

Your own memory?

As TMs begin to be bought and sold on the open market, Ross Smith asks who actually owns them

Computerised translation tools are generally recognised as being an essential resource for any technical translator nowadays, and none more so than translation memory (TM), which has become virtually ubiquitous. This is due to the clear advantages TM offers with respect to the efficient recycling of existing translations, combined with certain terminology and workflow functions.

The wide use of TM systems by major international companies (General Motors, Siemens, Microsoft, Sony, to name a few) in their translation processes has led to the generation of huge numbers of TM files containing millions of translation units. These files come in different formats but they all contain the information needed to generate new translations from the source and target language segments stored in them.

In a world in which specialised translation skills are highly priced, the perception has emerged that the content of these memory files could be of considerable value to professionals with the necessary know-how and technical resources. This has caused a major shift in the way TM files are viewed: rather than being seen as just one component in a set of technical resources used to generate a commercial product (ie the translated document), the idea has now arisen that they can be treated as commodities in themselves, to be sold or licensed to third parties.

The first outlet for TMs as tradable products was set up in 2007 as a joint initiative between MultiLingual Computing Inc and International Writers' Group, under the name TM Marketplace (www.tmmarketplace.com). Its creators use the term "TM assets" to refer to its products. However, certain fundamental

questions remain unanswered, the most significant being the actual ownership of the TMs; deciding who holds the intellectual property (IP) rights' is far from simple.

Identifying the owner

For those of us who actually do the translating, identifying the TM owner may seem simple: we make the TM using our effort and specialised knowledge, therefore the IP rights belong to us. Yet the end-client who is paying for the translation and supplied

file created in the translation process, are they acting legitimately as the legally recognised owners of the file or are they exploiting their dominant position? Owing to the complexity of the issue, there is no consensus among the few legal experts who have expressed an opinion. Two specialist lawyers, one from a private law firm and the other from a government ministry, clearly advocate that TMs belong to the translators who create them. This approach is not shared by a third legal expert from the European Commission, however, who considers that ownership should be shared 50-50 between translator and client.

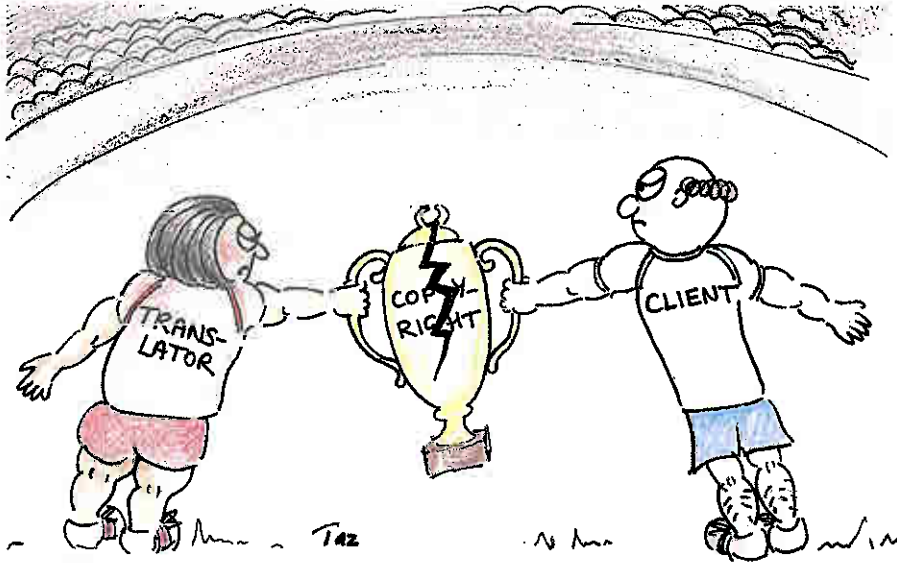
This discrepancy is not due to a lack of specific legislation (in any EU member state, local laws, EU Directives and various international treaties can be invoked), but to the nature of TMs themselves, and the manner in which information is segmented and stored by them.

To qualify for intellectual property protection, a written work has to be original and of a certain size. The kind of documents that are translated using TM systems are not usually composed of language that can be regarded as original or attributable to a specific author or entity. For instance, no one can claim IP rights to phrases such as "profits have fallen by 12 percent" or "insert the card in the left-hand slot". At the same time, the TM program dissects the source document into segments which, at most, are a sentence long and therefore are disqualified from IP protection. These are the main arguments employed to advocate, from a legal viewpoint, that the translator who creates the TM also owns it.

When an agency or client instructs a translator to deliver a TM file are they acting legitimately?

the source document may see things as being equally simple: the clients create the source documents and buy the translations, so it is not logical that the relevant TMs, which contain both, should also belong to them? In some cases, there will also be a third party involved, namely a translation agency or company, which may have generated the TM and therefore regards itself to be the lawful owner of the relevant IP rights.

We can restrict the number of potential owners of a TM to three: the translator,² the translation buyer (client), and any agency involved. But when an agency or corporate client instructs a translator to deliver the TM



The translator's claim to the IP rights is further boosted by the time-honoured "sweat of one's brow" argument, whereby the TM should be regarded as belonging to the translator because it is the product of his or her own effort and specialised knowledge. This position is supported by the fact that a TM is a kind of database, and under EU law (European Parliament and Council Directive 96/9/EC) it is the investment in time and money made to compile and store the most frequently used sentences and phrases of a database that is protected, not the author's creative effort. However, while this legislation governs the formation and structure of databases, it does not provide any protection for their content.

Furthermore, some experts argue that, while it is true that the source document is atomised within the translation memory and each segment cannot be regarded as an original creation, the source text as a whole remains inside the relevant TM file and could be re-generated at any time. From this perspective, the "source text" half of the TM continues to belong to the client as it has not undergone any significant transformation, while the "target text" half belongs to the translator.

To further complicate the matter, many TMs contain source document segments from a number of different authors (and sometimes target segments by different translators as well), which could mean that there are several owners. Clearly, it is too early to offer a conclusive solution, and the debate will probably continue until some particularly conflictive matter ends up in court and a legal precedent is set.

Protecting your assests

Some translation service companies require freelancers to hand in the specific TM used in a project, which they then deliver to their own clients. In this way, in the words of one such company, clients can keep their hands on their "translation family jewels".

Some translators may feel comfortable with this arrangement, especially for large, lucrative jobs; others may not. If the translator refuses to hand over a TM file there is little the agency can do, but the translator's

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standing with that service provider may well suffer and payment problems could ensue.

The ownership of any TM generated during the translation process must, therefore, be agreed in writing with the agency or client before any work commences. A provision for joint ownership is also an option in cases where an agency supplies a TM that has been created *ad hoc* for use in a specific project, but which is subsequently augmented and perhaps improved by the translator.

Freelance translators may not wish to enter into a specific agreement with a client governing TM ownership because they are fearful that forcing the client to focus on this

unfamiliar area, which may seem rather daunting from a technical and legal perspective, could have an adverse effect on their business. This may be true; on the other hand, translation service users are becoming more aware of the technical resources available to translators and educating them a little in this area could be beneficial. In any event, as things stand at present in this fascinating but highly complex field,³ a prior written agreement is the best option in order to avoid any subsequent conflict.

Notes

1 According to the World Intellectual Property Organisation (WIPO), intellectual property can be broadly defined as the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Copyright is one main branch of IP; the other concerns industrial property

2 It should be noted that if the translator is a salaried employee, under most national laws the IP rights will pass automatically to the employer unless otherwise stipulated in the employment contract

3 To find out more, visit www.telefonica.net/web2/rossko/INTELLECTUAL_PROPERTY_AND_TRANSLATION_TOOLS.htm

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