# Cosmopolitan Copyright

Just as there is no universal correspondence between words and world, such that literary translation is necessary, there is no universal correspondence between laws and world, so that legal borrowing is necessary.

Pierre Legrand

# Cosmopolitan Copyright
## *Law and Language in the Translation Zone*

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# Contents

# *Preface and acknowledgments*

I trace my interest in translation back to the mid-1990s, working on what in 1998 would become my Ph.D. thesis, *Global Infatuation*: *Transnational Publishing and Texts*. The second leg of the somewhat cumbersome title—*The Case of Harlequin Enterprises and Sweden*—probably gives something of its content away. While Sweden and Harlequin Enterprises were the hub around which my case study orbited, I also set out to capture more general strategies at play in global publishing. Reading the different versions through which the "Swedified" Harlequin materialized led me to coin *transediting* as a more appropriate term for the sometimes collaborative, sometimes conflict-ridden, process of translation and editing. Given many of the die-hard prejudices surrounding the global dissemination of popular literature, it was quite an eye-opener to discover the extent to which *transediting* actually engendered new writing.

My interest in copyright, on the other hand, I owe to the serendipitous discovery of a speech given by Victor Hugo at the first *Congrès Littéraire Internationale* in Paris 1878. Somewhere in between the low (Harlequin) and the high (Hugo), another H came along, and the story of the two English-language translations of Peter Høeg's bestselling 1992 novel *Frøken Smillas fornemmelse for sne* (*Smilla's Sense of Snow* in the U.S., *Miss Smilla's Feeling for*

*Snow* in the UK), ended up a chapter in my book *No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization* (2004). *Smilla* confirmed what I suspected already during my Harlequin years; that the combination of copyright and translation was an under-researched but rewarding topic, worthy of much more attention than I had been able to give it so far. For various reasons, one of them being that I was caught up in writing about the public domain as a jungle (the result was *Terms of Use: Negotiating the Jungle of the Intellectual Commons* from 2008), translation was put on the backburner for a few years.

Until the spring of 2008, that is. At that time, Bo G. Ekelund invited me to join him and a few of his colleagues at Uppsala University in an application to the Swedish Research Council. Translation would be one of the research foci of the project he had in mind, and, considering my history with Harlequin and Høeg, would I be interested in teaming up for the proposal? Indeed I was, but only under the condition that I could add copyright into the equation… Always the gentleman, Bo not only gave in to my blackmailing tactics but the application for "Languages, Education and Swedish Society 1960-2010," also proved successful. I owe him warm thanks for the invitation and for giving me the leeway to pursue my ideas as I felt they deserved best.

For the past two years, a number of people provided valuable criticism, excellent partnership in research consortia that both ended and started during the lifespan of this project, stimulating dinner conversation, and/or invitations to interesting conferences and workshops. It is a real pleasure to acknowledge that *Cosmopolitan Copyright* evolved from interacting with a very cosmopolitan bunch of people, including Domen Bajde, Sara Bannerman, Salah Basalamah, Lucky Belder, José Bellido, Maurizio Borghi, Sarah Brouillette, Jo Bryce, Madeleine Cock de Bunig, Barbara Culiberg, Marianne Dahlén, Leonhard Dobusch, Mireille van

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I am grateful to all my Uppsala University colleagues at the Department of Archival Science, Library and Information Science, Museology and Cultural Heritage Studies for everything from daily infrastructural support to the occasional bout of disco-bowling. Donald MacQueen, also at Uppsala University, was kind enough to do a final check-up on my use (and occasional abuse, no doubt) of the English language. As always, Annika Olsson proved her unparalleled capacity as sounding board, confidante, first-rate reader, and Instigator of Life-Saving Extracurricular Activities. Last, but certainly not least, a special thanks to my husband Per Wirtén for giving me input on a topic he describes as the most "nerdy" I have ever pursued. So far, that is.

Chapter one was originally published as "A Diplomatic *Salto Mortale*: Translation Trouble in Berne, 1884-86" in *Book History* (14) 2011 and chapter three as "Colonial Copyright, Post-colonial Publics: the Berne Convention and the 1967 Stockholm Diplomatic Conference Revisited," in *SCRIPTed: A Journal of Law, Technology & Society* (7) 3 2010. They have been revised for inclusion here and supplemented with new and previously unpublished writing.

Three young women make my day: Minna, Rebecca, and Aurora. They always have, and they always will.

# INTRODUCTION
## TREATY, TEXT, TRANSLATION

On September 9, 1886, when government representatives from Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia, signed the Berne Convention for the Protection of Literary and Artistic Works, they instigated a framework for international copyright relations that remains influential to this day.[1] From a handful of nations at the end of the nineteenth century to the almost two hundred Convention signatories in 2011, the concept of "international copyright" nonetheless remains something of an oxymoron. Copyright was and still is national law. Copyright was and still is a powerful instrument in the hands of nation-states. Even my use of the term 'copyright' is slightly ambiguous. If translation is an act of negotiation between languages, the Berne Convention results from negotiation between legal systems, between copyright and *droit d'auteur*, between civil law and common-law traditions. C*opyright* is not the same thing as Swedish *upphovsrätt* or French *droit d'auteur*. And while using "copyright," is a practical rather than onto-

logical choice,[2] it is worth keeping in mind that the complexities of language documented in this small volume are not limited to fictional works, but also have an impact on the law itself.

Despite all these caveats, international copyright exists, and by and large we date it from that September day and the birth of the Convention. From its Eurocentric roots until its insertion into the present trade-based global intellectual property regime, the Berne Convention represents one of our major access points into the inner workings of international copyright relations. To be even more precise, it is not the Convention *per se* that provides the key, but the *procès-verbaux* of the revision conferences that were convened in order to modernize and update the world's first multilateral copyright treaty in line with technological, social, and geopolitical change.[3] These conferences tell a story of international power relations in the making, practices of cultural transformation, the changing face of global governance, and the limits and possibilities of authorship vis-à-vis the law.

The setting for this book is the first era of international copyright, between 1886 and 1971. This is also the era of the *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle* (BIRPI), the administrative headquarters of the Berne and Paris Conventions, located in Berne. At the Stockholm Diplomatic Conference in 1967, BIRPI was dissolved and replaced by *The World Intellectual Property Organization* (WIPO), signaling the end of one epoch and the beginning of another in global intellectual property governance.[4] The before/after evidenced by the switch from French to English acronym and the move from Berne to Geneva should not be exaggerated; the two periods are bound together by a common history, a common history where the Convention reigns supreme. And while it would be possible to follow translation in the transition from

print to software, from man to machine, and hence also from BIRPI into WIPO, the exponential growth of stakeholders, documents, conferences, tweets, and meetings in today's global intellectual property arena prompted my decision to remain in the "old" Berne universe.[5]

In the following, I will consider why and how translation acted as a constant "pierre d'achoppement,"[6] in the evolutionnary history of the Convention during the BIRPI phase. There are three main reasons why translation—primarily denoting Roman Jakobson's translation proper[7]—and the history of its uneasy place in international copyright relations may have something to tell us about past as well as present copyright conundrums.

First, translation calls into question the nature and stability of the work. Of course, what constitutes a work and how to define its boundaries is something that not only literature studies, art history, or a number of other scholarly branches of the humanities have devoted considerable time to studying, it is also an ongoing problematic within copyright law and scholarship. Translation is one of the first instances of transformative uses of cultural works and their treatment in international copyright, but it is not the last. To consider the discussions on the legal and cultural ramifications of the translated work in analogue space could shed light on how we view the instability of digital works and their relationship to authors and readers, or, in a more updated terminology, "users."

Second, while authorship has been and continues to be at the center of attention for copyright scholars as well as book historians, translation, a contentious site of authorship and ownership, has not received the same attention. I am not suggesting that translation has been absent from scrutiny by intellectual property scholars, nor that translation studies, "the academic discipline related to the study of the theory and

phenomena of translation,"[8] has ignored the question of copyright.[9] Rather, I want to emphasize how translation offers a complementary, productive, and still largely unexplored approach to the persistent authorship/ownership dilemma.

The final reason for the importance of translation in this particular context is that it triggers one of the most long-lived of dichotomies in modern international copyright, that between minor and major languages, users and producers, importers and exporters, developed and developing nations.[10] This conflict was part of the Berne Convention from its very beginning, reached a highpoint in 1967, and has continued to be part of the construction of international copyright relations until this day. Looked at from the perspective of copyright history, I argue that translation offers an underdeveloped potential "for law to reflect upon its foundations and function as an economic and political instrument."[11]

The first and third chapter of the book constitute the chronological start and finish of my narrative. Chapter one revolves around the three diplomatic conferences that ended up finalizing the original Convention, conferences convened in Berne in 1884, 1885, and then 1886. The third chapter turns to one of the most controversial of the revision conferences, which took place in Stockholm between June 11 and July 14, 1967. Chapter two functions as a link between the two, and considers more in depth some of the enduring power relations set in motion by translation, concentrating especially on their impact also on the formation of the Convention as a text in its own right. In the concluding chapter I summarize the main findings related to the three main points discussed above, and end with a few thoughts on the possible epistemological consequences that might follow from thinking about translation also as a tool for the negotiation between disciplines.

The account I offer does not explicitly set out to document the Swedish experience as that of importer/user or developing nation/minor language. That history will definitely be present in the next chapters, but is perhaps more significant as a critical outlook, a perspective that informs my own work on copyright. I am convinced that neither copyright nor copyright scholarship can aspire to the label "cosmopolitan" in the sense Kwame Anthony Appiah thinks of "conversations across boundaries,"[12] unless we know more about and incorporate this still largely unwritten history into the larger copyright narrative. My hope is that in some small measure this book makes a contribution to the further understanding of international copyright history, its power relations, and even some of the hegemonic assumptions underpinning its current place in academia. As Susan Bassnett and Harish Trivedi contend, translation "rarely, if ever, involves a relationship of equality between texts, authors or systems."[13] Ultimately, I hope to convince my readers that the potential to uncover these unequal relations is precisely the reason why translation provides new fuel to the ongoing conversation that a truly cosmopolitan and interdisciplinary study of copyright entails.

# ONE
## FREEDOM OF TRANSLATION: BERNE, 1884-1886

As formative moments go, signing the 1886 Convention proved more than a milestone in legal history. Equally important, the union and its convention marked formal acknowledgment that those invested in print culture—be they publishers, authors, or readers—were international by default, and that the texts they published, wrote, and read, moved with ease across national and linguistic borders. Granted, all of this was old news. The fact that such movements had entered into a phase where their trajectories from now on required the governance of an international legal regime, however, was new.

At the end of the nineteenth century, the novel had triumphed, printing technology was sophisticated enough to facilitate large-scale piracy, the reading public displayed an appetite for foreign works, and European authors and publishers operated on a market Franco Moretti describes as highly uneven. Crystallized around the two narrative superpowers, Great Britain and France, was a core group of exporting nations and a very

large group of importing ones.[1] Consequently, there were "considerable gulfs between what may be called the "producing" nations—that is, those nations, such as the French, that were net exporters of literary and artistic products—and those nations, such as the Scandinavians, which were "users"—that is, net importers—of these products."[2]

Against this general backdrop, a small group of Old World diplomats, lawyers, and professors met in Berne during three diplomatic conferences in 1884, 1885, and 1886 with the aim of returning home signatories of the first ever multilateral copyright treaty.[3] That the author's exclusive right of translation, the author's right to authorize translations of his or her work as well as the right of the translator to his or her translation, warranted the label as "la question internationale par excellence,"[4] is not surprising. Translation made new works out of old. A prerequisite for the continued circulation of texts, it was the primary vehicle by which authors multiplied their works, but even more significantly, produced new readers. Yet, translation was a double-edged sword, a problem in search of a legal solution. On the one hand, there was the promise of new markets and readers, but, on the other, there was the possibility that unless somehow regulated, the transformation into a new language could result in substandard or even corrupt texts that in extension alienated the author from his or her work.

In this chapter I revisit the three diplomatic conferences in Berne in 1884, 1885, and 1886 in order to engage further with the producer/user infrastructure and the conflicts translation elicited within that matrix. Two nations play an especially important role in the events that follow. France and Sweden stood on opposite sides of the export/import gap, and they arrived in Berne with two incompatible views on what kind of

public interest translation actually served: those of authors or those of readers?

## 1884

The international legal landscape pre-Berne was far from unregulated. Bilateral treaties—mostly on a regional basis, but also across continents—proliferated. Increasingly, these agreements caused a fragmentation of the legal landscape running counter to the internationalist ambitions of the time.[5]

France was the undisputed ruler of the bilateral universe.[6] By its unilateral decision in 1852 to grant equal protection to the works of all authors, regardless of nationality, France seized the moral initiative in a crucial question.[7] Extending the right of national treatment to foreign authors without asking anything in return was the kind of quintessential gesture of cultural supremacy that secured the French a leading role in the development towards Berne.

Victor Hugo's keynote speech on the need for an international copyright regime at the *Congrès Littéraire Internationale* in Paris 1878 and the subsequent creation of the *Association Littéraire et Artistique Internationale* (ALAI) fueled the momentum even further.[8] In 1883, the ALAI managed to convince the Swiss government that the time was ripe for a diplomatic conference explicitly focused on creating a *Union génerale pour la protection des droits des auteurs sur leurs œuvres littéraires et artistiques*. Their ultimate goal was a treaty on authors' rights in line with the explosion of multilateral treaties, conventions, and agreements that were becoming the order of the day.[9] The first such multilateral organization of note, *Union internationale des telecommunications*, had been in existence since 1865, and the younger *Union Postale Universelle*, since 1874.[10]

The sixteen delegates welcomed by the Conseil Federal Suisse to the first Diplomatic conference on September 8, 1884, swiftly elected Numa Droz chair.[11] Swiss minister of commerce and agriculture, Droz had performed the same duty at the 1883 ALAI congress and would preside again over the succeeding Berne conferences. Other participants with ties to the ALAI included the Norwegian representative, Fredrik Baetzmann (an ALAI honorary vice president), and the ALAI president Louis Ulbach, one of two French delegates. In terms of influencing this first diplomatic conference with its agenda, the ALAI had been very successful indeed, and it would continue to exercise authority when it came down to formulating the principles of the convention.[12]

Tellingly, Numa Droz began his opening statement by crediting the ALAI for its work so far. He then made two additional comments. First, he acknowledged the validity of the ALAI's request to the Swiss government that the international diplomatic community now needed to shoulder the responsibility of securing a multilateral copyright treaty. The ALAI had in fact transferred the initiative from authors to an elite group of diplomats and lawyers, a group that, according to a commentator from 1892, "were better able to tackle the interests of the authors than the authors themselves."[13] If diplomats rather than authors were now in charge of taking the issue of international copyright further, another change of hands was also imminent.

So far, the French had secured their leadership partly by relying on Victor Hugo as an emblematic symbol for authors' rights as well as the assumed universal applicability of French law and language. They appeared less interested, however, in shouldering day-to-day responsibility of the union-to-be. In contrast, one of the virtues of the host country, Switzerland, was a reluctance towards international diplomacy that "made

it extremely difficult to establish and justify a Swiss diplomatic service."[14] Curiously, it was almost as if the absence of such professionals on the international scene provided a clean slate at home, guaranteeing from 1893 the efficient management of the convention and union by the BIRPI.

"[T]here is hardly any aspect of the law that has such a cosmo-politan character and that lends itself better to an international codification than the one we are about to consider,"[15] Droz asserted, and yet he received a brutal wake-up call to his grandiloquent opening statement. The *procès-verbaux* notes an avalanche of reservations following his speech: Great Britain went first, Holland followed, and then Sweden, Norway and Austria-Hungary; one after another, the diplomats carefully hedged their presence. Under no circumstances could they enter into any kind of binding agreement. Their role in Berne consisted only of listening and reporting back home. Alfred Lagerheim, senior official at the Swedish State Department and later foreign minister, stated that he would take part in the deliberations and the voting but that he could make absolutely no commitments on the part of his government, "to whatever it may be."[16] For those who nursed hopes for a more optimistic tone at the outset, the Swedish stance must have been disappointing. After a brief hour of deliberation, the group ended their meeting.

The discussion resumed the following morning. As they worked their way through a questionnaire prepared by the German delegation, the delegates faced the critical seventh question: "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?"[17] Two options were possible. First, there was the ALAI version from the 1883 conference, which completely assimilated translation into reproduction rights. Alternatively,

the Swiss proposal stipulated—in line with the French—that union authors would have an exclusive right of translation during the whole duration of the original rights. Probably anticipating the conflicts that would erupt over what they knew was an unpopular stance, there was an interesting ancillary parenthesis to the Swiss proposal "(possibly adding 'if they have made use of this right within a ten-year delay')."[18]

Alfred Lagerheim quickly seized the opportunity to clarify his position. "Sweden," he explained, "which for the present only provides foreigners with a very limited translation right, might perhaps be predisposed to favor them more, but in no case could she accept that the exclusive right of translation would be protected for the same period as the original work."[19] In 1876, when the Swedish Supreme Court weighed in on what the following year was to become the first Swedish copyright law, *Lag angående eganderätt till skrift*, they advised against granting translation rights too liberally.

> Such 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 Swed-

ish authors the same remuneration for the rights to translate Swedish works.[20]

Consequently, the principles Lagerheim defended in Berne were anchored in the experience of a "minor" rather than a "major" language. Classified as writing in dialects of the same language, Swedish, Danish, and Norwegian authors received protection against unauthorized translations for five years in the Scandinavian countries if the translation appeared within two years of the original publication. An amendment from January 10, 1883, allowed foreign authors to reserve the right of translation "to one or more named languages," in order to qualify for the same length of protection.[21] Lagerheim's viewpoint compelled the German delegation to intervene. They now considered accepting the principle of assimilation, but only under the condition that all other countries did the same. Since there was little prospect of that happening—Sweden was not alone in its critique—the French request for an adjournment in the deliberations was accepted.[22]

On September 17, following six days of discussions, the time had come to put the question to a vote. Alfred Lagerheim now offered a Swedish counterproposal—reminiscent of the German—but with a set of further qualifications added; including a three-year deadline for the publication of an authorized translation. The French rebuttal was expected and again suggested revising the text with the aim of securing full assimilation. Referring to the work of the ALAI and the many bilateral agreements signed by France in support of his line of argument, the French delegate, René Lavollée, became increasingly confrontational. Determined to arrive at complete assimilation—a principle the French considered the ultimate proof of cosmopolitanism—Lavollée stressed that in the eyes of the French government, "the right of translation cannot be

considered as anything else than an extension of the right of reproduction or as a special form of reproduction itself. In addition, in international relations is it almost always translations that is the standard mode of reproduction."[23]

On a superficial level at least, the French appeared to view translation as nothing more than a mode of direct reproduction. The crux was that the international author-reader partnership also required the multiplication of authorship, and when the need for Another Author—a translator—was a prerequisite for new readers to appear, the work in question was in danger of alienation from the author. Something happened when a text moved from one language into another, but exactly what was it? Was it reproduction only, or creation of a new work, or rewriting? The logic of assimilation relied on a language of conquest and dominance in order to assign definitive control over the work to the author, the only trustworthy guardian of the work. In French as well as in English, authorization connoted not only a more general authority but also direct legal sanction.[24] A sanction of this kind was perhaps on Lavollée's mind when he called attention to what he considered the undeniable right of authors to protect their works to avoid the travesty of translation. "On this last point," he noted, "the interests of the author are the same as those of the public, which needs to be assured of the fidelity of interpretation given to the original work."[25]

Alfred Lagerheim, on the other hand, reiterated the familiar Swedish position. He pointed out the specificity of the Scandinavian countries, all in a process of development but nonetheless ambitious to learn, to "appropriate the literary productions of the great nations." Any direct analogy between authorization and quality, was tangential at best and "one has to entertain the possibility that even an authorized translation can be bad." In such a case, "the public has a right not to be

deprived of all possibility to get to know the original work in a form that corresponds better to the thoughts of the author, where the author's honor cannot but benefit from the freedom of translation given after a certain period of time."[26]

The interchange between France and Sweden illustrates the chasm that opened up between producer and user attitudes toward translation. On the one side was the argument for assimilation; on the other, freedom of translation. For the French, the interests of the public and the author went hand in hand. Only protection and control over the work by the author ensured a text true enough to the original. For Lagerheim, however, the opposite was the case. If the author's control went so far as to hamper readers' access, then the public stood to lose. In the end, this would be detrimental also to the author's text, now corrupted by a substandard authorized translation standing in the way of a superior, but legally questionable, unauthorized version.

Although the first case tried under The Statute of Anne (1710) did involve translation and might therefore lend support to its central, rather than tangential role in claiming authorship and ownership, few nineteenth-century courts had actually considered the question.[27] One exception to the rule was *Stowe v. Thomas* (1853), Harriet Beecher Stowe's case against the publisher F.W. Thomas's unauthorized German translations of *Uncle Tom's Cabin* published in *Die Freie Presse*, a Philadelphia newspaper.[28] Stowe went to court to defend the translation she had authorized from Thomas's competing unauthorized version. However, as Melissa J. Homestead notes, critical of what they interpreted as Stowe's attempts to control the text at the expense of the readers, the German-language press accused the authorized translation of being filled with "entirely un-German expressions, grave language mistakes, or other irrefutable flaws" on "every page."[29] As Thomas's lawyer

Charles Goepp, insisted, Stowe's sales suffered not from piracy, but because she had relied on a translation that simply had "less genius than ours."[30]

Stowe's lawyer argued that the "translator is wholly dependent on that which is the author's" and that the author was injured in sales by a perfect translation and hurt in reputation by a bad,[31] but Goepp disagreed. "A translation of a romance … depends entirely for its success upon its individuality, and for that reason, it is original with the translator."[32] As the translation enhanced the value of the original, no injury had taken place. Judge Robert Grier ruled in favor of Thomas and emphasized, "To 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."[33]

Another female author, Selma Lagerlöf, Nobel Prize winner in 1909 and one of the most popular Swedish authors in the U.S. at the turn of the century, chose an alternative strategy. She allowed her authorized translators, Jessie Bróchner and Velma Swanston Howard, to work directly with her manuscripts in order to circumvent pirated editions.[34] Her tactic may or may not have curtailed piracy, but it indicated nonetheless that the threat of unauthorized translation also could function as a creative boost, generating new collaborative authorship strategies that questioned the limits of both authorship and ownership.

While the 1884 conference issued a general *vœu* in favor, France, Haiti, and Switzerland would nonetheless be defeated in their quest for assimilation. In his closing statement on September 18, Numa Droz concluded that the conference had achieved almost all of the ALAI's requests, with the exception of the most coveted one, the assimilation of trans-lation.[35] It was a close call, but translation had not, as the German dele-

gate Reichardt at one point feared, proved to be a fatal *salto mortale*, undoing the success of the union.[36]

**1885**

The second diplomatic conference took place almost exactly a year later, this time including several nations that had not attended the previous meeting. Most notable was the presence of the United States, represented by Boyd Winchester, minister resident and consul general to Switzerland. Winchester would go on record stating that while the U.S. Congress was not yet ready to commit fully to an international convention, he believed that his government was favorably disposed toward the basic principles of the union and that it was only a matter of time before the United States would fall into line.[37] He was off the mark by more than a century: the United States remained outside the Berne Convention until March 1, 1989.[38]

But Winchester was right to suggest that, for quite some time, international copyright had been a matter of interest for both Congress and the American people.[39] Beginning with Henry Clay's bill in 1837, those in favor of international copyright spoke of fairness and underlined how cheap imports hurt the chances of developing an American literature and contributed to the import of "foreign" ideas. Henry C. Cary's 1853 *Letters on International Copyright* epitomized the resistance. Opposed to rewarding authors (especially foreign) at the expense of domestic printers and publishers, Cary championed the dissemination of texts to the benefit of the reading public.[40]

On balance, nineteenth-century U.S. copyright was more protectionist than internationalist and was heavily weighted in favor of the interests of the publishing industry. Meredith

McGill suggests that successful lobbying on part of the printing trade cannot alone account for the tenacity with which Congress resisted international copyright. Instead, she interprets the opposition as "strong evidence of an alternate system of value in tension with the whole notion of authors' rights."[41] This alternate system rested significantly, but not exclusively, on a "culture of reprinting." Although the shared English language made the reprinting culture possible, it is important not to underestimate how important translation was to the dissemination of literature within the United States, where large immigrant groups depended on access to reading material in a wealth of other languages. As Colleen Glenney Boggs underscores in reference to the Stowe case, any interpretation of the classical liaison between the novel and the formation of the nation-state as essentially monolingual, underestimates the importance of translation to the multilingual American reading public at the time.[42]

British and American authors intensely engaged with transatlantic piracy and in many cases lobbied for securing U.S. compliance with international copyright. Charles Dickens issued antipiracy declarations during his American lecture tour in 1842, which some claim did him and the cause more harm than good.[43] During the second half of the nineteenth century authors as various as Harriet Beecher Stowe, James Fenimore Cooper, Joseph Conrad, Mark Twain, and Walt Whitman all took an interest in the promotion of international copyright.[44]

When Stowe went to court trying to extend her copyright to include translation, she did so as a well-known and commercially successful author. By effacing those pecuniary interests and presenting both herself and *Uncle Tom's Cabin* as vessels of a greater good, she balanced a fine line between claiming and disavowing authorship. Stowe spoke of God, Whitman of Everyman. Both authors had to navigate the ap-

parent contradiction of claiming property rights in texts that were, by their own accord, not really theirs. Whitman's textual ideologies placed him on a direct collision course with copyright, and yet he managed both to criticize Dickens's critique of the United States while lauding British novelists' call for international copyright as "wise and righteous."[45] According to Martin T. Buinicki, Whitman saw copyright as a way of ensuring that piracy did not corrupt his relation with the reader.[46] He was delighted to give his permission for a Russian translation of *Leaves of Grass* sent to him in 1891, the year of the U.S. International Copyright Act (commonly known as the Chace Act),

> And as my dearest dream is for an internationality of poems and poets binding the lands of the earth closer than all treaties or diplomacy—As the purpose beneath the rest in my book is such hearty comradeship for individuals to begin with, and for all the Nations of the earth as a result-how happy indeed I shall be to get the hearing and emotional contact of the great Russian peoples![47]

When copyright deliberations resumed in Berne 1885, however, it would still be an elite European diplomatic corps that acted by proxy in the interests of publishers, authors, and readers.[48] Whitman's utopian individual connection gave way to the *Realpolitik* of nation-states.

Once the general discussion began at the second diplomatic conference, Alfred Lagerheim reported that nothing had changed in the Swedish position. To accept the French proposal would mean the automatic exclusion of Sweden and Norway from the union. He addressed himself directly to France in the hope that they "would make the reform of the Scandinavian countries' legislation easier, and not ask of them a sacrifice that they most likely would be unable to make," and

he ended his plea by "appealing to the French spirit of broad-mindedness and equity."[49]

Positions were deadlocked when the discussion resumed the following day. Possibly provoked by French criticism that his earlier position on assimilation was inconsistent, the German delegate, Reichardt, claimed that the critique against his country was unfair. If the principle of assimilation had prevailed it would have meant the exclusion of several nations from the projected union, and, for Germany, he added, the project as a whole was more important that the principle of complete assimilation. Germany continued to seek consensus. So did the Swiss, who strongly favored the French proposal, but as hosts, were aware of their responsibility to break the stalemate and reach a compromise.

The final article 6 in the 1884 Draft Convention contained a number of detailed requirements. Most important, it gave union authors the exclusive right of translation for ten years after the original date of publication. "To benefit from this provision, the authorized translation must appear no later than three years after the original work."[50] France urgently wanted to remove this caveat and, just as urgently, Sweden wanted to preserve it. Although he addressed himself to the entire assembly, Lavollée's next statement was clearly intended for Swedish ears, or, "the delegates from countries where literature is poorly developed and where there is need to borrow from producing nations."[51] Freedom of translation was an illusory freedom, he argued, that could prove damaging for the development of a national literature.

Lagerheim again repeated the basic difference between producer nations and countries such as the Scandinavian, which published far more translations than they provided to other nations. When time came for the vote, Great Britain offered a counterproposal, which left it up to individual coun-

tries to decide the length of the protection for an authorized translation. Belgium, Sweden, and Norway seconded the proposal, but all other nations voted against. Five countries, led by France, cast their votes for full assimilation. Although the French could not rally enough support for complete assimilation, they were defeated by one vote only. Sweden was just as unsuccessful, unable to secure the three-year limitation for an authorized translation by a similarly narrow margin.[52]

Lavollée may have lost the battle, but he was convinced that he would win the war. For the time being he accepted the ten-year protection for translation in order to secure a more important goal: having Great Britain sign the Draft Convention.[53] Great Britain brought into the union an entire empire, an empire where not all dominions viewed Berne in a favorable light and some even advocated leaving the union.[54] Alfred Lagerheim, on the other hand, had to admit defeat: Sweden and Norway had now made the maximum number of concessions regarding translation that they were prepared to make.[55]

**1886 (and beyond)**

As a result of what had transpired the previous year, Sweden and Norway were absent in Berne during the third and final diplomatic conference in September 1886. This was not the time for additional confrontation or further debate but for fine-tuning the results from 1884 and 1885 into an actual convention. The final article 5 of the 1886 convention stipulated that union authors had the right to translate themselves or authorize a translation of their works within ten years from the expiration of the first date of publication in a union nation. Article 6 protected authorized translations as original works.

In 1891, the ALAI published a brief status report on the failure of the Scandinavian countries to come into compliance

with Berne, written by Fredrik Baetzmann. The Norwegian representative at the 1884 and 1885 diplomatic conferences, Baetzmann had then been confident that Norwegian adherence was imminent. Now he was forced to conclude that the Scandinavian countries had not displayed much interest in adapting their national laws so that they could join the union. Positive signs from Norway had come to nothing because of a change in government and while Denmark had showed some interest in a common Scandinavian initiative, Sweden "seemed absolutely uninterested in the question."[56]

The following year, 1892, *Le Droit d'Auteur* reported on the Swedish Supreme Court's decision in *Rundqvist v. Montan*. After what had transpired between Lagerheim and Lavollée in Berne, it was somewhat ironic that the case concerned the translation of a French book, Léon de Tinseau's 1890 novel, *Sur le Seuil*. Rundqvist had purchased the translation rights from the publisher Calmann-Lévy, but between February 20 and March 31, 1890, Erik Montan published an unauthorized Swedish translation as installments in *Stockholms Dagblad*, of which he was editor-in-chief. Rundquist sued Montan for infringement and asked for damages and a fine calculated on every copy sold of the journal. Montan, however, argued that while de Tinseau had "*Droits de reproduction et de traduction réservés*" printed on the title page, he had not expressly mentioned *Swedish* as one of the languages for which he reserved this right. Swedish law required such a disclaimer, and both Svea Hovrätt (the lower court) and the Swedish Supreme Court sided with Montan.[57]

An amendment from May 28, 1897, removed the prerequisite to state the language to secure protection, and all rights reserved became linguistically all-inclusive. However, because the translation had to appear within two years in order to qualify for protection during the following eight, Sweden re-

mained barred from joining Berne. Successful Swedish authors who sold well abroad—primarily in Germany—but did not enjoy protection for their works, soon made their voices heard, and lobbying from publishers and other invested parties escalated around the turn of the century.[58] Still, not until a change in the law, as of July 8, 1904, which removed all formal obstacles regarding translation, could Sweden sign the convention. Eight years after Norway and one year after Denmark, Sweden was no longer "terra clausa in respect to international protection."[59]

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The diplomatic conferences in 1884 and 1885 pitted the interests of nations like Sweden, whose self-image was that of a developing country, a "user-nation," against the interests of producing nations like France, which capitalized economically as well as symbolically on their role as a major exporter of cultural goods. Following a heated exchange in 1885 between Lagerheim and Lavollée, the latter stated that, "when it comes to making real progress, the advanced nations need to set the example, without waiting for the others to fall in line."[60] There was little doubt that France was the advanced country in question, nor that Sweden belonged to the category of "the others."

The disagreement between France and Sweden on the topic of assimilation versus freedom of translation illustrates the investments and expectations of a major language as opposed to that of a minor. As a report to the French Senate on the successful termination of the convention stated, "the French produce, the other nations consume,"[61] succinctly summarizing the impetus behind the French insistence on assimilation. Articulated from the needs of a user-nation, the Swedish point of view is that of a developing nation, where Alfred Lagerheim

promotes freedom of translation as a prerequisite for national welfare and indirectly as a form of resistance.

In the United States, Henry Carey thought translation rights belonged to the public, rather than to the author.[62] Alfred Lagerheim expressed a similar perspective in Berne when he argued that authorized translations could be detrimental to both authors and readers and that it might be in both their interests to embrace freedom of translation. Conversely, the French claimed that speaking for authors is to speak for readers. Behind the rhetoric of "user-nation" and "advanced nation," stood competing interpretations of what kind of public interest translation rights served: those of authors or those of readers?

The French position was unequivocally pro-author, seeing the complete assimilation of translation under reproduction rights as the only possible way for the author to control the dissemination of his works and safeguard stable transfer into other languages. Other nations, like Sweden, saw things differently. Freedom of translation ensured the greatest possible promulgation of print, and the causal link between authorial control and quality was far from conceded as a natural given.

# TWO
## OTHERS-IN-LAW: DIFFERENCE TRANSLATED

In what we have seen so far, accommodating translation legally in the embryonic Berne Convention was largely a matter of finding ways to regulate what could be described as *external* relationships, relationships between publishers, authors, and readers on an increasingly international book market. Emily Apter speaks of a "translation zone," as a "zone of critical engagement that connects the 'l' and the 'n' of transLation and transNation."[1] At this juncture, which represents a kind of "trans-*port*" between the two main chapters of the book, I want to suggest that behind the heated debates on freedom of translation or the conflicting arguments on how far authors' rights should extend, another translation, *internal* to the machinations of treaty making and diplomacy, also took place. If we accept the proposition that "the mode of translation is precisely where the historicity of so-called content is played out and where the circulation of meaning is made possible,"[2] this holds true also for the circulation of meaning in and by a treaty text such as the Berne Convention.

The translation zone is consequently also a site where law and language converge, a perspective that comes with two important ramifications. First, understanding more of how the text of the law travels, how it is imported and exported, even its possible source and target languages, and how legal doctrine undergoes transformation by translation and borrowing will add important knowledge to our understanding of translation as well as copyright. My position vis-à-vis the text of the law in these international conventions rests therefore on a view of the law as an intertextual totality, informed by and informing on the social, the economic, and the cultural.[3]

Second, considering the convention as a text in its own right may also help us understand something about the ways in which legal and official documents are as much part of copyright and print culture history as the "literary and artistic works" mentioned in the title of the Berne Convention. Studies on the historical transmission of texts across languages remain to an overwhelming degree focused on fiction or the literary text. Book historians have devoted much attention to the institutional parameters of publishing houses or libraries, dissected the material object 'the book' down to its most infinitesimal level, and documented the bibliographic lives of authors in detail. As Simon Eliot points out, while "text . . . finds its way into every aspect of society,"[4] fiction is a fraction of such ubiquitous textual abundance. Instead, there is a vast textual geography where technical manuals, advertising print, legal notifications, and a host of assorted texts remain out of sight while still being submitted to the same instances of refraction as any novel.[5]

As customary international law,[6] the treaty text is obviously different from a poem or a novel in almost all respects and often described as constructed around a "quite formalized language on all levels: lexical, syntactic, textual and genre."[7] Codified in the Vienna Convention on the Law of Treaties,

multilateral treaties like the Berne Convention are international agreements between sovereign states, and as such one of the primary sources of international law.[8] If the translation of the literary text represents specific problems of fidelity and treachery, authority and autonomy, the legal text encounters noticeably similar, but also distinct challenges.

If I make any claims in this chapter, they are of expansiveness rather than exhaustiveness. I suggest that when we broaden the analytical scope to include also the role of translation in texts that we tend to disregard for their lack of creativity or complexity, we can hopefully help redress the privileging of one limited textual category at the expense of the many. In addition, we might also learn something about the inherent instability of texts that at least superficially tend to be perceived as both fixed and stable. A prescriptive text part of international law, the treaty in turn depends on interpretation and translation for its continued circulation. As I will try and establish next, the Convention is also a text with authors, readers, and translators.

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Pierre Legrand once noted that "comparatists-at-law" might assist in the "urgent need to appreciate how various legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and how their thought differ from ours."[9] Legrand's quote provides an instructive preamble to a curious incident that took place during the first diplomatic conference in Berne in 1884. As I have already outlined in the previous chapter, Sweden was in Berne promoting freedom of translation, whereas the French lobbied hard for the accep-

tance of the assimilation principle, that is, the idea that authors' rights must include translation rights.

Only two days into the deliberations, on September 10, the *procès-verbaux* notes that Numa Droz hands over to the delegates a French translation of the Swedish law, given to him by Alfred Lagerheim.[10] There are few overt clues as to why Lagerheim decides to take this course of action, but it is clear from the outset of the proceedings that translation will prove a major obstacle in the negotiations. The fact that Lagerheim has no other recourse than to use translation in order to argue for his view on translation is perhaps instructive. As the participants center on the ability of translation to expand print culture through the transfer between languages, Lagerheim also recognizes that his is another law, a *different* law, and in order to sway his fellow diplomats his way, he produces a translation of the Swedish law into French. It is an act of persuasion that attempts to make difference legible, that demonstrates how the "attempts to translate […] linguistic and cultural differences,"[11] during the diplomatic conferences also included the negotiation of legal difference.

Whether or not the translation of the Swedish law provoked any discussion among the participants is something the proceedings do not divulge. We know that Lagerheim returned to Stockholm after the 1885 conference without having been able to convince his fellow diplomats of the validity of his arguments. Subsequently, in 1892 "the Swedish attitude" on freedom of translation was one that the official BIRPI organ *Le Droit d'auteur* deplored but "almost expected."[12] However, the fact that Sweden finally joined Berne in 1904 and abandoned its much-criticized stance on translation did not mean that the question was settled once and for all. In preparation for the 1908 revision conference in Berlin, the

Japanese government once again wanted to put freedom of translation on the agenda.

By referring to a treaty with the United States of November 10, 1905, the Japanese government suggested that translation into Japanese of a work written in a European language and vice versa should be completely free.[13] Speaking at a session on October 15, 1908, Horiguchi Kumaichi, second secretary to the Japanese delegation in Stockholm, clarified the reasons behind the proposal.[14] The many misunderstandings in the communication between East and West were preventable, and "[t]o redress this state of things," he asked, "are you not of my opinion, *Messieurs*, that freedom of translation should be reciprocally allowed between us?"[15] Convinced of the positive results such an agreement would yield, Kumaichi is equally sure of the counterarguments his proposal would elicit. In a preemptive rhetorical strike he takes it upon himself to formulate the European response, and he does so in a tone that the Berlin hosts no doubt found quite inflammatory:

> 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 fools' market where only you will reap the benefits, because strictly speaking, you Orientals have no literature.[16]

Pandora's box thus opened, all of the tensions embedded in translation suddenly surfaced anew. Kumaichi not only manages to encapsulate the Eurocentrism of the Convention and the vested interests of exporting nations, but also ends with the slightly bitter and ironic observation that in comparison with Europe, Japan of course had nothing to offer, no literature to barter with.

The target of a long and detailed exposé of its book market in *Le Droit d'Auteur* 1900, Japan joined the Union as early as 1899 and was, according to the same article, "an acquisition that the West should congratulate itself for."[17] "Acquisition" is a revealing choice of word. Geopolitical tensions had been present, if not openly acknowledged, from the very start of the Berne Convention. Haiti, Liberia, and Tunisia were initial signatories perhaps not as expected as France and Great Britain. Tunisia was a French colony at the time and Haiti, gaining independence from France in 1804, was formally reconized by France in 1825. Both Haiti and Liberia were countries where former slaves exercised power, and nations with which the United States for a long time refused diplomatic relations.[18] Although their direct or indirect impact on the Convention text is difficult to ascertain, both individual representation and historical ties suggest that their presence was hardly counterproductive to French interests.

The status of Japan, however, was quite different. Japan was put, if not by virtue of its literature, then on account of the fine watercolors, drawings, and applied art consecrated by the *Exposition Universelle* in Paris, almost on par with European nation states, culturally speaking.[19] Almost, but not quite. As a nation whose legal comportment vis-à-vis international copyright was in the making, Japan could set an important precedent in how "the adoption of laws and codes elaborated after western models" would "produce an essential transformation of custom and ideas."[20] The Berne Convention achieves its importance because it has the power to produce a prescriptive text, containing rules of conduct or norms.[21]

Suddenly, the Japanese proposal on translation threatened to upset the slow but reassuringly steady copyright compliance *Le Droit d'Auteur* envisioned was in the making. The proposal itself may be something of a footnote in the annals of the

Berne Convention, and yet the tone of the revealing comments it provoked speaks volumes on the disquiet translation still produced. One of the German delegates, Albert Osterrieth, even acknowledges the legitimacy of the Japanese position before he comes to the following conclusion:

> 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.[22]

Osterrieth resorts to scare tactics to play on the possible unease of European nation states towards linguistic minorities within their own borders. If we accord freedom of translation at a distance, he argues, we must accord it next door as well. From the perspective of the German hosts and their European counterparts, the Japanese proposal is at its most dangerous if it opens the door to potential linguistic resurgence within Europe. Such a development must be avoided at all costs, because the "system" Osterrieth defended had been erected on the importance not only of the nation-state, but on the importance of the ties between the nation-state and language. Copyright might be inherently cosmopolitan, as Numa Droz

claimed in his introductory speech at the first diplomatic conference in 1884, but the interests that copyright protected had a decidedly national ring to them.

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John E. Joseph writes, "It appears to be a universal feature of legal style that the author, together with the translator, disappear.[23] The finalized treaty text seemingly takes the author out of the equation all together, because who can possibly author a "negotiated text"[24] of this kind? Although it remains true that the treaty text itself has no author but many signatories, the Convention is nonetheless influenced by texts that *are* authored. Consider for instance the importance of Louis Renault, Nobel Peace Prize recipient in 1907.[25] He became the first official *rapporteur* of the diplomatic conferences in Paris 1896, a role he repeated in Berlin 1908. His status gave his words special weight, and in his response to the Japanese proposal he referred to the "ingenious developments that were presented with much eloquence by the Japanese delegation," but remained unconvinced of their validity. In a scathing tone, directly referring to Kumaichi's presentation, he avowed that, "we have none of the disdain for the literature and art of their country that they suppose us of."[26]

Adding one argument against the Japanese proposal after another, Renault recapitulated a central French tenet: the sensitive task of transmitting ideas is a delicate one, and only the author's authorization guarantees the quality of a translation. He ended his long rebuttal by agreeing with Osterrieth's assessment: accepting the Japanese proposal would set a dangerous precedent. "We ask of our Japanese colleagues," he concluded dismissively, "that they take these considerations into account and we would be happy to see their opposition disappear."[27]

The French crowned their long-standing ambition to see translation completely assimilated into reproduction rights with success at the 1908 Conference. This was the development France and the ALAI had fervently desired for so long and at least on the surface a complete victory for the expansion of authorial rights. However, if *les partisans* of translation rights believed that they had definitely vanquished *les adversaries* with that definitive assimilation, they were mistaken.[28] For the continued history of translation in international copyright, another Berlin development is perhaps even more important. From 1908, translations were also to be protected as original works *without prejudice* to the underlying work. Speaking on behalf of the German hosts, Albert Osterrieth seconded the need for assimilation and then went on to explain:

> In article 6 you will find the proposal to protect *translation*, whether authorized or *unauthorized*. If it seems necessary to reserve for the author the exclusive right of translation, it is not less true that the simple fact of making a translation is not a blameful or disloyal action. The translator, who adapts a work in a foreign language to the genius of his own, creates an individual work still worthy of protection. If the translation has been made without the authorization of the author, the translator has no right to publish it. But why give away the unauthorized translation to the author of the original work, who, by the fact of having his or her rights infringed, has not acquired any particular merit, why give it away to the public domain, when the rights of the original will come to an end?[29]

Translators—historically relegated to membership in what Emily Apter terms the "literary proletariat"[30]—were now for the first time mentioned on a par with authors. Conspicuously absent during the 1884-1886 diplomatic conferences, translators were even capable of the same kind of "genius" as the original author.

That the day would come when translators received legal autonomy must have been the last thing on Stuttgart publisher Robert Lutz's mind, whose impression of translators was reprinted in *Le Droit d'Auteur* on December 15, 1900. Distraught over the lack of understanding and respect showed by a group "who are mostly women, primarily old school teachers or governesses," Lutz complained that these translators "have no knowledge of international arrangements for the protection of literary property or are not particularly careful to observe them." Forced to confront two female translators infringing on his rights as publisher, Lutz lamented their disregard for the law and cared little for the excuses they made for their illicit behavior, one woman translating for pocket money and the other, a widow, to support her children. He considered the widow incapable of producing her own unique work (and hence equally incapable of feeding her own children). She could only trespass on the works of others by hiding the name of the author and referring to her translations as "adaptations."[31]

Nonetheless, in 1908 this individual emerged as a holder of rights separate from those of the original author. Significantly, these rights are from now on even given to the spinsters, widows, and governesses Lutz in 1900 accused of being both completely unprofessional and completely ignorant of (or unwilling to comply with) the international agreements now in place. The Berlin text, paragraph 2 of article 2 protected translations (together with adaptations, arrangements of music, and compilations) as "original works, without prejudice to the rights of the author of the original work." Separated from their original source, translations fell under the author's exclusive rights, but was simultaneously, "without prejudice," liberated from it.

Read against the stipulation that translation now gained status as an independent work protectable in its own right, the convention implemented a paradox. One the one hand, the rights of the author included translation, but on the other, the translation emerged as a separate work. This begs Salah Basalamah's question, "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?"[32]

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Thirty years and two world wars later, BIRPI had overseen only one revision conference following Berlin, in Rome 1928. WW II saw to it that the next could not take place until 1948, in Brussels. The post-WW II copyright landscape was no longer a matter only for Old World Europe. Several important nations, most notably the U.S. and the USSR, did not adhere to the Berne Union. Beginning with the Montevideo Convention in 1889 and leading up to the Pan-American Buenos Aires Convention of 1910, 1928, and 1946, of which the U.S. effectively was a signatory only of the first, the Americas was a patchwork of different treaties.[33] The role of the U.S. vis-à-vis international copyright and the Berne Convention is a lengthy and complicated affair. Again and again, proponents of a "culture of reprinting" defeated pro-international copyright supporters in Congress.[34] Things did not begin to change until after WW II, when the U.S. definitely moved from being an importer to becoming a prominent exporter of cultural works.

The United Nations Educational, Scientific, and Cultural Organization (UNESCO), played an important role in trying to redress a situation where, in copyright terms, the world emerged from the war "virtually split into two entirely sepa-

rate and independent parts."[35] Launched in 1945 as successor to the International Committee on Intellectual Cooperation (ICIC), UNESCO anchored their copyright policy in the Declaration on Human Rights from 1948. At the time of the Brussels conference, UNESCO had already noted how copyright functioned as a "barrier" to the "free flow of culture among all the peoples of the world."[36] In the next few years, UNESCO instigated a number of copyright initiatives culminating in the 1952 Universal Copyright Convention (UCC). While any extended treatment of the UCC lies beyond the scope of this chapter, article V contained a provision on compulsory licensing for translations that will be of importance for the discussions that ensued in Stockholm. Subject to a number of conditions, it stipulated that such licenses could be issued if a) no translation in the national language had been published within seven years of the original publication, or b) if the translation had been published within this period but all editions of this translation were out of print after the seven-year term.[37]

In sum, UCC offered an international multilateral convention with lower levels of protection than Berne, thus providing a vehicle for the U.S. to come into the fold of multilateral international copyright agreements. Several specificities in national legislation kept the U.S. outside Berne until 1989, primarily the compulsory registration of copyright and the controversial manufacturing requirement, which afforded English-language books copyright protection in the U.S. only if manufactured on American soil. As a compromise between the formal registration required by U.S. law and the no-formalities Berne framework, UCC introduced the use of a © symbol, making it possible for the U.S. and other countries to sign UCC without having to change their national legislation.[38] While developing nations viewed UCC in a more favorable light than Berne, the so-called "Berne Safeguard Clause," com-

plicated the relationship between the two agreements. Any nation leaving the Berne Union in favor of the UCC automatically forfeited protection by UCC in Berne nations. Intended to hinder mass defection from the Berne Union, it was a mechanism effectively paralyzing the international copyright community and a major source of contention in later discussions.[39]

In Brussels 1948, Sweden, one of the few nations that emerged from WW II more or less unharmed, volunteered to host the subsequent revision conference. When the Swedish delegate Sture Petrén extended his invitation, he underlined that the Nordic countries had a common legal tradition with "big windows open to the exterior."[40] No doubt, he referred to the fact that small countries needed to embrace the outside world in order to avoid isolation. An alternative and less benign reading could instead see "big windows" as nothing but a glossed-up euphemism for a mind-set that during many years made Sweden a pariah in the nascent international copyright community.

But those ignominious days were long gone. Other challenges eclipsed the troubles caused by translation in print culture's mono-medial setting. The international copyright community now faced the realities of a new scenario, framed by new technology, new communication channels, and a new world order. Also, evolving copyright doctrine had concluded, as in Stephen P. Ladas well-known overview on the Berne Convention *The International Protection of Literary and Artistic Property* from 1938, that the assimilation of translation rights in 1908 was an "achievement in international legislation" that was "one of the most remarkable in the field."[41] Published thirty years following what he considered the crowning achievement of the international copyright community to date, Ladas repeated Renault's verdict on the Japanese pro-

posal almost verbatim, concluding that the "ingenious argument" of the Japanese "was false at its basis."[42]

If we look at the history of freedom of translation so far, and view it as consisting also of texts such as Ladas', texts that narrate and interpret events for the next copyright generation, how should we understand the fact that Ladas in a sense writes the history of the winning team? Rediscovering the largely forgotten interventions from Sweden and Japan on freedom of translation therefore represents more than archeological excavation. It also stands as an important reminder to query what histories that have been written out of the history of copyright.

The arguments in favor of freedom of translation put forward by Sweden and Norway at the end of the nineteenth-century resurfaced thanks to the Japanese in 1908.[43] The European response to the Japanese proposal was representative of the anxieties with which the "exporting" nations met the interests of the "importing" nations, and it "foreshadowed later, and more radical, opinions on the question of translations that were to be expressed by developing countries nearly sixty years later at the Stockholm Conference."[44] Somewhat ironically, in 1967, it would be up to Sweden, the former freedom of translation advocate and French adversary to assume responsibility for the matter in the international copyright community.

# THREE
## TRANSLATING KNOWLEDGE: STOCKHOLM, 1967

One participant has described the fourth revision conference in Stockholm, which took place at the Swedish Parliament between June 11 and July 14, 1967, as "the worst experience in the history of international copyright conventions."[1] Stockholm marked the culmination of several years' of discussion on the viability of the international copyright regime to accommodate the needs of developing nations. Essential to the dissemination of knowledge, translation once again reappeared as a contentious topic. Despite monumental changes in technology and governance, the Stockholm Conference would demonstrate that translation had lost none of its powerful impact on authors, publishers, texts, and readers.

The purpose of this chapter is to address the key rhetorical strategies engendered by translation during the Stockholm Conference, particularly as they played out between developed and developing nations at the time. Such a perspective is particularly relevant, I argue, because it reaffirms how international copyright relations have always been inscribed within a

colonial grid, developed in the intersection of law and language.

Both a problem and a possibility, copyright was of paramount importance in an embryonic knowledge economy. On the one hand, it raised artificial barriers that made the influx of culture and science more difficult, but on the other hand, copyright could encourage local production of culture and knowledge. This tension extended into the substratum of the Convention and came to a head over the chauvinistic so-called colonial clause, which had extended the reach of the Convention by incorporating dominions and colonies of the original European signatories by proxy. Following decolonization, newly independent states had to affirm (alternatively denounce) their loyalty to the Convention by declarations of "continued adherence."[2] Before considering the Stockholm conference in detail, however, we need to understand something of the copyright landscape following decolonialization in the early 1960s, when newly independent states sought to replace colonial legal regimes with new laws, sensitive to their current situation.[3]

**Brazzaville, August 1963**

The first and arguably most important of the numerous meetings taking place in preparation for the Stockholm Conference was the African Study Meeting on Copyright in Brazzaville in August 1963, jointly organized by BIRPI and UNESCO.[4] Twenty-three African nations sent delegates. In addition, there were six non-governmental organizations (NGOs) including the ALAI and the International Confederation of Societies of Authors and Composers (CISAC), three non-African states, and significantly, two "experts" present. Swedish Supreme Court Justice Torwald Hesser, architect of the 1967 Stock-

holm Conference, was one of them, and Eugene Ulmer, Professor at the Institute of Copyright Law, University of Munich, the other. In a sense, Hesser and Ulmer's legal expertise provided the sounding board for the discussion. They delineated the history and justification of various topics within the intellectual property system, then there were questions and comments from the African delegates and in conclusion, Hesser and Ulmer weighed the concerns of developing nations against their interpretation of what the law allowed or not. It is worth noting that both legal authorities came from civil-law countries. Given this circumstance, there is a certain logic in Hesser's later observation that inspiration for the African Model Copyright Laws came from the continental European legal tradition and that rules from the Anglo-Saxon copyright tradition failed to receive support.[5]

At Brazzaville, African states stated clearly that they desired access to the best works of other nations, but that they also intended to export their own.[6] Indeed, the language used during the meeting identifying the particular African experience of import/export would set the tone for what was to come in Stockholm. When the delegates turned to issues of international copyright relations, the Tunisian representative began his statement by making an association with food:

> 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.[7]

The quote encapsulates something of the contradictory position taken by developing nations at the time. Of the two intellectual foodstuffs, it is the second, the "fruits of imported knowledge," for which Africa must not overpay. On the other

end of the import/export spectrum lie cultural heritage and folklore, both of which should be encouraged. Recognized both as "millénaire" and as a base for new "créations originales contemporaines,"[8] the tendency to associate folklore with the "ancient" and imported knowledge with the up-to-date, entrenched developing nations further into a dichotomy between the old and the new.

The Brazzaville meeting ended by noting the injustices of the copyright system and concluded that international copyright conventions benefited exporting nations. Of the three recommendations made by the delegates, the last one is perhaps the most noteworthy. First, it considered significant protection of folklore and the free use of copyrighted works for educational purposes together.[9] Second, folklore and cultural "heritage constitutes not only a source of inspiration for the cultural and social development of the peoples of the different African states, but contain also a potential for economic expansion susceptible of being exploited for the profit of citizens of each state."[10] At least in this respect, developing nations considered themselves potential exporters rather than importers. As the momentum on developing nations and copyright continued apace between the meeting in Brazzaville and the one in Stockholm, the geopolitical friction between export/import only accelerated.[11]

**Stockholm, 1967**

What then, could the international delegates expect of the host nation Sweden in 1967? In the shadows of the more illustrious year that followed, 1967 lay half-way through the twenty-year period—between the end of the 1950s and the beginning of the 1980s—that Kjell Östberg refers to as "the Long '1968'." More precisely, 1967 belongs to the 1965-1970

"red" period, characterized by protests against the Vietnam War and the rise of new social movements.[12]

More than eighty years earlier, Alfred Lagerheim had traveled to Berne promoting the interests of Sweden as a developing nation, dependent on access to culture, knowledge, and information in order to advance national goals. He did his best to convince his European counterparts of the validity of his arguments and urged them to finalize a Convention affording copyright levels that were not too steep for his country to accept. He failed. By 1967, however, Sweden had been a signatory of the Berne Convention for more than sixty years and was a paragon of development and social welfare.

All the work done on the development dilemma by the Swedish government in preparation for the Stockholm Conference coalesced in one key document: the Protocol Regarding Developing Countries (henceforth "the Protocol"). In the draft version sent out before the conference, it was suggested that developing nations could declare reservations in five areas: "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."[13]

The Protocol encapsulated the growing presence of the Third World in Swedish consciousness and public life. During the 1960s, Swedish media increasingly allotted space to the fate of developing nations, and the number of periodicals published by the solidarity movement was impressive: infrequent as their publication may have been, MPLA in Angola and Frelimo in Mozambique and Biafra had their own bulletins, as did a broad spectrum of Third World countries.[14] Reports, news, and documentaries from Africa and Asia penetrated media, books, and newspapers. In her book *Att ge den andra sidan röst* (2004), Annika Olsson analyzes the complicated strategies

whereby public intellectuals, as they debated the Vietnam war and documented life in distant Chinese villages, engaged in a particular kind of ventriloquism, "speaking on behalf of" those who had no voice for themselves.[15] The same self-proclaimed ability provided perhaps an impetus for the content of the Protocol, with Sweden translating and exporting its identity as a small nation/small language into a politics at least in theory sensitive enough to "speak for" developing nations.

On the home front, political and public awareness of the situation for developing nations mixed good intentions with condescension. On the international stage, Sweden capitalized on its status as a small, neutral, and progressive state so as to emerge as both critic and mediator in World Politics. It was precisely the peripheral European location, precisely the linguistic isolation of speaking a language understood by a handful of millions, and precisely the rapid economic growth channeled into the famous Swedish Model, that made Sweden seem more modern and more international than many other nations at the time. Partly justified, partly naively complacent, Swedish self-esteem permitted proactive criticism of other nation-states (notably at this particular period, of the U.S. war in Vietnam), while simultaneously creating an identity as mediator on the international stage, participating in peacekeeping missions and hosting international conferences.[16]

The Stockholm Diplomatic Conference is a perfect example of how, in the 1960s, the world comes to Sweden, but also how Sweden comes to the world. On that second aspect, aid was one especially important component, given the aim of the conference. In 1965, Torwald Hesser framed the question of the expansion of intellectual property rights into developing nations as one where the needs of developing nations and the encouragement of foreign investment happily must co-exist. For Hesser, the proposals that the Swedish government was

planning to present to the Conference were "entirely in conformity with the traditional policy of Sweden in helping the developing nations."[17] A national preoccupation with the Third World might explain something of the motivation behind the Swedish government and BIRPI's discussion on the underlying principle behind organizing the revision conferences. "Improvements intended to perfect the system of the Union," now meant not only

> the enlargement of the protection granted to authors by the creation of new rights or by the extension of rights which are already recognized, but also the general development of copyright by reforms intended to make the rules relating to it easier to apply and to adapt them to the social, technical, and economic conditions of contemporary society.[18]

The objective of the Conference, then, was not only to create new rights or enlarge those already established into new areas, but also to consider the reformation of copyright. There was a distinct historical symmetry in having Sweden, a developing nation in the early years of the Berne Convention, now host a conference where the question of developing nations was at the top of the agenda. The legitimacy of the Berne Union was called into question by the competing UCC and the power balance within the Union had begun to shift in favor of developing nations, now constituting twenty-four of the Union's fifty-seven members. The stage was set for a turbulent diplomatic encounter in this quiet corner of the world.

**In Committee II: June 21-July 8, 1967**

It would be the task of Committee II, first convened on June 21, to tie up the many loose ends of the draft Protocol and turn them into a cohesive text. The following narrative does

not detail each intervention during the altogether ten meetings held by the Committee between June 21 and July 8, but rather highlights a few key elements in the import/export continuum as they came to the fore in the discussion on the Protocol.

Almost immediately following the obligatory first official statements, the UNESCO delegate framed the Protocol provisions within a familiar triangle of aid, hunger, and food. While the book supply amounted to approximately 2,000 pages per person a year in Europe and North America, in India the average tallied 23 pages per person per year. Hard-core data made the challenges more concrete, but also the solution something of a foregone conclusion. To measure and name the great divide between the haves and the have-nots as one of abundance in one end and shortage in the other corroborated the standard narrative of flows of knowledge as always beginning at the metropolitan centers and then being transmitted out to the periphery of the colonies. Never mind that the trajectory quite often began with the collecting of knowledge in the periphery, then was subjected to scrutiny and reassembly in the centers of calculation in London or Paris, and then moved out again—the idea that knowledge was overfull at one end and absent at the other would be remarkably resilient. It provided a blueprint for mechanisms of knowledge transfer as always one-directional rather than back-and forthish, but even more importantly, tied them to a particular kind of receptacle. Bruno Latour would rank the material object in question among his "inscription devices,"[19] but most of us perhaps know it better by another name: "the book."

"India as a nation ran the risk of dying intellectually and spiritually if the prevailing book famine was not checked,"[20] UNESCO continued. Books were a matter of life and death, and just as surely as food would be the solution to famine,

saturating developing nations in printed matter would help eradicate "book hunger" and redress "the intolerable shortage of books."[21] Not texts, not readers, but *books* were in short supply. The subtext of the scarcity problem led to an almost fetishistic preoccupation with the book rather than with the inaccessibility of content or the dangers of illiteracy. Faced with such a pervasive construct, it is refreshing to come across the notion of "reading hunger" in a UNESCO report from 1973. *La faim de lire* was prepared by Robert Escarpit, who came to epitomize 1970s *sociologie de literature*, and Ronald E. Barker of the British Publishing Association. The report ended with a "Chartre du livre" where the first article stipulated, "Everybody has a right to read."[22] Although the report appears to have left few imprints on the wider copyright narrative, its suggested recalibration of starvation from books to reading at least anticipates a more recent concern with users and user's' rights.

It might be just a coincidence that among all the developing nations present in Stockholm, UNESCO singled out India as an example of the kind of fate that might befall countries dispossessed of books. Then again, it could have been a very conscious choice. Chaired by Minister of Education Shere Singh, and with Registrar of Copyright T.S. Krishnamurti as an active discussant, India had secured a towering presence in Committee II. Firmly committed to the success of the Protocol, India for instance recommended developed nations to establish a redistribution scheme channeling one cost—their marketing expenditures for exports of books—into another—a fund offsetting the costs involved in the use of said books by developing nations.[23]

Outspokenly skeptical of the Protocol, the UK stood as India's main antagonist in Committee II.[24] France, too, had serious misgivings. The reservations set forth in the Protocol, they

argued, must not be constructed in such a way that they risked compromising "a structure which it had taken 80 years to build," and any changes that "distort the spirit and undermine the foundations of the Berne Convention,"[25] were unacceptable. This type of argument had cropped up many years earlier, in 1908, when Albert Osterrieth feared that the Japanese proposal for freedom of translation risked destroying the same, carefully erected but essentially exclusionary, system.

Of course, it is hardly surprising that France would rally to the defense of strong author's rights to protect what they see as the spirit of the Convention, nor that they would play the card of universal applicability of this principle, claiming such rights to be indispensable to all countries, regardless of their level of development. Dethroned from the linguistic and cultural supremacy that once gave them the upper hand in the creation of the Convention and Union, the French now witnessed the rise of English as new lingua franca of diplomatic relations. As if that was not problematic enough, there was an even greater danger on the horizon. The law materializes in the intersection of culture and language and the escalating linguistic presence of English paired with the legal ascendancy of copyright might, by extension, usurp the French language and *droit d'auteur* both.[26]

Some Stockholm participants viewed the Convention "one of the most completely perfect instruments in private international law."[27] This focus on the "perfect instrument," and the Convention as valuable in its own right, partly salvaged the troubled premise of how to defend rights positioned as universal but perceived of as partisan. The collective known as Authors could do the rest. Without authors, no intellectual or artistic progress was possible and without ample protection, there would be no authors.[28] Several countries took this position in favor of the status quo, and not only the expected ones.

At first blush, Mexico's support of the Berne spirit might seem surprising. Expanding the territorial reach of the Convention must never serve as justification for its deterioration, Mexico argued, and adopting the Stockholm Protocol meant that the "very existence of copyright would indeed be endangered."[29]

The UK definitely shared Mexico's concerns. William Wallace from the Trade Department began his opening statement by addressing the problems and challenges of developing nations, nations on which the UK had spent "millions of pounds in economic aid." Trying to pull their weight helping developing nations manage copyright, the UK had "operated a scheme under which low-priced textbooks containing up-to-date knowledge in a plentiful variety of subjects were made available to many developing countries of Africa and Asia."[30] The Protocol, however, did not signify "aid in the normal sense," but rather meant the "giving away of the property of a part only of the community, namely, the authors."[31] Within an author-centered context such as Berne, the UK had no other option than to place authors, and not publishers, as Protocol victims. Paradoxically, then, the strong author-based system in Berne provide the author-centered France as well as the copyright publishing lobby in the anti-Protocol UK with the arguments needed to maintain the status quo.

CISAC and the International Writers Guild (IWG) opposed the tenets of the Protocol on similar grounds. Misguided and misdirected, in their view, the Protocol posed a serious threat to the interests of authors in both exporting and importing nations. IWG ended their intervention encouraging developing nations to consider the wellbeing of their own national authors in a situation where these enjoyed only minimal protection. Lower copyright levels will clearly harm foreign authors, but will definitely cause even greater injury to any ambitions fostering authorship in developing nations.[32] Such an

argument again deflected the copyright question from being about access and reading and translated it into one of investment and incentives, predicated on the universal plight of authors. If authors were disenfranchised in developed nations, how could disenfranchising authors in developing nations be the answer to the copyright problem?

For very different reasons, the placeholders of the two major legal systems present at Berne—France and the UK—both ended up universalizing authors' rights of remuneration and encouragement, but failed to do the same for readers or consumers' rights to access and use. The Senegalese delegate on the other hand, tried a different strategy when he noted that "cultural borrowings were characteristic of all cultures." Use, however, would be far more difficult to universalize than authorship, and even more problematic was to question the innate value of property. Developing nations respected human rights "and particularly the right of ownership," he continued, but "nowhere was the absolute character of the latter acknowledged."[33] Interpreted against the backdrop of the debate in Committee II, which increasingly veered towards education and knowledge, the Senegalese export-potential in "not only seeking to borrow but also to give" yielded in Stockholm to an increasing emphasis on developing nations "importing" identity. Even India helped place a higher value on books by referring to these as "more essential kind of works."[34]

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The European Broadcasting Union (EBU) was an NGO with a slightly different take on the Protocol. Less developed nations, the delegate noted, provided a huge market for "books which were out of date in the developed countries." Supporting the non-exclusive license for translation set out in the Protocol, he

believed this "would allow developing nations to publish books in their national languages, without in any way preventing the author from publishing a translation himself."[35] Although the vision of developing nations happily receiving books more or less worthless on the original market strikes a slightly false note and smells of knowledge dumping, the EBU statement nonetheless takes us back to the critical issue of translation.

I mentioned previously that Article V of the UCC provided a compulsory licensing scheme for translations. In preparation for the Stockholm Conference, India took the initiative to secure a similar caveat in the Berne Convention.[36] The reservations regarding translations in the draft Protocol had been set at a similar level as that of the UCC, but a group of developing nations felt it was inadequate, and instead submitted a counterproposal. Proposal S/160 went further than the draft Protocol and provided for the ending of translation rights within a set period and for a highly detailed compulsory licensing scheme.[37]

As the work in Committee II progressed, it was increasingly clear that the translation issue widened the rift between exporting and importing nations even further. This was especially so following the overlaps that began to form between translation and education. Increasingly the first language of scholarly communication, English did not suffice when it came to a wider dissemination of textbooks in developing nations, where a wealth of local languages required translators as well as translations. The prominence placed on knowledge, education, and textbooks accentuated the importance and dangers of translation. In the nineteenth century, the French actively sought the assimilation of translation rights into reproduction rights. Legal protection at least gave the impression that control over an inherently destabilizing activity was possible. In fiction, where the translated work potentially could claim the

same qualities of style, originality, and narrative voice as the original, the question of fidelity or betrayal was one thing. It was quite another when it came to educational materials, textbooks and science, where translation was both perceived of as less creative, more bound by the source-text and above all, often was the property of the publisher, and not the author.

Controlling knowledge was big business already in the mid-1960s. With educational publishing a profitable sector, UK publishers had invested heavily in markets now becoming independent. The Stockholm Protocol, if ratified, threatened to pull the carpet from under an industry that paid lip service to the necessity of indigenous publishing and authorship, while being highly reluctant to abandon a possibly lucrative future market where they already had secured a foothold. 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.[38] For all its insignificance in monetary terms, it was still an important textual territory. In 1963, Rex Collings, an editor with the Overseas Editorial Department of Oxford University Press, wrote about his experiences in Ghana:

> Yet in Ghana one can buy—I have myself bought them—cheap, obviously heavily-subsidised, Russian books with comparative ease: not only the inevitable books on politics and economics but gaily illustrated children's books as well […]. Propaganda, of course, the books are, for they are there to demonstrate that Russia can produce and export cheap books whilst the West, Britain in particular, operating through capitalist publishers—for so the Communist argument runs—is more concerned with making a large profit out of the books

> she sells to a poor and struggling people than with providing inexpensive reading matter.[39]

If the USSR engaged in propaganda at the expense of the UK, the other Cold-War protagonist, the U.S., also relied on books to disseminate values under the pretext of development and aid. Financed by the United States Information Agency (USIA), The Franklin Book Programs participated at UNESCO-sponsored events and organized themselves meetings on copyright and developing nations.[40]

Collings, for one, later opposed the Stockholm Protocol by stressing the negative impact it would have on encouraging local authors. "The imported voice rather than the authentic local one will be heard. This is a disaster,"[41] he wrote. The projected losses in case of an implemented Protocol—set at £ 10–12 million or a quarter of total earnings annually—referred to publishers, not authors.[42]

Supporting and building a national publishing industry was a cornerstone of the pro-copyright argument, and commentators saw a failure to protect copyright as a direct threat to the promotion of a local publishing industry serving growing educational needs.[43] Yet, the statistics and experiences from the African market were discouraging. Post-independence African publishing houses were often small and heavily state-subsidized, and more to the point, dependent on an infrastructure set in place during colonial rule. British presence was not diminished but rather reinforced by the setting up of joint ventures that provided know-how and training while offsetting some of the local costs, but that kept largely intact the colonial presence and dependency.[44] Even *The Times* worried that the best markets of British publishers included nations that were likely to take advantage of the Protocol and the "legalized piracy" it afforded in the educational sector.[45]

Despite all the controversies and heated interchanges, the Conference managed to produce a final Act and Protocol. It was very far from being an unqualified success, however. The UK government did not make the whole edifice crumble by voting against the Stockholm Act, but they abstained from voting altogether. Mexico and Uruguay followed suit, but France now sided with Protocol defenders. As expected, closing speeches from July 14 were civil, diplomatic, and praised Swedish efficiency as well as summer weather.

While the Swedish hosts preferred to remember a conference that took place in "a spirit of excellent international cooperation,"[46] history came down hard on the Stockholm Conference. The judgment on the Protocol would be harder still. "[G]rossly defective in meeting the needs of developing nations, while at the same time highly objectionable to the more advanced countries," legal commentators judged it "nearly a complete failure."[47] For the first time, the Union had become 'politicized,' Sam Ricketson and Jane C. Ginsburg note, and its continued survival uncertain.[48]

In the UK, the barrage of criticism launched from publishers and copyright societies only intensified following the Conference. Copyright interest groups wanted to make sure that the British government stayed firm, did not ratify the Protocol, and adequately protected British interests. *The Times* even indicated that a lawsuit from publishers against the State for loss of revenue might be forthcoming in case the Government for whatever reason went back on their word.[49]

Incensed with the British performance in Stockholm, Alan Herbert, Chairman of the Copyright Council, identified three main problems ahead. First, the decision not to vote was a decision that "admitted a delayed-action bomb of dangerous principle into the flagship of Copyright," putting ideas into "dangerous heads." His second criticism was that "politics, *for-*

*eign* politics" had guided a decision based not on "conviction but cowardice." Finally, he noted, "anyone joining a copyright club must fully observe its rules."[50] Ironically, while the word "club" in Herbert's universe appeals to something akin to a presumed shared spirit of sportsmanship, African states had previously used exactly the same term in conjunction with a quite different set of values, indicating that Berne membership was reserved for the wealthy and initiated.[51] The question now was what rules the club was supposed to set for the future and who would be allowed to join it.

**Paris 1971 (and beyond)**

Any post-Stockholm stalemate soon turned into action.[52] During the next four years, BIRPI and UNESCO jointly convened several meetings with the express purpose of achieving simultaneous revisions of the Berne Convention and the UCC. All the topics in the Protocol were on the table, including the future fate of the Safeguard Clause, which developing nations for obvious reasons wanted to remove.[53] Even the highly critical UK publishing industry and the copyright lobby changed their tune and looked confidently ahead to the new Revision Conference scheduled for Paris 1971.[54] The Paris Revision Conference substantially modified the reservations from the Stockholm Protocol and placed them in an appendix to the Paris Act. In doing so, they managed to produce a text longer than the original Berne Act.[55]

If developing nations had been successful securing their outlook on licenses and educational uses in the 1967 Protocol, 1971 concessions instead seems to have favored the publishing industry. Developed nations were concerned, for instance, that countries taking advantage of the license might engage in exports back to the country of origin.[56] Excluded from the scheme altogether were the major exporting languages English, French, and Span-

ish, with an overshadowing linguistic presence on the book market that made the licensing scheme basically moot. Already the UCC was a cumbersome vehicle with a number of administrative procedures to negotiate, in addition to which the non-exclusive nature of the reservations made incentives for investing in translation low. Compulsory licensing obviously intended to lessen, not add to, the administrative burden. Yet, the overall impression of the different licen-sing schemes discussed during this period is not one of facili-tating the situation for developing nations. Instead, they produced an extremely dense and complicated framework that stands as evidence of a more structural realignment in Berne from informal beginnings to an increasingly formalized system.[57] The fact that after twenty years, no single UCC license had been issued, or, that to date, basically no nation has availed itself of the provisions in the Paris Act appendix, indicates perhaps some of the costs involved.[58]

For an anti-Protocol hardliner like the UK, the Paris Revision Conference was a godsend. For India, previously threatening to withdraw from international copyright conventions alto-gether unless the UK accepted the Stockholm Protocol within six months,[59] Paris was a disappointment. Undoubtedly, as Sam Ricketson and Jane C. Ginsburg write, the events in Stockholm "threatened to break up the entire international copyright system."[60] As it turned out, those five weeks of intense negotiations did not cause the undoing of the Convention. On the contrary.

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Together with the Stockholm Protocol, a satellite "disconnected from its orbit,"[61] and the UCC, "wholly peripheral to the current international copyright framework,"[62] the Berne Convention may look like another dusty old relic from the cemetery where intellectual property texts go to die. Nothing

could be further from the truth. The Convention remains a living document in the global, contemporary trade-based intellectual property regime of the World Trade Organization (WTO) and its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Indeed, if Silke von Lewinski is correct, "the Berne Convention has experienced the strongest boost in its 'career' through the incorporation of its substantative law into the TRIPS Agreement and into bilateral and regional trade agreements."[63]

At the end of the nineteenth century, a European diplomatic and aristocratic elite articulated the concerns of vested stakeholders like authors, publishers, and readers. In 1884, 1885, and 1886 a handful of nations formulated the original Berne Convention. Those present, moreover, represented a diplomatic elite. Fifty-seven states and more than 400 NGOs were present in Stockholm in the summer of 1967. In 2011, WIPO counts 184 member nations and over 250 NGOs among those who burn the midnight oil debating the minutiae of intellectual property rights in Geneva.[64]

Translation is perhaps no longer the controversial topic it once was, but the "pathological process in the construction of IP relations between developed and developing nations,"[65] remains as important as it always has. Daniel Gervais describes the present trade-based intellectual property rights regime as being pressured by challenges from "the Very Old and the Very New."[66] Demands to protect traditional knowledge and folklore represent the first category; digital piracy, peer-to-peer networks, and bit-torrent sites like the Pirate Bay the second. What opens up in-between the two is a geopolitical minefield flanked by developed and developing nations, where Very New information technologies bring Very Old conflicts to light.

# CONCLUSION
## TOWARDS A COSMOPOLITAN COPYRIGHT

I want to begin this conclusion by returning to the points raised in the introduction, where I listed three reasons why the combination of translation and copyright provides a creative research terrain. First, there was the fact that translation calls into question the stability of the work. Second, that it provides new perspectives on authorship as well as ownership, and third, that it so clearly illustrates an ongoing geopolitical power struggle in international copyright that placed the interests of "importing" nations against those of "exporting" ones. From the end of the nineteenth century until today, translation has highlighted the multifaceted legal dimensions associated with the inherent instability of cultural works, the proliferation of authorship, and the tensions between major and minor languages, producers and users, and import and export. Rather than evolving on separate tracks in copyright history, these elements were intertwined then and they will continue to be so in the future.

"As translation interprets the original for different audiences, it provides for its continued flourishing and, in the process, for the future of national and transnational cultures."[1]

Sandra Berman's quote illustrates neatly why translation was both an opportunity and a threat to the nascent international copyright community. The primary mode by which authors multiplied their works internationally but by extension also reached new readers, translation was an intrinsic part of nineteenth-century print culture and, by proxy, of an emerging international copyright regime.[2]

On the one hand, translation was the most obvious vehicle by which authors became *international* authors. Not only did it enable the exponential diffusion of the work, but it also provided for the exponential growth of readers. This was the upside of the translation coin. On the downside, it was unclear to the diplomats during the first Berne conferences how to accommodate translation within the distinction they needed to uphold between original and copy. Piracy within the same language—for instance, in the American-British reprinting culture—was clearly the site of controversy and conflict. Translation, however, generated a set of different and even more acute concerns in the relationship between authors and readers relating to questions of authorization and control vis-à-vis the work, rather than the market. Reprinting was one thing, translation quite another. The risk of losing linguistic control over the work provided a stronger incentive to emphasize the inherent value of the original source-language text and the need for a controlled conversion into a faithful target-language version.

The interdependency between old and new works was at the core of the debate on translation in the diplomatic conferences in Berne and remains one of the contentious issues in the present framework of copyright and digitization. "Mashing-up"—"taking a digital media file containing any or all of text, graphics, audio, video and animation drawn from pre-existing sources, to create a new derivative work"—and "sampling"—

"the act of taking a portion, or sample, of one sound recording and reusing it as an instrument or a different sound recording of a song"—are two cases of "appropriation"—"the use of borrowed elements in the creation of new work"—an activity with a long and illustrious history.[3] Borrowing, adapting, abridging, translating, appropriating, and even copying, these transformative practices are historically, linguistically, and legally situated.

Translation is one of the first such destabilizing activities that undermine the perceived stability of cultural works. This was so in no small part because it required that another author—the translator—entered in-between author and reader and turned the relationship into a threesome. Translation sets in motion a contradictory and ongoing expansion of authorship, the repercussions of which we encounter almost daily in the present copyright wars. Translators, editors, and indexers are now authors, and because they are, they help destabilize the traditional view of authorship and the fixity of the work. At the same time, they expand the scope of what copyright protects, which creates about as many problems as it solves.[4]

Anxieties regarding the stability of the work coalesced in the question of translation's true owner: the author or the reader. Because readers were absent from direct representation we know them only indirectly, or, rather, we know them in the shape and form they take when producer as well as usernations speak for them. The most obvious "author/owner" of all, the translator, remained invisible at the diplomatic conferences until 1908, when he or she was no longer only a tool for the original author, but an independent creator in her or his own right. At this stage, the translator was often a "she," autonomous in one respect, yet resolutely pushed into the background in others. Stephen P. Ladas saw the full recognition of translation rights in Berlin in 1908 as "sufficient proof

of the soundness of the view which opposed freedom of translation. The only juristic argument, that translation is an independent intellectual creation, is obviously erroneous."[5] Ladas sounded very sure of himself; translations were derivative and not original works.

On a more geopolitical level, translation acted as a conduit for tensions between center/periphery, between import/export, and between user/producer. In that sense, the Swedish "culture of translation," resembled the American "culture of reprinting" described by Meredith McGill. Behind the rhetoric of the public interest in the dissemination of knowledge lurked a protectionist policy favoring printers and publishers.

In 1967, translation acted as a catalyst for disagreements between developed and developing nations, between the interests of producing and consuming nations, between exporters and importers, between major and minor languages. One of the more significant points discussed in Stockholm was the question of knowledge in the context of import/export, one which tended to situate developing nations as importers, as recipients of a knowledge ultimately produced somewhere else. Of course, knowledge and cultural heritage was already there in developing nations, but its form was unrecognizable to a legal regime biased in favor of traditional print culture and optimized for copyright. When the Brazzaville meeting connected the dots and articulated the possibility of exporting, they planted a first seed for what was to come in the WIPO Development Agenda from 2007, where developing nations pursue the question of proprietary rights in genetic resources, traditional knowledge, and folklore, "as an opportunity for requiring protection of resources that they have in relative abundance."[6]

All these conflicts have migrated from the printed page to digital space, but we still struggle with the question of how to understand the original/copy division, we continue to take an interest in authorship and its relationship to ownership, and we do so while the conflicts between developed and developing nations continue to mount in today's global negotiations on copyright and intellectual property.

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Let me end on a slightly more speculative note, and suggest that all of the translation trajectories I have traced so far also offer the potential for a productive critique of the epistemologies at play in copyright scholarship. The final use of translation in this book operates therefore on an important meta-level, suggesting that translation is a process integral to interdisciplinary work. I am deeply sympathetic to Alan Watson's claims that borrowing is "the main way law develops."[7] Borrowing, of course, is also what takes place when we engage in the "epistemological translation" between disciplines. Copyright scholarship has developed into a huge interdisciplinary field, and yet we are still "translating" between what in a sense is seen as the scholarly "source language" (the law) and the various "target languages" surrounding law, be they comparative literature or political science.

That law occupies a privileged place in the study of copyright is perhaps not so strange, after all. What is more challenging, however, is to understand the consequences of this fact when we consider how the history of international copyright is told. Tentatively, one can ask whether we see the same tensions between import/export and user/producer also in the shaping of interdisciplinary copyright scholarship, and if so, what this might mean?

My question follows in part from what Silke von Lewinski writes in her 2008 book, *International Copyright Law and Policy* and where she notes that, "it may be worthwhile studying whether the prevalence of the English language has had an impact on the perception of this field of law, or given rise to a possibly enhanced influence of 'copyright thinking'."[8] The "copyright thinking" von Lewinski primarily refers to results from a legal and linguistic sea change that has taken us from the Convention's French and continental beginnings to the present convergence between copyright and trade, where, as she writes, "the USA has exercised increased influence on international copyright law and strongly pushed for recognition of elements of the copyright system."[9] In extension, 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,"[10] have cemented their power with the aid of an interface that is not so much territorial as it is symbolic: language.

In the beginning there was France the nation-state, French, the language, and *droit d'auteur*, French law. It is one of the striking features of the early negotiations in Berne that they take place in a completely monolingual setting. The lingua franca of diplomatic relations, French was the language of the spoken interventions and of the proceedings. No interpreters appear present and I have encountered no objections to this monolingual setting. The history I have outlined documents a transition from French to English, from the early roots in *droit d'auteur* to the present copyright hegemony. Today, the Berne Convention has both English and French as authentic texts, but before the 1948 Brussels Act, the French text was the only authentic one. Art 37(1)c of the Berne Convention still provides for the primacy of the French text.[11] If French was the lingua franca of the emerging Berne and Paris Conventions,

English dominates the era of WTO and TRIPS. French interests and the French language led nineteenth-century ip ideologies. Conversely, the present trade-based intellectual property regime appears substantially driven by U.S. interests and speaks English.

The most important consequence of "copyright thinking," however, is epistemological. Indeed, one can question whether the combined hegemony of the English language and English law has not led to a powerful producer-nation storyline where the empire of Anglo-Canadian-Colonial-Australian-American family relations provides an influential model for the narrative on international copyright history. No doubt, this is an oversimplification in both the linguistic and legal senses, because such hegemony is neither uncontested nor all-encompassing.[12] The history of international copyright is not the history of the internationalization of *copyright*, but it is sometimes easy to get that impression.

The most worrying effect of the monolingual tendency is that it produces a mono-epistemological outlook, a skewed history where alternative experiences, told in other languages and offering other interpretative frameworks remain unaccounted for. One way of correcting this problem, I believe, is to work towards a more comparative stance in intellectual property scholarship. Lawrence Venuti has criticized the linguistic tradition in translation studies for being fussy and giving the impression that truth is in the details.[13] For analogous reasons, Pierre Legrand has criticized comparative legal studies for its positivist leanings, its obsession with *praxis*.[14] Nonetheless, translation studies and comparative legal studies studies both have the potential to say important things about translation as well as copyright.[15] This is so because they can help us think critically about geographies of interdisciplinarity that may have something to do with the geographies of intellectual

property. Recognizing such a decisive correlation might, in turn, help remedy the "intensely national orientation" in the study of law.[16]

If a "cosmopolitan polycentricity,"[17] is to have an impact on future copyright scholarship, we need to interrogate critically not only the lacunas that exists in the history of international copyright, but constantly be vigilant about the perspectives we deploy (or leave out) in writing that history. Some stories get told over and over again; others are never told. It is a challenge for future research to investigate how these processes function, and, if we believe in a more cosmopolitan copyright history, also recapture experiences rendered invisible.

Pierre Legrand once made an analogy between legal and literary translation by drawing attention to the fact that "in both instances, texts are intentional and relational. In both instances, the meaning of the original is assumed not to reside wholly within the original itself. In both instances, there are silences to be addressed."[18] Hopefully, his insight reminds us that the silences we must address include epistemological silences.

# *Notes*

The quote by Pierre Legrand on the front page is from "Issues in the Translatability of Law," 42. All urls were last checked on March 21, 2011.

## INTRODUCTION: TREATY, TEXT, TRANSLATION

1. Anyone interested in the history of the Berne Convention cannot do without Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* and von Lewinski, *International Copyright Law and Policy*. Published at the time of the Convention centennial, BIRPI, *La Convention de Berne* is another useful resource.

2. An important point made by Silke von Lewinski, *International Copyright*, vii. See also Alexander Peukert's discussion on the term "intellectual property," in *Encyclopedia of European Private Law*, 6.

3. Conferences in Paris 1896 and Berne 1914 only produced additional Acts, and are therefore not revision conferences. Following the original 1886 conference, revision conferences took place in Berlin 1908, Rome 1928, Brussels 1948, Stockholm 1967, and finally, Paris 1971.

4. The 1886 Berne Convention explicitly mentioned the formation of a bureau to handle administrative tasks. Modeled on an already existing such entity formed three years previously with the Paris Convention, the two officially merged on November 11, 1892, and became known by the French acronym BIRPI. The World Intellectual Property Organization (WIPO) is known as L'Organisation Mondiale de la Propriété Intellectuelle (OMPI) in French. In 1974, WIPO became an organization within the United Nations. http://www.wipo.org. Compare also the discussions regarding setting up the Bureau of the International Publisher's Association at the fourth Congress in 1902, where Leipzig lost out to Berne, partly because Berne was considered more international and partly because of the proximity to BIRPI. See Guedes, *International Publishers Association*, 141-49.

5. The fact that "no negotiation on a new substantive treaty in the field of intellectual property was successfully concluded" between 1971 (the Paris revision) and 1994 (TRIPS), also supports the 1971 cut-off dates. Gervais, "The Internationalization of Intellectual Property," 942.

6. Vignes, "Aide au développement," 722.

7. Roman Jakobson identifies three main types of translation: "intralingual translation or *rewording* (the interpretation of verbal signs by means of other signs of the same language); interlingual translation or *translation proper* (the interpretation of verbal signs by means of other signs of the some other language); and finally intersemiotic translation or *transmutation* (the interpretation of verbal signs by means of signs of nonverbal sign systems)." Jakobson, "On Linguistic Aspects of Translation," 114.

8. Munday, *Introducing Translation Studies*, 1. Munday's book offers a comprehensive introduction to the field. Venuti, *The Translation Studies Reader*, provides access to a broad selection of relevant texts and Pym, *Exploring Translation Theories*, is another recent overview. Snell-Hornby, *The Turns of Translation Studies* is a personal take on the development of translation studies.

9. Salah Basalamah is perhaps the most notable exception to the rule. See, for instance, *Le droit de traduire* and "Aux sources des normes." In law, see Legrand, "Issues in the Translatability of Law," and in translation studies, Venuti, *The Scandals of Translation*, 47-66.

10. Because intellectual property scholarship tends to use these concepts rather than the alternative "the global north/south," I have decided to keep the same terminology.

11. Basalamah, "Translation Rights," 118.

12. Appiah, *Cosmopolitanism*, xxi.

13. Bassnett and Trivedi, "Introduction," 2.

## FREEDOM OF TRANSLATION: BERNE, 1884-1886

1. Moretti, *Atlas of the European Novel*, 184, 74.

2. Ricketson and Ginsburg, *International Copyright*, 1:67.

3. 8-19 September 1884, 7-18 September 1885 and 6-9 September 1886. All translations from French or Swedish are my own. The original quotes have been omitted in the notes because of lack of space, but can of course be consulted in the primary sources.

4. Louis Renault quoted in "Actes 1896," 168.

5. For an overview of the bilateral agreements of the era, see von Lewinski, *International Copyright Law and Policy*, 14-23 and Ricketson and Ginsburg, *International Copyright*, 27-40. Silke von Lewinski argues that bilateral agreements have enjoyed a renaissance within the current trade-dominated intellectual property regime, especially on part of the U.S. von Lewinski, *International Copyright Law and Policy*, 350-52.

6. Ricketson and Ginsburg, *International Copyright*, 1:40.

7. "Rapport et Décret sur la Contrefaçon d'Ouvrages étrangers" (1852). Primary Sources on Copyright (1450-1900).

8. Although there is no doubt that Hugo in that keynote advocated the party line and argued for the importance of an international agreement on copyright, in the discussions that followed during the rest of the conference he very vocally came to the defense of *le domain public*. On Hugo and international copyright, see chapter one and six in Hemmungs Wirtén, *No Trespassing*. Catherine Seville is one of the few who notes the importance of Hugo's position on the public domain, and she writes that "Hugo seemed more preoccupied with the public domain than with perpetuity." Seville, *The Internationalisation of Copyright Law*, 59 note 42.

9. Beginning with the Treaty of Westphalia, October 24, 1648, 32 multilateral agreements were signed during the 17th century, 68 during the 18th century, and 425 during the 19th century. This is my own estimate based on the information in Wiktor, *Multilateral Treaty Calendar 1648-1995*.

10. On the global intersection of technology, politics, and media of the time, see Winseck and Pike, *Communication and Empire*.

11. The sixteen delegates present represented Germany, Austria-Hungary, Belgium, France, Great Britain, Haiti, Holland, Sweden, Norway, and, of course, Switzerland. To my knowledge, not much has been made of these congresses in scholarship on copyright history. However, for an

exception, see Bellido, "Copyright Law in Latin America," esp. chapter four. See also Bannerman, "Canada and the Berne Convention: 1886-1971," and in respect to the ILO and child labor, Dahlén, *The Negotiable Child*.

12. As Bellido points out, there was a significant interchange of people between the ALAI and the Berne framework. Bellido, "Copyright Law," 186. The same observation holds true for for contacts with The International Publishers Association (IPA, founded in 1896). Guedes, *International Publishers Association*.
13. Bellido, "Copyright Law," 173.
14. Altermatt, "On Special Mission," 317.
15. *Actes 1884*, 21.
16. Ibid., 23.
17. Ibid., 31.
18. Ibid., 11.
19. Ibid., 31.
20. Högsta domstolens protokoll, November 22, 1876.
21. For an overview of the Swedish position vis-à-vis translation rights, see Eberstein, *Den Svenska Författarrätten*, 79-87. For a more recent study on the history of Swedish copyright more generally, see Fredriksson, *Skapandets Rätt*. One of the reasons why the U.S. was late coming into Berne was the fact that formal registration was required for U.S. copyright, whereas Berne was based on non-formalities. Some critics of copyright expansionism suggest that registration and other forms of requirements may help limit the damages of too broad and easily obtained copyrights. See for instance Lessig, *Free Culture*.
22. *Actes 1884*, 32.
23. Ibid., 48.
24. "Authorisation," in *OED*, "the conferment of legality; formal warrant, or sanction. In *Le Robert*, "Autoriser," "rendre licite."
25. *Actes 1884*, 48.

26. Ibid.

27. As *Burnet v. Chetwood* concerned the unauthorized translation of the public domain *Archaeologiae Philosohicae*, no living author was compromised. See Green, *The Trouble with Ownership*, 147-49. Meredith McGill notes that only a handful of the more than 120 copyright cases tried in the United States between 1840 and 1880 concerned authors of books; many instead involved playwrights and other categories of authors. McGill, "Copyright," 169. This does not preclude translation from being considered, but from her list of selected cases 1834-1880, only *Stowe v. Thomas* appears to concern translation directly (170-172).

28. *Stowe v. Thomas*, 23 Fed. Cas 201 (1853). For a longer discussion on the case, see Boggs, *Transnationalism and American Literature*, 127-49 and Homestead, *American Women Authors*, 105-49.

29. Otto Reventlow quoted in Homestead, *American Women Authors*, 127. In the case of Harriet Beecher Stowe and Calvin Stowe, Colleen Glenney Boggs notes their interest and proficiency in foreign languages, *Transnationalism and American Literature*, 131.

30. *Stowe v. Thomas*, 206.

31. Ibid., 203.

32. Ibid., 205.

33. Ibid., 207.

34. Svedjedal, *Bokens Samhälle* 1: 211.

35. *Actes 1884*, 68.

36. Ibid., 49. In the final vote, three were in favor of the French proposal (France, Haiti, Switzerland), six voted against (Germany, Austria, Hungary, Costa-Rica, Sweden, and Norway) with Belgium, Great Britain, and Holland abstaining. Six nations voted in favor of the suggested article 6 in its entirety (Germany, Costa-Rica, France, Sweden, Norway and Switzerland) against three (Austria, Hungary, and Haiti). Belgium, Great Britain, and Holland abstained.

37. *Actes 1885*, 61.

38. For an overview of this process, see Ginsburg and Kernochan, "One Hundred and Two Years Later."

39. *Actes 1885*, 60.

40. The history of the international dimension of Anglo-American copyright relations has been discussed in detail by a number of scholars, see for instance Khan, *The Democratization of Invention*, 222-87 and McGill, *American Literature*, 76-108. For a useful comparision of the major copyright enactments in the United States and Great Britain 1790-1981, see McGill, "Copyright," 160-63.

41. McGill, *American Literature*, 82.

42. Boggs, *Transnationalism*, 127. On the importance of translation to the novel/nation state matrix during the eighteenth-century, see Mary Helen McMurran, "National or Transnational?," 66. See also Colleen Glenney Boggs interesting discussion on the linguistic politics of the U.S. in *Transnationalism*, 148-9.

43. For an extensive discussion on Dickens and his U.S. tour, see McGill, *American Literature*, 109-40.

44. For a comprehensive overview of the interests of Dickens and other British authors and publishers in relation to the U.S at this point, see Seville, *The Internationalisation of Copyright Law*, 146-252. On Conrad, see Towheed, "Geneva v. Saint Petersburg," and on Whitman and Twain, Buinicki, *Negotiating Copyright*.

45. Buinicki, "Walt Whitman," 251.

46. Ibid.: 258.

47. Whitman quoted in Buinicki, *Negotiating Copyright*, 130. Diplomacy at this time was certainly an aristocratic undertaking Whitman no doubt would have found alien to his own project.

48. Mösslang and Riotte, "Introduction," 12-14. Compare also with Homestead's discussion on Carey's view of treaty-making as favoring "presidential powers" on the expense of the "people's representatives in Congress." Homestead, *American Women Authors*, 116.

49. *Actes 1885*, 20.

50. *Actes 1884*, 78.

51. *Actes 1885*, 28.

52. Belgium, Spain, France, Haiti and Tunisia voted for complete assimilation, Germany, Honduras, Italy, Sweden, Norway, and Switzerland against. Sweden, Norway, Germany, Spain, and Honduras were in favor of keeping the three-year rule, and lost with only one vote to France, Belgium, Haiti, Italy, Switzerland, Tunisia. *Actes 1885*, 44.

53. Ibid., 62.

54. Both Canada and India opted out of Berne. On Canada, see Nair, "The Copyright Act of 1889," and Seville, *The Internationalisation of Copyright Law*, 78-145. On India, see Bently, "Copyright, Translations."

55. *Actes 1885*, 63.

56. Baetzmann, "De l'état," 7.

57. Högsta domstolens protokoll, July 22, 1892. Reported in "Jurisprudence. Suède," 27.

58. According to a 1901 estimate, Germany was by far the most important market for Swedish authors in translation, see Svedjedal, *Bokens Samhälle*, 191 and Eberstein, *Den Svenska Författarrätten*, 85-86. For a general overview of the Swedish move towards Berne, see Svedjedal, *Bokens Samhälle*, 190-213.

59. "Pays Scandinaves," 118.

60. *Actes 1885*, 26.

61. Quoted in Baetzmann, "De l'état," 11.

62. Homestead, *American Women Authors*, 115.

## OTHERS-IN-LAW: DIFFERENCE TRANSLATED

1. Apter, *The Translation Zone*, 5. One is reminded also of Mary-Louise Pratt's "contact zone" from *Imperial Eyes*.

2. Liu, "Legislating the Universal," 134.

3. Legrand, "What 'Legal Transplants?'," 60.

4. Eliot, "Has Book History a Future?," 14.

5. The term refraction is often associated with André Lefevere. See for instance "Mother Courage's Cucumbers."
6. von Lewinski, *International Copyright Law and Policy*, 4.
7. Chromá, "Semantic and Legal Interpretation," 304. Legal translation, translation of language for special purposes (LSP), would be other terms. See Baker and Saldanha, *Routledge Encyclopedia of Translation Studies*, 246-49.
8. Sarcevic, *New Approach to Legal Translation*, 195.
9. Legrand, "Issues in the Translatability of Law," 34.
10. *Actes 1884*, 38.
11. Bermann, "Introduction," 6.
12. "Pays Scandinaves," 117. For a longer contemporaneous overview of the position of the three Scandinavian countries to the Berne Convention at the end of the nineteenth centruy, see "Le mouvement."
13. *Actes 1908*, 78.
14. Ibid., 201-03.
15. Ibid., 201.
16. Ibid., 202.
17. "Le Japon," 126.
18. Nickles, "US Diplomatic Etiquette," 308-12.
19. "Le Japon," 126.
20. Ibid., 128.
21. Sarcevic, *New Approach to Legal Translation*, 11.
22. Osterrieth, "Mémoire," 26. I have italicized the languages instead of attempting a translation.
23. Joseph, "Indeterminacy, Translation and the Law," 18.
24. Sarcevic, *New Approach to Legal Translation*, 204.
25. See the entry on Renault in Abrams, *The Nobel Peace Prize*, 62-64.

26. *Actes 1908*, 248.

27. Ibid., 248.

28. "Adversaires/partisans," is from Osterrieth, "Mémoire," 24. For an overview of the two rights, see Radojkovic, "Le droit de traduction." At the time of the Paris revision conference in 1971, French commentators expressed surprise at the fact that this issue was not solved once and for all at Berlin. See Majoros, "Position moderne."

29. *Actes 1908*, 166-67.

30. Apter, *The Translation Zone*, 10. Even so, the status of the translator varies and is sometimes on a par with the author translated. Gayatri Chakravorty Spivak's translations of Derrida comes to mind. See Spivak, "The Politics of Translation." See also Delisle, *Portraits de Traducteurs* and *Portraits de Traductrices*, and of course Venuti, *The Translator's Invisibility*.

31. "Nouvelles diverses. Allemagne," 156.

32. Basalamah, "Translation Rights," 122.

33. For an overview of the Pan-American Conventions, see Ricketson and Ginsburg, *International Copyright*, 2:1169-213.

34. On the "culture of reprinting," see McGill, *American Literature*. For comprehensive overviews, see Ringer, "The Role of the United States," 1054-60 and Jaszi and Woodmansee, "Copyright in Transition."

35. Honig, "International Copyright Protection," 218.

36. UNESCO, "The Administrative Obstacles," 1.

37. Ricketson and Ginsburg, *International Copyright*, 886. Ricketson and Ginsburg also stress that this actually provided a less generous reservation than what was allowed under the Berne Brussels Act.

38. For a good overview of the work done by UNESCO leading up to the UCC and especially details on the U.S. policies at the time, see James, "The United States."

39. Ricketson and Ginsburg, *International Copyright*, 2:1189-90.

40. Sture Petrén, quoted in *Documents de la Conférence*, 87.

41. Ladas, *The International Protection*, 1:368.

42. Ibid., 379.

43. Ricketson and Ginsburg however refer to an expert meeting in Brussels in 1938, when the Japanese again raised the issue of freedom of translation. See Ricketson and Ginsburg, *International Copyright*, 2:1183.

44. Ricketson and Ginsburg, *International Copyright*, 1:98.

## TRANSLATING KNOWLEDGE: STOCKHOLM, 1967

1. Ringer, "Role Of," 1070. Barbara A. Ringer was Assistant Registrar of Copyrights at the Library of Congress and member of the U.S. delegation in Stockholm.

2. See Deere, *The Implementation Game* for a very illuminating account of this history. Ruth L Okediji interprets these standardized forms as important tools supporting the colonial apparatus. Okediji, "The International Relations," 330-31.

3. Ruth Okediji makes an important point when she questions our preconceptions regarding an absolute separation between indigenous custom and European law, and instead underscores their hybridization in forming colonial legal regimes, Okediji, "The International Relations."

4. For the report from the Brazzaville meeting, see Ntahokaja, "Réunion."

5. Hesser, "Det Immateriella Rättsskyddet," 160. In 1967, Percy Jarrett, Vice-Chairman of the British Copyright Council, called the Model laws "deplorable" and as "authorizing the stealing of other people's property." Jarrett, "Why Piracy of Books is Wrong."

6. Ntahokaja, "Réunion," 250.

7. Statement from Tunisia. Ibid.: 256.

8. Ibid., 253.

9. Ntahokaja, "Réunion," 258.

10. Ibid., 259.

11. For an overview of the preparatory work following Brazzaville, see Ricketson and Ginsburg, *International Copyright*, 2:890-94. The website of the Knowledge Ecology International provides a valuable timeline for events leading up to the Stockholm Conference based on Johnson, "The Origins of." http://keionline.org/node/983.

12. Östberg, "Sweden and the Long '1968'," 339.

13. WIPO, *Records*, 18. Of course, reservations were not new to Berne, but had a long history – especially perhaps as pertains translations. See Ricketson and Ginsburg, *International Copyright*, 2:884.

14. Östberg, "Sweden and the Long '1968'," 342.

15. She also shows how these tendencies relate to a crisis on the book market. See Olsson, *Att ge den andra sidan röst*, 42-52.

16. Bjereld, "Critic or Mediator?"

17. Hesser, "Det Immateriella Rättsskyddet," 168.

18. WIPO, *Records*, 10.

19. Inscription devices "transform pieces of matter into written documents." Latour and Woolgar, *Laboratory Life*, 51. My favorite description of these processes is Bruno Latour's delightful account of Laperouse's travels in *Science in Action*.

20. WIPO, *Records*, 2:948, 1993.3. For additional statistics on the book market during the period, see Escarpit and Barker, *La faim de lire*. In view of the discourse on hunger and famine, it is slightly disconcerting to read Svante Bergström's account of the work done in Committee I, where he elaborates the analogy with a *smörgåsbord* in some detail. Bergström, "Kommitté I," 7.

21. Stuevold Lassen, "Komité II," 32. The "intolerable shortage of books" is from brief presentation of the Ranfurly Library Service in Rudd, "Ranfurly Library Service," n.p.

22. Escarpit and Barker, *La faim de lire*, 165.

23. WIPO, *Records*, 2:948, 1993.7. Ricketson and Ginsburg trace India's involvement back to the beginning of the 1960s and the UNESCO General Conference in 1960. Ricketson and Ginsburg, *International Copyright*, 2:887.

24. According to Barbara A. Ringer, "most of the real decisions were made in camera, between the principal negotiators from India and the United Kingdom. Ringer, "Role Of," 1070.

25. WIPO, *Records*, 2:949, 1994.2-3.

26. In 1973, Robert Escarpit noted that "le mot anglais "copyright" (droit d'auteur en français) est en réalité une fausse appellation." […] L'expression française "droit d'auteur", qui signifie en fait "le droit de l'auteur", est beaucoup plus exacte." Escarpit and Barker, *La faim de lire*, 97. One of the few contemporaneous instances mentioning the ascent of the English language is Bergström, "Kommitté I," 10.

27. WIPO, *Records*, 2:950, 1997.1.

28. WIPO, *Records*, 2:949, 1995.3.

29. WIPO, *Records*, 2:949, 1995.4. Carolyn Deere notes that Latin American countries were more inclined to modify and develop new intellectual property legislation, which possibly could explain the Mexican standpoint. See Deere, *The Implementation Game*, 39. Stuevold Lassen, "Komité II," 37, notes that Mexico (also representing Argentina and Uruguay) was one of the UK's strongest supporters.

30. WIPO, *Records*, 2:950, 1996.2.

31. WIPO, *Records*, 2:950, 1996.5.

32. WIPO, *Records*, 2:955, 2014.4-5.

33. WIPO, *Records*, 2:951, 1998.

34. WIPO, *Records*, 2:948, 1993.10.

35. WIPO, *Records*, 2:955, 2016.1. Ricketson and Ginsburg also note the consistently positive attitude of the EBU during the deliberations at Brazzaville, Ricketson and Ginsburg, *International Copyright*, 2:889.

36. Basalamah, "Compulsory Licensing for Translation," 507. Basalamah's article provides a good overview of compulsory licensing within Berne history.

37. WIPO, *Records*, 702.S/160. These various options on translation prompted the Committee to form a special working group for this topic, comprised of India, the Ivory Coast, Tunisia, Czechoslovakia, France, Sweden, and the United Kingdom. The fact that Sweden, and

not Israel, is elected to this group will cause a diplomatic incident with Israel threatening to disrupt the proceedings completely. The day after forming the working group, the Israeli delegate asks for an adjournment to the following week, clearly upset that the long and detailed document where Israel had made its position on the Protocol clear and also suggested solutions to the Protocol problem had not secured them a place in the working group.

38. Statistics from UNESCO, "Book Development in Africa," 8-9.

39. Collings, "Books in the Market-Place," 405-06. For more on Rex Collings and OUP in the African market at the time, see Davis, "The Politics of Postcolonial Publishing." Interestingly enough, in 1975, Keith Smith noted "the absence of an indigenous commercial industry in all countries except Ghana." Smith, "Who Controls?," 146.

40. A brief report prepared in 1966 by Homayoun Sanati, the Director of the Franklin Book Program in Teheran outlined the issue of translation and copyright. Sanati, "Translation and Copyright." For a recent, and illuminating account of the Franklin Book Program, see Robbins, "Publishing American Values."

41. Collings, "Writers in Africa," 9.

42. "Publishers May Sue State," n.p.

43. See for instance Kennedy, "Copyright and the Developing Nations."

44. Publishers like Macmillan received criticism for their publishing strategies. See Smith, "Who Controls?," 145-46. Noted also by UNESCO, "Book Development in Africa," 25. For an overview of the situation for developing nations at the end of the 1980s, see Altbach, *The Knowledge Context*.

45. "Books on the Cheap," 9.

46. Sterner, "Inledning," 1.

47. Olian, "International Copyright," 101.

48. Ricketson and Ginsburg, *International Copyright*, 914.

49. "Publishers May Sue State." See also the brief comments from various stakeholders in "The Government's Decision on Copyright."

50. Herbert, "Britain's Role in Copyright Decision," 9.

51. WIPO, *Records*, 2:952, 2004. The representative from the Cote d'Ivoire noted that the African nations meeting at the 1963 Brazzaville meeting "had felt that the members of the Berne Union constituted a club of more fortunate countries in which they had no place." The Tunisian representative underlined that the conferences were aimed at revisions. Special treatment in the Convention was nothing extraordinary, and the "purpose of the Convention was to establish a Union and not a kind of club consisting of States apparently in agreement but in fact opposed to each other because of divergent interests. Ibid., 2:951, 1999.

52. Ricketson and Ginsburg, *International Copyright*, 2:914. For a detailed exposé of all the meetings convened after Stockholm, see Ibid., 2:916-24.

53. See Danelius, "U-Länderna Och Upphovsrätten."

54. Herbert, "International Copyright," 7. See also the joint statement from a number of copyright societies in "International Copyright of Books," 7.

55. Ricketson and Ginsburg, *International Copyright*, 2:957.

56. Basalamah, "Compulsory Licensing," 520. See also Ndiaye, "The Berne Convention," 54.

57. Noted by Okediji, "The International Relations," and Basalamah, "Compulsory Licensing," 519.

58. Olian, "International Copyright," 96. Ricketson and Ginsburg, *International Copyright*, 2:957.

59. Shah, "India," 647. Stuevold Lassen noted India's threats during the Conference, but also saw India as the absolute winner [absolute seierherre] of the Stockholm Conference. "Komité II," 37.

60. Ricketson and Ginsburg, *International Copyright*, 2:883.

61. Danelius, "U-Länderna Och Upphovsrätten," 76.

62. Ricketson and Ginsburg, *International Copyright*, 2:1203.

63. von Lewinski, *International Copyright Law and Policy*, 585. As Ricketson and Ginsburg note, the bilateral tendency has been especially strong on the part of the United States. Ricketson and C. Ginsburg, *International Copyright*, 172.

64. For information on the current member nations of WTO and WIPO, see www.wto.org and www.wipo.int.

65. Okediji, "History Lessons," 152.

66. Gervais, "The Internationalization of Intellectual Property." It is of course important not to interpret Gervais' Old and New as distinct binary categories without overlaps. In addition to being useful conceptual markers however, they also highlight how two different scholarly topics in intellectual property law achieve varying levels of "public-ness." The "New" copyright problems associated with digitization have reached a larger constituency of readers via works by Lawrence Lessig, James Boyle, and Yochai Benkler, to name but a few. The "Old" copyright problems, on the other hand, addressed by for instance, Graham Dutfield, Ruth Okediji, and of course, Daniel Gervais, appear perhaps less immediately accessible and more like an opaque specialist area within the already complex global governance of WTO and WIPO.

## CONCLUSION: TOWARDS A COSMOPOLITAN COPYRIGHT

1. Bermann, "Nation, Language," 6.

2. This is not to say that translation was not a significant part of older print cultures, merely that its legal ramifications become apparent during the 19th century. As Mary Helen McMurran notes, "both as writing practice and a larger conceptual apparatus in translation, translation was central to the eighteenth century's view of the novel. McMurran, "National or Transnational?," 51.

3. All definitions from Wikipedia, www.wikipedia.org.

4. For an illustrative example, see the controversy over the Dead-Sea Scrolls in Lim, MacQueen, and Carmichael, *On Scrolls, Artefacts and Intellectual Property*.

5. Ladas, *The International Protection*, 369.

6. Netanel, "Introduction," 13.

7. Watson, *Legal Transplants*, 118.

8. von Lewinski, *International Copyright Law and Policy*, vii.

9. Ibid., 33-34.

10. Bourdieu, "Deux impérialismes," 148.

11. "In case of differences of opinion on the interpretation of the various texts, the French text shall prevail." http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

12. The experiences of Canada and Australia as narratives of resistance come to mind. On Canada, see Bannerman, "Canada and the Berne Convention," and Nair, "From Fair Dealing to Fair Duty." On Australia, see Atkinson, *The True History of Copyright 1905-2005*.

13. Venuti, "Translating Derrida on Translation," 248-9. Venuti's project has always related to the politics of translation studies, and he refers to what he calls a double academic marginality, a neglect in cultural studies of the materiality of translation, and the lack in translation studies of the "philosophical implications and social effects that accompany every translation practice." Ibid., 241. For an example of the limitations of the empiricist approach when applied to a publishing phenomenon like Harry Potter, see Gillian Lathey, "The Travels of Harry."

14. Legrand, *Le droit comparé*, 11.

15. Munday, "Accounting for an Encounter," 16-17. I am grateful to Marianne Dahlén for reminding me that Pierre Legrand is Canadian and that his experience of two official languages and two legal systems, at least in part explains why his writing is so relevant in this context. The same thing can be said of Salah Basamalah.

16. Wilson, "Comparative Legal Scholarship," 87.

17. Legrand, "On the Singularity of Law," 517.

18. Legrand, "Issues in the Translatability of Law," 37.

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