**Lost in (mis-)translation: when IP law doesn’t always mean what it says**

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In June 2019, Directive 2019/790, ie the Directive on copyright in the Digital Single Market (DSM Directive), entered into force. Individual EU Member States will have 24 months to transpose it into their own laws. Like all other pieces of EU legislation, also the DSM Directive has been translated in all official EU languages. However, the various language versions are not entirely consistent with the version of the directive that was negotiated and eventually adopted.

First, there are instances of material errors in the translations. An example is the current Italian version of Article 17(7) of the DSM Directive. While the English version states that “[t]he cooperation between online content-sharing service providers and rightholders shall *not* result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights” (emphasis added), the Italian version mandates that said cooperation shall result in the prevention of the availability of lawful subject matter.

Second, the various language versions of the directive are not always literal translations of the negotiated English text. If one considers once again Article 17, a softer regime is provided for those online content sharing service providers (OCSSPs) that, together with satisfying other conditions, have "made best efforts to obtain an authorisation" from relevant rightholders for the making available of protected subject matter. Not all the language versions provide a literal translation of the concept of ‘best efforts’. While some language versions correspond to the 'best efforts'/'meilleurs efforts' concept, others entail something else: so, for instance, the Spanish version requires the making of 'greater' efforts, while the Bulgarian, Czech, Dutch, German, Greek, Hungarian, Latvian, Lithuanian, Polish, Portuguese, and Romanian versions require that 'all efforts' be made to obtain a licence. Also the Swedish version requires 'all efforts' be made, but the way the obligation is phrased appears to entail a direct proportionality between the ability to make such efforts and the efforts actually made. The Italian version requires OCSSPs not just to have made their 'best' efforts, but actually their 'greatest' efforts. These differences might present challenges at different levels, including at the national transposition phase of the DSM Directive, compliance, judicial interpretation and application of resulting national provisions.[[2]](#footnote-2)

This would not be something new in the IP field.

A recent example can be drawn from trade mark law. The referral to the Court of Justice of the European Union (CJEU) in *Louboutin*, C-163/16 was made *because* of uncertainties in the interpretation of the concept of ‘shape’ within Article 3(1)(e)(iii) of the Trade Mark Directive 2008/95/EC (now Article 4(1)(e)(iii) Directive 2015/2436). Such uncertainties had been caused by discrepancies in the various language versions of that directive, notably whether the concept of ‘shape’ is limited to three-dimensional elements, or can also encompass two-dimensional elements, like a colour applied in a certain position of a product. The latter would appear to be the case if one considered the German, Dutch and French (but also Italian) versions of that directive. The CJEU answered that the concept of ‘shape’ is not limited to three-dimensional elements. It appears that the referral could have been avoided in its entirety should the language versions of the Trade Mark Directive have left less room for ambiguity.

CJEU case law itself is not immune from problems arising from the various translations of the original French version of a judgment either. So, for instance, in the case of the right of communication to the public in copyright law, from the inconsistent English translations of the adjective ‘incontournable’ in relation to one’s own intervention (alternatively translated as ‘essential’ or ‘indispensable’ intervention), some commentators have inferred that this concept might have different meanings, depending on the adjective used in the English version of the judgment under consideration.

Unsurprisingly, all this shows that in law – including IP law – words do matter. While in ordinary contexts, the choice between using a certain term or, instead, a synonym would not make much difference, in legal language choosing a synonym might not always mean choosing a *synṓnymos* or, at least, it might not mean choosing a term whose meaning is uncontroversially understood by everyone … especially lawyers.

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2. See further at <http://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html> (last accessed on 10 June 2019). [↑](#footnote-ref-2)