. All tools still require considerable human involvement to minimize noise and silence (L'Homme 2004, 2008).

In addition to responding to the needs of language professionals, terminological tools can also serve language planning purposes, as L'Homme (2004) shows in her overview of *Termium* and the *Grand Dictionnaire Terminologique* as illustrations of terminology practice in a Canadian context. Although this is not something

completely new in itself, recent technological advances have rendered these tools more accessible and present in everyday life than ever before.

Also, due to the availability of these tools and technologies, employer expectations have been raised, making it quite difficult for a terminologist to work at a professional level without having a good grasp of at least the general operation of these tools.

As was the case with advances in translation technologies, advances in terminology technologies have also forced scholars to look at the foundations of their discipline, starting with the most basic notion of term, about which they are still expressing doubts (Gaussier 2001, 169).

Researchers in the field who have kept themselves updated on the technological developments have also had to reject the traditional theory and replace the traditional models, for instance letting go of the onomasiological approach (L'Homme 2006). While some scholars are now working on what they call frame-based terminology (Faber 2014) and terminological knowledge bases, trying to identify conceptual relationships in knowledge-rich contexts (Meyer 1992, 2001; Marshman 2002) others have focused their efforts on linguistic descriptions of the lexical properties of terms based on lexico-semantic and semasiological analysis (L'Homme 2003). Others still have simply turned to other fields for possible inspirations, such as cognitive sciences, ontology (in the philosophical and informational senses) and metaphoric analogies, while basing all work on evidence from corpora (Temmerman 2000)⁸⁰.

The manner terminology is taught is also being affected by these tools, in order for students to get acquainted with them and be able to apply their learned skills for what is waiting for them in the workplace (Austermuhl 2010).

There has been disciplinary criticism in terminology about the fragmentation of the scholars and their work, and the duplication of many efforts (Budin 2001). Technological tools now available offer a great forum not only to bring professionals together, but also to open the discipline up for contributions from outside the field (think Wikipedia of terminology for example), which would provide yet another instance of change in the manner in which we think about terminology.

II.2.C Corpora

Previously discussed technologies (term extraction, translation memories, etc.) rely on corpora.

⁸⁰ Also see Cabré 2003; Diki-Kidiri 2007; and Gaudin 2007 for the increasing presence of the social and cultural dimensions and implications of terminology.

Corpus linguistics is an empirical approach, studying what already exists, as opposed to hypothesizing about what might or should be said (Bowker 2002).

The main features of corpora are their authenticity, format (electronic), volume (large) and specificity (based on well-defined criteria). Each one of these points can lead to practical and theoretical investigations (Bowker 2002, 2003, 2010b; Bowker and Pearson 2002).

Because of corpus linguistics' generally unfavorable stance towards translation, translation has been largely ignored by corpus linguistics. It is only recently that there has been more interest in translation by translation scholars and corpus linguists (Baker 1996b; Olohan 2004).

The use of corpora can offer many benefits to translators. For instance, it can be useful for terminological research, help with technical writing, and give insight into the idiosyncrasies of authors and translators (Bowker and Pearson 2002).

However, some preliminary research found evidence that a heavy reliance on corpora during translation can also have the effect of disturbing the coherence of the end product. This kind of study would of course make translators a little wary of relying too heavily on corpora, which is why some have underlined that translators use corpora as a complementary resource only (Bowker 2006). Of course, the quality of the corpora and the uniformity of its texts can reduce risks of incoherence and other inconsistencies.

As mentioned already, terminologists have been using corpora for their work since their development, so the change on their professional activities is not as drastic as it is on translators for instance (Bowker 2009, 2010a).

But when we look at the possibilities offered by corpora and current technologies, we quickly realize that terminographic habits have yet to catch up with the times and pass the benefits of recent advances on to the end-users. For instance, translators mostly use term records for the contextual examples and the frequency information they can provide. Perhaps this is a case of what translators want to see on term records, as opposed to what they get because that's not what they are designed for. In any case, term records still seem to be created with the same fields and information as they did decades ago. Also, when this is combined with the information and tools that we now know are available to terminologists, (which would reveal nuances between terms for instance) it becomes much less acceptable to see incomplete or quickly prepared entries where such information is lacking (*Id.*).

Mona Baker proposes (1996b) the use of corpora to find evidence for distinctive features of translation, such as simplification, explicitation, normalization/conservatism and levelling out, which will turn corpus linguistics on its head, because these features have various manifestations and are not language-specific (175). In other words, while corpus linguistics have traditionally been interested in individual languages and the frequency of words, translation scholars are looking for more generalizations and patterns that can help them theorize their practice.

With the amount of data made available through a corpus, new patterns that were previously unaccounted for will most likely emerge. This will require further guidelines for their identification and explanation. Also, some argue that corpora can be used for their textuality (Tognini-Bonelli 2001). We can explain textuality as that which gives a certain text its specificity, and we would not expect to find it in randomly accumulated texts. If it truly is the case that corpora have textuality, it would put into question the current foundations of textuality, poetics and hermeneutics, which have all been erected on the foundation of the subjective intention of meaning.

Both translation and terminology have shifted their initial position, and now favor descriptive models over normative ones. For better or for worse, the use of corpora would certainly feed that drive.

Though some translation scholars are enthusiastic about the use of corpora for the revelation of ideological influences for instance (Baker *op.cit.*; Tymoczko 1998, 657; Malmkjaer 2003, 119), others are much less optimistic about such abilities (Hermans 1999, 93 - 94). This reticence to the use of corpora is not proper to translation studies (Chomsky 1962, 159; Hjelmslev in Tognini-Bonelli *op. cit.*, 52).

II.2.D Conclusion

Recent advances in translation technologies and corpus studies have undeniably provided insights to better understand the nature of language in general, and translation and terminology in particular on a theoretical plane. At the same time, these advances require much more research and investigation, both theoretical and experimental, to understand and define their limits, strengths and weaknesses.

At the professional and practical level, we saw that what machines lack in qualitative and rational faculties, they make up for in quantitative and computational abilities. However, be it for translation or terminology purposes, human intervention is still very much required before the work, after the work, and sometimes, even during the work, and this can represent significant effort and time. Also, different tools present different advantages and lacunae, and so they must be chosen and used appropriately, which necessitates in itself considerable training and trial and error.

Technological advances and corpora have therefore not only modified the way in which we practice terminology (terminography, term extraction, etc.) and translation (machine translation, translation memories, integrated tools), but also forced us to rethink the paradigms and theoretical frameworks in which that work is done. It has also clearly revealed that we still have a lot to learn and understand about the linguistic disciplines. The current technological limitations are in fact a reflection of our own theoretical limitations with regards to natural language.

II.3 Copyright and translation technologies

When articles of copyright law were drafted, translation technologies did not exist. Since then much has changed, as we just discussed. Translation work is often done in collaboration with other agents among whom the translator is but one player, and in cases of crowdsourcing and open translation projects, the work may be divided among many translators and editors. In addition, MT may be used to produce significant portions of a translation with the help of termbanks, and major translation service providers today use translation memory tools as well as MT, such as SDL/Trados and Systran, to the point where they consider it unthinkable to translate without these tools, especially in technical fields (Smith 2009).

Initially, translation memories and termbanks were confined to the personal computer on which they were installed. Today however, translation memories can be bought and sold individually. For a platform where such sharing is occurring, we can cite the Human Language Project at taus.net, which presents its vision as:

1. Fearless sharing of language and translation data (speech and text) in all languages and language pairs, not hindered by outdated copyright law. European legislators must modernize copyright regulations on translation data.
2. A library of translation, language and reordering models covering all languages and a wide scope of domains to help fast-track and fine-tune the development and customization of machine translation engines.
3. A translation quality evaluation platform to help assess, benchmark and predict the right translation quality for different content types and different purposes of communication.
4. A library of language tools – such as parsers, chunkers, lemmatizers, taggers – to assist service and technology providers to improve and customize their solutions.
5. Common translation web services API's to ensure that all services and technologies work seamlessly together.

(<https://www.taus.net/data/taus-data-background>)

Translation memories are databases containing previous original texts and their translations. Depending on the system being used, once a new text is put through the translation memory, the user can see what percentage of it is already part of the memory, as well as see the level of matching accuracy (exact matches v. fuzzy matches), which are all parameters that can be adjusted.

Copyright law covers not only literary and scientific works, but as we have mentioned previously, databases and computer software as well.

“Collections of literary and artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangements of their contents, constitute intellectual creations shall be protected as such.” (*Berne* Art 2(1))

“Compilations of data or other material, whether in machine-readable or other form, which by reason of the selection or arrangement their contents constitute intellectual creations shall be protected as such.” (*TRIPS* 1994, Art 10 (2))

“Compilations of Data (Databases) [...] compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such.” (*WIPO* 1996, Art 5)

The U.S. Copyright Act (section 101) also protects databases under the category of compilations, considered as original works of authorship, which it defines as “collection and assembling of preexisting materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship.”

The European Union’s Directive on the legal protection of Databases (1996/9/EC) define database as “a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means” (Art 1.2).

However, it is not the content of the database that would be covered by copyright protection, only its structure:

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.
2. 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.

(Art 3, Database Directive)

In March 2012, the European Court of Justice ruled in the *Football Dataco v. Yahoo*, and explained that to qualify for copyright protection, the selection or arrangement of the data in the database must amount to “an original expression of the creative freedom of the author.” So when the database creation is dictated by “technical considerations, rules or constraints which leave no room for creative freedom,” there is no protection. The court also distinguished between skill and effort in collecting and arranging data versus skill and effort making

the database. In the case of MT, translators do not have anything to do with the making of the database as their job would consist in populating, maintaining and editing its content (*cf.* Gow 2007).

Keeping in mind that a translation is protected as an original work if it was done with the authorization of the author of the original, then the translated work will qualify for copyright protection. As for the translation memory itself, it will qualify for copyright protection if it can be shown to be an author's intellectual creation.

Where there is protection, while the moral rights belong to the owner of the translation right, any economic rights will belong to whoever commissioned the translation in the U.S. as part of their "work made for hire" provisions, while in the E.U. the details would have to be specified in every contract. An employer will therefore own any translation memory, by law (U.S.) or by contract (E.U.), and will retain these rights when the translation memory is shared with other service providers who may be doing work for them. If there is no translation memory sent to the service provider, and they decide to create one, they may keep it, unless otherwise stipulated in their contract.

In her 2007 article "You Must Remember This: The Copyright Conundrum of 'Translation Memory' Databases" Francine Gow explores whether databases used in translation memories deserve their own protection, independently of any protection in the underlying translation or source texts. She argues that, if we keep in mind the nature of work traditionally performed by translators on the texts in translation memories (mainly consisting in the selection, alignment and post editing of texts), then these texts would not meet the minimal threshold of skill and judgment applied in Canada, nor the high or even low sweat of the brow standards applied in the U.S. and the U.K. The work would therefore only be protected through the clauses of a contract, or under the provisions of work made in the course of employment. Given these dead-ends, she proposes that TMs be justifiably created by translators under fair dealing (even if it is ultimately for commercial motives) because they are akin to files a consultant or a lawyer keeps for future reference and research. This is, at best, a questionable argument. After recognizing that translators should not be selling or sharing TMs in any way without the consent of the clients who commissioned the work, and instead of underlining the shortcomings of the law and calling for some reforms that would put these situations to rest, her last argument is a plea to the members of the profession to act with collegiality and not apply the law against each other, so that the translator, the client and public benefit in the end. After making what seems like a sales pitch for TM Marketplace, a company that happens to be in the business of sanitizing texts in preparation for input into TM databases that can be accessed and manipulated for a fee. So apart from this solution from a private company trying to exploit a grey area in a law that is ill-conceived for these realities, her conclusion, is that no one can, or should, own the database in its entirety. Despite this complete lack of a legally valid answer to this issue, translators and clients continue to use databases of translation memories on a daily basis.

Translators and corporations build corpora from copyrighted material, either manually or by developing automatic processes for doing so. If the content retrieved is taken and used to produce unauthorized translations, then the translator or company may be sued for direct infringement, or secondary liability for knowingly causing or contributing to the infringement of their users.

While copyright licenses are usually explicit in the permissions they grant, the law also recognizes implied licenses, based on the conduct of the rights holder. An implied license is an unwritten license permitting another party to do something that normally requires a license. Some have argued that web site owners imply a license to do certain things with their sites (crawl, cache, RSS...) (in Cohen et al. 2015, 194; Ketzan 2010):

We can presume that the copyright owner has granted an implied license to allow people to copy a web page to a local machine and display it there; after all, if they did not want people to be able to read a page (and create a temporary copy on your computer), they would not have put the document up on the Web.

(Manow 2003)

But cases mentioning implied licenses in Canada, such as *Robertson v. Thomson Corp.* (2001) or elsewhere, have not directly extended the notion to language technologies allowing to manually or automatically collect and translate content.

Machine translation, however, will most certainly be the most problematic area of translation technologies for copyright law, even though it has not yet been explored much by translation or legal scholars, perhaps because the quality of the outputs has not warranted it yet. The problem with this thinking is that, as we very well know, MT is already being used directly in many instances where quality and accuracy of translation are not the most important factor, or at least with some human post-editing if higher quality is required. But if the current pace of progress is maintained, then we should assume that it will only be a matter of time before the near human quality (NHQ) we witness in certain language pairs and domains improves to the point of fully automatic high-quality translation (FAHQQT), even if it is for certain domains or types of documents only. Once this takes place, then we can expect very significant changes in the translation industry and, along with them, copyright infringement at unprecedented levels, because machines could be translating content automatically from any language and into any language, and making it all public without consent. Imagine, for instance, a web crawler that producer instant translations of all the pages it encounters in the top 10 languages (see Chapter 10) on the Internet, and publishing the content on an ongoing basis.

There is still a lot of skepticism and what I consider to be underestimation within TS and elsewhere of the quality that MT will eventually be able to produce. In 1964, Victor Yngve wrote that “the semantic barrier” had

been hit, and that ‘we will only have adequate mechanical translations when the machine can ‘understand’ what it is translating” (in Hofstadter 1997, 518). Of course, this was before the tremendous progress of the statistical and neural approaches, but researchers in TS are still very reluctant to contemplate the full potential of MT.

for several decades there was still this false expectation that one day we would develop a fully automatic high quality translation computer program that could translate unrestricted text. The ongoing and high-pace of advances in technology and computer science, and deep desire to indeed have a device that could automatically translate, as seen in many science fiction novels and movies (like Star Trek’s Communicator and Douglas Adams’ Babel Fish), seemed to blind-side many people for many years, as exemplified by President Clinton’s State of the Union Address as recently as in 2000 when he stated: “Soon, researchers will bring us devices that can translate foreign languages as fast as you can speak.”

(Giammarresi and Lapalme in Gambier 2016, 213)

Although this passage is relatively recent, having been published in 2016, it does not seem to consider that today, we are closer than ever to the reality described by Clinton, with applications like Skype Translator (which works in 8 languages for voice, and 50 languages for text) and the Tap to Translate from Google (which can be used directly inside any other app and even offline, allowing to access over 100 languages). To test their new afore-mentioned Google Neural Machine Translation System (GNMT), which Google had declared 60% more accurate than the previous system, Google asked humans to evaluate translation on a scale from 0 to 6. For Chinese to English, the system rated an average of 4.3, compared to a 4.6 for human translators. For English to Spanish, the system rated an average of 5.43, while human translators earned an average of 5.5 (Turner 2016).

After an initial paper entitled “Google’s neural machine translation system: Bridging the gap between human and machine translation” (Yongui Wu et. al. 2016)) introduced the GNMT, the team of researchers presented, in November 2016, a second paper entitled “Google’s Multilingual Neural Machine Translation System: Enabling Zero-Shot Translation” (Johnson et. al. 2016) in which they proposed a solution to allow for the system’s AI to translate between languages without having to go through any other natural language, such as English, as an intermediary. Until now, other machine translation attempts were mainly relying on language pairing and reliance on an intermediary natural language, usually English, leading to inefficiencies and other issues. As they explain in their article, Google supports over 100 languages as source and target, which would mean that, based on previous models, they would need to either rely on an intermediary, or create 100² models, which would be quite problematic in any production environment. Secondly, because their solution relies on common parameters and data that are generalized to all languages, languages where there is typically little data greatly benefit as a result of the abundance of data from other languages. So the system is able to produce reasonable quality translations for language pairs that it has never seen (which they call “zero-shot”), and which may be improved with little additional data afterwards.

The authors of the paper announced their findings on Googleblog where they explained in how the system works by using an example with Japanese $\rightleftharpoons$ English, Korean $\rightleftharpoons$ English, and Korean $\rightleftharpoons$ Japanese. They then asked:

The success of the zero-shot translation raises another important question: Is the system learning a common representation in which sentences with the same meaning are represented in similar ways regardless of language — i.e. an “interlingua”? Using a 3-dimensional representation of internal network data, we were able to take a peek into the system as it translates a set of sentences between all possible pairs of the Japanese, Korean, and English languages.

(Google Brain Team, research.googleblog.com, Nov 22, 2016)

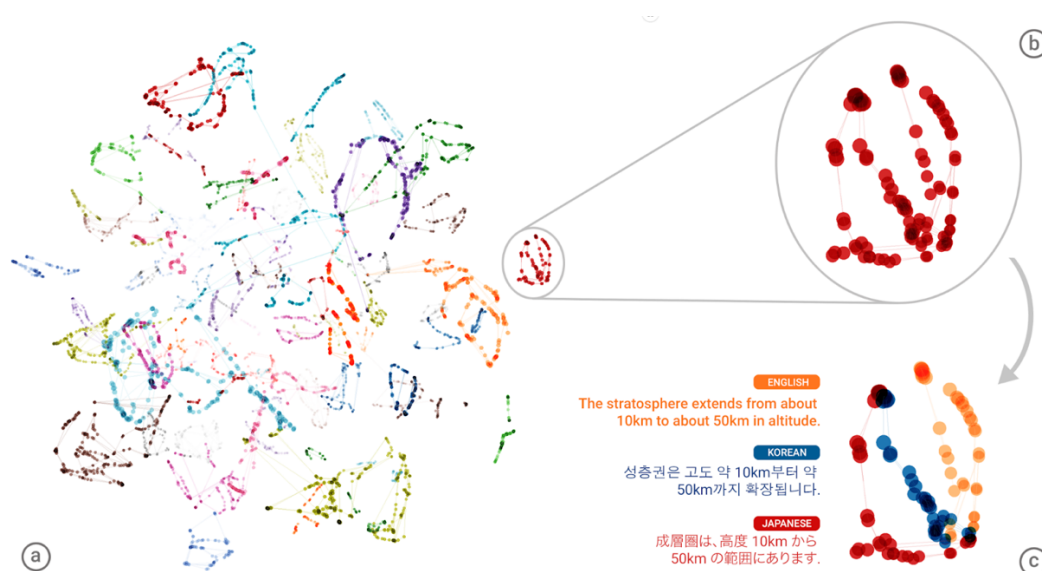


Figure 3: A visualization of GNMT when translating a single sentence in multiple directions for an example with English, Korean and Japanese (Johnson et. al. 2016)

Their analysis of the data allowed them to conclude that: “[...] This means the network must be encoding something about the semantics of the sentence rather than simply memorizing phrase-to-phrase translations. We interpret this as a sign of existence of an interlingua in the network” (*Id.*). in other words, yes, the system has created its own language, or interlingua, in which all data is represented, and from which it can translate into any of the 103 languages currently supported.

Of course, this is not saying that this technology is already here for all language pairs and all contexts, only that good translation theory, and good public policy, ought to be forward looking, and preparing for the

eventualities, especially when there is valid evidence that progress is ongoing, and that certain desired outcomes no longer seem to be that far out of reach.

If the current copyright laws remain in place, then this will simply generate a legal and social crisis. Given what looks like the inevitable evolution of technology in the direction of quality MT, the options will therefore be to either add exceptions to copyright law allowing for MT and other non-human translation to be produced without fears of infringement, or modify copyright law and the translation right specifically, as I have argued throughout this thesis, so that this becomes a non-issue.

The underestimation of the eventual capability of MT to produce viable or “good enough” quality may simply be out of defensive fear, especially from those who may see themselves most impacted by such a development. Of course higher quality MT can have detrimental effects. The first and most obvious is specific job loss in the translation and localization industries. The language services market in 2016 was estimated to be in excess of US\$40 billion (Common Sense Advisory 2016) with machine translation accounting for about US\$400 million of it (Global Market Insights 2017). Machine translation can very significantly reduce costs of translation worldwide by automating the process, especially for translation work that can be easily automated. But this will never eliminate the need for translators, who will be asked to concentrate on more complex and nuanced works where the literary, stylistic or cultural content is more present, or simply shift their attention to the management or development of the MT systems and their related applications.

At a global level, there could also be decreased incentive to learn foreign languages. While populations of countries like the U.S. and U.K. currently don’t seem to have much incentive to learn other languages, South Africa has 11 official languages, and countries like India, Morocco, and Luxembourg have very significant levels of polyglots.

The more important reality, however, is that higher quality MT has the potential to significantly increase social and cultural interactions at a global level, and allow people of most linguistic backgrounds to access information much more freely, in the language of their choice.

In addition to bringing people and cultures together despite geographical and political boundaries, translation is a big market. A lot of energy in the MT field has been spent on static documents and texts. But the business potential is perhaps even bigger for social media platforms, whose main purpose is to make money by allowing users to build communities and networks and enable them to interact. The ability of MT to provide real-time translation for messaging, chatting and multi-player networked video games will be in very high demand. This

explain Skype's investment in their Translator, mentioned above, or Facebook's announcement that all posts will soon be available in 44 languages.

There will also clearly be direct applications of MT for open knowledge and education initiatives like the ones we discussed in this chapter or the previous one. After all, we must not forget that

[c]yberspace may have given Western academics, corporate executives and business women, scientists and journalists, access to cutting edge technology that appears to be everyman's because in their lives it *does* make the world smaller – but those fancy gadgets that enable a select few to roam the computer freeway or to communicate with colleagues in the other room or on the other side of the Atlantic by a simple click on the flickering screen, are still largely the reality of a privileged minority.

(Wirten Hemmugs 2004/1998, 24)

Finally, given the increased integration of MT into sites and applications, there is also reason to believe that the localization market will be deeply impacted by improved MT, once again most likely leaving only content requiring cultural adaptation to human intervention.

E-commerce would be deeply impacted, as it would allow customers to access products directly, while allowing sellers to access new markets for advertisement and marketing.

MT also has the potential to complement resources available in minority languages as well as preserve them by allowing them to access information without having to resort to translated material. Of course, this can have ramifications on the political dynamics between linguistic and cultural minority communities with the rest of the population.

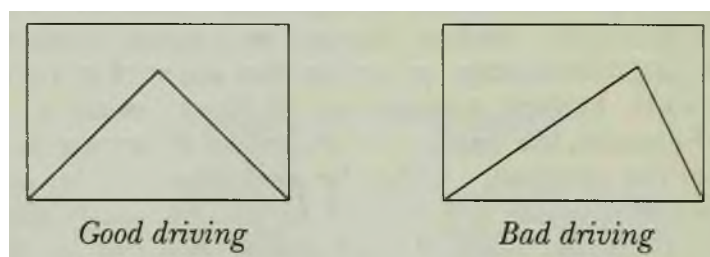
All of that said, currently, it seems reasonable to suppose that there is still fear to openly develop and implement MT, given the considerable potential infringement risks, especially as secondary or contributory liability. In other words, this is an area where copyright law is hindering the innovation of a socially, culturally and economically beneficial technology.

Looking more closely at current copyright law provisions, we can clearly see the very considerable potential for copyright infringement. If any work, from music, to blogs, to movies, to books can be translated to an acceptable quality by the click of a mouse⁸¹, then we can be sure that this capacity will be fully exploited, regardless of what copyright says.

⁸¹ I am predicting that the functions performed by the cute peripheral device will no longer require any of the device's current physical features by the time the output of MT will have reached good or superior quality, and will therefore no longer be called "mouse," or will simply no longer be required.

MT has not been directly addressed by copyright law nor are there any court cases that have directly dealt with the output of MT. In *Le Ton Beau de Marot*, cognitive scientists Douglas Hofstadter asks:

“Does what Systran and its cousins do even merit the name ‘translation?’” (Hofstadter 1997, 515) He then goes on to explain that when computers are said to be able to drive cars, all that is meant is that they can distinguish between these two pictures:



Exclaiming: “Does this sound like driving to you? [...] is that all the word ‘driving’ means?” to which he finally answers “in a very crude approximation, yes indeed, driving *is* the centering of a triangle’s tip in a rectangle. When everything else is going just swimmingly, you can get away with no more than this” (*Ibid.* 516). He then goes on presenting a barrage of scenarios in which a computer might fail reacting, or calculating, or making the right decision on the road.

This is the analogy he then uses to explain that translation is also more than what Systran and other MT systems can accomplish.

To be sure, the combination of fast dictionary lookup of words and fast rearrangement of syntactic structures constitutes the *sine qua non* of translation, but that does not mean that these activities alone make up translation, no more than real-time triangle-tip centering amounts to driving. The union of word lookup with syntactic reordering constitutes a disturbingly anemic conception of translation.

(*Ibid.* 518)

To him, this is typical of artificial intelligence research, which oversimplifies complex scenarios and presents them as advances and progress. And so we find that “some central aspect of a complex mental task is isolated, distilled down into a pathetic caricature of the whole, more or less adequately computerized in this junior form, and the achievement is then passed off, all too often in hysterically hyped press releases and splashy videos, as the whole ball of wax” (*Id.*).

The relevance of this passage is to show that an argument could be – and has been – made that a translation resulting from MT is not a translation proper.

The provision and articles of copyright law and translation rights have not been written in a detailed manner where nuances have been made between what constitutes a translation and what doesn't, or whether translating an installation manual, an anatomical textbook, or T. S. Elliot's *The Waste Land* need to be differentiated. Furthermore, there is no requirement in copyright law that the authoring of a work, be it an original or a translation, is at the hands of a human. So unless special provisions or exceptions are introduced for MT, it would simply fall under translation rights.

As stated previously, implied licenses may provide a solution, as it has been suggested for web browsing and other activities. Relying on *Field v. Google Inc.* in which the court held that an author granted implied intent license to a search engine to cache his copyrighted works because he chose not to use the well-known "no-archive" metatag, while he was aware of it, Ketzan (2007, 230) suggests the use of metatags (e.g. "do not translate") to discover the intent of authors of online content, and clarify to users as well as MT systems that they do not allow for their content to be translated online.

Although this is quite a practical solution because of its ease of implementation and simplicity, it has its challenges, some of which are mentioned by the author. For instance, he mentions that the World Wide Web Consortium, which is the leading Internet standards body, would most likely not approve of such a tag because they do not create individual tags, and because they believe in internationalization of online content.

I would also add that this implied license combined with metatags would most likely also be rejected because it does not align with the spirit of current copyright law, which grants protection by default without any need to invoke, declare or register anything. This would make everything translatable by default, with the burden of declaring something out of bounds on the content owner.

To work around this problem, a positive metatag can be used to allow for translation, instead of a negative one to prohibit it. In a comment from law Professor Karl-Friedrich Lenz on Google's argument in a lawsuit that if online content owners do not want Google's robot to access their content, then it is up to them to use the metatag robots.txt exception, he writes:

Google wants a "robots.txt exception". They want to point to the fact that anybody can easily shut them out so as to be able to violate copyright as the default. I don't approve of that. The default is that you have to ask first if you want to make copies, or derivative works like an index. Let those who actually want their content to be copied and indexed by Google specify so in their "robots.txt" files. There is no "robots.txt" exception in copyright law now, and there is no need for it.

(Lenz August 09, 2005)

Of course, this is not to say that I am arguing for copyright granting protection the moment a work is published as a default. But given that this is currently the standard, a minimalist approach to modifying it would have to take this point into consideration.

Furthermore, while this protects the creators of MT systems from liability, a metatag would not prevent anyone who still wishes to do so to translate the work, any more than copyright notices currently prevent people from illegally downloading online content.

Another possible solution for the of MT is to rely on the fair dealing exception⁸², which has been put in place for the purposes of research, private study, education, parody, satire, criticism, review, and news reporting. But because MT, although transforming the original, translates the entire work, be it a document or a webpage, then it would most likely not pass the fair dealing test. And if it would, then why wouldn't translation in general be considered fair dealing?

As we have seen, while some argue the notion that MT can even be referred to as “translation” (Hofstadter *op. cit.*), others are preaching to “pave the way for online MT through statutory recognition of its noninfringing nature” (Ketzan 2007, 234). What this discussion was meant to reveal, however, was that current copyright is ill-equipped to deal with MT and all its ramifications, and that the proposed solutions will not be considered adequate, because they are relying on existing copyright laws as their starting point.

II.3.1 Agency between human and machine translation

The works in translation studies that have looked at the issue of agency in translation when machine translation is involved have mostly focused on the attitudes of translators towards the technology or their behavior in its presence (e.g. Lagoudaki 2006, Koskinen and Kinnunen 2010, Olohan 2011, LeBlanc 2013, Ruokonen and Koskinen 2017, Koskinen and Ruokonen 2017).

Perhaps the most promising of these works is Maeve Olohan's “Translators and translation technology: the dance of agency” (2011). Though it is a case study of translator reaction to MT on an online forum, its merit lies in its attempt to apply Andrew Pickering's notions of “mangle of practice” and “dance of agency” to translation practice in the presence of MT.

⁸² Ketzan (2007) proposes fair use, as he is writing from the point of view of U.S. law.

Pickering's works on these notions (1995, 2008, 2010) are rich and complex, and could provide a sociological grid of analysis that allows for a "posthumanist" agency. Rosi Braidotti's *Posthuman* (2013) is yet another work that has ventured beyond human agency, with a feminist component:

Discourses and representations of the non-human, the inhuman, the anti-human, the inhumane and the posthuman proliferate and overlap in our globalized, technologically mediated societies. The debates in mainstream culture range from hard-nosed business discussions of robotics, prosthetic technologies, neuroscience and bio-genetic capital to fuzzier new age visions of trans-humanism and techno-transcendence. Human enhancement is at the core of these debates. In academic culture, on the other hand, the posthuman is alternatively celebrated as the next frontier in critical and cultural theory or shunned as the latest in a series of annoying 'post' fads. The posthuman provokes elation but also anxiety (Habermas, 2003) about the possibility of a serious de-centring of 'Man', the former measure of all things.

(Braidotti 2013, 2)

In translation theory, Michael Cronin (2017), inspired by recent literature on ecology and the anthropocene specifically, also questions human exceptionalism (68-70) and argues for extending our consideration beyond the human.

The topic of agency between machines and humans as it relates to MT is indeed an interesting one philosophically, but that is precisely why I will leave it out of scope here. The question is at hand is a legal one, and current legislation, as we have seen, will not allow to go beyond considerations of human agency without falling into pure conjecture. This is yet another piece of evidence to demonstrate the outdated nature of copyright law, this time as it pertains to humanities and social science discourse in general.

III. Conclusion

When Lego repeatedly failed to revive the interest of their fans in their products, they resorted to a desperate but genius solution: organize a competition, and have the winners help Lego work on a new line of products. This campaign was Lego's saviour, resulting in the launch of a line called Mindstorms. Four obsessed fans, who were also engineers, were awarded with the priceless gift of working for Lego, without pay, for almost a year, at Lego headquarters in Denmark – they were also more than happy to pay for their airfare out of pocket to get there (Kroener 2006). The privilege and bragging rights of being part of the creation of this new line was compensation enough for these fans, confirming von Hippel's thesis in *Democratizing Innovation* (2005) that people will gift their time and effort in return for things they believe in and that they are passionate about. This

is illustrative of the presumption enabled by the state of mind of the technologized, collaborative society (Fisher 2010).

This chapter provided an overview of the place of technology in society, its relationship with copyright law, and its potential for political and socio-cultural change. We were reminded that mashing-up and transformation of existing works is representative of creativity in the digital age, and that translation, which predates present-day transformative practices – has always called into question the nature of a work and its fixity, or stability.

Through the evolution of open movement in the software industry, we were able to identify the characteristics of recursive communities, and explore the hacks they found to continue developing their revolutionary products based on new business models.

The impacts of technology on translation can be looked at both at the micro- and the macro-analytical levels. At the macro-analytical level, as the principles and strategies of the open software movement spread to the rest of society, they were taken up by all other actors wishing to participate in collaborative, crowdsourced, open projects, including translators. But while the open software movement was able to find a way to recursively generate code that is open for use and reuse, translators are still at the mercy of authors for their source material. This is the result of the current translation right under copyright law, and it prevents translation to affect social change to its full potential, without providing any social value for the restrictions that it sets in place.

As for the micro-analytical level, the work of translators has changed significantly over the decades, to the point where it no longer looks like the work that was performed by translators at the time the articles of copyright law were first drafted, and which have remained largely unchanged ever since.

The “interrelationship between translation and technology is only deepening,” meaning that that the “widespread technological impact on translation is only likely to increase” (O’Hagan 2013, 503-4). “Technology keeps developing at a quantum speed, and the demands made on the professional translator do not show any signs of abating” (Jiménez-Crespo 2017, 4). There is a necessity to recognize that “in today’s market, the use of technology by translators is no longer a luxury but a necessity if they are to meet rising market demands for the quick delivery of high-quality texts” (Bowker and Corpas Pastor 2015).

This is felt in every aspect of the work of the translator, from the tools and processes followed, which rely heavily on technology, to the agents who participate in translation projects, which require higher degrees of specialization and diversification:

the final translation typically represents the result of a vast network of interrelated tasks produced by several agents, such as initiators, translation managers, terminologists, translators, reviewers, proofreaders, Desktop Publishing (DTP) specialists, and localization engineers. The emergence of such collaborative networks is partly due to the rapid growth of the language industry in recent years, which has instigated greater diversification of the labor force in the field, creating new professional profiles that did not exist before.

(Jiménez-Crespo 2016, np)

A number of scholars have already pointed to the revolutionary potential of crowdsourcing for translation theory (e.g. Cronin 2010, 2013; O'Hagan 2013; etc.). "What is true is that the 'world of translation' has been definitely and irrevocably changed, with the industry introducing new business models due to the impact of the combined effect of MT and crowdsourcing." (Jiménez-Crespo *op. cit.*, 3)

As we saw, nowhere are the shortcomings of copyright law and the translation right more obvious than when looking at the potential of MT, whose revolutionary potential at the political and socio-cultural levels does not seem to have been grasped yet by jurists and policy makers. Given all of these fundamental changes translation as a phenomenon (macro-analytical) and a process (micro-analytical), it is time to revisit the notions of translation right, translation and the translator in copyright law.

Chapter 10: Globalization and the translation right

This chapter will attempt to look at the effects of globalization and the role translation can play in a globalized world. We will start by providing an overview of globalization, after which we will try to identify the main copyright issues that have risen as a consequence of globalization.

We will then look at the place of language in a globalized world, with a comparative view of the Internet presence and general power of the most dominant languages, in order to understand the power relations between languages and the communities that speak them, as well as some of the ways that have been proposed to preserve linguistic diversity and heritage.

A special focus of this chapter will be to consider necessity of recognizing difference at the international level, which we will illustrate specifically with a discussion on the usefulness of the translation exemptions provided by the *Berne Appendix* for the educational needs of the developing world.

All of this will inform us on the current as well as potential role of translation in a globalized world.

We will end the chapter with a brief discussion on the globalization of law.

I. Overview of globalization and its relevance to copyright

I.1 Globalized Society

Although it has been in use since the 1930s, the first popular use of the term “globalization” in the sense that it is used today seems to have been in an article entitled “Globalization of Markets” by Theodore Levitt, which appeared in the *Harvard Business Review* in 1983.

One of the most defining traits of globalization is the interconnectedness of peoples and events, which almost gives the impression that the world is a much smaller place than it really is. Giddens defines globalization as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa” (Giddens 1991, 64). Roland Robertson writes that it is a “massive two-fold process involving the interpenetration of the universalization of particularism and the particularization of universalism”, and adds later that it is “the compression of the world and the intensification of the consciousness of the world as a whole” (Robertson 1992, 20). Others emphasize the unity that the processes generate, by defining it as “all those processes by which the people of the world are incorporated into a single world society” and adding that “[g]lobalism is one of the forces which assist in the development of globalization” (Albrow 1990, 9).

Manfred Steger proposes the term globality to signify “a social condition characterized by the existence of global economic, political, cultural, and environmental interconnections and flows that make many of the

currently existing borders and boundaries irrelevant” (Steger 2003, 7). As for globalization, he reserves it to “a set of social processes that are thought to transform our present social condition into one of globality” (Ibid. 8) which implies that the unachieved transformation process is still unfolding according to expected patterns.

While there is no consensus on what social processes constitute the essence of globalization, Steger (*Ibid.* 9 – 12) has identified four defining traits to the process of globalization. The first is that it requires creating new social networks and multiplying existing ones that overcome traditional boundaries of geography, politics, economy, and culture (to which I also add law). Secondly, the globalization process expands and stretches social interdependencies. Thirdly, social interactions are intensified and accelerated by globalization. And finally, the preceding traits are internalized in human consciousness, which sees itself as undergoing the process and being changed by it: “Reinforced on a daily basis, these persistent experiences of global interdependence gradually change people’s individual and collective identities, and thus dramatically impact the way they act in the world” (Ibid. 12).

Steger therefore identifies four main empirical dimensions to the process of globalization: economic, political, cultural, and ecological, with the ideological dimension cutting across the others. He then provides a definition that takes all of this into consideration, by stating that globalization is:

“[...] a multidimensional set of social processes that create, multiply, stretch, and intensify worldwide social interdependencies and exchanges while at the same time fostering in people a growing awareness of deepening connections between the local and the distant” (Ibid. 13).

Given the complexity of globalization, scholars tend to emphasize specific aspects or dimensions, some even arguing that it is mainly economic, political, or cultural.

According to economists, globalization can be viewed as both cause and consequence of the internationalization of neoliberal capitalist markets. Political scientists focus on the increasing complexity of global politics. Sociologists view the emergence of a networked world society as an outcome of globalization. In cultural studies, globalization is studied from the point of view of the “McDonaldization” of the world and post-colonial realities (Pieterse 1995, 45). And so on and so forth.

Markets are certainly a driving force of globalization, and they have dictated much of the course and outcomes of the processes. “The concept of globalization reflects the sense of an immense enlargement of world communication, as well as of the horizon of a world market, both of which seem far more tangible and immediate than in earlier stages of modernity” (Jameson in Steger 2003, 10). The weight of markets therefore explains why globalization pushes for imposing one set of economic rules for the entire world, and along with

it, certain social, cultural and political models that maximize technological innovation and market growth, while fighting against welfare states and trade unions. The center of control and policy increasingly lies outside domestic policy analysis, be it for interest rates or fiscal regulation (Urzua 2000, 421).

Globalization unifies markets on a global scale, allowing capital to circulate freely thus creating complex interdependencies, with much enabling for said markets and very little impeding from law or politics. National markets and economies are deregulated and deinstitutionalized, to be replaced by a global order that often eliminates differentiation in order to establish efficiently harmonized processes. The size of governments (in the sense of regulating and managing domestic public life) can be reduced, as supranational forces and global economy naturally take over.

Traditionally, states culturally defined themselves by the association of using a specific language (among other cultural identifiers, including religious affiliation) over a given territory. The interactions across national borders that are characteristic of globalization weaken the power of the state in maintaining a cultural identity, and force it to cooperate with other states, international institutions and multinationals to resolve many issues. International laws and regulations become more important and national legal systems lose their power if they are not modified accordingly. National norms are replaced, and the power of the state erodes in favor of cosmopolitan norms and international forces, and all of this requires internationally institutionalized financial regulation. (Williams 2010, 2-10)

In other words, globalization is ideologically defined and steered by Western, corporate neoliberal capitalism to serve its own purposes. And if the U.S. activities and those of its large multinationals on the international scene are considered the standard for globalization, then one can clearly see that they have shifted their strategies from soft power to hard economic and military power to continue driving the process, to the point where the enemy can become entire states, because of their refusal to implement the globalist agenda (Fairclough 2006 7-8).

What may be interesting to note, however, is that globalization leads to a deterritorialization of corporate control – which is in line with the weakening of the nation-state. “[...]he transnational ownership of culture conceals ownership as much as it reveals it” (Halbert 2014, 8). And though we have emphasized the role of the government of the United States in strengthening IP around the world through various means to protect its own interest at the expense of those of weaker nations, this must be interpreted as a protection of the interests of its elites and content owners, and not those of its citizens. Halbert states that

U.S. domestic and foreign policy [...] is designed around the assumption that American ingenuity must be protected globally. However, the globalized world in which we live means that in fact behind the veneer of American global cultural hegemony lies a far more complicated story of ownership and one that suggests that the U.S. government may be supporting the interests of corporate conglomerates housed outside the United States at the expense of its own citizens.

(Ibid. 9)

1.2 Copyright issues arising out of globalization

Given the above context and reality of globality and the ongoing globalization of the world, let us now look at the copyright issues that have come to the fore as a result of globalization.

I.2.A Stakeholders

As the main driver for strong intellectual property around the world, multinationals assume that by harmonizing intellectual property at a global level, they will be able to better protect their interests and spread their scope geographically while excluding others from penetrating the same markets. Privatization and commercialization are further enabled through globalization and stronger intellectual property. Governments tend to protect and promote the business interests of their own citizens for a number of reasons, ranging from strengthening their own economies (better employment rates, tax payments, etc.), to officials ensuring that they will get re-elected. And NGOs have widely varying interests, with many fighting for humanitarian causes, and appreciating the impacts and ramifications of copyright and intellectual property on global wealth and its circulation.

The interests of the stakeholders in the globalized world are divergent and contradictory, and their decisions and actions all have an incidence on each other. Multinational corporations are after money, developed countries want to maintain their political and strategic domination, developing countries want to acquire the technology and knowledge required to become competitive in the global market, and least developed countries are often trying to deal with more humanitarian concerns. To this we can add the different hierarchies of the international scene (Clark 1989) and the dynamics between them, which include the small, medium and great power groupings; the developed, developing and least developed economic groupings; and the cores, semi-peripheries, and peripheries of the cultural and political groupings.

Moreover, very different outcomes are witnessed in international negotiations depending on who happens to be representing the interests of the different stakeholders. As we saw in Part II, the Scandinavian countries were initially opposed to translation rights, because of their reliance on free translation to access cultural and scientific works from the rest of Europe. Over time, the government finally gave in to the lobbying of their publishing industry and those representing some of their authors. For many years, Louis-Joseph Janvier was

instrumental not only in articulating and defending the interests of Haiti, but of all other countries with similar needs to access scientific works.

For intellectual property to be approached and implemented as good public policy, it would have to turn its attention to the specificities and perspectives of the various stakeholders that make up the populations that it impacts.

There are hundreds of indigenous nations in the Americas, and every one of those nations has customary laws that regulate how their knowledge is used and accessed. These legal regimes are at least between five thousand and twenty thousand years old. The great irony about the status quo today is that Western intellectual property rights are only two or three hundred years old at the most! And there's the other irony, that is being told that indigenous legal regimes are not legitimate and that we have to adhere to this so-called universal system, which came from a very small part of the world called Europe. The intellectual property rights system was imposed on indigenous knowledge systems without the consent of indigenous nations, and the conflict is a conflict of legal regimes. It's a legal power play; it's an unjustly and immorally applied conflict between laws and sets of laws.

(Greg Young-Ing in Murray and Trosow 2007, 189)

Although negotiating the different, and at times contradictory, points of view can become a complex task, the balancing act that it requires is precisely what grants public policy its merit, for not allowing the well-being of some of its populations to become more important than that of others.

I.2.B Development (Agenda as well as other similar initiatives)⁸³

A number of developing countries made efforts to have their perspectives and concerns voiced internationally, which eventually led to the current version of what is known as the UN's *Development Agenda*.

I say the most current version because the meaning of the term “development” from the perspective of international copyright, has changed over time, and because its recommendations have gone through various iterations. Development was initially used in the sense of developing the rights of authors, as can be observed from the full title of the *Berne Convention*. It was then used to mean developing the international laws and institutions required to administer copyright law globally, and present it, in its Western image, as the embodiment of civilization to be followed by the rest of the world. Development was then used specifically in reference to literature, art, culture, education, domestic law and creative works, and used strategically and ideologically by the U.S. to influence the populations of their Soviet enemy and its allies. The formation of the UCC at about this time brought about the focus on the peace and security that would ensue from such development as well. This was followed by the industrial and commercial meaning of development introduced

⁸³ Deere (2009); Netanel (2009); Halpérin (2009)

during Harry Truman's presidency in the U.S. Between the 1960s and the 1990s, the intensity of the conflicts around development rose until they reached a crisis level. At issue was the developing countries' position that their interests in matters of copyright law, as in other domains, lie in different sets of laws and policies than those of the developed countries. WIPO considered IP a necessary ingredient for any country's economic growth, which explains its focused efforts in raising the awareness of the value of IP (see Bannerman 2016, 21-26).

The initiative of the developing nations, led by Brazil and Argentina, voicing concerns over the need for differentiation in matters of intellectual property (calling themselves the *Friends of Development*) was an opportunity for renewed credibility and importance of the role of the WIPO in matters of IP, since the informal takeover of the WTO. The success of this initiative lies mainly in having questioned the exclusive focus on protection rights, when development is at least similar in importance. They also argued for the participation of NGOs to represent the interests of different stakeholders in international negotiations on copyright law. Since then, the development agenda, and similar developments, have increasingly questioned IP, especially when what is at stake is culture, the dissemination of knowledge in an information society, and even human welfare and livelihood. We can also add that the development agenda also represents a great opportunity to recognize the fundamental role that translation can play in preserving and promoting cultures, fostering respect, recognizing the unique needs of the different participants, and in general, having a vision that goes beyond the material gains of the few at the expense of the deprivation of the many.

To a large extent, the Development Agenda can be considered as the culmination of the resistance of a number of developing nations to the domination of the IP discourse of a few powerful nations on the international scene. When TRIPS was initially drafted, its implementation was swift in many countries. The general narrative at the time was that more IP is better for everyone. This was justified by the traditional arguments that more IP generates profits and encourages further research, and that it would boost foreign investments in the economies of developing nations with strong IP, leading to further development. "Almost everyone can agree that the original connection to trade was for purely economically instrumental purposes" (Chan in Dreyfuss 2010, 448).

As Jeremy deBeer and Michael Geist put it, "[t]he intellectual property-trade dilemma [...] is that low protection for foreign cultural products may cause the population to consume more of them at the expense of domestic industries while high protection may cause a large outflow of royalty payments" (DeBeer & Geist, 2007, 167).

As stated in Part I, during the Uruguay Round of negotiations, critics explained that the provisions and deals had been reached through coercion and threats, “to isolate developing countries from the global trading system or to impose punitive unilateral sanctions if they did not accede to the demands of the West” (Gervais in Beer 2009, x). Mounting criticism of TRIPS questioned whether IP was a proper subject matter to be covered by the WTO, or to be applied in the proposed manner to the developing world.

[...] a host of prominent international economists, such as Jagdish Bhagwati and Joseph Stiglitz, questioned the place of TRIPS in the WTO system (and continue to do so). TRIPS triggered an intense global debate on the relationship between IP regulation and development. In 2008, the chief economics commentator for the Financial Times described constraints upon developing countries in the area of IP as ‘unconscionable’. Cambridge economist Ha-Joon Chang, among others, emphasized the costs to developing countries of introducing ‘irrelevant or unsuitable laws’ that restrict access to technologies and knowledge.

(Deere 2009, 2)

Lack of empirical data demonstrating a causal effect between IP and foreign investment, as well as foreign investment and innovation continued to feed the arguments of some developing nations that were encountering domestic problems as a result of the constant expansion of IP.

Eventually, these developing nations, as a result of working together and leading the cause for their own nations as well as for the numerous under-developed nations, were able to get some recognition that different nations have different realities, and therefore need differentiated implementations of TRIPS. This meant that there was also a recognition of a minimal threshold of development required before the introduction of IP can even be considered potentially beneficial.

Now backed less by faith (as in the past) but responding to the diversity of evidence on the role of IPRs in development, WIPO’s public pronouncements [...] beginning to recognize that the full protection of IPRs is appropriate only once countries have reached a certain stage of development. This realization has driven the Development Agenda and has now entered the policy mainstream from a position on the margins during the negotiation of the WTO’s Trade Related aspects of Intellectual Property Rights (TRIPs) agreement.

(May in de Beer, 2009, 171)

Although IP is still presented as a necessary mechanism for innovation, there is now a recognition that it is not sufficient on its own, and that it must therefore be part of larger strategic initiatives if it is to achieve developmental goals. Finally, there is now a recognition at WIPO that if strong IP is introduced or suddenly implemented where it was not before, it would significantly harm the environment in which this takes place (*Ibid.* xi). These concessions are indicative of the efforts deployed by a few developing nations, such as Brazil and India, in leading discussions on these and many other points of contention, in order to calibrate the narratives around IPRs and their implementation. As some have boldly stated, “the Development Agenda may be the last best chance for WIPO to maintain its relevance to the global governance of IPRs” (*Ibid.* 174).

I.2.C Free Trade Agreements

At present, and especially since the TRIPS agreement and the multitude of regional and bilateral agreements – a topic discussed in detail in Chapter 4 – the more powerful nations can impose the regime they wish to see implemented on the ground on nations who have no choice but to comply if they wish to participate in global markets through free trade agreements for instance. These agreements are usually quite detrimental to those nations, but their financial need and lack of expertise usually lead to compliance. In fact, least developed countries have often implemented measures that do not even taken full advantage of the flexibilities accorded to such countries by the TRIPS for instance, specifically for such reasons.

Since the 1990's, the European Union and the United States (along with many other developed countries) have mainly resorted to bilateral, multilateral and regional free trade agreements, in order to move discussions away from the more democratic international scene of the WIPO (and even the WTO), to talks in which they can force their desired outcomes with much less resistance. As an extension to the knowledge equilibrium framework presented in Chapter 8, I propose that developing and least developed nations adopt the same strategy to counter these actions, by signing bilateral and regional agreements that allow the free flow of translated works. Because of its unique position, as a bilingual, bijuridical, developed country, Canada can play a pioneering role by signing such agreements with French speaking African countries for instance. Committees could be put in place to observe and follow the progress of the outcomes for a determined number of years, and the results could help determine whether such policies are helpful, in what situations, and to the direct and indirect benefit of whom. Such an initiative could lead to significant results, especially given the present lack of reliable evidence in most intellectual policy-making, which seems to rest entirely on untested theories, assumptions, and lobbying, as discussed at length especially in Part I.

The ultimate aim for global IP policy, like all public policy, should be that it becomes balanced, human-centered and democratic. And translation certainly seems to have a role to play in that.

II. Language and Globalization

There are over 6,000 languages spoken in the world today, but about 2,000 of them have fewer than 1000 speakers. Out of the remaining 4,000, the top 15 languages are used by more than half of the world's population (Chan 2016, 6). It is also well established that minority languages are disappearing at an alarming rate. By the end of the 21st century, more than half of the 6,000 languages will no longer be in use, meaning that between two and three are dropped every month. Despite these striking figures, the exact mechanisms required to protect languages against this type of erosion are still unknown:

To this day, remarkably little is known about how [...] to prevent some languages from dying out, to revitalize other languages in order to guarantee their continuing presence as elements of mankind's cultural heritage, or to restrict the extent to which certain languages, seen as predatory, render other languages obsolete and squeeze them out of existence as living languages.

(Grin 2003, 4)

Despite the admitted complexity and the many unknowns of this situation, we must realize that it will continue on this path unless an interventionist approach is adopted: “enough experience has been accumulated in the past decades to make one thing clear: the protection and promotion of threatened languages requires some careful planning” (*Id.*).

Language policy seems to be mainly concerned with the social position of a language relatively to other languages, such as its official status. In other words, the measures taken as part of language policy aim to modify the linguistic environment. Language planning, by contrast, usually refers to measures taken on a language itself, such as its terminology or spelling. We are therefore mainly concerned with language policy in this chapter, while also recognizing that the two have a reflexive relationship, and that there is a lot of shared ground between the two notions as well as ambiguity in their usage.

In April 1989, close to 1300 experts took part in a congress in Paris to discuss the state of languages as part of a celebration of the French Revolution. They concluded the meeting by announcing a new right: *le droit aux langues, qu'elles soient maternelles, régionales, ou étrangères*⁸⁴. This is a right not only of use, but of access to languages. They were affirming that it would no longer be acceptable for any citizen to be contented with one language, given the globalized reality of the world (Ould-Abdallah in Müller 1994, 36).

Article 2 of the *Universal Declaration of Human Rights* (UDHR) established the principle that no one may be denied any of their fundamental human rights because of their language:

Everyone is entitled to all the rights and freedoms set out in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

In this same spirit, but going much further than simply non-discrimination, the *European Charter for Regional or Minority Languages* (Council of Europe Portal, www.coe.int) was the first international document drafted with the purpose of protecting and promoting minority languages, which is part of Europe's broader commitment

⁸⁴ *the right to languages, be they maternal, regional or foreign*

towards the protection of national minorities, as seen from its *Framework Convention for the Protection of National Minorities*. Right from the Charter's Preamble, the Charter states its legal positions and philosophical commitments of achieving a greater unity between its members, by protecting their historical regional or minority languages because this contributes to the maintenance and development of Europe's cultural wealth and traditions. The Preamble explicitly states that the use of regional and minority languages both in private and public life is an inalienable right, that must therefore be protected and promoted because it leads to interculturalism and multilingualism. Part II of the Charter then goes on enumerating its principles and objectives, which include the recognition of minority languages as an expression of cultural wealth; as well as the need for resolute action to promote minority languages in order to safeguard them in speech and writing, in public and private life. It also states that signatories will remove anything that may discourage or endanger the maintenance or development of minority languages, which may require the adoption of special measures. Finally, it states that all parties shall take into consideration not only the needs, but also the wishes expressed by the speakers of such languages. Part III continues by providing a detailed list of the measures ensuring the protection and promotion of minority languages for the categories of education, judicial authorities, public services, cultural activities and facilities, economic and social life, among others.

The Charter therefore goes much beyond the negative rights (requiring the removal of barriers and discriminatory elements), as well as the positive rights (of recognition and even promotion even if this means special measures), by insisting on actions, measures and actual results. It explicitly and forcefully recognizes the important place of language and linguistic diversity by recognizing that such diversity contributes to the general quality of society's well-being (Grin 2003, 55-86).

Language experts everywhere are recognizing the need for a renewed look at language policies, given the repercussions of technology and globalization. The biggest concern is that of the double-edged sword of English⁸⁵ as both a lingua franca that facilitates communication through a common language, and as a reflection of the US's hegemonic colonization of all dimensions of life, including the linguistic (which carries a renewed significance in an information society where language becomes another commodity that yields power).

Economically, one of the main concerns voiced against globalization is that it leads to economic agglomeration, which basically means that the big get bigger and the small get smaller – both in cumulative size and per capita income. However, globalization also requires localization, through which the local/regional economy becomes relatively more important to individuals and business, and which requires local/regional adaptations. When

⁸⁵ This is not to deny that English has come to designate a language that incorporates within its folds a large diversity of dialects, variants and accents.

looking at these points from a linguistic perspective, we can see that while globalization tries to standardize parameters, including language, localization tries to customize parameters based on local preference, including language. The dynamics of globalization and localization can create problems for governments, because the clear emergence of a dominant lingua franca makes them lose their ability to influence citizens to learn a minority language, such as French in Canada, when there is no clear economic benefits. However, diplomatically, a country's bilingual or multilingual policy signals linguistic and cultural openness to other nations, some of which may strongly value this in their business and diplomatic partners (Harris in Breton 1998, 35-88).

Not everyone agrees that English, as a *lingua franca*, is a threat to multilingualism, (see House in Shiyab 2010) arguing that it is simply a socio-culturally neutral language for communication, which means that it does not have to be used for socio-cultural identification. We are told that as a *lingua franca*, English complements pre-existing mother tongues, meaning that it does not replace them. Julian House also relies on a few neurolinguistic studies to show that, from a cognitive perspective, reliance on English as a *lingua franca* in addition to one's mother tongue does not carry any harmful effects on the conceptualization of one's native language. She concludes by proposing language policy that recognizes English, as *lingua franca*, as a co-language, working alongside mother tongues, which are not negatively impacted by it. She writes that English, as a *lingua franca*:

[is] an additional tool which functions in conjunction with, but not in opposition to, a multitude of native languages which continue to be used and flourish alongside ELF – no more and no less. On this view, then, English as a global lingua franca is but a special (often default) form of intercultural communication.

(Ibid. 34)

As we shall see along this chapter, this exceptionally optimistic view of English as *lingua franca* in today's world is, however, challenged by overwhelming data and the opinions of countless scholars, all agreeing that if measures are not taken, native and minority languages will be weakened, in some instances to the point of extinction (e.g. Phillipson 2003, Durand 2004, Cassen 2008).

The process of globalization is being interpreted by many as a force for the elimination of diversity in all its forms. Thus the arguments concerning the impact of the predominant role of English as a global lingua franca on other languages is often interpreted much in the same way as the explanatory arguments concerning how minority languages have been subject to an evolving process of erosion. The exclusion of these minority languages from the economic process, and their relegation to the informal networks associated with the family and the community, was viewed as an expression of their subservient role outside of the confines of reason and its relationship to politics and the economy.

(Williams 2010, 93)

In the new globalized realities of the world, many of the rules and structures from the pre-globalization era are no longer sufficient to help us understand what changes are happening in global human culture. And perhaps

the greatest change is that everything moves towards mutual interconnectedness and cross-impacts, including languages. Gone are the days of explaining language change in the simple terms of unidirectional effects. Despite the strong domination of English, languages now have a felt reciprocal action on one another; languages at the center affect peripheral languages and languages at the periphery affect central languages. In fact, some have even said that today it is impossible to write in a language without being influenced by, and aware of, other languages (Glissant 1996).

This means that a nation with only one language at its disposal, even if that language is English, will be at a disadvantage over time, with progressively stronger tendencies towards isolation and insularity in its general outlook as well as in the more technical areas of research and output. In turn, this can have devastating repercussions on the competitiveness of the country, which, given the current economic climate, should be avoided. This conclusion has been echoed in various studies and reports, especially in Europe, but more policy implementation is yet to appear. In 2009, the British Academy published a report, *Language Matters*, in which it explained, for instance, the problem of “insularity” and marginalization in scholarship (or, in the words of the report, to be a scholar that is “world-famous only in England”). Other studies have highlighted and reached similar conclusions (Graddol 1997; 1999; 2000; 2006; 2010). Manifestly, unilingualism is seen as a problem for everyone, and language experts are recognizing the need for a renewed look at language policies, especially given the repercussions of technology and globalization.

In modern welfare-based democracies, the assessment of policies and governmental positions is often based on whether a given political position or allocation of resources serves the greater good of the greatest majority while minimizing harms for the others. And the tolerance and promotion of diversity in society, while requiring relatively very low costs (see Grin and Vaillancourt 1997), is positively correlated with social welfare, while also securing increased peace and security.

In addition to these reasons for being concerned with the maintenance of the world’s language diversity, especially by taking measures to protect minority languages, there is also the legal/moral argument that is implied in Article 2 of the UDHR, encountered a little earlier: Protecting minorities, whether linguistic or ethnic, and even promoting their language can be justified by a moral imperative that is enshrined in legislative instruments, and falls under the more general discourse on basic human rights.

In line with Friedman’s economic philosophy, or Nozick’s political philosophy, one may want to adopt the libertarian position and argue that language planning ought to be left to private initiatives and the dynamics of the free markets, which will regulate language as it does every other aspect of society. While this line of thinking may hold for material goods and services, complex intangible social commodities like health and education

require more intervention in order to avoid situation of market failure, in which the general principles of supply and demand do not work.

Although these can be broken down further, economic theory generally recognizes three sources for market failures:

- If too much market power is held by a small group, as is the case with monopolies;
- If the production of the good or service results in costs (or benefits) that affects a party who did not choose to incur that cost or benefit; or
- If the good or service is a public good, meaning that individuals cannot be excluded from using it, and its use does not reduce its availability to others.

(Krugman et al. 2006, 160-2)

And as argued by a number of scholars (e.g. Grin op. cit. 35) “if market failure occurs in [the] production [of linguistic diversity] then state intervention is justified [because] a strong case can be made that all [...] sources of market failure are present.” And it is also generally recognized that, in cases of market failure, only states can reliably intervene and take the appropriate measures, which, in the case of language diversity, means securing the presence and visibility of languages.

Since world governments and scholars seem to unanimously recognize that linguistic diversity is good and therefore desirable, then the notion of market failure from economic theory may practically be the more accepted argument, as opposed to the more indirect utilitarian or philosophical ones.

However, it seems that governments are still ill-equipped for strategic language intervention and policy. While they seem to have sophisticated and evolving policies on health, immigration and the environment, the depth and breadth of language policy and planning, when it does exist, is lacking in comparison. “When they have to select, design, implement and evaluate measures dealing with language, governments are venturing into what remains to a large extent a terra incognita” (Grin op. cit. 7).

In order to understand the situation of languages in the world, we will look at their presence online as well as their power (or influence) in social life. This will help explain their directionality, and allow us to gain a better appreciation of the role and importance of multilingualism and translation in globalized society, with the hope of further enabling policy-makers in matters of language planning and policy.

II.1 Languages on the Internet

In the 1990's, when the Internet was so young that none of us were addicted to it yet, the general impression was that English would always be the language of information and communication technologies (ICT). Now, more than twenty years later, although English is still the dominant language on the Internet, it no longer has the absolute dominance it was once thought to have. Below is a table in which I have combined data from March 2017, based on estimates indicating that there are 7.5 billion people in the world, 49.7% (or 3,74 billion) of which are Internet users.

Table 1: Top ten dominant languages on the Internet in 2017 vs. language speakers

Rank based on Internet speakers	Language based on percentage of Internet content	World Speakers	% of world population	Number of Internet Users	% of World's Internet users	% of Internet's content
1	English	1,4 billion	19%	952,1 million	25.5%	51.6%
8	Russian	143,3 million	1.9%	104,6 million	2.8%	6.6%
7	Japanese	126,1 million	1.7%	118,5 million	3.2%	5.6%
10	German	95 million	1.3%	84 million	2.2%	5.1%
3	Spanish	510 million	6.8%	293,8 million	7.9%	5.1%
9	French	406 million	5.4%	101 million	1.3%	4.1%
5	Portuguese	282 million	3.7%	155 million	4.1%	2.6%
Unknown	Italian	85 million	1.1%	51,8 million (in Italy)	1.4%	2.3%
2	Chinese Mandarin	1,4 billion	19%	763 million	20.4%	2%
unknown	Polish	55 million	0.7%	28 million	0.7%	1.7%
World languages combined		• 7,519 billion speakers • 3,74 billion Internet users (49,7% penetration rate)				

(sources of data: www.internetworldstats.com, <https://w3techs.com>, www.your-translations.com and www.UN.org)

Table 2: Top ten dominant languages on the Internet in 2011 vs. 2015

Rank based on percentage of web content	2011		2015	
	Language	Percentage of web content	Language	Percentage of web content
1	English	57.6	English	55.5
2	German	7.7	Russian	5.9
3	Japanese	5	German	5.8
4	Chinese	4.6	Japanese	5
5	Russian	4.1	Spanish	4.6
6	Spanish	3.9	French	4
7	French	3.4	Chinese	2.8
8	Italian	2.1	Portuguese	2.5
9	Portuguese	1.6	Italian	2
10	Arabic	1.6	Polish	1.7

(source of data <https://unbabel.com>)

The Data suggests that if the top 10 languages with the highest proportion of Internet users are taken out of the equation, Internet participation (or “penetration” or “saturation” in economic terms) falls to a low 35%, while the average Internet participation of the top five Internet languages is 76% and the top ten is 57%. That is because while the Internet participation is at 88% in North America and 77% in Europe, it is only at 28% in Africa and 45% in Asia. This translates in Africa representing almost 17% of the world population, but having about 9% of the world’s Internet users, while North America has about 4.8% of the world’s population, yet represents 8.6% of the world’s Internet users, and Europe has about 11% of the world’s population, but about 17% of the world’s Internet users.

II.1.A Language-specific highlights

A glance at the data clearly shows the dominance of English in many regards. Different estimates of the percentage of English content on the Internet place it somewhere between 51% (stated above) and 56% (e.g. www.unbabel.com), which is very high given that only 5% of the world’s population consider English as their native language, and another 14% speak it. This 19% of the world population make up 25.5% of the Internet users. The proportion of English content online has decreased from 57.6% in 2011, to 51.6% in 2017. We can expect its proportion to keep decreasing steadily up to a certain point, as the online representation of other

languages continues to grow. English still tops the charts for private tuition, and its speakers will continue to grow in the years to come (and having already grown 200% since 2000). English speakers also have one of the highest purchasing powers in the world in terms of per capita GDP and combined GDP. The English speaking markets are already almost saturated in the US, the UK, Canada and Australia, so growth will have to come from non-native speakers.

Russian went from 4.1% in 2011, to 4.6% in 2015, to 6.6% in 2017, showing considerable growth in both its presence online, as well as the percentage of its speakers participating in the Internet. It seems that Russian's presence will therefore continue to grow. Russia's GDP is at a modest 26,5K USD, which is a little lower than Poland's 27,7K USD, but the online presence of Russian continues to grow promisingly.

Spanish went from 3.9% in 2011, to 4.6% in 2015, to 5.1% in 2017. When combined with the fact that less than 60% of Spanish speakers are online, it means that Spanish representation online will continue to grow as Spanish speakers participate in the Internet. The Spanish market includes most of Southern and Central America, part of the US, and Spain. Spanish speakers have relatively good purchasing power and this shows in e-Commerce sales figures. Participation in the Internet will most likely continue growing especially in Spain, Mexico, Colombia and Argentina.

Portuguese went from 1.6% in 2011, to 2.5% in 2015, to 2.6% in 2017. Only about 55% of Portuguese speakers are connected, which seems to indicate that the language representation can still grow, although its growth rate seems to have slowed down between 2015 and 2017. Brazil and Portugal are the two countries where most Portuguese is spoken, with more speakers found in Mozambique, Guinea-Bissau and Angola. Portuguese loses some of its selling power because it is different from Brazil to Portugal, so they may be considered two different markets.

German, which is mainly spoken in Germany, Austria and Switzerland, has been decreasing steadily, going from 7.7% in 2011, to 5.8% in 2015, to 5.1% in 2017. Because 88.4% of the German population is already using the Internet, we can expect German to continue dropping in comparison with other languages which have much more room for faster growth. In terms of market size and GDP, it is a market that is similar to the French, and quite attractive given its purchasing power. The market is saturated and quite mature, and can therefore be expected to making significant online purchasing.

Japanese stayed at about 5% of online content from 2011 to 2015, but now represents about 5.6% of the Internet's content. Because 94% of Japanese speakers are already Internet users producing much content online for their size, the language does not seem to have much more room to grow. Other languages with more

speakers can therefore be expected to catch up to them soon. Japanese speakers have a high GDP of 41K USD which indicates higher online spending.

French only has about 80 million native speakers, and many of the other 320 – 370 million speakers are in technologically poor countries, explaining why only about 25% of its speakers are connected. Its representation online should be expected to grow significantly if more efforts are made to improve the infrastructure and access problems in Africa. Given its presence as an official language in 29 countries, and its significant efforts for language preservation, we should expect it to continue growing, from 3.4% in 2011, to 4% in 2015, to 4.1% in 2017, if said efforts are made. The combined GDP of French speakers is similar to that of Spanish speakers, despite a much smaller size in terms of users, despite including countries with rather low GDP.

While Arabic at least made it on the top ten list of 2011 with 1.6% of the Internet's content, it has been in decline since then. As one of the fastest growing languages, the 5th largest native language, spoken in 23 countries as the main language, and with over 420 million speakers worldwide, its speakers represent about 4.7% of Internet users worldwide, yet it currently ranks 16th with only about 0.8% of the Internet's content. Only 41% of its speakers are currently online, which is significantly low compared to the average of all other languages combined, which comes in at about 50.2%. It is important to note that there does seem to be some discrepancies about Arabic. While Unbabel reports that Arabic content has decreased since 2011, Google reports that it was in seventh spot in 2012, and 8th spot in 2013, making up about 3% of overall Internet content (Mustafa 2013). In any case, the Arabic-speaking world is made up of some very rich middle eastern countries, as well as some very poor countries in the Middle East and North Africa. Devastated by war, disease and hunger: While Qatar's GDP is 127K USD, Ethiopia's is 1,9K USD, and Chad's 2,4K USD. Until more efforts are made to improve the situation of the African countries in terms of infrastructure and access, the significant potential for Arabic presence online will most likely not be reached.

Chinese is even more puzzling of a case than Arabic. Generally assumed to be the fastest growing language online, with its speakers representing about 20% of the world's population, its online content went from 4.6% in 2011, to 2.8% in 2015, to 2% in 2017. While only about 55% of Chinese speakers are online, they still make up over 20% of the world's Internet users. So why is it that only 2% of the Internet's content is in Chinese? And why does it seem to be on the decline? There are countless sources that have been stating for years that Chinese is the fastest growing language online, and that it will therefore most likely (or inevitably) become the most dominant language of the Internet with time. For instance, a TheNextWeb infographic entitled "Chinese: The New Dominant Language of the Internet" stated in 2010 that

it would (theoretically) take less than three years (at current rates) for Chinese to overtake English. However, not everyone in China uses Chinese online and so forth, and the number of English speakers is still rising. Give all of that, it seems very fair to say that in five years, Chinese will be the dominant language online.

(TheNextWeb 2010)

China is still considered a relatively poor country given its per capita GDP of 6894 USD, but its national booming economy continues to show great growth potential, and it will soon be the world's largest economy. Traditional Chinese spoken outside China displays significantly higher GDP, especially in Hong Kong (29K USD), Taiwan (16,5K USD) and Singapore (35K USD). The low levels of income are counterbalance by market growth, which will eventually improve GDP.

Distinguishing between number of speakers of a language on the Internet and percentage of Internet content in a given language can be a clear indication of certain realities. If Chinese speakers online start producing more content, or if more Chinese speakers come online, we can expect the percentage of Chinese online content to grow quickly. Until then, this is an anomaly that requires further investigation.

The complete absence of Hindi from any of the top lists is shocking, given that it is the native language of at least 330 million people, and understood by another 215 million. This is more puzzling when we remember the booming technological industry in India. The best explanation is that it is not being measured because it is simply an aggregate of about 12 dialects or languages bundled together for mainly political reasons. Hindi and Urdu are essentially the same languages, but they use different scripts and have since the partition of India and Pakistan developed respectively unique characteristics. This requires further exploration, which would be out of scope for this thesis.

Russian, Portuguese, and Spanish are clearly growing languages online, while German, Japanese, and French still represent very significant portions of online content even though they seem to be shrinking.

This also indicates that there is still a tremendous potential of growth for other languages, especially for commercial purposes, as indicated by many reports.

In *Can't Read, Won't Buy: Why Language Matters on Global Websites*, Common Sense Advisory (2006) surveyed web consumers (post purchase) from eight large, non-Anglophone countries that are economically significant, located on three different continents (Brazil, China, France, Germany, Japan, Russia, Spain and Turkey). The most relevant findings are as follows:

- While 50.8% of consumers would buy internationally known brands despite lack of information in their native language, 56.2% stated that they would be more likely to purchase the item if information is provided in their language than to purchase it at lower price.
- 72.1% of consumers spend most or all of their time on websites in their own language;
- On average, 52.4% of buyers will only buy from websites that present information in their language, with these figures exceeding 60% in France and Japan. 72.4% said that they would be more likely to buy a product if information about it is presented in their own language;
- The more valuable is the purchased item, the more consumers will want to have the information in their language, with 45.8% stating that language is important for purchasing clothes, against 85.3% for purchasing insurance and financial services.
- Browsing commercial sites in English does not result in increased purchasing. While 67.4% consult English sites regularly, only 25.5% regularly purchase from them. (This may be partially due to the difficulties or inconvenience of having to use foreign currencies for instance as a result of poor site performance and convenience);
- Consumers with little or no English skills were six times more likely not to purchase from Anglophone sites when compared with others in their country;

The European Commission's *User Language Preferences Online* (2011) was conducted in the 27 member states to examine the attitudes and opinions of Internet users towards performing various activities (reading, writing, watching) on the Internet in languages other than the respondent's. Following are some of the highlights of the report:

- 9 in 10 Internet users said that they would always visit a website in their own language if given the choice. Only 53% said that they would accept using an English version of a website if it was not available in their own language. Unwillingness to consult English websites if it is not available in their language reach 81% in Slovenia, 85% in Greece and Sweden, 90% in Cyprus and 97% in Malta;
- 88% of respondents believe that all websites produced in their country should be available in their country's official language, with 81% believing that it should also be made available in other languages.
- Only 44% of Internet users thought that they were missing out on important information because it was only available in a language they do not understand.

II.2 Power of languages on the world stage

Kai L. Chan (2016) developed the Power Language Index (PLI), which may be considered a much less fragmented approach to analyzing the power languages carry as anything else I have encountered. Such an

approach may be more suited to getting a more representative idea of the overall power of a language and its general usefulness.

The PLI was built by identifying 20 influence indicators from five categories, which also represent the enabling opportunities of a language. These are:

1. Geography: the ability to travel and explore geographically. This includes the number of countries speaking a language, the total land area over which a language is spoken, as well as inbound tourists whose main purpose is other than business, which indicates its desirability.
2. Economy: the ability to participate in economic life. This includes GDP measured in purchasing power, and GDP per capita, exports, share of foreign exchange transactions in forex markets.
3. Communication: The ability to engage in dialogue. This includes number of native speakers, second language speakers, number of speakers from the same language family, and the outbound tourism.
4. Knowledge and media: The ability to consume knowledge and media. This includes Internet content, feature films produced, top-500 universities and number of peer-reviewed academic journals.
5. Diplomacy: The ability to engage in international relations in global settings. This includes presence and use in supranational organizations, such as the United Nations, the International Monetary Fund, the World Bank, and smaller organization like FIFA, the International Criminal Court, the WTO.

When Chan applied his formula to 124 languages, the following results were obtained for the top ten most influential or most powerful languages:

Table 3: Power Language Index ranking (current top 10)

RANK	SCORE	LANGUAGE	NATIVE (MM)	GEOGRAPHY	ECONOMY	COMMUNICATION	KNOWLEDGE & MEDIA	DIPLOMACY
1	0.889	English	446.0	1	1	1	1	1
2	0.411	Mandarin*	960.0	6	2	2	3	6
3	0.337	French	80.0	2	6	5	5	1
4	0.329	Spanish	470.0	3	5	3	7	3
5	0.273	Arabic	295.0	4	9	6	18	4
6	0.244	Russian	150.0	5	12	10	9	5
7	0.191	German	92.5	8	3	7	4	8
8	0.133	Japanese	125.0	27	4	22	6	7
9	0.119	Portuguese	215.0	7	19	13	12	9
10	0.117	Hindi*	310.0	13	16	8	2	10

* If all Chinese dialects/languages (Mandarin being the largest) are considered as one it would not change the rank ordering. However, if Urdu and Hindi – and all the Hindi dialects – are taken as one it would vault it past Portuguese and Japanese.

Table 4: Power Language Index ranking (expected top 10 in 2050)

RANK	SCORE	LANGUAGE	NATIVE (MM)	GEOGRAPHY	ECONOMY	COMMUNICATION	KNOWLEDGE & MEDIA	DIPLOMACY
1	0.877	English	541.6	1	1	2	1	1
2	0.515	Mandarin	940.5	6	2	1	2	6
3	0.345	Spanish	589.0	3	5	3	6	3
4	0.325	French	88.4	2	8	6	5	1
5	0.295	Arabic	494.1	4	7	4	18	4
6	0.242	Russian	134.1	5	10	10	8	5
7	0.155	German	88.6	10	3	9	4	7
8	0.149	Portuguese	273.4	7	9	8	12	9
9	0.138	Hindi	489.1	11	4	7	3	10
10	0.110	Japanese	106.1	30	6	17	7	8

English still comes out as the clearly dominant language, with Mandarin as a distant second, and less than half as potent. The top six languages also happen to match the six official languages of the United Nations. As for the last four languages, they include the two languages not already covered used by the BRIC countries (Portuguese and Hindi), as well as the languages of two economic heavyweights (Germany and Japan).

With the exception of Japan, all of the financial centers of the world (London, New York, Hong Kong, Siingapore, etc.) all either have English as an official language, or have elevated proportions of proficient English speakers. The composition of the global elite, including billionaires, also seems to be heavily comprised of English speakers (Wai 2014).

In addition to the notes mentioned above we can add the following language specific remarks based on the data calculated by Chan:

English is clearly the unrivaled dominant language, leading in all categories, and being twice as effective and influential as the next influential language. Its economic dominance is closely linked with the long and dominant history of the British Empire, the US's economic, military and cultural dominance, as well as the strong influence of other English speaking countries, such as Canada and the UK, which are part of the G7. Many nations, such as India and Singapore, have opted to recognize it as an official language, viewing it as a neutral communication tool that allows their populations to be competitive.

Chinese Mandarin's influence is much more evident when observed at the international arena, as opposed to the calculation of Internet content. Post-Mao economic reforms have finally propelled Chinese economy into modern global economy. Chinese still remains a local language, with little uptake outside of China.

French still holds much prestige and power from its political or diplomatic presence. While it is the smallest language in terms of native speakers, it continues to be the second language of many speakers around the world, especially powerful elites in Africa and elsewhere.

As Latin America continues to experience growth, Spanish looks like it will eventually overtake French. Only Mandarin has more native speakers, and it is very present politically, being only behind English and French. However, it is only spoken in Europe and Latin America, and in the category of knowledge and media, it lags behind German, French and English.

Arabic is mainly spoken in the Middle East and North Africa, but its religious significance compels many Muslims to study it. Forty-nine countries around the world have a Muslim majority and in 2010, the Muslim population was at least 1.6 billion and rising at a rate of about 1.5% annually (Pew Research Center data, 2011). Arabic has 250 million secondary speakers, training only behind English. It also happens to be supported by some very strong oil-rich economies, although this may change if oil prices fall sharply. The political instability of the Middle East and North Africa have not produced an environment where research and higher education have been able to prosper (Arabic ranks 18th in this category, very much behind all the other top ten languages.)

Russian is spoken in many of the satellite and former Soviet states in addition to Russia. Russia's vast and rich land as well as its strong diplomatic presence, should allow it to continue to grow. There are some voices pushing for Russian to adopt the Latin script instead of the Cyrillic alphabet.

German has the highest GDP per capita, but its geographic reach is limited to Western Europe. If Brexit diminishes the influence of the UK over Europe, one can expect German to become more prominent in Europe. Germans are known to be accommodating of non-German speakers (in contrast with French speakers for instance) and will not impose German on non-native speakers.

Japanese is the most isolated language of the top ten, spoken in only one country. Japan's population will continue to drop due to low birth rates and immigration, and unless it somehow leverages the momentum behind Chinese (suggested by Chan 2016, 26) we can expect it continue losing ground.

Spanish's close cousin, Portuguese, is spoken on four continents, and benefits from the growth of Spanish as it is said that its speakers can understand the latter more than vice versa. The fate of this language seems to depend to a large extent on the successes of Brazil.

India is home to hundreds of languages, where Hindi is the dominant one. India continues to carefully navigate the promotion and protection of different languages for political reasons, and therefore cannot promote Hindi domestically nor internationally. This has allowed English to continue spreading in the world's second most populous country and third largest economy.

II.3 Beyond the data

All of this data allows us to conclude that the need for translation will continue to grow, but along with it, an appreciation of the cultural nuances and differences. While the volume and rate of translation force technology to meet these needs – as discussed in Chapter 9 – the fundamental function of human communication will remain central. “Just as Google has not made all humans researchers, neither will translation devices, *per se*, make us more empathetic or knowledgeable of other cultures” (Chan 2016, 5).

Translation, as we have said, entails more than simply rendering a message in another language. Citizens of America and the United Kingdom, or of Brazil and Portugal, will not necessarily always understand each other despite speaking the same language; while they share a common language they do not share cultural spheres. When these speakers communicate, they exchange, as a result, different cultural content from those spheres. Similarly, translation doesn't just make linguistic changes; it also opens channels of communication to different cultural content. A multiplicity of languages and cultures with abundant and free flows of translation would lead to epistemological plurality, not only in general worldviews, but in particular content fields that are heavily influenced by language, such as law.

Louis-jean Calvet (2007) said that the *lingua franca* model eventually leads to a cultural scientific autism, to a uniformity which leads to the impoverishment of the language at the center, contrarily to the languages at the poles and the periphery. Only a translation policy can ensure scientific progress: guaranteeing the circulation of information, the sharing of conclusions, discoveries, comparisons, critiques from fresh eyes and different perspectives—all things without which no real human progress can take place.

But there is hope, because many have already realized the growing role translation is playing in our world, not least of which is Europe, as we have seen, and not only economically (Dwyer 2010). For example, the European Commission recognizes the important roles of translation for its politics, culture, and economy, and devotes specific activities and funds to its study. Increasingly, scholars and institutions have identified translation as the point of convergence for the social, cultural, political, and economic threads we have been discussing here.

For Europe to become unified, we are told, the magic formula is not hidden in some common language, but rather, in multilingualism. Respecting multilingualism gives every culture an opportunity for developing itself while preserving its identity and difference. Promoting a multilingual Europe is not only essential for maintaining respect and unity in the European Union, but also for preserving the economic prosperity of the European states. A complete language policy would not only preserve one's language, but also promote the learning of other languages through increased exposure. The improvement of the linguistic skills of European citizens will make it easier to reach Europe's political and economic objectives of having societies that are founded on integration and 'respect of the other,' while at the same ensuring the sustainability of the workforce and the stability of European economy (Orban 2010, 43-58).

Since May 2004, the area covered by the European Union has expanded by a quarter, its population by a fifth, its GDP by 10%, while the number of languages has soared from 11 to 24. The European Union now includes about 511 million citizens, 28 member states, 3 different alphabets, and 24 official languages (in addition to about 60 other non-official languages). All of these differences must be seen as factors of wealth, and not as barriers. And it seems that European politicians and policy makers are slowly starting to realize what translation studies has been repeating for decades, that their identity lies in being "united in their difference." And if it is good enough for Europe, it should be good enough for the rest of the planet. Perhaps this puts Umberto Eco's famous words "Europe's language is translation" a little bit more in context.

II.4 Intercomprehension

Opinions on the proper course of action with regards to this domination of English in the world vary greatly. Multilingualism, in various forms of implementation, has been argued by many (such as Gazzola 2006 and Grin 1997, 1999, 2003, 2005) as the best solution.

The intercomprehension movement in Europe (Conti and Grin 2008) proposes to teach Europeans (starting with the staff of the European Union), the linguistic elements that are common to a family of languages. Though this method will not make it possible to speak the other languages of the same family, it will be possible to understand them sufficiently. Ultimately, everyone will be speaking in their own language, and yet, be understood by the others, who are also only speaking in their own language, because of the shared commonalities of the linguistic families. This would, it is argued, significantly reduce translation and interpretation costs in the European Union (which currently has 23 official languages), and foster new feelings of European identity and citizenry.

Other similar proposed solutions include "functional multilingualism" which is based on the idea that the specific linguistic job requirements are all that matter in a society, and language planning strategies can be

customized to meet such needs in a most efficient manner, instead of trying to get a country's entire population to learn a new language (Corbeil in Müller 1994, 43).

But there are also those who think that it is time to recognize the dominance of a few languages (Ginsburg / Weber 2005), or of a single one, namely English (de Swaan 2002), and even encourage this hegemony (Van Parijs 2004).

If such admissions and fears are expressed by members of the powerful European Union with regards to their cultural and linguistic identity, then such fears should be expressed with much more seriousness in the case of developing and least developed nations, which are often dependent on others culturally and linguistically. The intercomprehension movement underlines the importance of actively resisting the increasing domination of English by resorting to the use of other languages. Another mechanism that can play this role of ensuring the continued presence and use of other languages is translation.

The relationship between multilingualism/plurilingualism and translation has been explored by many authors. Norman Denison (1978) explained that plurilingualism and translation can both serve the purposes of communication between different linguistic groups, with people resorting to functional plurilingualism more often than we might think. He provides many examples from the Amazon area, Africa and New Guinea to show that "multilingual competence is the rule, not the exception" (Grutman 2008, 182). Denison argued that in addition to serving as a linguistic bridge to communicate information, translation is often used "for reasons of ritual, dignity, civil rights or time-gaining" (Denison op. cit. 314), even when the information contained in the foreign language is understood by participants.

Translation and multilingualism are therefore two different means of allowing interlinguistic communication and ensuring the presence and access of multiple languages in social settings. They should not be considered as mutually exclusive, and public policy can leverage the strengths of each means in a complementary way and as needs arise, which will not necessarily mean having to choose between them. In fact, their combined presence as policies would augment intercomprehension abilities as a result of the increased likelihood of finding a common language of understanding combined with an ability to translate via a mediating language.

A smaller nation or a minority language requires investment to learn the language of the majority. This may come out of pocket, or through public funding. But in all cases, the minority group will be the one benefitting the most from their new access to a language. Investing in learning a majority language can be motivated by wanting to enjoy the language's literature and poetry or share our own heritage with it, wanting to interact socially or commercially with speakers of another language, or under social pressure of conforming with the

majority. These can all be considered cultural reasons. To these economic reasons of having access to new and bigger markets can be added (Breton 1998).

Language in a society is associated with cultural identity and social status, and therefore carries potential for political or cultural conflict. To recognize a minority group usually implies preserving and even promoting its language, which can be perceived as having been granted it higher legal and political status (Grin 2003).

The development of communities of practice has also been identified as a key component in moving towards creating knowledge societies. Such communities are able to generate new knowledge (which includes “learning to learn”) by relying on collaboration and the open sharing of experiential or tacit knowledge (Wenger 1998). This link between language, culture and knowledge generation and creativity has been highlighted by a number of works. Although I find that his line of argumentation requires further empirical evidence to be confirmed, in *The Knowledge Economy, Language and Culture*, Glyn Williams (2010) argues that multilingual interaction furthers the knowledge generation and creativity potential of language through the construction of novel conceptions required for interpreting symbolic variations:

the value of working within communities of practice which operate across languages would be far more productive by reference to the generation of both knowledge and innovation than operating within monolingual contexts. Thus rather than pragmatically seeking to stimulate the flow of operations by insisting on the use of a common lingua franca, firms [and therefore countries...] would be much better off if they facilitated linguistic diversity in their operations. (Williams 2010, 166)

Such a policy has not yet fully been adopted consistently, even by Europe, which recognizes two dozen official languages, and which already has policy instruments for the protection of minority languages, as we saw earlier. Currently educational systems across most of Europe disproportionately focus on teaching English (Williams et al. 2007), which has been described as “inefficient in terms of the allocation of resources, unjust in terms of the distribution of resources, dangerous for linguistic and cultural diversity, and worrying by reference to its geopolitical implications” (Grin in *Ibid.* 22).

II.5 Language Power relations

What is clear from all the above is that the power hierarchy between languages, and by extension, those who speak them, is a fact. When languages interact with each other, they are always in a relation of power. When they are in translation, someone (whether the translator, the publisher or any other agent) is making choices about what to translate, how to translate it, etc. which are derived from a political (and ideological) agenda. That is why Alvarez and Vidal (1996, 2) defined translation as a political act, because it “has to do with the

production and ostentation of power and with the strategies used by this power in order to represent the other culture.”

While it is clear that translation will continue to be heavily required for communication between speakers of world languages, it also forces academic and professional translation programs, publishers, translators, and governments to make choices about their resource allocation, in trying to answer questions such as: What to translate? Who should decide what to translate? From which language? Into which language? Where should translations be produced and published? What purpose(s) will translations have? How to translate? Etc. All of these decisions are overtly or covertly socio-political.

The construction of the representation of other cultures has historically taken place through translation. This can be said equally about the manner in which a society or a government wishes to portray the other, as well as the manner in which a society wishes to be portrayed by the other. The answers to the questions above are the choices that must be made in order to construct that representation. In *The Scandals of Translation* (1998) Venuti argued that translational choices will impact the representation of the foreign culture’s literary canons, and contribute to the domestic literary canons, and the translator ought to adopt domesticating methods in order to resist the hegemony of English and its aesthetic and literary domination by introducing foreign elements from the original into the translated text. However, translation allows the infiltration of much more than the literary canons of the other culture. The choices of the translator (or those commissioning the translation) can therefore strengthen the domestic cultural values and ideologies, or weaken them.

If translation has such far-reaching social effects, if in forming cultural identities it contributes to social reproduction and change, it seems important to evaluate these affects, to ask whether they are good or bad, or whether the resulting identities are ethical.

(1998, 81)

While Venuti turns to ethics to assess the validity of these choices, I am arguing that simply turning to effective public policy mechanisms may be sufficient, and perhaps much more realistic for contemporary plural societies, where strong ethical values and positions cannot always translate into popular political discourse.

Faiq (2000) and Salama-Carr (1990) demonstrated how medieval Arab governments adopted a policy of funding and institutionalizing translation in recognition of the political role translation played for them domestically. History is full of examples that extend to the present, where governments have promoted knowledge of their culture abroad, or enhanced their domestic culture, through translation. The German institution Inter Nationes, the French Ministry of Culture, the European Commission, the Canada Council for the Arts, and others such institutions in Denmark, Finland, Belgium, Italy, Ireland, Spain and the Netherlands are well known bodies funding translation in their jurisdiction in order to promote their respective literature. In 2007, Abu Dhabi

launched Kalima, an initiative to revive the translation movement in the Arab world and boost Abu Dhabi's regional contribution to culture. In all of these cases and many more, it is generally felt that market dynamics alone are insufficient to disseminate translations, especially when translated works are competing with ubiquitous English works (Venuti 1995). In addition to creating a rich and diverse culture (which is important in the case of Europe for instance) it is also considered domestically beneficial to have local authors and publishers be recognized through translated versions of their works, because they would "benefit economically from greater international recognition of their work, recognition that would lead to enhanced sales, increased royalties, potential film and television rights and so on" (Cronin 2003, 56).

In other words, it is important to realize that national cultures and the power of languages must often be constructed through the commitment and investment of governments in various programs, ranging from language education, to translator training and translation costs (especially in the case of having more than one official language). This is similar to Lefevere's notion of translation patronage for literature (Lefevere 1992) to all kinds of translations (Schaffner in Kuhlman and Littau 2007, 134-147), because they all carry an ideological, an economic and a status component, which makes them political.

Given the present economic and legal systems, public sector financial and logistic support is what will most likely determine the success or failure of translation domestically and internationally. This is clearly observed as one goes through international data about translation, such as the different reports of UNESCO's *Index Translationum*⁸⁶, where the countries occupying the highest ranks in translations are also those that benefit from strong government support and investments, such as Germany, Spain and France (respectively occupying the first, second and third places in the "TOP 50 Country" report). Blind reliance on market operations will not produce these outcomes; the cultural value of translation must be recognized if translation is to be factored in as part of a nation's larger cultural strategy and policies.

The presence and circulation of translated works enriches domestic and international dialogue by exposing speakers of a language to the thoughts of foreign speakers, which will then be critically assessed, and to which there will be reactions in various forms. This potential enrichment of languages and cultures is an obvious benefit resulting from globalization processes, but again, impeded by copyright law from reaching its full potential. This impediment is further amplified as a result of the concentration of power in the hands of giant multinational corporations, which control the publishing industry, cinema, music, television, and the Internet, and for whom it is beneficial to produce less diverse outputs, because they are more manageable and with lower

⁸⁶ despite its shortcomings, as explained in Pouaud et. al. (2009), see the analyses of Basalamah (2009), Venuti (1998), Vitrac (1998), Šajkevič (1992), Heinich (1984)

costs. Giant multinationals also can't be bothered with concerns such as the preservation of minority cultures and languages, because they don't translate into monetary bottom lines.

Just like translation under totalitarian regimes, the legal framework of copyright law, as well as the commercial and ideological agendas of these gigantic multinationals can be viewed as forms of censorship, hindering translation through ideological control instead of enabling or promoting its free circulation: "institutions have the authority to exercise explicitly censorship, preventing translations from being published at all, or only in specific form" (Schaffner *op. cit.* 138). While this may be explicit, such as the publishing policies in Fascist Italy (Rundle 2000) or Nazi Germany (Sturge 2004), it can also be more subtle, such as the manipulation of film titles to promote Catholic values during the Franco regime (in Schaffer *op. cit.*).

Contrarily to House's claim above that the use of English as lingua franca can be considered a neutral and purely utilitarian choice, the data and analysis we have presented clearly demonstrates that there are indeed power relations taking place between languages, and that the choice of source and target language in a translation (direction or directionality) are not neutral or purely practical as stated by Branchadell and West (2005), Venuti (1995, 1998), Schaffner (*op. cit.*), and many others:

The fact that English has become the dominant language in translation is primarily a political fact. That is, both the power of the United States of America and the legacy of the colonial power of the United Kingdom have made English a lingua franca in various communicative contexts.

(*Ibid.* 139)

The power relations are even more deeply rooted in cases where the language pairs also reflect a colonial past, as explored in Part II, with reference to the works of Tymoczko (1999, 2003, 2007), Niranjana (1992), Robinson (1991, 1997, 2002), among others. And underlying all of this, translation still carries a stigma of being inferior to the original, which extends to the speakers of the translation language and their culture. That is why, while the EU accepts the principle of multilingualism (everybody has the right to use their national language within the EU institutions) and has gone through extensive measures to translate all official documents into 24 official languages, it does not make any mention of "translation" for fear of evoking any notion of hierarchy, and uses instead "language versions", which creates an illusion of equality or identity.

In cultural and political discourse, "minority" is generally used to mean subordinate, and in the case of language, may refer to its lack of prestige or authority as a result of not being used by a hegemonic culture. "Minorities also include the nations and social groups that are affiliated with these languages and literatures, the politically weak or underrepresented, the colonized and the disenfranchised, the exploited and the stigmatized" (Venuti 1998b, 135). To be less vague, I opt to define a language to be in a minority position when it is used by a group

that is smaller than the rest of the population, and different from the language of the majority, which is usually the official language.

Accordingly, a language that is in a minority position in one nation may not be in another, which is an acceptable ambiguity for the purposes of this chapter, which is concerned with the need for translation, and the role it can play in empowering such languages, and by extension, the cultures associated with them, in a globalized context. The most interesting and fertile aspect of the cultural turn in translation studies was its ability to zone in on the power asymmetries between different cultures, and how language and translation fit into that relationship. This power difference between different languages is the main object of study when looking at minority languages.

And as discussed in Part II when addressing the cultural and postcolonial agency of translation, it can be used to further the cause of the dominant forces, as well as resist them through various means.

In the case of minority languages, translation can also be seen as potentially playing the opposite roles of furthering the linguistic imperialism of English, as well as empowering minority languages and allowing them to resist the expansion of English through various means. Numerous studies in translation studies, sociolinguistics, and language planning works have shown how translation can help minority languages by preserving, standardizing and disseminating them, as well as by allowing them to develop and individualize in the same way as major national languages and literatures (see many relevant references listed by Branchadell in Branchadell and West 2005, 7-8).

As we have argued, translation may be used for language standardization (Gaudin 2007, Siegel 2013), as a language planning tool (Holmes 2001, García 2011, Núñez and Meylaerts 2017), as well as a means for sociocultural and linguistic language maintenance and development (Gubbins and Holt 2002; Campbell 2013). Translation has greatly facilitated the colonization of the Americas, Asia and Africa, and continues to operate in extending the reach of the neoliberal multinational corporations (Venuti 1998, 158-189): “Although the history of colonialism varies significantly according to place and period, it does reveal a consistent, no, an inevitable reliance on translation” (Ibid. 165). But it has also been used in various nation-building policies, which includes nationalism and resistance purposes (Tymoczko 1999; Venuti 1992, 1998). The simplistic assumption that translation only takes place to make a text available to readers who cannot understand it in its original language is refuted daily, as already throughout this study. When translation is not necessary for communication and yet still takes place, it is a political statement performing an ideological role. Of course, on the negative side, a minority language may not have the choice to not translate itself, which may be in violation of the principle of linguistic security, which guarantees the right to carry one’s activities in their own language (Branchadell and West 2005).

If we consider translation and its treatment as a representation of the place of the foreign in a culture, then it can be telling to realize that translation is still a marginal, underpaid, derivative and often invisible activity culturally, linguistically and even legally, especially in English nations such as the U.S. and the U.K. where the spoken language is hierarchically superior in status and power to the source language. That is why the works of Venuti and Basalamah have used the status of translation as a starting point for their discussions on its ethical, political and even epistemological roles in society.

III. Translation's place in globality

The interdependence and interconnectedness of the various stakeholders in a globalized world mean that the world economy functions as one unit, in real time, at a global level. Although English is the dominant language of this economy it is far from being the only one, which means that, for this world economy to function, translation is very much required for all multilingual communication.

Yet, almost all measured official translations are between countries of the North, with almost no translation between countries of the South. Furthermore, only 1-2% of all these translations are from languages of the South, while about 98% is from languages of the North (Jacquemond in Venuti 1992, 139). Furthermore, there is very little translation going into English from other languages, while most other languages translate mostly or only from English. This means that a very significant amount of research and authorship is simply invisible to the rest of the world, because it is not going through English (Goggin in Goggin and McLelland 2009, 123; Basalamah 2012).

As mentioned in the previous chapter, the Internet has created new opportunities and needs for translation to play important roles in intermediating communication between cultures. In reaction to the still increasing numbers of those who do not use English on the web out of inability or preference, the booming localization industry has moved towards catering websites and services that are continuously updated and revised in multiple languages, at times with significant differences from language to another.

Globalization has the effect of encouraging all to translate their content into the language that already provides the highest information density, to maximize its availability. This impoverishes languages that are already informationally poor, to the point where the language becomes at risk of progressively being abandoned.

As discussed in the last chapter, the rate and volume of production and consumption of information in the globalized world also puts the translation industry under constant pressure to produce quickly, or risk weakening the position and status of a language that cannot keep up with the realities of globalized digital societies.

Globalization has also been accompanied by a proliferation and sophistication of institutional work by NGOs and international corporations, that have become important stakeholders in addition to governments. A number of such fora, such as the European Union, Amnesty International, and the United Nations, have made it a point to operate in multilingualism, which requires significant amounts of instant interpretation and translation, all performed at the highest professional standards.

In addition to the formal translation service providers who fulfill such demand formally, grassroots movements of translators and language professionals and amateurs have also come together, driven by more activist and humanitarian incentives, and on a volunteer basis to provide such services.

Babels is an international network of volunteer interpreters and translators whose main objective is to cover the interpreting and translation needs of the Social Forum [which] brings together groups critical of the political, economic and cultural impacts of globalization. The existence of such a network and other similar groupings guarantees that linguistic and cultural diversity is maintained as a core value in movements contesting the assimilationist tendencies of hegemonic languages sustained by economic and military might.

(Cronin 2008, 127)

What these movement highlight is the increasing awareness of the language professionals of the role language can play in power relations and the globalization processes at the political, economic, cultural, ideological and military levels. Clearly, translation is not always used for purely practical or informational purposes.

The power relations between languages are always present, even when efforts are made to minimize them. Article 33 of the *Vienna Convention on the Law of Treaties*, called the treaty on treaties, directly addresses the “interpretation of treaties authenticated in two or more languages”:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

And historically, it was understood that the French text would prevail in case of divergence.

And in Quebec’s *Interpretation Act*, article 40.1 used to state that “in case of divergence between the French and English texts, the French text prevails.” However, this clause was abrogated in 1993, most likely because it was deemed unconstitutional as a result of a judgement from the Supreme Court against a similar clause in the legislation of Manitoba (Morin and Woehrling 1994, 234).

Globalization, as many complex phenomena always do, provides opportunities and threats. From a linguistic and cultural perspective, while the potential for increased communication and intercultural relations is certainly recognized, there is also a very tangible feeling of threat, which is proportional to the self-perception of one’s

cultural and linguistic minority status. Globalization can be a “centrifugal” force that forces interdependence, hybridity, crossover and creolization – as optimistically argued by Pieterse in “Globalization as Hybridization” (1995). But as recognized by the same author, globalization also standardizes, homogenizes, Westernizes/Americanizes all that it touches, and this “centripetal” force is a reminder of its imperialist roots.

As I argued previously for knowledge societies, the path and effects of globalization must be viewed as stemming from societal selections and decisions. Globalization as both a centripetal and centrifugal force is the result of a social construction. When translation blindly supports Hollywood’s financial agenda and aims of dominating world cinema, it is contributing to globality, as a centripetal force that constantly reinforces the centrality of the central agent of the system by reinforcing the marginality of the marginal elements. On the other hand, when translation allows speakers of a minority language to access works in their own language, it contributes to globalization’s centrifugal effect of decentralizing power, and empowering the marginal elements by freeing them from dependence on the central elements.

Translation allows societies to move beyond the notion of multiculturalism – which may be seen as implying a sort of static conception of cultures that interact with each other while maintaining their identities – towards the notion of interculturalism, which implies constant change and reciprocal influence from the different communities. This potential for translation’s role in a globalized world has been recognized by a number of translation scholars:

if the 1960s and 1970s have been loosely periodized as the time of the ‘linguistic turn’ in translation studies and the 1980s and 1990s as the period of the ‘cultural turn’, it is apparent that translation studies in the context of accelerated globalization has shown evidence of an ‘intercultural turn’.

(Cronin 2008, 129)

This brings us back to the necessity for recognizing the special needs of nations internationally, which we began discussing in Chapter 6 with the failed *Stockholm Protocol*.

IV. On the usefulness of current exceptions and limitations to the translation right

When the developing nations voiced their concerns with the impeding effects of copyright on their access to knowledge and educational sources, their initial minimal requests, which were found in the *Stockholm Protocol* were rejected.

The weaker financial situations of the developing and least developed nations have created very urgent and extensive needs for flexibilities and freedoms in accessing copyrighted works, especially to respond to their educational needs. Their main requests center around limitations to the reproduction and translation rights.

Given that Internet penetration is still very low in those parts of the world, that book publishing is insufficient to meet their educational needs, and that available textbooks are too expensive for the average citizen, the developing world is at the mercy of the access to books produced in the industrialized world. As for translation specifically, the language of education in most of those areas is not the one in which the educational materials were prepared, and it must therefore be translated before it can be used by educators and students. When the developed countries rejected the provisions of the *Stockholm Protocol*, they attempted to provide an acceptable alternative that would seemingly meet the needs of the developing world in the *Appendix to the Berne Convention*.

The same concerns that had already been raised previously by developing nations were reiterated during the negotiations leading to TRIPS, and a number of exceptions and limitations were therefore allowed (although they cannot be taken advantage of as we shall see (see Deere *op. cit.* 91)). TRIPS simply incorporated the *Appendix to the Berne Convention*, which had come about as a result of the efforts of developing countries in the 1960s to fight illiteracy and improve the conditions for printing and distribution in their territories (Altbach 1994). The exceptions were intended to allow flexibilities to help improve access to education. Moreover, in recognition of the important role of translation to education, knowledge and culture, some countries maintained provisions related to translation rights in their copyright laws.

We would therefore like to get an appreciation of the usefulness of the translation limitations in meeting the needs of the developing nations.

In *International Copyright Law and Access to Education in Developing Countries*, Susan I. Štrba (2012) explores the use of the *Berne Appendix* by the developing countries. She explains that in 2012, out of the 165 contracting parties to *Berne*, 34 countries had notified WIPO of their intentions to make use of the *Appendix*. 16 of the 34 had valid notifications, while the remaining 18 were considered expired. 9 of the 16 countries (namely Bangladesh, Cuba, Jordan, Sri Lanka, Sudan, Syria, Thailand, Vietnam and the UAE) had referred to the *Appendix* in their national legislation, to allow for its implementation (*Ibid.* 100). She then goes on showing the inconsistent and contradictions between the provisions of the national legislations of most of these countries and the requirements of the *Berne Appendix*. She then proceeds to examine the legislations of a number of countries whose notifications have expired, as well as countries who have never availed themselves of the *Appendix* while still providing for compulsory licensing for translation. She cites one non-compliance after another, and one contradiction after another for most of the countries that have attempted to avail themselves of these provisions (*Ibid.* 100 – 108). After her meticulous and thorough investigation, she concludes by stating that:

the Appendix to the Berne Convention, which provides “special provisions regarding developing countries” to permit compulsory licensing for translation and reproduction of copyrighted works in

hard copies, cannot be used by developing countries. The complicated administrative and procedural requirements render the use of the Appendix overly expensive for developing countries. [...] none of the special regimes for developing countries serve the purpose of facilitating access to educational materials in printed form. (*Ibid.* 109)

Berne's allowing for such exceptions is certainly a step in the right direction to the extent that it confirms the necessity of differentiation. But it is, bluntly, a useless or non-solution to a complex problem. Because it can only apply to translations for the purposes of teaching, scholarship and research, and because the translation may only be published with a delay (e.g. three years after publication), “the protocol is actually a compromise that satisfies neither” developing countries nor Western authors and publishers, because it “prevent[s] a publisher from capitalizing on the international popularity of a foreign work or author and increasing the size of the domestic audience” (Venuti 1998, 161-2). Any reform of translation rights and copyright law in general must keep such provisions and exceptions in sight, as they represent the differentiation needed for the creation of a more balanced, though never egalitarian, environment. However, the unwillingness of the developed nations to compromise on the protection and rights of their content owners, the lack of enforcement mechanisms to reach an international solution to accessing copyright material for those who need it most (despite unanimity over its necessity), and the foundational and path dependency problems mining copyright itself, makes it clear that the entire regime needs to be revisited, and that any other attempts can not be considered as being more than temporary patches to hold off immediate catastrophes:

The problem of copyright and access to education in developing countries lies in the nature of international legal instruments and the international IP system as a whole. As demonstrated earlier, international IP system stresses the protection of IP and not access. In relation to copyrights, there is strong emphasis on protection of rights without providing for access to those rights or concerns of public interest.

(Štrba *op. cit.* 205)

While it is questionable to what extent stronger copyright laws can improve or generate research and creativity, it is well established among experts that stronger copyright law is not going to benefit countries with weak economies, as we saw recognized even in UN reports:

IP protection is not expected to be the driver stronger innovation or technological capacity the world's poorest countries. Instead the evidence suggests that long-term investments in education, scientific research, technological training, and infrastructure are more important first steps.

(Deere, 2009, 99)

The Berne Convention and the TRIPS Agreement grant states the discretion to determine the conditions under which certain copyrights can be exercised and to impose limitations on the enjoyment of those rights. [...] how states take advantage of this ‘permission’ affects how they balance the enjoyment of copyrights and access to copyrighted works by the public, through limitations and exceptions. Inevitably, where the state is not able to effectively use the

flexibility – in a developing country for example – it cannot achieve a balance between private interests in copyright and the public interest of education or access to knowledge.

(Štrba *op. cit.* 205)

So while the translation right is unanimously recognized as one of the main keys, along with the right of reproduction, to accessing knowledge and information and improving the educational state of the world in general, and the developing world in particular, reforming it is contingent upon reforming the copyright regime which houses it. While I have identified a number of concrete measures that must be taken immediately to remove the legal barriers preventing translation from performing its functions, these measures must be seen as examples of the temporary patches mentioned above, to be put in place until copyright law is revisited and reformed in spirit and substance.

The lack of educational resources in certain languages is part of their minority status, and the problem is compounded when the financial situations of their communities or societies are too weak to remedy their situation. But before moving on to the next section, I would like to conclude this one with an explicit mention of a point that may have been too implicit in this chapter: the differences in status and power between languages are often not the result of some natural linguistic evolution based on their lifecycle. The differences we witness today are often the result of calculated social, political, and economic efforts of marginalization of social groups throughout history, which has amounted to the minority position of their languages. “Dominant powers have gone to considerable lengths to eradicate these languages and some have a horrific record of violence against children, aiming, quite literally, at beating the language out of them.” This is therefore a reminder that minority languages “are not *intrinsically* less profitable, in market or non-market terms, than large dominant languages” and that “their current, often unenviable position is generally [...] the result] of deliberate action by wielders of power [...]” (Grin 2003, 37-8).

V. Globalization and law

As we saw, the effects of the processes of globalization extend beyond the accelerated circulation of material goods to socio-cultural constituents, such as language, as well as law. Legal notions and perspectives are also in constant circulation as a result of globality, eliciting reactions that range from new ways of thinking about the law, to strong resistance. As was the case with the other social realities mentioned thus far, globalization tends to empower the already-powerful, be it a corporation, a nation, or a language, while weakening the rest. Law is no different in this regard, with the legal traditions and systems of powerful countries increasingly dominating the international arena, which amounts to what some have called “legal imperialism” (Mattei 1997, 7). To adopt a more neutral terminology, we can refer to it as legal globalization.

Legal systems are in movement. They communicate with each, copy each other, exchange solutions, hybridize each other in a thousand different ways (without ignoring the dominance that always makes such exchanges biased.)

(Ost 2009, 21, my translation)

As mentioned repeatedly throughout this thesis, the realities under-developed, developing, and developed nations are significantly different, and thus require significantly different perspectives, policies, and approaches to address copyright. Even within each one of these categories, the historical and socio-cultural contexts are so different, that they must be studied individually first. Although India, China and regions of Africa all fall under the heading of developing nations, they cannot be expected to adopt similar copyright policies only based on their belonging to this questionable category of “developing nations.” Their respective traditions, histories and circumstances, must feed their proposals for reform and implementation of copyright law.

When the forum for discussing copyright shifted from WIPO, under the UN, to that of the WTO, the economic or financial dimension became the main lens through which copyright was to be discussed. Instead of being discussed as a human rights theme with derivative questions on knowledge, Internet and linguistic rights for the citizens of the world, copyright was now discussed only as a question of commercial trade. And while all citizens and nations of the world are in principle equals when viewed as subjects of human rights, this is certainly not the case when their worth is a function of their power and influence in international trade.

Like technology, the globalization of law can result in outcomes that improve human and social conditions, as well as produce outcomes that are detrimental to certain elements of some societies. One such double-edged notion is that of legal harmonization. On the one hand, it can signify new ways of looking at the law, by complementing our own tradition and approach in a manner that renders it more compatible with other traditions, which amounts to an enrichment of all the perspectives involved. On the other hand, harmonization can signify the dominant nations imposing a “one size fits all” formula that is beneficial to their interests, and usually at the expense of the less powerful nations.

With time, various legal notions, values and models spread as a result of their efficiency as well the dominance of the economic discourse. These concepts infiltrated national laws, and this begins to show in the astonishing similarity, in letter and spirit, between these laws and the provisions of, say, the WTO. Some have referred to this as a sort of legal survival of the fittest resulting from natural selection (Martin-Serf in Ost 2009, 25). Whether the drivers are economic constraints or intellectual fascination, they are often voluntary changes to one’s respective laws that create legal hybrids, because they are always partial borrowings, never adopting an entire legal system (Delmas-Marty 2007, 2009, 2011).

What we have been witnessing for the past decades is a progressive Americanisation of law, where the American legal model and language seem to be dictating their will – and that of their giant multinationals – internationally. While the United States do not always sign international treaties and agreements, and when they do, it is often with many conditions and delays, they have been very successful at imposing their model to the rest of the world (ibid. 32).

While seemingly outdated and too technical, one may argue that copyright has been the most influential and representative legislation in our conditions of globality:

Globalization in the legal field has been pioneered by copyright. [...] It is fair to say that copyright has come to be identified more closely with globalization than any other aspect of the law. Copyright has become the legal face of globalization – its true legal counterpart.
(Rajan 2006, 8)

When keeping this significance of copyright law in mind, we begin to understand why the forum shifting tactics of the powerful nations (from the WIPO to the WTO) clearly fall under the second meaning of harmonization, in the sense of creating conditions of globality through legal imperialism:

The movement from Berne to TRIPS may be described as a transition from consensus to compulsion, individual to corporation, culture to commerce. [...] Developing countries argue that [...] TRIPS [is] an essentially coercive regime. Their concerns seem justified by the fact that developing countries were typically excluded from negotiations for the Agreement, inevitably giving priority to the interests and concerns of the industrialized world.
(*Ibid.* 14, 15)

In certain contexts, such as the case of post-socialist Eastern Europe, there was a will on the part of the countries themselves to reform their regimes in an attempt to make up for lost time and become economically competitive as quickly as possible. All these countries had legislated copyright laws during the social era, with many of them being members of *Berne*. In other words, these countries were much more legally aligned with international norms of copyright law than say the United States, so any reform should have been minimal. Yet, we are surprised to learn that, in line with legal globalization, most of these countries revised their copyright laws “to the point where virtually nothing remains of the pre-transition legal framework” (Rajan *op. cit.* 51). And while these reforms are supposed to be part of a conscious will for self-determination based on their domestic interests, in many instances, reforming copyright laws in these countries has meant “literally translating provisions from American or, occasionally, European law into local languages” (*Id.*).

This is a case of what Mattei calls legal imperialism:

The transfer of knowledge, rather than being a pattern of communication and exchange between different legal systems, becomes a one-sided exportation of legal rules and concepts

that usually end up being rejected, or creating intellectual dependency. The existence of exporting and importing [...] legal cultures is a fact. It is also a fact [...] that this one-sided attitude winds up with [...] rather serious problems.

(Mattei 1997, 7)

Given these repeatedly expressed concerns, the need for evaluating the copyright regime against local factors seems pressing (Birnhack in Netanel 2009, 364). The legal, economic, political and cultural situations of a country must therefore be the main consideration, as opposed to the current approach which use a more “international” legal and economic benchmark, which is often simply the discourse of the dominant nations and the interests of their powerful, multinational corporations. Nor is this concern only voiced by authors of the south or developing nations. Even governments of countries with developed economies and an enviable quality of life, like Canada, are regularly called upon by their scholars to stand up for their own interests: “Canada does not need copyright reform: it needs effective copyright reform appropriate to its particular cultural and economic needs” (Murray and Trosow 2007, 201).

While finding the universals that will regularize and harmonize processes and generate economic efficiencies is heavily driven by the momentum of globalization, a counter movement must ensure specificity is not simply eliminated in the name of efficiencies. As Max Weber explained, the greatest explanation does not always come from seeking the common, but in understanding the difference:

a comparative study should not aim at finding ‘analogies’ and ‘parallels’, as is done by those engrossed in the currently fashionable enterprise of constructing general schemes of development. The aim would, rather, be precisely the opposite: to identify and define the individuality of each development, the characteristics which [make] the one [...] be so different from [...] the other. This done, one can then determine the causes which led to these differences.

(Weber 1976, 385-6)

Simply uprooting legal notions and terminology from one system and “transplanting” them in another cannot be expected to produce beneficial results. Nor is this idea specific to copyright law:

We know the story of that Mongol Conqueror who ravished a bird from its nest, and the nest from its tree, who brought back, with the bird, both its nest and its song, the whole native tree itself, taken from its location, with its population of roots, its clump of earth and its margin of land, all its strip of home ‘territory’ reminiscent of prairie and province, country and empire [...]

(Saint-John Perse in Bles 2005, 65)

Legal notions are always relative parts of a semantic web that is itself part of historical, linguistic, and socio-cultural realities, and cannot be exported/imported without consideration to the greater webs of notions and values of a society. Adopting copyright standards as-is from international models or other countries, with little or no analysis on their impacts on domestic conditions will most likely negatively affect those nations, which

often do not even have the ability to assess their situation, nor implement policies that were drafted by foreign experts for foreign contexts. Ideally, nations should naturally evolve into building their internal capacity for assessing their own conditions, proposing solutions that serve their interests, and negotiating these proposals internationally, and implementing them domestically. Reliance on external assistance can only indicate that a country is still lacking maturity in these regards, and is perhaps being forced to comply against its own interests by more powerful nations.

[I]t must be elementary comparative law that no one attempts to transplant wholesale one legal culture into another; that one works in the language of the recipient legal system; that one has a thorough command of the recipient legal system. [...] Law reform assistance to this day remains substantially uncoordinated, underfunded, and rendered by individuals and institutions who are not adequately equipped to deliver the product which is required.

(Butler in Ginsburg *et al.* 1996, 509)

This is also how I understand what Rajan states when she writes that the “involvement of international expertise in these projects has [...] been extensive and, at time, controversial” (*op. cit.*).

VI. Conclusion

This chapter was about diversity and power, mostly of languages, but by extension, cultures and nations, in a globalized world, where stakeholders are competing for divergent interests.

While globalization may be considered the latest culmination of progress and modernization, it clearly carries a history of inequality and exploitation (Drahos 1996, 101). The primary beneficiaries of the international copyright regime have been the rich countries and their corporations, which include the producers of copyright content. International copyright law is thus a legal system that was put in place for the maintenance of the interests of these powerful countries, enabling them to further their exploitation through the profitable circulation of their works and ideas. “The international copyright system is thus intricately connected to colonialism and economic imperialism” (Bannerman 2016, 5).

Whether through laws and economic policies, or through language and culture, today’s world is still very much shaped by its history of colonialism, which permeates all major institutions and dimensions of social life. The decisions that were made in very different times and contexts have created long lasting path dependencies from which developing and other nations have not been able to escape.

Translators contribute to the continuity of linguistic and cultural diversity of the world, which is one of humanity’s greatest treasures. This in turn allows humanity to face one of its greatest challenges, that of communicating and understanding across languages and cultures. However, current translation rights simply

perpetuate the unidirectional flow of profits from the periphery and into the hands of content producers, located in the dominant core.

The *Appendix* to *Berne*, which includes the compulsory licensing provisions for teaching and scholarship provided to developing countries in the *UCC*, does not serve their purpose if these countries do not have a greater ability to translate and publish their translations. The colonial past and the damage it had caused on local languages in Africa is an example of the potential of translation to improve the conditions of the affected countries. Colonization of Africa had meant that indigenous languages had either been completely eradicated and replaced with European ones, or their speakers had been geographically divided by new political borders. In 1963, the Organization of African Unity and the Brazzaville meeting, there was a will “revalidate African culture” through the use of African languages, with a recognition that European languages were now part of life in Africa, especially in metropolitan areas, and are here to stay. Since then, little has taken place in terms of cultural revival as a result of works in translation, in large part because of the significant lacks that require much more than insufficient exemptions here and there.

Since the time the translation right was fully assimilated, there has not been a tangible improvement in the universalization of access to knowledge, and the imbalance in the directionality of translation in favour of the dominant languages is unacceptably strong. After the initial crushing dominance of English on the Internet, other languages have made some progress in Internet representation, but this is nowhere near threatening its still substantial dominance. More people are learning English as a second language, and it is increasingly being used as an intermediary language for practical considerations like exposure, and even political reasons, when viewed as being culturally and historically neutral in certain loaded contexts.

In the age of the hegemony of globalization, the study and promotion of pluralism and diversity can help maintain the balance between pragmatic efficiency and the principles of public policy, such as social welfare and human rights. Unequal power relations and their effects on legal systems are nothing new. As a subfield, legal pluralism “began in the study of colonial societies in which an imperialist nation, equipped with a centralized and codified legal system, imposed this system on societies with far different legal systems... [and thus] is embedded in relations of unequal power” (Merry in Dreyfuss 2010, 449).

There is no question that globalization has generated very significant economic benefits worldwide, but this has come at a cost that must be assessed against the individual contexts of regions and nations. Yochai Benkler relies on the argument of capabilities and access to knowledge before assessing the worth of economic growth (Benkler 2006). Many of the great economists, philosophers and development scholars like Mahbub ul Haq in *Reflections on Human Development* (1996), and Amartya Sen in *Collective Choice and Social Welfare* (1970) and in *The*

Quality of Life (1993), edited with Martha Nussbaum, have articulated the importance of looking beyond economic instrumentalism and taking into account the many aspects of a human being's life to assess their position in terms of social development, including their freedom, and their ability to participate in social life. This last notion takes a new meaning when the social life in question is no longer limited to the local, regional or even national, but extending to the global. Chon (Ibid. 460-1) has argued for a development-as-freedom paradigm, which she applies to nations as well as individuals. When applied to nations, this paradigm

not only stimulates innovation but also protects knowledge goods that enhance human capabilities, which in turn build national capacity for innovation. [...] For developed countries the path to innovation may diverge quite sharply from that [sic] developing countries, and each may require different kinds of policy and flexibility.

As for human beings, she reminds her readers that economic development is but one measure of human development among others.

Many agree that intellectual property theory and practice seem fixated on an economic justification to the exclusion of any other; yet it seems clear that the intellectual property has much to contribute directly to the other prongs of human development.

(Ibid. 461)

In Parts I and II, we understood the role of France in all the international negotiations and its influence in shaping international intellectual property law. What we did not explicitly mention, however, is that all of these meetings and conventions seem to have taken place entirely in French, the internationally recognized language of diplomacy, without any mention of interpretation services present. Before 1948, the French text was the only official version of the *Berne Convention*, and it is still now considered the prevailing version. Today, the same can be said of TRIPS and all other negotiations taking place in the international setting, once again reminding us of the symbolic and real power behind these languages:

one could argue that there have been two Empires in the history of international intellectual property relations: the French and the American. Both “imperialisms of the universal,” have cemented their power with the aid of an interface that is not so much territorial as it is symbolic: language.

(Wirten Hemmeungs 2011b, 73)

While online translation will certainly play an important role in the dissemination of culture and knowledge, we must not forget that at least half of the world's population still doesn't use the Internet on a regular basis. This means that the publishing industry is still the only provider of literary and scientific works.

Without question, the multinational publishers retain a good deal of influence in the international textbook situation: they set the standard for texts and they are able, in some markets, to dominate the production and sales of textbooks. In recent years, they have begun to publish in Third World languages and have thereby spread their influence. Branches of multinational publishers in such countries as Zimbabwe, Nigeria, India, and Malaysia are actively producing books in local languages for specific markets (Altbach 1985, 8).

Publishers enjoy what has been called a cultural and economic hegemony that shapes and then exploits markets in Africa, Asia and South America. And so long as their profits from translation rights are not reinvested in those markets, then one can only agree with Venuti when he says that “their publishing strategies remain distinctly imperialist” (Venuti 1998, 167).

Conclusion: Synthesis and final thoughts

I. General overview / summary

I.1 Summary of the primary discussion

This thesis established the necessity and timeliness of revisiting the translation right, from a transdisciplinary public policy perspective, in the following manner.

In Part I: Copyright law, I demonstrated the questionable historical and philosophical foundations on which rests copyright law. In Chapter 1: Copyrightability, the notions of works, conditions, and duration were examined. This allowed for discussions on the idea-expression dichotomy behind fixation, as well as the notions of originality and authorship. In Chapter 2: Balancing Interests moral rights and exemptions were covered. The conceptual infrastructure of copyright was presented as relying on either natural law (moral rights) or positive law (exemptions). The chapter highlighted the lack of reliable evidence in the copyright debate and highlighted the benefits of weaker copyright protection as reported in various report and case studies. Chapter 3: Infringement addressed the foundations of infringement and remedies from the linguistic and criminological perspectives. In Chapter 4: Institutions, we discussed the various institutions at play in copyright, and provided a brief historical overview of the most relevant developments that have led to today's Canadian and international copyright regimes. Copyright law was shown to have a colonial past that has created long lasting legal and other path dependencies very much in effect today. Furthermore, the development of copyright law was shown to be the outcome of an interplay between various competing stakeholders that are part of a power network, in which the dominance of the discourse takes precedence over the merit of arguments, or social and democratic considerations.

In Part II: Translation, I argued that the historical and philosophical foundations of the translation right, dubbed the “question internationale *par excellence*,” are as questionable as those of copyright law. Given the complete absence of the translator's point of view in all international meetings and negotiations leading to the legislation of the translation right on one hand, and the recognized importance of translation by the international community on the other hand, it was important to try to provide a “translational perspective” to copyright law, which was mainly done by formulating an overarching notion of agency for translation and the translator. Chapter 5: Translation right, presented and explained the translation right, as it is stated in law, as well as three key international documents for the translation right, namely: the *Berne Convention*, the *Nairobi Recommendation*, and the *Translator's Charter*, the latter leading to a short discussion on the translator's self-image from a historical, psychological, and social aspect. The paradoxical nature of translation as both a derivative and an original work

was explained, and the right of integrity of authors and their works was refuted for the case of translation. In Chapter 6: Foundations of translation rights, we explored the historical events that led to the translation right. The historical account, mainly consisting of reports and minutes of the various international meetings over the years, gave us a good understanding of the arguments put forward by various nations trying to protect their respective interests. This revealed that many of the issues with which we are still struggling with regards to the translation right – and copyright – have been presented and debated since the beginning of international discussions on the topic, and that many good proposals and alternatives were presented, but often not considered seriously for various reasons, the most common being that it is the powerful nations that set the agenda and exert influence to protect their interests, further confirming that colonial past of the translation right. This chapter also highlighted the need for different measures to apply to different nations, depending on their level of development and their exporting/importing ratio for cultural and scientific works, which was identified by developing nations as a key indicator at the first international meeting on the translation right. In Chapter 7: Agency of translation/the translator, we looked at how TS views the agency of translation as a professional and academic practice and discipline, as well as the agency of the translator, as the one performing this task. The aim of this chapter was to provide this perspective to the debate on copyright law and the translation right. The understanding of the agencies of translation and the translator, as understood by the discipline of translation studies, was shown to be incompatible with the assumptions of the translation right about translation.

In Part III: Translation in the New World Order, I examined the new realities of the world from the tripartite lens of knowledge societies, technology, and globalization, in order to understand the current as well as potential role translation in modern networked societies. In Chapter 8: Knowledge society and the translation right, I established that the translation right impedes translation's role in allowing citizens and societies to participate in the knowledge society as consumers and producers of knowledge, which is the new capital of the world. In Chapter 9: Information and communication technologies and the translation right, I showed that the translation right impedes the macro-structural role of translation by hampering collaborative translation projects, while lacking the necessary updates to address the microstructural and technological changes that have taken place in the translation profession as a result of the integration of translation technologies. In Chapter 10: Globalization and the translation right, I demonstrated that translation can play a significant role in the preservation of linguistic and cultural diversity, both online and offline. The chapter also explained the specific needs for differentiation, particularly with regards to the translation right and its role for education in the developing world. Overall, Part III highlighted the tremendous gaps between the haves and the have-nots, and demonstrated that the translation right is outdated and unsuitable for the new realities of the world, and that instead of enabling the dissemination of knowledge and culture, it impedes the potential role of translation in performing those functions.

Thus, the translation right, with its questionable foundations and outdated nature, was shown to be an impediment to the potential role of translation (as representative of the public interest) in the world, and must therefore be revisited and at least reduced to the point of constituting balanced public policy.

1.2 Summary of the complementary discussions

In addition to the general outline of the structure which was built to reflect the main argument as stated above, a number of complementary topics were deemed important enough to be addressed in the thesis.

The economic notion of monopoly was presented and discussed in order to assess its efficiency, especially when it is created artificially, by government intervention, to provide the economic backdrop for the IP regime to function in modern societies. The detrimental effects of monopolies were also observed when the notion was carried over beyond the economic realm, to result in cultural and knowledge monopolies. Translation flows have the potential to destabilize these monopolies, were it not for the translation right. Also related to the economic discussion was the entire basis for copyright, usually presented as the economic incentive model. Our exploration allowed us to conclude that while there is not much evidence to support its superiority and efficiency over other models, the discussion in Chapter 9 on open business models and user generated content, as well as gift economies found in the academic world for instance, demonstrated that alternative business models have appeared and are successful. The lack of evidence goes beyond the economic incentive argument to the optimal duration of protection: even if we were to accept the economic incentive argument, duration of protection should not last more than its provision of an incentive, otherwise it constitutes over protection, which is harmful to markets. There is also lack of evidence to support the claim that creativity would be stifled without the current incentive in place.

Furthermore, if the mechanisms of the free market are deemed to be the best for managing intellectual works, then it should be left to the participants in such markets to determine what strategies to use as incentives, and whether granting monopolies to one sector or group of participants is the most effective and socially beneficial strategy. The monopoly argument has been directly criticized by economists and jurists at least since the 1840s, but there does not seem to be any appetite to revisit it.

From the linguistic perspective, we looked at the metaphors traditionally used in the discourse on copyright. Because of the role metaphors play in shaping our realities, we must be aware of their presence and use, without falling prey to rhetorical strength. It is especially important for policy-makers to be aware of the presence of metaphors in legal discourse, and careful in its interpretation. The dominant discourse on copyright projects

the victimization of the content industry on the public to demonize infringing activities. Today, copyright infringement is covered under criminal law, along with theft, rape and murder.

From a criminological point of view, along with the strengthening of copyright protection, there has been increased social acceptance of infringing activities, further intensified by technological advances making such activities cheap and easy. In other words, there is a clear misalignment between the direction in which intellectual property laws have been moving, and social and cultural behavioural norms in dealing with intellectual works. When laws and policy no longer seem to be representative of the views and values of the democratic society from which they have emerged, this should be viewed as an indicator that it may be time to revisit such laws and policies, and identify the drivers causing this disconnect. In countries like Canada, where something as rigorous, crucial and counter-intuitive as assessing personal income taxes relies on the good will and honesty of citizens to voluntarily disclose and file their incomes has produced one of the strongest economies and qualities of life in the world, it is surprising that intellectual property constantly seems to be moving in the direction of increased policing and stronger remedies.

Our philosophical exploration of the foundations of copyright law allowed us to show that, in addition to the arguable validity of some of their claims, the authors never provided the detailed accounts necessary for law and policy applications, leaving too many questions unanswered. Of course, these notions were then taken out of their contexts, and in time, combined with notions from different philosophical traditions with which they are misaligned, to generate legal notions. While the moral argument is often referenced as a justification for authors' rights, a deeper look into it revealed that its reasoning contains many weaknesses, contradictions even, that undermine its belonging to the category of natural rights. It is derived from the problematic notion of the creative genius of the individual author, and the principle of national treatment in copyright law confirming that copyright is not a natural right, but an administrative, utilitarian, and strategic or diplomatic one. The terms "exception" and "exemption" imply that copyright protection is the norm, while society's interest in accessing works is the exception. One could hold the opposing view that it is the granting of copyright protection that is the exception, while the norm is society's access to all works.

Covering various aspects of the legal history of copyright law and the translation right of specific countries, such as Canada, the United States, Russia, France, Germany, the UK, Scandinavian countries, and India allowed to establish some general trends and confirmed for the translation right what scholars have repeatedly said about the inequality and unfairness of the negotiation processes and of the tactics used by the superpower to force their agendas and interests on other nations. For instance, the history of copyright in Canada revealed at least two very important points, related to the labeling of the development levels of countries, as well as the criteria for assessing the level of development from a copyright perspective. Canada recognized itself as

belonging to developing nations in some regards, yet it considered itself closer to developing nations in others, such as copyright. This tiered self-assessment from Canada is exactly what is needed in copyright law and translation rights. Having a stronger economy in one sector, or relying more on technology does not automatically make a nation “developed” nor does lack thereof make it “developing,” or “least developed.” Every country has strengths as well as areas that need to be improved for various reasons, and must assess itself to determine where its interests lie, independently from external and internal pressures. In the late 1960’s, a committee led by Canada’s Minister of Consumer and Corporate Affairs recommended using the export-import ratio as the determining indicator for the level of a nation’s development for copyright law, as opposed to *per capita* income. While my entire research points to this as being, without question, one of the most telling indicators of the level of maturity of a nation’s copyright market, the note on file called this recommendation “utter nonsense.”

Canada, the United States, Scandinavian nations, and other countries were all presented as cases of shifting priorities and positions. At one time, all of these nations refused to sign copyright agreements because they were considered harmful to their interests, while they signed them at a later time, when their conditions changed. This is evidence that if there are any benefits from implementing copyright legislation, they are only operative once a country reaches a certain level of economic maturity, before which such provisions will cause more harm than good.

The effects of globalization on law have led to an erosion of the boundaries between the different legal tradition. However, the difference in treating the moral right argument between common law and *droit civil* reminds us that, while there is much convergence, transplants, and mixing between legal and philosophical traditions, we have not yet reached a point where we can say that the distinct legal traditions are no longer operative.

The theorization of knowledge societies led to the conclusion that they are complex social constructions, and translation can play an active role in accelerating the access to and dissemination of knowledge, contributing to the construction or strengthening of such societies. This is in opposition to models that imply that knowledge societies emerge and rise automatically once technological and other means become widespread. Public policy will dictate whether knowledge societies can be constructed, and if so, which ones, when, and how. Furthermore, in reaction to the information and knowledge monopolies, there has been a steady increase in mobilization movements from below, highlighting the contrast between the expectations of the general populations of developed nations (as well as their frustration) and the constraints of copyright.

The potential role of translation for social development purposes was raised where possible, with a special emphasis on access to knowledge and education, because the latter partially provide the cognitive infrastructure

to participate in the modern world. Dozens of UN and other documents introducing the necessity of development efforts in the world and highlighting the tremendous and growing gaps between financially poor and wealthy nations were consulted, establishing the urgency of the matter, as well as confirming the recognized role translation can play in this regard. The current limitations to the translation right afforded by the *Appendix to the Berne Convention* to developing nations for scholarship and other purposes were shown to be completely useless. This revealed the lack of willingness of the developing nations to make any changes to the current copyright regime, regardless of the reason, that may lead to less protection for their rights holders.

Analyzing the power networks from various angles revealed that, in today's world, multinational corporations are gradually replacing the nation-state as the superpowers with the most power and influence, and that the positions of the nations that house them are usually identical to their own. This gives a new appreciation of the influence of the content industries and the extent of their role in international negotiations, especially since the forum shifting from WIPO to WTO. The concentration of power has been intensifying over the last half-century, creating situations of uneven power and wealth that require drastic and immediate action according to the U.N. Specifically, the ownership and control of communication systems is almost entirely in the hands of the richest members of a few societies, who will also spread and then leverage ideological power by controlling information content and dissemination. Copyright, in such a context, becomes the legal mechanism that regulates the ideological and institutional hegemony required to feed and perpetuate this cycle. While new information and communication technologies came with promises of openness and diversity in society, these promises could never be fulfilled because they fall under the means of communications which are owned by an identifiable socio-economic class. Recent trends have also seen multinational companies expand by acquiring and controlling every aspect of their line of business, creating real monopolies for which there is little to no competition. Today, in the U.S., less than 1% of the population owns more than 40% of the wealth, and they happen to be the ones making the decisions for multinationals and the governments. Unsurprisingly, these decisions will be self-serving. Public policy discussion about intellectual property must therefore take into consideration its power and wealth concentration role, especially as information and knowledge become the new capital of societies.

In all of these of these discussions, translation repeatedly revealed its destabilizing agency for the dominant order, and presented itself as a representative of the interest of the public and the masses. This was no different in the legal discussions in copyright law, where translation is the most problematic issue, disturbing such notions as originality, authorship, derivativeness, integrity, and fixation.

II. Summary of the practical measures formulated

Throughout this thesis, I presented numerous measures pertaining to translation and the translation right, the most noteworthy being the following:

- Matters of translation rights and copyright need to be evidence-based. I argued that governments mandate committees, or fund research to develop neutral, objective data repositories in various fields and subfields and for various types of products and scenarios. Until there is sufficient, factual data that is applicable to a topic, policy-making that results in monopolies and exclusive rights must be suspended. This would mean that different policies would have to be soft-launched and piloted, with proper monitoring and evaluation, for the efficiency to be assessed and compared with other measures and policies. The evaluation must be done directly by policy-makers or hired academics, and cannot be deferred to corporate experts for possible conflicts of interest.
- International treaties have provided flexibilities, exemptions, and differentiated tiers of enforcement and implementation for copyright for various situations and categories of nations. Given the level of technicality required to be aware of their existence and the proper execution of their implementation to be eligible, as well as the general fear around infringement, they are rarely utilized, and when attempts are made to do so, they fail. This is a strategic mistake that must be rectified. Citizens as well as nations must learn to use the law in a manner that is most advantageous to them, so as to provide valid feedback afterwards that the exemptions in place are insufficient or inefficient. If evidence cannot be provided that the measures in place do not work, they will remain in place under the guise of being the sufficient charitable policies that superpowers agreed to provide, and that nothing further is required.
- If copyright and the translation right must be granted, then copyright law must clearly state that its primary *raison d'être* is the encouragement and dissemination of scientific, cultural and artistic works that are beneficial to society. Laws and policies must be more balanced, as they are currently favouring content owners at the expense of society. They must also be further balanced to protect and encourage individual artists, authors, thinkers, and creators, as opposed to companies, multinationals, etc.
- The international treaties, conventions, and agreements on copyright and the translation right should not be providing more than guidelines and general practices and recommendations. Maximum flexibility of the adaptation, implementation, and enforcement of these matters is to be left to each nation to determine domestically, with respect of its sovereignty. International bodies of intellectual property can play the role of educating national policy-makers, or conducting analyses and presenting reports and recommendations to governments on their best course of action for the promotion of

cultural, scientific, and artistic growth. At the moment, their role consisting in promoting and enforcing the protection of the interests of the content owners.

- Developing and least developed nations are encouraged to ally themselves with other countries in similar situation, and implement multilateral and regional agreements to pilot various policies that are mutually beneficial, while collecting data.
- Ideally, the translation right would be completely repealed internationally for all works. The only leftover would be the moral right of attribution, a new moral right “of identification” which clearly states that this work is a translation of another, as well as the moral right of integrity – in the sense that if an author is able to demonstrate that a translation was undertaken with the intention of harming the reputation of the author or the work, then it is to be treated as defamation. In cases where the translation generates profits, authors must receive a percentage of these profits, to be determined by public policy research.
- As an absolute minimum, the translation right must be entirely repealed for educational purposes, in all least developed, and possibly developing, countries.
- Countries – especially those that have already been identified for exemptions or that receive international aid – must abrogate the translation right domestically, as well as through multilateral agreements with other nations in their situation.
- Canada can implement a “no translation right” policy domestically, to foster stronger translation activities and markets at least for French, English and all Indigenous languages, though there is no reason to limit the provision to these. Furthermore, at least as part of its social development and humanitarian aid initiatives, Canada can sign agreements with a number of least developed or developing nations, to suspend the translation right on certain types of works for a certain duration. Such an initiative would be tracked for various indicators to be assessed, and for the data to be used for future initiatives.
- As a strict minimum, translation rights must generally be reduced in a manner according to which exclusive translation rights be granted to authors who wish to register their work and use those rights for 2 to 3 years after publication at a maximum, which reflects the pace at which knowledge is being generated in the world as a result of knowledge societies, technology and globalization.

III. Final thoughts

Studying the translation right is like looking through a prism that not only refracts into multiple disciplines, but also into different spatiotemporal realities. It is an excellent indicator of the complexities of our world, where different stakeholders are competing for power and interests, though many of them are unable to escape the path dependency of their history, because they do not break with the tradition in which they think and work.

Today, the once powerful notion of the nation state has been weakened by globality and technology, which has allowed the rise of multinationals. International laws and regulations become more important and national legal systems lose their power if they are not modified accordingly. Local national norms are replaced, and the power of the state erodes in favor of cosmopolitan norms and international forces, and all of this requires internationally institutionalized financial regulation. And so it seems that the expansion of the translation right as part of copyright law is fatalistically inevitable, as it is part of the greater regime of intellectual property, currently used by these elites to control their newly acquired capital.

But this work has also been the history of the little triumphs of the weak, the peripheral, and ironically, the mass, with its constant struggles. The Development Agenda is one such example: it imposed its official recognition of a minimal threshold of development before IP implementation, as well as differentiation in laws and provisions for countries at different stages of development. Movements like the creative commons and the A2K must also be seen in this promising light, as they have not only provided alternative models to traditional copyright law, but also inspired millions to create and apply similar models in various areas of life, from education to humanitarian activism. And across all of these efforts, we have encountered collaborative translation projects, wherever the need for them arose, and the circumstances allowed.

The world is currently in a state of transformation and flux, and the role of copyright and the definition of its main notions are all unstable. The tensions between the various values and points of view still allow for reflection and action. It is up to the citizenry of the world to decide what kind of world they wish to live in, and which values to promote for themselves and for the future generations, *from below*. Knowledge societies require rich cultures of science and art, where there is a constant in-flow of creative material resulting from the borrowing and re-appropriation of some from the work of others. Such societies would promote the democratization and open access to knowledge, and a decentralization of power resulting in networked models. Truly networked societies would see the integration of humans with humans, humans with machine, and machines with machine, to form together, collective networked thought (Lévy 1990, 2011). This is in stark

contrast to the current hierarchical models according to which development and growth are only the result of monopolistic control over knowledge, and a centralization of the power at the tip of the top.

As an act of resistance against the *Stop Online Piracy Act* (SOPA), countless pages on the Internet went black for 24 hours on January 18, 2012. Wikipedia displayed the following screen:



This was only the tip of the iceberg. Reading a description of the protests and their impact is a reminder of the awesome power of the masses:

Reactions to the protest were overwhelming and could be observed in real time. Students freaked out on Twitter over how they were now going to fail their papers, due that morning, because they couldn't do any research on Wikipedia – all because of something called “SOAP”? Educators received incontrovertible proof that a fair share of their students leave their assignments to the last minute and depend too heavily on Wikipedia for their research. And American voters let their representatives in Washington know that they were very displeased with “SOPA.”

The numbers boggle the mind: Google collected more than seven million signatures for its anti-SOPA online petition, while more than 162 million people saw the Wikipedia blackout page. According to Wikipedia, more than eight million people looked up their elected representatives' contact information via Wikipedia, with so many people trying to contact their representatives that “the Senate's web site was unable to accommodate the number of citizens attempting to use its contact forms.”

Washington did not know what hit it, but the results speak for themselves. Legislators from both parties spent the day scrambling to get off the SOPA bandwagon. By the time the dust had settled, both the Senate and House bills had been withdrawn.

(Haggart 2014, 253)

If humanity were to be given a chance to redo the past few centuries in any way it wanted, and without the benefit of hindsight, I do not think that it would choose to have copyright and translation rights, nor would it ever allow power to be concentrated, centralized, and monopolized in the hands of the few in such a manner ever again, whether it be in matters of IPRs, or any other aspect of human life. This is because copyright and the translation right are simply conventions put in place to regulate certain aspects of human life. But there is nothing intrinsically necessary about them, and alternative models exist, if we are willing to think them.

In the age of user-generated content, content ought to be controlled by the users who are generating it, and sharing it collaboratively on YouTube, Wikipedia and TED. Lego fans working for free for Lego for almost a year, *dojinshi* artists who revived an art form they loved by spinning off Manga characters without authorization, mash-up artists of all types, scholars who make their research available online for public use... all of them innovators and contributors in a social culture that has sneaked through the cracks and silences of copyright law for now: none of their content would exist if things were entirely up to the content industry and proponents of the maximalist approach to copyright law. But they, and so many others like them, are proof that our main incentive for creating is not the “economic incentive” granted by copyright law, but a deeper human instinct to share ourselves through our various creations, and to enjoy the satisfaction of knowing that others have accepted our gift. Secondary to that may be the more practical consideration of making money through the creation of an artificial scarcity, and enjoying the monopolistic and exclusive rights that come from a claim of commodified ownership over our intellectual creation. And as seen throughout this work, translation’s nature and agency has constantly made it into a destabilizing agent, revealing that what is hidden, and questioning that which is taken for granted.

Translation is stigmatized as a form of writing, discouraged by copyright law, depreciated by the academy, exploited by publishers and corporations, governments and religious organizations. Translation is treated so disadvantageously, I want to suggest, partly because it occasions revelations that question the authority of dominant cultural values and institutions. And like every challenge to established reputations, it provokes their efforts at damage control, their various policing functions, all designed to shore up the questioned values and institutions by mystifying their uses of translation.

(Venuti 1998, 1)

Translation is one of the main engines of the global cultural economy, and translators must be aware of their role in that complex system. This work was an attempt to help them gain that awareness, so that they may make informed decisions.

Metaphorically speaking, copyright law and its translation right are legally monolingual paradigms in a multilingual world. They were the solution of one group of monolingual speakers to a local problem, which they decide to generalize to the rest of the planet without any effort of translation.

To translate is to play host to the other, to offer hospitality to their difference so that I may grow through finding myself in the other. And hospitality implies a gift economy. My gift as a translator is to allow an *other* to multiply the sharing of their gift, to extend it beyond their reach, to tell in my own way how they shared a gift, through my cognitive skill, my linguistic sensitivity, my art and my voice. The translation right and copyright law were simply not drafted with this in mind; they were originally put in place as instruments of censorship, and for the protection of a publishing industry in a technological and socio-cultural context that no longer exists today.

As the combined effects of technology, globalization and knowledge societies are leveraged in manners that are beneficial to humanity, the abundance of knowledge and information will require assessing their value not as financial commodities, but as hubs of interpretation and reinterpretation for different communities and inhabitants of different cognitive universes, processes that are best left entirely to the collective interest of the public, which will be appropriating, reinterpreting, and reusing the information. This is the hypercortex, that is being weaved together for the future in the Pierre Lévy's Semantic Sphere (Lévy 2011). If intelligence in the future is collective (Lévy 1997) then the place of translation as an enabler of direct access to knowledge as a common or public good must become the forward-looking prism through which it be revisited, legally and otherwise.

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