

Copyright, open access and translation

To ensure that information is widely available to end-users, it is important that, where relevant, research results should be translated into local languages. If smallholder farming communities, local agricultural scientists, and extension bodies in developing countries are to have meaningful access to information, translation is inevitable. To this end, CGIAR's 2013 Open Access Policy encourages the research centres to translate 'key documents and other media into pertinent languages'. It also mandates that 'all versions ... be deposited in suitable repositories and made Open Access'. To meet the goals of open access, the translations should be:

- free of charge,
- in a digital format,
- available as soon as possible, and
- accurate.

One of the problems that CGIAR faces in meeting these goals arises because where material is protected by copyright, the copyright owner has the ability to control whether or not and, if so, under what conditions that work may be translated into another language.

CGIAR's open access policy applies to a range of different outputs including journal articles, reports, books, chapters, videos, audio, and images. Many of these will be protected in copyright law as literary works. One of the fundamental rights given to copyright owners is the right of translation, which allows copyright owners to control translation into local languages. As a result, copyright has the potential to undermine the widespread dissemination of research results.

Where a work is protected by copyright, a work may be translated *without permission* under either (i) the general exceptions to copyright, or (ii) the special provisions for developing countries in relation to translations. Alternatively, (iii) a work may be translated *with permission* under a licence.

(i) General exceptions to copyright protection

While the rights given to the copyright owners of literary works are extensive, they are not absolute. There are a number of limitations placed upon the rights granted to copyright owners. One of the most well known is the fair dealing/fair use defence, which allow the use of copyright protected works, which would otherwise be construed as infringements, provided that the use is 'fair'. The general exceptions are unlikely to provide much assistance in facilitating the translation of copyright-protected works where the copyright owner will not agree to a translation or is imposing unreasonable demands.

(ii) Special laws for developing countries in relation to translations

Under international copyright law, developing countries are able to:

- introduce a compulsory licensing scheme for translations, or
- amend their laws so that translation rights lapse if the rights are not exercised within a ten-year period.

Compulsory licenses for translations:

International copyright law allows countries to replace the right of translation with a system of non-exclusive and non-transferable licenses. Colombia, India, Indonesia, Malaysia, Mexico and the Philippines have introduced compulsorily licensing schemes for translations.

A person who wishes to obtain a licence to translate must make an application to an administrative body to review the application and decide whether to grant the licence. Where the translation is into a language not in general use in a developed country, applicants can apply for a compulsory licence to translate *one year* from the date of the first publication of the original work. Once an applicant has complied with the requisite administrative requirements, they must wait a further nine months before the licence to translate will come into effect. Where a translation has not been published in a language in general use in a country, an applicant can apply for a license for translation *three years* after the date of the first publication of the original work. However, they must wait an additional six months before the licence comes into effect.

The applicant must show that the copyright owner has refused their request to translate the protected work. Where the owner cannot be found, the applicant must show that they exercised due diligence to find the owner. They are also required to send by registered airmail copies of the application for the license to the publisher of the work and to any designated national or international information center.

The compulsory licence scheme is limited to works published in printed or analogous forms of reproduction. A licence to translate should only be granted 'for the purpose of teaching, scholarship or research'. While it is normally not possible to export a translated work, in some cases public bodies are able to export translations to other countries. Copyright owner must receive 'just compensation' for translations, that is consistent with royalties normally paid. The translations should also be 'correct'.

Lapse of translation rights: International copyright law also allows countries to amend their law so that translation rights lapse in the event that they are not exercised within a ten-year period after publication. This option is open to all developing countries, so long as they have *not* introduced compulsory licencing.

Problems with the existing scheme

While international copyright law may appear to provide an effective scheme to facilitate the translation of copyright protected works, the scheme has been widely and justifiably criticised for failing to meet the needs of developing countries.

One of the problems for CGIAR is that research frequently spans a number of countries, with different languages and different copyright laws. While there is a high degree of standardisation in copyright law between different countries, there is still a high degree of diversity. Given that the extent to which a copyright owner is able to control the translation of their works depends on the laws of individual countries, this means that it would be necessary to navigate the intricacies and idiosyncrasies of local laws.

Delays: The fact that the translation rights lapse 10 years after publication means that this option will be of limited use for most scientific publications. While there will be exceptions, the time between initial publication and permissible translation would render the translation of little value. While the time that needs to lapse before a compulsory licence is able to be granted is much better – one or three years, plus

the time for administrative requirements – nonetheless there are a number of problems with the compulsory licencing scheme that limits its usefulness.

Printed Matter: As the compulsory licencing scheme is limited to works published in printed or analogous forms of reproduction, it does not apply to works published online. As a result, it undermines the relevance of the scheme to CGIAR's open access policy that focuses on online digital reproductions.

Administrative burdens: The usefulness of the scheme is undermined by the administrative burdens imposed on parties wishing to make use of the compulsorily licensing scheme.

Cost for access: Given that the countries that introduce a compulsory licencing scheme for translations must ensure that the author is paid 'just compensation', the question arises about payment of the royalty costs? If the end-user is to pay, it will run against the idea of the open access policy that materials should be freely available.

(iii) Licence

Given that neither the general defences in national copyright laws, nor the special options available under International copyright law for translations in developing countries provide any real assistance, there is little that can be done to get around the translation rights given to copyright owners.

As a result, if a CGIAR centre wishes to translate copyright protected material for the purpose of making it openly accessible, they need to obtain prior authorisation from the copyright holder to do so. One of the problems here is that there may be some uncertainty about who owns copyright in the research, particularly where there are a number of authors from different institutions involved.

The question of whether a published work can be translated depends on the terms of the initial research agreement (or contract) and/or the conditions under which the authors of the work were engaged (if any). Where a contract is unclear or does not deal with translation, the only option will be to renegotiate with the relevant copyright owner to allow the translation.

Going forward, it would be advisable if all publishing agreements expressly allowed the translation of copyright protected works where needed.

This fact sheet was produced as part of a collaboration between the CGIAR Consortium and the Australian Centre for Intellectual Property in Agriculture (ACIPA) to research international intellectual property issues relating to agriculture.

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