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TRANSLATION IN LIBEL CASES: REPUTATIONS AT STAKE!

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Abstract: In this paper we examine translation arising in court cases involving reputational damage. A diachronic and tightly focused cross-jurisdictional selection of examples from case law is used to highlight the range of ways in which translation can be employed, blamed, or relied upon by the parties and by the courts, and we glimpse how translations can be a source of libel, a defence against libel, or a gateway to libellous material, how crucial translation can be in protecting or damaging reputations, and how significantly it can

affect a case's outcome. We apply Engberg's lens for communication in legal contexts, distinguishing micro, meso and macro occurrences of translation at publisher/business/individual, judicial, and State levels. Recurring translation-related topics either mooted by courts or arising in our analysis are then outlined, including: competing translations; translation techniques; translator identification; online translation; how the acceptance of jurisdiction may be influenced by translation requirements; and how judges approach decision-making when foreign language documents and translation are involved.

Keywords: Legal translation; translation; defamation; libel; libel tourism; competing translations; reputation; law and literature; online translation; Google Translate; impacts and repercussions of legal translation; weaponization of translation.

TŁUMACZENIE W SPRAWACH O ZNIESŁAWIENIE (PISEMNE): STAWKĄ JEST DOBRE IMIĘ

Abstrakt: W artykule analizie zostają poddane tłumaczenia powstałe w sprawach sądowych o naruszenie dobrego imienia. Przemyślany wybór przykładów omawianych spraw służy podkreśleniu, w jak szeroki sposób tłumaczenia mogą być wykorzystywane w tego typu sprawach przez strony sporu i sądy. Autorzy analizują, w jaki sposób tłumaczenia mogą stać się źródłem zniesławienia, obroną przed zniesławieniem lub furtką do tworzenia zniesławiających materiałów, jak kluczową rolę może odgrywać tłumaczenie w ochronie lub niszczeniu czyjegoś dobrego imienia, oraz jak duży wpływ może mieć na rozstrzygnięcie sprawy sądowej.

Słowa klucze: tłumaczenie prawne i prawnicze; tłumaczenie; zniesławienie; zniesławienie pisemne; turystyka procesowa w sprawach o zniesławienie; tłumaczenia konkurencyjne; dobre imię; prawo i literatura; tłumaczenie online; tłumacz Google; tłumaczenia prawne i prawnicze i ich możliwe następstwa; tłumaczenie jako broń.

1. Introduction

Translation is all about the written word[1]. So is libel. This paper explores that relationship and many of its facets. As noted by Shuy,

[1] We exclude interpreting from the scope of this study, and focus on the written form of defamation, libel, rather than the spoken form of defamation, slander.

language and defamation are intrinsically linked (2010: 10). In the same vein, an English judge[2] has observed, regarding translation:

> Liability for defamation depends on meaning, which is a subtle and nuanced thing. Quite small differences in wording can lead to significantly different meanings. In order to avoid the wrongful imposition of liability, precision is necessary (judgment, §39).

In this paper, we examine reputation-related court cases requiring or ensuing from foreign language translation. More specifically, we focus on libel cases pertaining to the press, other media and to literary works. The reputations concerned are those of individuals, of businesses – including publishers – and also States. In particular, we look at how courts and other key players in the cases treat translation issues, and the kind of expertise, if any, judges call upon in order to reach their decisions[3]. It is important to stress that these matters have scarcely been studied.

Moreover, as Kasirer asserted: "legicentrism [has] distracted translation scholars from studying legal translation as it is practiced in a non-legislative setting" and "most scholarly work on [...] legal translation has used the statute as a model (2000: 339, 352). While, as Engberg notes, legal translation may be:

> [T]ranslation of texts for legal purposes and in legal settings [...] not only prototypical legal texts like statutes and contracts, but also restaurant bills and other texts to be used as evidence, for example in a court case [...] (2002: 375).

This paper, devoted to defamation and reputations, forms part of a wider project examining how legal translation impacts all levels of business, politics and society (Scott and O'Shea 2021a)[4]. As in other sectors that we have researched[5], sums of money at stake can be high,

[2] *Umeyor v Ibe* [2016] EWHC 862 (QB) (20 April 2016).

[3] The authors would like to point out to readers that in this paper italics have been used for emphasis within citations from judgments or academic sources. Unless otherwise stated, emphasis is ours. Italics have also been used as is standard practice for case names.

[4] Given that a large volume of legal translation studies relates to institutional settings, our research explores the 'outstitutional' arena – i.e. translators working outside institutions.

[5] Cross-sector analysis Scott and O'Shea 2021a, medical (Scott and O'Shea 2021b), business, financial and economic risk (Scott and O'Shea 2021c).

but consequences go far beyond their financial impact[6]. Space here only allows us to scratch the surface of the mass of material available and yet to be discovered, and we have therefore opted to include a small selection of concise case summaries in order to give a flavour of the diverse ways in which translation arises in/gives rise to reputation-related litigation[7].

In order to be able to draw comparisons across the subsets of case data and for consistency, we apply to all of the data the same basic framework (Scott and O'Shea 2021a), developed using Engberg's conception of micro, meso and macro levels (2015), to the effects of translation throughout society. Figure 1 shows the application of that framework to reputational settings. Individuals and businesses, at the micro level, may suffer damage to their reputations and be exposed to litigation and/or to financial loss, while at meso level, in determining a legal wrong such as tort or criminal liability, the courts create precedent or case law with sometimes far-reaching effects. Harms for States, at macro level, can encompass trade, tourism or public image, and political position-taking. Cross-jurisdictionally, legal concepts akin to libel can collide and evolve (e.g. Lamalle 2017).

[6] Our cases were heard in Western Europe and relate to parties' litigations, but apropos another jurisdiction it is worth noting that defamation law may also be used as a censorship tool: "For example, in 2013, China's Supreme People's Court and Supreme People's Procuratorate jointly issued a judicial interpretation, which states that individuals can be charged with defamation if the online 'rumours' they create are viewed by 5,000 internet users or reposted more than 500 times, and they can even be prosecuted if the rumours cause 'damage on the national image', 'adverse international effects', or 'other serious harms to social order and the national interest'" (Liu and Wang 2021).

[7] The data discussed in this paper relates to reputation-related cases in the UK and US jurisdictions, and one case in Italy. We adopt the following definition of libel from Jowitt's, a widely respected legal dictionary regularly cited by the English courts: "[f]alse defamatory words, if published, constitute a libel" (Greenberg 2019). For an extensive guide to the incommensurability of legal concepts across legal systems see Matulewska 2013.

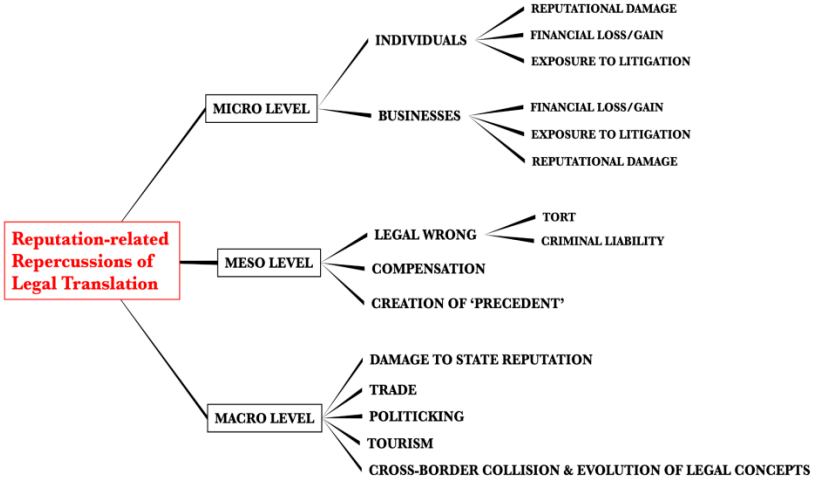

Figure 1. Reputation-related repercussions of legal translation (Scott and O'Shea).

The data in this sample was collected through searches on legal databases for the England & Wales and US jurisdictions, and from academic literature on cross-border libel cases, yielding around 150 cases. From that sample we selected 10 cases over a long timeframe, heard in England (London), Italy (Turin), and America (at federal and State levels), pertaining to 10 language pairs[8] and to 10 countries where facts relied on in the case occurred[9]. Given that the main focus here is to tease out how courts and lawyers approach translation in such cases rather than their legal merits, we have not discussed the latter.

Our examination of these libel cases, involving literary works and the press/online media[10] from the seventeenth century to the twenty-first century, brought to light the relevance and effect of socio-political context. The cases in our sample were heard against a background of: a nascent regulated book trade; colonialism; heightened morality and censorship; the Spanish Civil War; racism and 'hispanics'

[8] Dutch>English, English>French, English>Spanish, Brazilian Portuguese>English, French>English, German>English, Norwegian>English, Serbian>English, Spanish>English, Spanish>Italian.

[9] Brazil, England, France, Germany, Holland, Italy, Norway, Portugal, Serbia, Spain, United States.

[10] Cases involving video media channels deserve separate analysis owing to the broader spectrum of contextual cues.

in America; public awareness and perception of the Nazi Holocaust; tensions between Israel, Trump-led America and Russia; and the growing public abhorrence of money laundering[11]. The more recent cases reflect the growing influence of the online channel as a means to sway public opinion. Since our aim here is how the courts encounter and treat translation, we do not enter into analysis of the surrounding media/political discourses or narratives (for the latter, Bhatia 2017; Breeze 2020; Pontrandolfo 2021).

The diachronic set of cases leads us to ponder how core issues in translation have traversed time largely unchanged. We note the ways in which translation(s) can be adopted, utilized, exploited, deployed, and even misused. We posit that the 'co-opting' of translation(s) to political, moralistic, nationalistic, procedural, pecuniary, or malicious ends should, far from giving cause for 'end-users' to fear a '*traduttore traditore*' (~translator-traitor)[12], provide grounds for respect and esteem for, and empowerment of, the expert translator and their profession. In today's translation practice, including the judicial sphere, the translator is often reduced to a negligible link in a long outsourced chain of service providers and intermediaries (Scott 2019). Conversely, in the scenarios we present in this paper, translation, the translator, and translated term(s) are often the central themes of the case – albeit little understood and, in many cases, negligently assessed.

2. Translation in reputation-related cases - examples from case law

In the following section we discuss examples of how translation and the law interact in a diachronic selection of 10 court cases pertaining to reputations. A summary of the cases in this section can be found in the Appendix, including source/target language, translation makers, reason the original translation was performed, the purpose or effect of the translation, translation issues brought before courts, competing translations supplied, how courts reached their decisions, reputation-

[11] e.g., 'Panama Papers' https://www.icij.org/investigations/panama-papers, 'FINCEN files' https://www.icij.org/tags/fincen-files, 'Pandora Papers' https://www.icij.org/investigations/pandora-papers.
[12] e.g. (Davie 2012, comment posted September 30).

related repercussions at all levels, as well as case outcomes. As can be seen from the case descriptions and as outlined in the Appendix, all of these 10 cases have micro-level impacts and several have impacts at meso and macro levels.

2.1 Translated word(s) held to damage the libelled party's reputation

"Elizabeth Mayor on the attack: Calls Hispanics 'Pigs'"[13] (1987)

The dilemma of whether a translation into Spanish had rendered a word libellous was the subject of the American case *Dunn v Gannett*[14]. The appeal court examined whether the target term "*cerdos*" attributed by the Spanish-language newspaper *El Diario-La Prensa* to Thomas G. Dunn, the mayor of the town of Elizabeth, New Jersey, translated from the source term "litterbugs", constituted libel. The judge noted that:

> [a]n acceptable English translation of '*cerdos*' is "pigs". We are required to determine whether the actual Spanish word or its English translation should be considered in deciding whether actual malice was implicated in the publication (§448).

As elsewhere in this paper, the political context is not insignificant in this case. The amorphous group formed of persons of Spanish-speaking origin constitutes a highly sensitive policy matter in the United States, and a headline exclaiming that a potentially racist mayor had insulted that population would leap off the page.

The judgment notes at §451 that the editorial staff of the newspaper had held a meeting to decide on a suitable headline, and that the editor "explained that the paper faced a problem, because there are no exact Spanish words for litter, litterbug, or litterpig". An affidavit from a second witness was submitted in support of this view. The editor concluded "after considering all of the subtleties of the Spanish

[13] We cite the headline as translated into English in the appeal judgment. The use of the term "hispanic" as the court's translation of the Spanish "*Alcalde de Elizabeth al ataque: LLAMA `CERDOS' A LOS HISPANOS*" could in itself be discussed at length, for example instead of Latinos, but we lack space to do so here.

[14] *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987).

language, the Mayor had called Hispanics 'cerdos', as the word is used in the Spanish language to refer to those who dirty the street by littering". From these explanations we also surmise that the translation was most likely performed by the editorial team and not by a professional translator.

In a footnote to the judgment, the court adds definitions and translations of alternative terms, all taken from *The Collins Spanish-English English-Spanish Dictionary* (1971). In a groundbreaking summing up regarding the question of which language should be selected to assess actionability, the court found "[w]e are not willing to base an actual malice determination solely on the translation to English from Spanish of the language used by the defendant" – i.e. a back translation – and adds the following reasoning:

> [i]f the language is Spanish, we must apply the standard to Spanish. We proceed in this manner because we believe that a translation may not always reflect the nuances and subtleties of the original language (§452).

After discussions of points of law unrelated to the translation issue – in particular an open letter from the Editor-in-Chief implying that Dunn was involved in wrongdoing and embezzlement – the mayor's appeal was dismissed.

2.2 Translation to determine whether words are libellous

2.2.1. "Pillaging at Banco Espirito Santo Angola" (2015)

The Angolan subsidiary of the parent Portuguese bank BES, Banco Espirito Santo Angola (BESA), was the subject of libel (England) and *difamação* (Portugal) proceedings brought by Álvaro Sobrinho, described in the London claim as an "Angolan banker, businessman and philanthropist". He brought both criminal and civil proceedings in Portugal, and only a civil case in the UK.

The case *Sobrinho v Impresa*[15], a libel claim in the High Court of England & Wales, turned on whether a press headline "*Saque no BESA*" should be translated as "Pillaging at BESA" or "Withdrawal from BESA". In 2014, *Expresso*, a weekly newspaper of reference, published an article alleging that Sobrinho had sanctioned a loan of USD $5.7 billion to "unknown borrowers and that there was reason to suspect he had fraudulently misappropriated millions of dollars from BESA"[16]. The newspaper was circulated in Portugal in print and available online as subscriber content, in Portuguese[17].

Translation was so central to this case that the pre-trial judgment opens thus:

> Needless to say, the words complained of are in Portuguese. In a libel action like this, based on words published in a foreign language, the claimant must prove not only the publication of the words in that language but also their *true* English translation (pre-trial judgment, §2).

The pre-trial judge Mr Justice Warby first likened "true" translation to "literal" translation, and then placed native speakers on a par with trained experts:

> the literal translation or the true translation of the words is usually agreed between the parties with the help of native speakers of the language in question who are fluent in both languages, or experts who have acquired skill through training in the foreign language (pre-trial judgment, §3).

> Any evidence of what foreign words mean in English is expert evidence, if it comes from a person who has a basis whether in training or experience sufficient to enable them to give reliable evidence on the issue (pre-trial judgment, §23).

The 'expert evidence' in this case was supplied by two individuals, described as "lay witnesses" (2015 judgment, §26). Online searches we carried out to identify the profiles of the persons named in the judgment revealed that one was a translator and the other an

[15] *Sobrinho v Impresa Publishing SA* [2015] EWHC 3542 (QB).

[16] https://globalfreedomofexpression.columbia.edu/cases/sobrinho-v-impresa-publishing/

[17] It was contended that readers could potentially use Google Translate to read the article in English, although the judge discounted this owing to derisory UK subscriber numbers.

international lawyer. In addition to his ruling on the experts' qualifications and knowledge, the pre-trial judge also rejected a suggestion by the claimant that an expert should be chosen with expertise in the language variant used in Brazil and not the variant used in Portugal, finding that there was no need to differentiate at that stage.

In the judgment handed down in the main proceedings[18], Mr Justice Dingemans noted that there was overall agreement between the claimant's expert and the defendant's expert on the translation of the *Expresso* article, and "much common ground", apart from the headline; he cited a joint statement by the two 'expert' witnesses to the effect that "the word '*saque*' does not translate perfectly into English" (§30) before reaching his own conclusion as to the "proper" or "correct" translation.

The hearing of a libel case in a jurisdiction whose language is not that of the libel is technically more sensitive – in particular giving rise to translation arguments, and it is conceivable[19] that the claimant brought proceedings in London in the hope of a more favourable outcome than in Portugal – a form of 'libel tourism'[20] or 'forum shopping'.

2.2.2. "United States: Israeli Agent targeted by Russian interference investigation" (2019)

The libel case *Soriano v Le Point*[21] brought in London involves an article published in hard copy and on the website of the leading French news magazine *Le Point*. The subject of the piece is Walter Tzvi Soriano, the claimant. The French words complained of, translated by the claimant who, according to the preliminary judgment, was required

[18] *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB) (22 January 2016).
[19] 2016 judgment: "It might have been thought that the most appropriate place to bring these proceedings would have been Portugal given: the language of the article; the fact that the overwhelming majority of the readership was based in Portugal; and given the subject matter of the article" (§34).
[20] "Libel tourism can be broadly described as the phenomenon whereby litigants issue libel claims in inappropriate fora in order to avail themselves of more pro-claimant laws therein" (Larkin 2019: 82).
[21] *Soriano v Societe D'exploitation De L'hebdomadaire Le Point SA & Anor* [2020] EWHC 3121 (QB) (20 November 2020).

by English law to provide a "true and literal translation" in the particulars of claim, read as follows:

> The Claimant is a dangerous and unscrupulous secret agent with close connections to Donald Trump and his circle of advisers and the KGB, who knowingly uses illegal and "offensive" information gathering techniques (such as mobile data interception) and was responsible for spying on the Israeli police who were investigating charges against Prime Minister Benjamin Netanyahu (judgment, §10).

The same paragraph was translated thus by the defendant:

> The Claimant is a private security and intelligence consultant and there are grounds to investigate whether he has directly or indirectly used surveillance, military methods or data interception technology in his work; whether he was involved in the surveillance of police officers investigating President Netanyahu; and whether he was involved in Russia's attempt to interfere in the 2016 election in the USA (judgment, §11).

In introducing the expert evidence, the judge notes: "what matters is the natural and ordinary meaning which would be given to the words complained of by a French speaking reader", and the need to establish "the correct English translation", tasks in which "[t]o some extent" the experts can assist (§12). He also states: "the experts' role is limited. I must be alert to see that they do not exceed it" (§12), without further specifying what such boundaries might be[22]. The experts, UK academics, were respectively Professor of Medieval French Studies at Oxford University and Reader in French Translation Studies at Aston University. It is worth noting that this is the only case so far in our research in which we have found a translation studies scholar called upon as one of the expert witnesses.

In this instance, the experts collaborated in the production of a joint report which sets out points of agreement and of disagreement. Having corrected various points in the translation provided by the claimant, the experts' focus is on distantiation, through the use of "*selon X*" [according to X] and a linguistic strategy specific to French, le "*conditionnel journalistique*" – a conditional tense used to imply that information is not entirely certain, that the author is not the source and

[22] The French Court of Cassation has also referred to limiting the role of translation experts (Monjean-Decaudin 2012).

that the author does not take responsibility for the content. In addition, translations of the terms "(*méthodes dites*) '*offensives*'" [~offensive=insulting versus offensive=military jargon] and "*relais*" [networks versus middlemen/go-between] are discussed in detail.

The bulk of the judgment is devoted to discussing the parties' linguistic arguments. The judge weighs up the meaning(s) of words and the correctness of translations, and at §30 provides his own definitive interpretation of what the litigious words meant. In summing up, the judge dismissed the case, finding that the natural and ordinary meaning for a French reader of the words at issue was not that contended by the claimant.

2.3. Online translation tool as a disseminator of libel

2.3.1. "The state knows who was taking millions to Switzerland" (2015)

Politika is Serbia's oldest national daily broadsheet with a reputation for serious reporting[23], and in 2015 the publisher, as well as its editor and a journalist, faced a misuse of private information and libel case[24] in the High Court of England & Wales brought by Nandi Ahuja, a businessman. Ahuja justified bringing the action before the English courts by arguing that he travelled constantly for his work and that London was the place where he had the closest ties. Those arguments were accepted and libel tourism was discounted by the judge.

Two articles referring to money laundering by an unnamed businessman were the subject of the claim. Circulation was through hard copies in Serbia and neighbouring countries, and worldwide through an openly accessible website. The judgment notes:

> While the words published by the Defendants were all written in the Serbian language, what the Claimant complains of is the publication to readers in the English language. He contends that the words in English can be easily read by persons who are using a search engine to search for references to the Claimant and who, when they see results in

[23] https://medialandscapes.org/country/serbia/media/print.

[24] *Ahuja v Politika Novine I Magazini D.O.O & Ors* [2015] EWHC 3380 (QB) (23 November 2015).

> Serbian, click on the icon which sets in motion Google Translate, or an equivalent application, to produce an immediate translation (judgment, §8).

The first article, illustrated with bundles of euro notes and the HSBC logo, described a bank transfer and referred obliquely to a businessman carrying out money laundering to Switzerland from Serbia. The title of the second was translated by the claimant as "The state knows who was taking millions to Switzerland" while its content refers to an unnamed "tycoon", and includes a reported quote in which the Serbian Prime Minister names Ahuja. The claimant complained both of the release of his private banking information and of the defamatory nature of the articles' wording.

The defendants' counsel submitted that Google Translate could "garble the original" and that there might be "differences in the translations produced for each individual reader" (judgment §65). In finding that the claim could be tried on the point of the Google translation, the judge noted that there was a "direct link to the translation application from the *Politika* website" and also that the translations seemed "better, and more consistent with one another" than in another case, without giving any source for his comparison or reasoning for his assessment of translation quality and consistency between the two cases.

2.3.2. Libel claim as vendetta (2011)

An article published on a Norwegian press agency website was the subject of a case[25] in which a former UK solicitor, Farid El Diwany, brought libel proceedings against a Norwegian journalist, Hansen, and a Norwegian police officer, Torill Sorte. In addition, El Diwany sued the Ministry of Justice and the Police of the Kingdom of Norway on the ground that it was vicariously liable for Ms Sorte's conduct as the ultimate employer of Norwegian police officers. The article described highly offensive criminal harassment by El Diwany of Ms Sorte, ensuing from an investigation of another harassment case for which he was convicted by Norwegian courts twice, in 2001 and 2003. The

[25] *El Diwany v Hansen & Anor* [2011] EWHC 2077 (QB) (29 July 2011).

harassment followed an investigation of El Diwany that she carried out during the 1990s, relating to the harassment of another woman.

As stated in the claim, "[t]he version of the article actually complained of by the Claimant is in English. The English version has been created by the use of a Google-based web translation service". Noting that parts of the article "are simply *gibberish and unintelligible and it doesn't even do that consistently*" (judgment, §61), the judge found that "it would not be rational, reasonable or just to ascribe tortious liability" to the defendants for a Google Translate version of the article (§61). Importantly, she notes that "the use of the service at different times, produces a different combination of words" (§61). Given the garbled nature of the Google translation (reproduced in full in the judgment), a professionally translated version was provided by the defendants as evidence.

El Diwany held that because the Hansen article could be accessed in the UK, it was published there, and it was "only since he discovered the article was available in English on the internet that he has been able to sue in the UK [*sic*] courts; and that the gist of it can be clearly understood even in the Google translation" (§45). He further held that Hansen would know that "the English version is a reasonably foreseeable consequence of Mr Hansen's placement of the Norwegian article on his website" (§45).

The judge rejected El Diwany's various arguments, referring, *inter alia*, to the court's jurisdiction, limitations, and causation, concluding that "it is difficult to characterise the actions here as anything other than an abuse of the process" (§61). On the subject of translation she concludes:

> The Claimant's real complaint of course is said to be about the Google article, and not the original article. But I do not consider there is anything which fixes the Defendants, either Ms Sorte or Mr Hansen for that matter, with liability for the publication of the Google article on the internet. The '[translate this page]' facility is a service provided by Google, and not by the Defendants (§61).

The case thus raises interesting points about relying on the inaccuracy and inconsistency of Google Translate as an argument to avoid liability, about the service's potential to widen an audience for allegedly libellous content, and its position as a third party distinct from the author of such content.

2.4. Improper translation as the crux of a libel case

Denying the Holocaust (2000)

Translation found itself in the limelight in a highly controversial case heard in London[26] in which the historian David Irving claimed that he had been libelled in a book entitled "*Denying the Holocaust – The Growing Assault on Truth and Memory*", written by Professor Deborah Lipstadt and published by Penguin Books. In the judge's words the book accused Irving of "being a Nazi apologist and an admirer of Hitler, who has resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place" (judgment, §XIV.1.2). Irving held that the book aspired to ruin his reputation as a historian and he sought damages on that basis. During the libel proceedings, a number of expert witnesses gave extensive evidence to the effect that Irving had deliberately skewed facts[27] through his politically motivated (non-professional) translations.

At the start of the judgment, we find citations of litigious passages from the book, including an event in 1992 when the *Sunday Times* newspaper had hired Irving to translate microfiche plates of Goebbels' diaries, to shed light on the Final Solution. We note in this regard that Irving was a well-known historian, and not a qualified professional translator. Page 179 of Lipstadt's book is cited: "[t]here is serious concern in archival circles that he may have significantly damaged the plates when he did so, rendering them of limited use to subsequent researchers" (II.2.4).

Another passage notes that when criticized for this choice of translator, the *Sunday Times* editor Andrew Neil "defended engaging Irving because he was only being used as a 'transcribing technician'" while an Oxford professor commented that "it was ludicrous for Neil to refer to Irving as a 'mere technician'" (judgment, §II.2.4). As a parenthesis, readers will recognize the foregoing as a highly typical example of the astounding dichotomic view of translation as a "mere" mechanical exercise, and at the same time with power to alter, even to distort far-reaching factual, historical and legal events.

[26] *Irving v. Penguin Books Ltd.*, No. 1996-1-1113, 2000 WL 362478 (Q.B. Apr. 11), appeal denied (Dec. 18, 2000).
[27] See Schneider (2001) on the Irving case and historians' objectivity.

The book was published in the USA (and only republished in the UK), and was written by an American author. Arguably, in this litigation Irving opted to lodge proceedings in the English courts rather than America because there, "actual malice" would have been required as a test. In the English courts, as the judge noted, "the burden of proving the defence of justification rests upon the publishers".

In his verdict, the Hon. Mr. Justice Gray found, regarding translation matters:

> It is my conclusion that the Defendants are justified in their assertion that Irving has seriously misrepresented Hitler's views on the Jewish question. He has done so in some instances by misinterpreting and mistranslating documents and in other instances by omitting documents or parts of them (judgment, §XIII.13.31).

An appeal was lodged by Irving, but denied. Having lost the appeal, he faced a costs bill of £2.4 million.

2.5. Translated literary works bringing libel to the attention of the libelled party

2.5.1. Alexandre Exquemelin (1685)

By the 17th century, publishing and the book trade had entered an era of a rapid expansion in Europe, alongside attempts by States and guilds at control and regulation. During this period, successful books could be highly profitable for publishers and printers and, in parallel, translations, sometimes in multiple languages, generated further revenue (e.g., Burke 2007: 7–38).

The case of *Morgan v Malthus* (1685)[28] involves a vibrant 'bestseller' of the time, a work entitled *Alexandre Exquemelin*, a memoir of the eponymous adventurer who had served under Sir Henry Morgan – variously described as a pirate, privateer or buccaneer, later the lieutenant governor of Jamaica and judge of the Admiralty Court. In terms of the political climate surrounding the case, it is worth

[28] See Gibbs' 2018 study of the plea roll, held in the National Archives of the UK.

mentioning that it was heard at a time of shifting support and rivalries over colonial interests.

Aware that a book about Morgan would be very popular[29], two rival printers and publishers – Thomas Malthus and William Crooke – commissioned competing English translations of the work, originally published in Dutch. The availability of the work in translation brought it to the attention of its subject, who spoke only English. Arguably because he had by then become a 'respectable' figure in society, Morgan took offence at the way in which he was portrayed. A case was brought against Malthus, and Crooke is likely to have been threatened with similar action, through Morgan's attorney John Greene, who held that the book was "a certain false, malicious, scandalous and famous libel" (Gibbs 2018).

In Restoration England, the legal concept of "libel" consisted, according to a contemporaneous definition, of "writing or publishing about another person by which his fame or dignity may be prejudiced" (March 1674: 135). While historians disagree as to the outcome, Gibbs (2018) notes that Morgan obtained final damages of £200[30] plus costs, (reduced from a claim of £10,000). The resolution with Crooke is less clear, but may have amounted to £300 or £400.

2.5.2. Hemingway in Spain (1977)

In this case, too, the availability of a work in translation brought it to the attention of its subject. The book was originally entitled *Hemingway Entre la Vide y la Muerte* and was written by Jose Luis Castillo-Puche and published in Spain in 1968. It gave the author's impressions of Ernest Hemingway during his travels in Spain and Cuba in the 1950s. Written in Spanish, it included unfavourable descriptions of A. E. Hotchner, a companion of Hemingway who had published his own work *Papa Hemingway, A Personal Memoir* in English in the United States in 1966.

[29] Morgan has been compared in importance by historians to Sir Francis Drake. A mark of the book's popularity is that German and Spanish translations were also published.
[30] Using the historical currency converter of the UK National Archives, approximately £23,000 today, or the price of 37 horses.

In 1970, the American publishing house Doubleday purchased English language rights to the Spanish work, and a translation, entitled *Hemingway in Spain*, was published in 1974. Upon publication, Hotchner, who did not speak Spanish and was probably unaware of the work until that time, filed libel proceedings against Castillo-Puche and Doubleday[31]. The plaintiff was required to demonstrate "actual malice" and the case was heard before a jury.

In fact, aware of potential for a libel suit, Doubleday's editor had contacted Castillo-Puche during the translation process, saying "it seems to our lawyers that it would be a good idea if we would tone down some of your remarks about him" (1975 judgment). The author agreed to this, and the editor worked together with the translator to bowdlerize[32] the text[33].

As published in 1974, the translation contained six passages which the jury found to be libellous. On appeal, however, the initial award of $125,000 in punitive damages was reversed, and Doubleday was found not liable as it had not published the alleged libels "with knowledge of falsity or reckless disregard for truth"[34]. Unusually in the dataset of cases that we have examined, the translator was named in the appeal judgment[35].

2.6. Translated literary work held to damage an author's reputation

Rachmaninoff (1957)

In a 1957 American case *Seroff v Simon & Schuster*[36], damage to an author's reputation was claimed on the basis of an allegedly 'distorted'

[31] *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975).
[32] See 3.2.2.
[33] Hence, for example, the original translation "[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." became once bowdlerized "I don't really trust him, though". (appeal judgment, §17 & §18).
[34] *A. E. Hotchner, Plaintiff-appellee, v. Jose Luis Castillo-puche, Defendant, and doubleday & Company, Inc., Defendant-appellant*, 551 F.2d 910 (2d Cir. 1977).
[35] Regarding the identification of translators, see 3.3.
[36] *Seroff v. Simon & Schuster*, 6 Misc. 2d 383, 162 N.Y.S.2d 770, 162 N.Y.2d 770 (NY: Supreme Court, New York 1957).

French translation[37]. The book *Rachmaninoff* is a biography of the composer written by Victor Seroff, an author specialized in such works, and was published by Simon and Schuster. In light of success in the United States, the latter publisher contracted with Editions Robert Laffont to produce a French language version. According to the New York Supreme Court judgment, the author Seroff was a fluent French speaker and upon receipt of the Laffont publication "protested bitterly", submitting "a list of 134 alleged errors, mistranslations, distortions and changes" (§385).

The judgment notes the "testimony of experts and the submission of various French-English dictionaries" and discusses translation competence and extent of "deviation" from a source text, criticizing literal translation and expounding on "proper" translation (§386). The judge even ponders whether the translator "may have consciously sought to sensationalize and inject pungent language in order to make the book more attractive to a certain segment of the French public" (§386). Seroff held that Simon and Schuster "'caused' the distorted French version, and was therefore responsible for the libel thereby produced upon his reputation as an author" (§391). The court found, however, that whatever the arguments involved, the French publisher Laffont was an entirely independent contractor upon whom the book's rights had been conferred, and thus declined to award any damages against Simon and Schuster.

2.7. Literary works held to corrupt society in or through translation

2.7.1. *Les Prospérités du vice* (1831)

Another type of libel – in respect of the State, seen as the corruption of a society's morals – was the subject of *X v Cannon* (1831), in which translation acted to demonstrate that a profanity law had been contravened. George Cannon was a London publisher of erotica, and

[37] Wirtén notes that "no question during the years leading up to the [1886 Berne Convention on copyright] was as controversial as translation [...as well as], the author's right to authorize translations of his or her work, and that the United States was "not a signatory to the Convention until 1989" (2020: 351-352).

along with other works, published – in French – the novel by the Marquis de Sade *Les Prospérités du vice.* In order to charge Cannon, the prosecution had to prove the obscenity of the text, and therefore paid for passages from the French to be translated for the jury. The translator was named: "a James Devereux" (McMorran 2016). One juror, Colonel Jones, noted that "the translation was a most literal one: indeed so literal, that it was much worse than the book itself" (McMorran 2017). It is unclear on what basis the colonel felt qualified to make such an observation, or whether he knew French – or had any grasp of translation techniques. The publisher Cannon received a six-month prison sentence and was fined £100. Interestingly, the name of the author Sade was not cited in the case.

This case was heard at a time when English society was starting to deprecate 'loose morals' – where "pornography circulated freely and largely unchecked" (Manchester 1981: 45). As the eighteenth century ended, a "systematic attempt to suppress pornography" (Manchester 1981: 45) came in the shape of a *Royal Proclamation, For the Encouragement of Piety and Virtue, and for the Prevention and Punishing of Vice, Profaneness and Immorality*, issued in 1787. After lobbying around the country, in particular by William Wilberforce's Proclamation Society, it became the 1857 Obscene Publications Act[38].

2.7.2. *Canti della Nuova Resistenza Spagnola* (1962)

A book entitled *Canti della Nuova Resistenza Spagnola*, consisting of translated transcribed songs of the Spanish resistance against General Franco, led to macro-level consequences with the Italian publisher Einaudi and the authors being accused of criminal offences against a foreign head of state and 'obscenity' libel (Fernández 2020). Einaudi was thus pitted against the then Francoist State of Spain. In January 1963, the Spanish newspaper *ABC* reported that its Ministry of Information had described the 'libel' (*libelo*) as a series of

[38] In a different socio-political context, a more recent Turkish case in 2013 involved a publisher and a translator on trial in Istanbul for corrupting public morals and obscenity over a 1999 translation of the French 1907 novel *Les Onze Mille Verges* by Apollinaire. A press release by PEN International referred to "government censorship in Turkish courts" (https://pen-international.org/es/print/3087) – the original French novel was banned in France until 1970.

"blasphemous attacks against catholic religion", "vile and rude offenses [*sic*] against Spanish individuals and institutions" and "coarse insults to the Spanish people as a whole" (Fernández 2020). The Spanish government also banned the publisher and authors from entering Spain.

A highly controversial criminal trial was held in Turin[39], with the two authors and Einaudi accused of *vilipendio*[40]. The defence lawyer Jona stated in a 2010 interview that although the authors were initially sentenced to two months' imprisonment and a fine of 10,000 lire each (the publisher was acquitted on grounds of lack of criminal intent), and the book seized throughout Italy, as a result of his arguments – supported by a university professor called as a witness – that the offending passages were metaphorical and that such wording could be found throughout revered Italian literature, the decision was reversed by the country's highest court, the *Corte di Cassazione* – Jona added that the book was then retranslated in France and England. (Ferrari 2013).

3. Recurrent topics involving translation in our sample of reputation-related cases

In the following section we explore a number of topics that emerged recurrently when analyzing our sample of reputation-related cases. We examine the topics individually, although several of the cases have a bearing on more than one topic, and some topics are interrelated. In future studies we intend to investigate whether and to what extent these topics arise in other areas of law.

[39] Criminal Court of Turin 26 June (?) 1962; Appealed 26 November 1964; Cassation (undated) (Armano 2014). These dates from secondary sources have as yet not been verified using a primary source by the authors due to lack of access.

[40] For a discussion of this legal concept and related common law concepts see, for example, Rossolillo 1961.

3.1. Accepting jurisdiction and accepting foreign language documents

The question of willingness to accept or examine translated and/or foreign-language documents seems to us in some cases bound up with the question of jurisdiction. In others, it can be a question of national policy[41] or judicial practice[42]. As regards choice of jurisdiction by the parties, legal scholars have long been debating the practice known as 'libel tourism' – a subset of forum shopping – and the attractiveness of the English courts in particular for this purpose, with its macro-level repercussions for other States. Hartley, for example, paraphrased the words of Lord Denning said with reference to the United States, "*As a moth is drawn to the light, so is a [libel] litigant drawn to [England]*" (2009). Some observers note that this trend might be changing in favour of other fora such as Ireland, Canada, Australia or New Zealand, while others feel it could become stronger still in England (Larkin 2019). Below is a selection of different approaches we have encountered thus far in respect of jurisdiction and foreign language documents.

In a case of a former Russian senator who sued for libel regarding allegations of fabricating evidence, conspiracy to murder, and the bribery and corruption of the prosecutor and judges in criminal proceedings, the English judge found:

> I do not consider that the issue of language would pose a significant problem here. English courts are accustomed to dealing with foreign languages. In practice, translation issues are rarely tried, but usually agreed.[43]

In a libel case between two Korean football journalists (see also 3.5), the judge found, somewhat obliquely that:

[41] E.g. France, where the longstanding rule was for courts to accept only documents in French (Villers-Cotterêts Order of 25 August 1539), since 2017 softened to concern only procedural documents, thus allowing medical or scientific documents to be submitted in the original language (*Cour de Cassation* judgment No. 15-21176 of 22 September 2016, Order of 5 May 2017 (17/00144) of the *Tribunal de grande instance* of Bobigny).

[42] In Greece the authors have noted a willingness for judges to examine documents directly in English (e.g., in a reputation-related matter, Greek Supreme Court Judgment No. 848/2019, Nomos Legal Databank entry No. 759969).

[43] *Sloutsker v Romanova* [2015] EWHC 545 (QB) (05 March 2015).

> potential translation difficulties do not provide a reason for concluding that England and Wales is definitely not clearly the appropriate venue (judgment §65)[44].

Similarly, in a case of libel concerning an alleged war criminal where the first language of many witnesses was Bengali:

> I agree [...] that the need to translate testimony or documents is not relevant: that is a daily fact of life in numerous courts and tribunals in the U.K.[45].

However, to illustrate that the English courts do not always accept jurisdiction, it is worth inserting here a case management hearing relating not to libel but to the Fundão dam disaster, between two English subsidiaries of the Brazilian parent company and 202,600 individual, corporate and institutional claimants[46]. That judge took a different approach: advising against England as the forum and giving the following justifications. First, regarding testimony most claimants and many potential witnesses spoke Portuguese as their first or only language and would require extensive input from translation/interpreting. Second, "litigation in England would require the translation of a very considerable quantity of documents from Portuguese into English. The costs of translation would be bound to be very high and the delays generated significant" (judgment, §110). He further emphasized the dangers of mistranslation; and the difficulties of applying Brazilian law[47].

In similar fashion, in a defamation action involving private equity[48], the Delaware Superior Court expressed its reticence:

> When language barriers require translation for evidence or witnesses and an alternative appropriate forum is available, Delaware courts have found this factor to weigh in favor of a stay. [...] Considering the

[44] *Kim v Lee* (Rev 1) [2021] EWHC 231 (QB) (09 February 2021).
[45] *Mueen-Uddin v Secretary of State for the Home Department* [2021] EWHC 3026 (QB) (15 November 2021).
[46] *Município De Mariana & Ors v BHP Group Plc & Anor* (Rev 1) [2020] EWHC 2930 (TCC) (09 November 2020).
[47] e.g., "If the expert evidence deployed for the purposes of this hearing, which sprawls dispiritingly over 600 pages of reports (not counting appendices), is anything to go by, then the chances of complete agreement between the parties as to what the law of Brazil might be in any given circumstances are remote indeed." (judgment §113).
[48] *Zilberstein v. Frankenstein*, Del: Superior Court 2021.

> potential language barrier, Israel is the more appropriate forum (Memorandum Opinion, p. 22).

The Supreme Court of Western Australia stresses that "[r]eal case management considerations do loom large once such foreign evidence is foreshadowed at a defamation trial" and expresses its concern that the "attempted invocation of foreign publications, [...] might rapidly escalate in terms of increasing significantly the dimensions and magnitude of a trial, not to mention escalating the expense associated with a need for overseas witnesses, translators or the like"[49].

Furthermore, regarding the acceptance or refusal of foreign documents, cases may also be dismissed on procedural grounds, either due to a lack of translation or to a failure to certify a translation. The following are but a few examples from the United States of America. In an extensive libel case with applications to several jurisdictions, claiming damages of between USD 155 million and 267 million[50], the Court of Appeals of California found "In any event, we denied the request for judicial notice, because, among other things, it asks the court to consider uncertified translations and hearsay evidence.". In an anti-SLAPP [strategic lawsuit against public participation] case[51], the appeal court notes regarding the underlying allegedly libellous statements that the trial court had found "it could not read the articles absent a translation". The New York County Supreme Court dismissed a libel claim regarding defamatory blog postings and reviews on blog websites owned by Google[52], because "the second amended complaint was not, as required by CPLR 2102(b), accompanied by an affidavit of the translator who transcribed the blog posts from Korean to English", and the defendant also argued that the affidavit was insufficient because the "certification of accuracy was not notarized"[53].

[49] *Wong v Aripin*, (2011) Aust Torts Reports §82-091, Supreme Court of Western Australia, 22 July 2011.
[50] *Claassen v. Kuhn*, Cal: Court of Appeal, 1st Appellate Dist., 2nd Div. 2015.
[51] *Nguyen v. Do*, Cal: Court of Appeal, 3rd Appellate Dist. 2019.
[52] *Chung v. Google, Inc.*, 2019 NY Slip Op 31418 - NY: Supreme Court 2019.
[53] The case cites as authority *501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494, 494 [1st Dept 2013] where the court declined to consider an English translation absent an affidavit from the translator.

3.2. Debate over translation techniques

The technical (and commercial) practice of translation is little regulated in general[54], and the same applies to translation for the courts. For example, "[o]fficial translation services are organised differently in the Member States of the European Union with very different professional frameworks (heterogeneous systems and practices)", where 'official' translation is an umbrella term for translations to be used by the authorities, whether courts or other bodies[55]. In the US, as Wahler notes, "there is no federal law establishing the qualifications of translators of written documents" (2018: 110–111). There exist some international standards, but they do not currently offer insights or recommendations on translation techniques[56]. Regrettably, a rigorous comparison between rules and legislation governing translation practice has not been achieved to date[57]. Incidentally, a commercial translation contract may occasionally include obligations specifying the techniques to be employed. A so far unique case in Switzerland found against a client for not supplying a translator with technical specifications (Hammond 1995). The following sections sketch out certain recurrent subjects of debate on translation techniques in the court cases we have analyzed so far. Some even include court rulings on the technical performance of translation. However, it should be remembered that these are not statistically representative in any way.

[54] Except for obligations on the *provision* of a translation (some of which also relate to interpreting), at national and supranational levels. An exception is the study by Somssich et al. (2012). There are recent moves by courts concerning translation *costs* – e.g., in the United States, *Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997—US Supreme Court 2012*, and in England & Wales *R (Translation of Documents in Proceedings)* [2015] EWFC B112.

[55] European e-Justice portal of the European Commission, consulted 24 January 2022.

[56] e.g., ISO 17100:2015 on translation services, ISO 20771:2020 on legal translation, 1SO 11669:2012 on translation projects, currently being revised, DIN 2345 on translation contracts.

[57] Such studies as there are often include gaps where countries either fail to reply at all or provide one-line responses. See, for example, European Union Agency for Fundamental Rights report https://fra.europa.eu/en/publication/2016/rights-suspected-and-accused-persons-across-eu-translation-interpretation-and, and European Commission https://e-justice.europa.eu/content_find_a_legal_translator_or_an_interpreter-116-en.do.

3.2.1. Literal translation

Below we offer a spectrum of views on the matter expressed by courts, from the cases described in Section 2 as well as some further examples from our wider subset of reputation-related cases. They range from literal translation being asserted as the only option to literal translation being slated by the judge.

In France both approaches can be envisaged in different circumstances. The highest court for civil and criminal matters, the *Cour de Cassation*, has stipulated that translations submitted in the ordinary way should render the 'literal' meaning of a text, which, it states, should be distinguished from an *expertise* [expert appraisal] of a translation, which gives an appreciation or opinion of the technical nature of the text (Monjean-Decaudin 2012: 226, author's translation).

The European Court of Human Rights has expressed a view on literality:

> The applicant submitted that the domestic courts had *utterly twisted his words* written in plain English, *maybe because they had translated them literally* into Maltese.[58]

From our data so far, it seems that common law courts are divided, even in the same legal order. For example, in England & Wales:

> Mr Justice Warby ordered that preliminary issues be tried in this first trial of this matter limited to the following: (1) the publication of the words complained of in Urdu; (2) the *literal translation of the words complained of into English*; [...][59]

> the *literal translation or the true translation* of the words is usually agreed between the parties (*Sobrinho*, see 2.2.1.).

while another judge, in discussing an English translation from Arabic of an allegedly libellous newspaper editorial found:

[58] *John Anthony Mizzi v. Malta*, EctHR.
[59] *Shakil-Ur-Rahman v Ary Network Ltd & Anor* [2015] EWHC 2917 (QB) (27 November 2015).

> a court should not be too analytical or too literal in considering the words used[60]

In similar fashion, in the United States different judges take different approaches.

> A too literal translation would be avoided by any competent translator" (Rachmaninoff judgment, see 2.6.).

Whilst in a domain name infringement case in which Alitalia alleged the "tarnishing" of its reputation and image,[61] literal translation was the grounds for the case:

> Indeed, Alitalia claims that the word "casinó" [*sic*] means "brothel," so that a literal translation of "casino alitalia" is "alitalia's brothel." Thus, argues Alitalia, the site appears in the minds of consumers familiar with the Italian language to offer the services of a brothel associated or affiliated with Alitalia. In this regard, plaintiff contends, the website irreparably harms, tarnishes, and dilutes the goodwill, reputation, and image of the Alitalia mark. (judgment §342).

In Australia, literal translation may be viewed as a condition for acceptance by the court:

> The following is a *true and literal translation* of the Defamatory Publication. (Supreme Court of Western Australia[62]).

Alternatively, it is seen as something to be avoided. Robert French, a former Chief Justice of the High Court of Australia, emphasizes that the literal approach impedes translation "to the extent that it disables the court from an optimal comprehension of what the party or witness is seeking to communicate" (2015).

Whereas at the higher echelons of the Kenyan court system, not only is literal translation required but failure to provide such a translation raises a procedural question:

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[60] *Arab News Network & Anor v Al Khazen & Anor* [2001] EWCA Civ 118 (2 February 2001).
[61] *Alitalia-Linee Aeree Italiane v. Casinoalitalia*. Com, 128 F. Supp. 2d 340 – Dist. Court, ED Virginia 2001.
[62] *Wong v Aripin* (2011: 49).

> The learned Judge disposed of the above issues by holding that the failure by the appellant to present the English literal translation certificate for the words complained of was fatal to his claim (Court of Appeal at Nairobi[63]).

While certain common law judges champion, advocate or espouse literal translation, it is an interesting paradox that one of the main principles used as a reference by English judges in libel cases is: "The meaning of words is often a matter of subtlety, going well-beyond what they literally say"[64]. In the same vein, tense debate over literal interpretation or construal of the law has a long history (Plato; Voltaire; Montesquieu; Baaij 2012 on the case law 1960-2010 of the Court of Justice of the European Union; and on the American courts Solan 2012; and Scalia and Garner 2012).

Debate between literal and 'free' translation is long, voluble and extensive (Cicero, 46 BCE/1960 CE: 364, and see for example Baker 1992; Newmark 1988; Venuti 1995; Bassnett 2002). In addition to being a well-worn argument in translation studies as a whole, it has also been explored by legal translation studies (Šarčević 2000; Cao 2007; Gémar, e.g. 2014; Scott 2018). Whilst comparative law scholars tend to favour literal approaches, the official guide for multilingual lawmakers at the European Union deprecates literal translations (Strandvik 2014), and – as emphasized by Gémar – meaning in legal translation settings "is determined by the context, not only of the words of a text, but also by the circumstances and facts that produced it – which can vary enormously" (2016a: 449, author's translation). Moreover, as Gémar further notes, legal translators must not only take into account the words of a text, but also the notions and concepts that they convey" (2016b: 156, author's translation). Hence the 'requirement' for literal translations expressed by certain common law judges, whose 'preferences' and findings establish precedent and thus take on legal authority, is in our opinion a matter of grave concern.

[63] Civil Appeal No. 286 of 2016 *Raphael Lukale v Elizabeth Mayabi & Another* [2018] eKLR (slander).
[64] per WarbyJ in *Rufus v Elliot* [2015] EWHC 807 (QB) at [21].

3.2.2. Skewing

The extensive body of academic translation studies literature on distortions in the technical performance of translation relates in the main to the intentional or unwitting skewing of information, meaning or style, and to ideological skewing, where 'skewing' gives rise to differences or 'shifts' between the source and target texts (e.g., Catford 1965; Munday 1998; Baker 1999).

One example is bowdlerization. The Oxford English Dictionary defines bowdlerization[65] as follows: "[t]o expurgate (a book or writing), by omitting or modifying words or passages considered indelicate or offensive". Where this is carried out by a translator without their having been given instructions to do so, it may be seen as an overstepping of the role, improper discharge of duties, or of dissension. On the other hand, when carried out at the behest of a publisher, for example, or even in consultation with an author, in order to adapt a text to other, different cultural values in the target culture, it may be entirely proper – indeed required – conduct.

Venuti (1995) points to the bowdlerization of literary texts due to moral conservatism. For instance, in America George B. Ives produced a 'fig-leaf' translation[66] of Michel de Montaigne's essays (1925). On the other hand, as we noted in Section 2.5.2, *Hemingway in Spain* was bowdlerized in a collaborative attempt by the publisher Doubleday, the author, and the editor to avoid libel proceedings. In the 1977 appeal judgment the court found:

> Appellee contends that Doubleday should be liable simply because it knowingly published a bowdlerized version of Hemingway's alleged statement. We disagree. [...] the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement about Hotchner. If Doubleday could not have been liable for publishing the uncut version, it cannot be liable for deciding to make the passage less offensive to Hotchner (§914).

Whilst bowdlerization through history has been discussed extensively with regard to publishing, our interest in the present day is

[65] https://www.oed.com/viewdictionaryentry/Entry/22199 The etymology of the word itself comes from Thomas Bowdler's expurgated edition of Shakespeare (1818).
[66] referring to the practice of covering the genitalia of classical statues with fig leaves

focused rather on the translator's contractual obligations and legal implications.

In *Seroff v Simon & Schuster* (see 2.6), we saw that an allegedly 'distorted' French translation was the very basis of the claim. The author described the printed French book as a "complete distortion of my English version". At the start of the Supreme Court judgment, after referring briefly to the complexities of the translation endeavour, the judge deems, apparently from his own knowledge or experience and without citing any authority or references, that in a "proper translation, the translator, however, must be content with his role and not attempt to rewrite, revise or alter the ideas, mood or style of the original". The question is also raised as to whether the translator might have adapted the language for the French reader. However, the matter of whether changes were instigated by the translator or made upon instructions from the French publisher Laffont is not mentioned.

Skewing and distortion were again at the heart of the case in *Irving v. Penguin Books Ltd.* (see 2.4) brought by the now discredited historian Irving[67] alleging that he had been libelled by Professor D. Lipstadt in her work entitled *Denying the Holocaust.* In summing up the High Court case, the Hon. Mr. Justice Gray stated that "[m]uch of the argument revolved around questions of translation" (judgment, §13.28). Several examples of distortions are listed in the judgment, of which we reproduce only a few below:

> Evans[68] claims that the cumulative effect of the mistranslations and omissions in Irving's account give the false impression that Hitler merely ordered the police […] (§5.43).
>
> But, said Evans, Irving misconstrues and mistranslates the record of what Hitler then said (§5.96).

[67] In 2017, University College London published the following: "Catalogue records for all copies of Irving's books held at UCL will have the subject heading 'Holocaust denial literature' added where appropriate; for books that are not specifically about the Holocaust, we will use the sub-heading 'Historiography', e.g. Churchill, Winston, 1874-1965 – Historiography. Additionally we believe, following informal consultation with other research libraries across the UK, that this position is aligned with a sector approach." https://www.ucl.ac.uk/library/news/2017/aug/statement-david-irving-books (consulted 27/1/2022).

[68] Expert evidence was given by 5 experts for the defence, including Professor Richard Evans, the then Professor of Modern History at the University of Cambridge, described in the judgment as the writer of "many historical works about Germany".

> The Defendants accuse Irving of perverse and selective quotation and deliberate mistranslation in a passage at p377 of Goebbels which purports to give an account of an occasion [...] (§5.125).
>
> Irving totally disagreed with the suggestion put to him that he was deliberately using a mistranslation in order to exculpate Hitler (§5.143).

Irving's translations also deliberately glossed over euphemism and camouflage in the original German texts, according to the experts and as reported by the judge:

> Irving translates *abschaffen* as 'to remove', which the Defendants allege misrepresents the true significance of the note [...] to remove the highly significant contrast between their treatment and that awaiting the deported French Jews (§5.196).

In conclusion, the judge found that:

> the Defendants are justified in their assertion that Irving has seriously misrepresented Hitler's views on the Jewish question. He has done so in some instances by misinterpreting and mistranslating documents and in other instances by omitting documents or parts of them (§13.31).

From our perspective, looking at evidence on technical points concerning translation performance, and especially given the extent of evidence (expert reports totalling more than 2,000 pages) and damages at stake in this case, we are puzzled as to why no translation scholar was called as an expert witness.

We posit that further research into cases pertaining to allegations of skewing, along with cases involving literal translation, could provide substance to educate lawyers and judges on how and to what extent, from an evidentiary point of view, legal translation (using Engberg's wider definition of the latter) – whether expert or non-expert – can significantly affect case outcomes and why diligence is crucial in that regard.

3.3. (Not) identifying the translation 'maker'

Recurrently, across our whole dataset of court cases[69], we note that the makers of translations are as a rule not identified – whether they be individual professional translators, agencies or lay translators. Even in literary circles, translators are rarely named on book covers – sparking a movement which culminated on the occasion of International Translation Day[70] 2021 in an open letter hosted by the Society of Authors which also promoted the hashtag "#TranslatorsOnTheCover"[71], specifying in particular:

> [...] From now on we will be asking, in our contracts and communications, that our publishers ensure, whenever our work is translated, that the name of the translator appears on the front cover (2021).

In judgments pertaining to translation we see expert witnesses named when they are academics, but rarely is the translator named – the judge limiting themselves to "a translation" or "a [language] translation" or "the Claimant's(s')/Defendant's(s') translation(s)", or even "Parties have agreed a translation". An exception to this trend can be found in *Hemingway*:

> Doubleday proceeded to acquire the English-language rights to the book from Ediciones Destino and to engage an experienced translator, Helen Lane, for the translation.
>
> In editing *Lane*'s translation [...] (1977 judgment, see 2.5.2.).

There is thus little opportunity for traceability, or for researchers – and indeed lawyers – to examine the professional qualifications of the translator, or, more importantly, the conditions under which the translation was performed[72]. In the legal translation

[69] Including other settings such as intellectual property, procedural, criminal (Scott and O'Shea 2021a), medical (Scott and O'Shea 2021b), business, financial and economic risk (Scott and O'Shea 2021c).
[70] United Nations Resolution 71/288 of 24 May 2017.
[71] https://www2.societyofauthors.org/translators-on-the-cover/
[72] For extensive examples of insufficient times allowed for legal translations, as well as woeful market practices such as lack of necessary contextual and reference material,

field, Scott has advocated the 'indelible marking' of translations – on the document itself – with essential information such as the purpose for which the translation was briefed and performed, and/or its status (legally binding, information purposes, etc.), as well as the date and name of the translator (2019: 100-101; 177-178).

Interestingly, it seems that an electronic system or software that is the 'maker' of a translation is more likely to be identified than a human translator. In the libel cases we have examined thus far, the vast majority involving machine translation mention Google Translate by name, others referring to an online web translator or browser-based translator.

From our overall dataset so far, lay translators do appear to be identified marginally more often than professionals – particularly if they have a close link to the parties in the case – such as family members[73]. In a libel case brought by a Russian businessman against a Russian journalist[74] – a lay translator was used because of an alleged lack of funds to pay for a professional translation.

> I have had to rely on *my husband* [...] to translate many of the email communications and documents I have received in relation to my case. [...] Furthermore, due to my financial position, I have also been unable to afford translators to work on my case. [...] I am unable to ascertain my legal position from these documents [...] due to language issues, my lack of legal representation and my lack of translation resources (judgment, §33).

In another case[75], a civil suit including claims for libel following criminal charges of sexual abuse:

> Kefalas and her father texted one another in Greek. The English translation produced in discovery, and relied on by both parties in their summary judgment papers, was prepared by defendant and her father. [...] At oral argument, both parties stipulated to the accuracy of the translation (§IV. [7]).

splitting texts without ensuring consistency, and failures by intermediaries to pass on translators' queries, see Scott 2019, sections 5.5 and 5.6).

[73] *Mazgani v. Moda*, Cal: Court of Appeal, 2nd Appellate Dist., 4th Div. 2020.

[74] *Sloutsker v Romanova* (Rev 1) [2015] EWHC 2053 (QB) (16 July 2015).

[75] *Thomsen v. Kefalas*, Dist. Court, SD New York 2018.

In passing we note that it is surprising the judge felt it permissible to allow lay translators to attest to the accuracy of a translation, especially one performed by the defendants themselves.

3.4. Online translation tools

3.4.1. Reliability of online translation tools

A recurrent point raised by courts, lawyers and parties in the cases we have examined is doubt as to the accuracy of a translation[76]. Of equal concern is the fact that, at the current state-of-the-art, online translation tools may generate different translations of the same source text each time a request is entered, thus rendering them diachronically inconsistent. Individual words or expressions may also be rendered inconsistently upon the same translation request. Below are two examples taken from the cases discussed in this paper:

> the Google Translate application can garble the original (and in fact did so in this case in relation to the Disclaimer), and there may be differences in the translations produced for each individual reader (*Ahuja*, see 2.3.1.).

> simply gibberish and unintelligible and it doesn't even do that consistently; [u]se of the service at different times, produces a different combination of words (*El Diwany*, see 2.3.2.).

In an American defamation case[77] brought following a negative Yelp.com review and subsequent legal action, plaintiffs moved to hold the defendant in civil and criminal contempt of court for commenting on the case, including in a publication in Korean. The judgment found that: "whether it is true or not cannot be determined based on a Google translation" (at footnote 2), making reference to Rule 2101 of the Civil Practice Law and Rules on the form of papers submitted to court.

[76] In this regard, an empirical study of neural machine translation highlights, for example, a specific error with potentially far-reaching consequences in which "The *trial court enjoined the violence* but specifically exempted peaceful picketing from the scope of the injunction" is translated into an Indian language, Kannada, as "The *trial court ordered the violence* but exempted peaceful picketing from jurisdiction" (Prabhu 2021).
[77] *Great Wall Med. PC v. Levine*, 2018 NY Slip Op 31842 - NY: Supreme Court 2018.

3.4.2. Access to libel through online translation tools

On a related point, we have encountered a number of cases in which Google Translate is held by parties to provide access to libellous content[78]. For example, in *Ahuja* (2.3.1), the claimant complains that the words at issue may be read by English speakers:

> who are using a search engine to search for references to the Claimant and who, when they see results in Serbian, click on the icon which sets in motion Google Translate, or an equivalent application, to produce an immediate translation.

In *Sobrinho* (2.2.1), the claimant "pleaded that readers might read the website in English using Google translate or a similar service" (§67). There seems to be an increasing number of cases using similar arguments. In a defamation case involving the current Speaker of the Tunisian Parliament offending words were held to be "readable [...] potentially, by others who used a means of translation (whether through a human, or electronic such as by Google online)"[79]. In a micro-level libel case with macro-level implications, involving alleged bribery and corruption of judges in Italy and the trading of oil in breach of international sanctions[80], the judgment notes that "the serious harm caused or likely to be caused by the publication of the articles derives from [...] the ability of non-Italian readers to use automated translation software available online" (§18).

3.4.3. Republication of libel in other languages

In a further development in this line of cases involving machine translation as a 'gateway' to libel, there seem to be links between the

[78] The critical issues of lack of secrecy (Wołoszyk 2021; Kotarska and Wołoszyk 2021) and loss of ownership (Blake 2015) of data entered into online translation tools have hardly been broached by the courts.
[79] *Ghannouchi v Middle East Online Ltd & Anor* [2020] EWHC 1992 (QB) (23 July 2020).
[80] *Napag Trading Ltd & Ors v Gedi Gruppo Editoriale SPA & Anor* [2020] EWHC 3034 (QB) (13 November 2020).

concept of "republication" and machine-translated content[81]. For example, an English case involving a high-net-worth individual[82] related to the allegedly libellous republishing of an article on a Baghdad-based website, in what appeared to be "a variety of pidgin English translation of the first article, suggestive of a computer-generated translation into another language and then back into English" (§155). The potential harm of this was challenged on the grounds that "the articles said to have been republished were barely comprehensible and would be seen by any English reader as unreliable nonsense" (§156).

A more elaborated approach was taken in a case heard before the Ontario Superior Court of Justice[83], where the judge dismissed a defamation action relating to an English translation of an article posted on a Chinese-language website, finding that:

> an online publisher that provides a free widget that allows visitors to generate instantaneous, automated translations cannot be said to have 'published' the translated text and therefore cannot be held liable for statements contained in such translations (judgment §3).

She also stated that the translation was "rife with grammatical and typographical errors and inconsistencies" and that therefore she was "not satisfied that the widget-translated article is a reliable translation of the original Chinese article" (§24). In finding that the article had not been republished, the judge considered at §23 of the judgment, *inter alia,* that:

> a) The defendant did not take any positive action to post the translated article;
>
> b) The widget was created by a third party and was offered to visitors as a free, independent, service;
>
> c) The defendant did not have control over the widget insofar as it could not change its underlying translation algorithm and could not review or

[81] We posit that this link might also arise with human-translated content – see *Perlman v. Vox Media, Inc.*, Del: Court of Chancery 2015, in which it is unclear whether the Spanish translation was performed by a person or a translation tool.
[82] Lisle-Mainwaring v Associated Newspapers Ltd & Anor [2017] EWHC 543 (QB) (17 March 2017).
[83] Shanthakumar v. WST Media Group Inc., 2021 ONSC 2802.

> change the translated article before it was automatically displayed to the visitor; [...]
>
> f) The defendant did not take any responsibility for or make any warranties regarding the widget or the translated article's accuracy; and
>
> g) A reasonable person would know that the translated article was not a substitute for reading the article in its original language or obtaining an official translation.

The above list could be seen as a useful summary of issues that are likely to be critical and potentially litigated in coming years. It is perhaps unsurprising that a judge in Canada – a country with more mature experience of translation – could provide such an incisive analysis.

In America, courts do not seem to have a uniform approach: some deeming that a statement on a website is not republished unless materially changed or supplemented, or the website directed to new readers; and others finding that a hyperlink, alone, does not constitute a republication[84]. We have not yet identified a definitive position on cases where translation is involved: in such cases new readers and material change will clearly be key matters, as will the issue of the hyperlink – for example in the form of self-executing or user-activated Google Translate functionalities.

Regarding another facet of republication, entirely new grounds for defamation litigation involving translation may be imminent, and that is the subject of emoji translation. A 2020 case pertaining to alleged harassment following insulting exchanges[85], heard at the Supreme Court of Colorado in the wake of a school shooting, saw the judge expressing concerns:

> The chance of meaning being lost in translation is heightened by the potential for online speech to be read far outside its original context. These days, one needs no more than a whim and a smartphone to broadcast to a massive audience (judgment, §49).

[84] *Perlman v. Vox Media, Inc.*, Del: Court of Chancery 2015.
[85] *People in Interest of RD*, 464 P. 3d 717 – Colo: Supreme Court 2020.

3.4.4. Use of online translation tools by judges and courts themselves

Another topic we would like to highlight is judges advocating or referring to the use of online translation in order to examine evidence. Referring to a large quantity of court documents in Hebrew to be translated in around 48 hours in a case involving, *inter alia*, libel and relating to internet publications and social media postings, an English judge pointed out "[t]his material could have been translated very speedily using Google Translate, if not necessarily with 100% accuracy"[86]. We find it astounding that a judge would take linguistic accuracy so lightly given that words are so central to law.

In what might be termed a 'counter-libel' case[87], a Dr Jang brought libel and defamation action against a consortium formed to establish an outpost of a Vermont independent school on an island in South Korea that had previously brought civil and criminal proceedings against Dr Jang for "misrepresentations and libelous statements" (judgment, §J) about the project. After describing various acrimonious exchanges between the parties over two years, the judgment refers to a key article in the case published in the *Boston Korean* newspaper:

> *As interpreted by Google Translate*, [...], the articles questioned the business relationship between the Academy and KDC, the business structure of KDC, and the academic qualifications of both St. Johnsbury Academy and SJA-Jeju. [...] Neither article named Dr. Jang (judgment, §H).

The judgment gives no explanation as to why the District Court deemed that an online translation of the Korean could be relied on as an 'interpretation' of significant evidence.

A libel case heard by the New York District Court concerned an article published on a news website[88]. The article's subject was a British news agency "which 'provid[es] news from non-English-

[86] *Soriano v Forensic News LLC & Ors* [2021] EWHC 56 (QB) (15 January 2021).

[87] *Soojung Jang v. Trustees of St. Johnsbury Academy*, 331 F. Supp. 3d 312 – Dist. Court, D. Vermont 2018, claiming $500,000 of future losses, special damages of $115,000 in lost research funds, as well as professional damage and extreme emotional distress.

[88] *Leidig v. BuzzFeed, Inc.*, 371 F. Supp. 3d 134 - Dist. Court, SD New York 2019. $5,000,000 in damages were sought.

language countries' to third-party media services in Britain and elsewhere" and it concluded that the plaintiffs were the "largest purveyors of [fake news] articles in the world" (judgment, §I.A). A witness statement provides an example from a Russian media outlet, the translation of which is deprecated by the court:

> That example is accompanied by *an unauthenticated machine translation*, which does not include any of the critical details the Article claims [the plaintiffs] made up (judgment, §D).

The judgment does not specify what 'unauthenticated' might signify with regard to an automated translation or how this might be remedied.

We note more generally across our whole dataset, including in areas of law other than libel, that the legal press have widely reported English judges typing text into Google Translate to obtain an immediate translation[89] where no court interpreter is available[90,91]. Google Translate is also being used by some courts to translate their website content. For example, the Greek Supreme Court website has the Google Translate API (application programming interface) integrated into the directory of court rulings[92]. In the current climate of many governments and institutions, including the judiciary, rushing headlong into digital channels, including translation, we believe that the number of cases relating in various ways to online automated translation provision may well rise exponentially, and could have significant impacts both at meso and macro levels.

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[89] On a related point, an extensively reported America landmark ruling USA v. Cruz-Zamora involved a police officer typing his request for consent into his mobile phone app, in which the court found "it is not reasonable for an officer to use and rely on Google Translate to obtain consent to a warrantless search, especially when an officer has other options for more reliable translations" *US v. Cruz-Zamora*, 318 F. Supp. 3d 1264 – Dist. Court, D. Kansas 2018.

[90] e.g., https://www.thelawyermag.com/au/news/general/uk-judge-uses-google-translate-in-pre-trial-hearing/203152, https://www.lawgazette.co.uk/law/blame-game-begins-as-google-translate-stands-in-for-court-interpreter/5062426.article, https://www.thetimes.co.uk/article/court-turns-to-google-translate-in-case-of-golden-wok-takeaway-and-redcar-and-cleveland-council-6qmq9kwnw.

[91] A further concern is that Google Translate may be being employed by lawyers and process servers for procedural steps such as serving notice.

[92] Other examples of lower courts: US Bankruptcy Court Wisconsin offers Spanish, German and Hmong through Google Translate: https://www.wiwb.uscourts.gov/nodeblock/google-translate; Superior Court of California San Diego County "court's website can be viewed in over 100 languages using the Google Translate icon located in the upper right-hand corner of the webpage".

To sum up this section, we turn to Wahler, whose comments about lawyers we feel could apply equally to judges:

> Since lawyers are both unlikely to understand the intricacies of legal translation and unable to personally verify the accuracy of the translations they rely upon, potential exists for blind reliance on neural translation systems – and surprise litigation when a translation error does finally surface (2018: 139).

Especially in the area of libel, where the very substance and crux of the case inevitably involve analyzing words and their meaning, we posit that the risks of automated translation bear very close scrutiny.

3.5. Competing translations

We define 'competing translations' as two or more translations produced by different translators (whether human – lay or professional – or machine). In publishing, works translated by different translators may be competing for readership (such as *Exquemelin,* 2.5.1), or an author with knowledge of a certain language may contest a translation of their work and proffer an alternative (such as *Rachmaninoff*, 2.6). In legal settings, such translations may be submitted by claimants and defendants initially in evidence, or produced by the parties' appointed experts. The translations can then be pitted against each other in court for the judge's appreciation or that of the jury in certain jurisdictions. Our conception of competing translations thus has an underlying adversarial element.

In *Dunn v Gannett*, as we saw in 2.1, the case focused on whether the word "*cerdos*" should be translated by "pigs" or by "litterbug/litterer". In the end no choice needed to be made, since the Appeal Court decided that only the Spanish word would be evaluated and not its translation. The English judge in *Sobrinho*, however, took the view that a 'literal' or 'true' translation into English of the Portuguese words at issue "*Saque no BESA*" was required in order for him to decide the case – as to whether the words should be translated as "Pillaging at [the bank]" (as the claimant held) or "Withdrawal from [the bank]" (according to the defendant).

In an American case[93], a trial court instructed the jury to choose between competing translations of disputed Farsi words displayed on a banner outside a woman's business which were argued to mean either that the libelled party was "a prostitute" or alternatively "a corrupt woman". Two court interpreters and a third "interpreter/translator" were called respectively as expert witnesses and as a witness to testify as to meaning.

Other cases, however, pertain to larger amounts of text than a single word or phrase. For example, the crux of *Soriano* (2.2.2) was a litigious paragraph. The judgment in an English libel case between two Korean journalists relating to eight social media posts[94] contains, for only two of the publications and thus only a quarter of the litigious text, up to three different translations for each item pleaded, one provided in the particulars of claim, one in the defence, and one in evidence, covering 17 pages. In *Irving v Penguin Books* (2.4) the 180-page judgment discusses a host of competing translations which represent only a fraction of the text examined by the numerous expert witnesses for each of the two adverse parties.

3.6. Whether the original or the translation is evaluated by the court

In the United States, a leading authority on foreign language in the area of defamation is *Dunn v Gannett* (2.1) whereby the legal standard must be applied to the libellous words in the original language – in that case Spanish. Whereas many other courts examine a translation of the libellous words originally written to ascertain whether libel has occurred. In a third scenario, such as in *Ahuja* (2.3.1), the libellous words are not those originally written, but a translation: "[w]hile the words published by the Defendants were all written in the Serbian language, what the Claimant complains of is the publication to readers in the English language".

[93] *Mazgani v. Moda*, Cal: Court of Appeal, 2nd Appellate Dist., 4th Div. 2020, at footnote 73. Amounts at stake were $30,000 in general damages for pain and suffering, $20,000 in special damages for economic loss, and $50,000 in punitive damages.
[94] *Kim v Lee* (Rev 1) [2021] EWHC 231 (QB) (09 February 2021).

The plot thickens even further when relay translations are involved. One example must suffice – from the libel and harassment proceedings *Hourani v Thomson & Ors*[95]:

> a person whom the defendants portray as a mafia operative, guilty of multiple murders, and a variety of other grave crimes. The vast majority of the evidence is in translation, with all the difficulties that can involve. Much of the evidence has been multiply translated; more than one document is *translated into English from a rough Arabic translation of a German translation of a Russian language original*. The translations are not made for the purposes of these proceedings. They are not agreed. They are of uneven quality, and in one important respect proved to be mistaken (judgment §26).

3.7. Courts relying on dictionaries when examining translations

According to our data thus far in our wider project across all areas of law, recourse by judges to dictionaries – rather than translation experts, forensic linguists, corpus linguists, or lexicographers, for example – appears to be commonplace. Carney's work on the use of dictionaries by courts in South Africa, with its eleven official languages, bears out this finding, and he points out that:

> Dictionaries are not perfect and though they could be used as a helpful starting point, jurists should be aware of their limitations: they cover a limited scope, they get outdated quickly, they sometimes contain circular definitions, they are acontextual and they are created for different target audiences, of which a [...] court might not form part(Carney 2016, translating from Afrikaans Carney and Bergh 2014: 41–46, our parentheses).

As for the cases described in this paper: in *Rachmaninoff*, the judgment refers to "the submission of various French-English dictionaries", while in *Dunn v Gannett* the court footnotes definitions and translations of alternative terms taken from a Spanish-English English-Spanish Dictionary, and in *Irving*, the latter argues that "dictionary definitions of the meaning of that word bear him out"

[95] *Hourani v Thomson & Ors* (Rev 1) [2017] EWHC 432 (QB) (10 March 2017).

regarding his translation of deportation as transport. One expert witness in *Soriano* supports one of her arguments "on the basis of the etymology of the word and its definitions and synonyms in a range of dictionaries", although clearly she is using this source as one of many, in addition to her linguistic and translation expertise.

From a monolingual perspective, the UK Supreme Court "unanimously rejected the approach taken by a first instance judge in using dictionary definitions as the starting point for interpreting the meaning of allegedly defamatory statements published on a social media platform" in the case *Stocker v Stocker*[96], and furthermore "held that the judge had erred in law by relying on the dictionary definition of the verb" (Watts et al. 2019).

In the US, also referring to monolingual use as far as we can ascertain, Calhoun reports on a "comprehensive dataset covering dictionary usage in every Supreme Court and circuit court opinion from 1950 to 2010", and notes that "recent research argues that the increasing use of dictionaries in Supreme Court and circuit court opinions may pose risks to the legitimacy, credibility, and accuracy of federal appellate court judgments" (2014)[97]. Solan points out the problems of dictionary reliance, citing Judge Learned Hand "But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary"[98] as an introduction to his study of 804 United States Supreme Court decisions, in which, after in-depth technical linguistic arguments he concludes:

> Turning to dictionaries may help courts establish a seemingly principled basis for their decisions. However, inappropriate resort to the dictionary does nothing to advance judicial argumentation and in the long run detracts from, rather than promotes, the legitimacy of the courts (1993: 56).

We intend to study further the use of and potential reliance on *multilingual* dictionaries by the courts in order to resolve translation questions that arise in cases brought before them, and how this might differ from country to country.

[96] *Stocker v Stocker* [2019] UKSC 17 (3 April 2019).
[97] See also Kimble 2022.
[98] *Cabnell v. Markham*, 148 F. 2d 737, 739 (2nd Cir. 1945).

3.8. Courts calling upon expert witnesses concerning a translation or foreign documents

In the cases described in Section 2, experts – and non-experts – were called upon to resolve translation matters. In the Einaudi case (2.7.2), a university professor of literature changed the outcome of the case. In *Irving* (2.4), five expert witnesses, of whom four were academic historians and only one a specialist in the German language (but not translation), worked on a massive body of evidence, and their considerations were integral to the final ruling. In *Soriano* (2.2.2) the two experts (two professors, one of literature, one of translation studies) were reminded by the judge not to overstep the boundaries of their role[99]. The *Sobrinho* case (2.2.1) may henceforth serve as authority for UK judges insofar as native speakers without further qualifications were deemed to be expert witnesses. In *Seroff* (2.6) the judgment refers to "testimony of experts" without further details. This provides us with a taste of the manifold ways in which expert evidence relating to translation is treated.

The first point to be made is that to the authors' knowledge, there is no international legal authority defining a profile for expert witnesses with expertise in translation. Indeed researchers analysing data collected during the observation of public court trials in the Australian state of Victoria have brought to light the fact that: "[p]olice officers often provide expert witness testimony to explain the meanings of terms and phrases contained in translated transcripts", and more worryingly still, "[e]xpert witness testimony in these circumstances is often delivered by *monolingual* police officers" (Gilbert and Heydon 2021). A study of 150 judgments of the High Courts of Justice of Spain by Guillén Nieto (2020), concluded that in none of the cases analysed were the services of an expert linguist called upon by the court.

In France, since Act No. 71-498 of 29 June 1971, court-appointed translators/interpreters have been included in the list of

[99] See also a highly emotive libel case *Begg v British Broadcasting Corporation* [2016] EWHC 2688 (QB) (28 October 2016). Concerning the contribution as to meaning of various Arabic words including *jihad* by the two academic expert witnesses (one for the claimant, one for the defendant) specialized in Arabic/Islamic Studies, the judge notes that they "have provided me with a deeper understanding", but adds "I have, however, assessed the [content] of the speeches for myself" as well as "what the Claimant said, and its meaning [...] that is a matter for the Court rather than expert evidence."

"*expert judiciaires*" [~court experts][100]. Despite the appellation, Moukheiber notes that in France translators are on no occasion appointed to produce any sort of expert witness report, whether to examine individual words or a whole text, and if the legislator had hoped to thereby confer an improved level of status upon court translators/interpreters vis-à-vis the judicial system, they have been wholly unsuccessful (2015, author's translation).

Without specifically delving into the topic of translation experts, forensic linguistics scholars have clarified and emphasized the contribution that linguists and other language experts can make in legal texts before the courts (see Solan 1998; Tiersma and Solan 2002; Guillén Nieto 2011; Coulthard 2005, 2020). However, these authors point out that, owing to a lack of understanding of what linguists actually do, together with fears that linguists will overstep their role and that the interpretation of language is the province of the judge or the jury, courts may consider that they are not needed, disregard their conclusions, or fail to select such experts diligently. Shuy offers the following additional insight:

> Since defamation is accomplished by means of language, some of the most useful tools to deal with slander and libel are the analytical procedures found in the field of linguistics. Unfortunately, most lawyers haven't been trained in linguistics and don't have these analytical procedures in their tool kits (2010: 28).

In *Sobrinho* (2.2.1) statements from two 'witnesses' – one described by the judge as 'A[101] Mr Fernandes' and the other "Mr Farsedas, another witness for the claimant" with no further qualification – were submitted. They self-professed their language abilities:

[100] A translator achieves the title of *expert judiciaire* at the various tiers of courts by virtue of having been listed as a court translator for a certain number of years, depending on the tier, and is subject to an initial 'probationary period' after having successfully presented proof of their diplomas and experience. https://www.sft.fr/fr/fiche-metier-expert-judiciaire-en-france It is worth noting that entry conditions for rarer languages may be less stringent.

[101] This use of the "A" as a determiner is "a way of indicating that you do not know them or anything about them" (Collins English Dictionary).

> I am a native Portuguese speaker and I speak fluent English. My interpretation of the original headline in this context [*sic*] it was written is that it means [...] (Fernandes, judgment, §13).

> As I read it as a native Portuguese speaker, the claimant was alleged to have [...] (Farsedas, judgment, §14).

At §23 of the judgment, WarbyJ asserts:

> Can the true translation of foreign words be proved by non-expert factual evidence from a native speaker, as the claimant suggests; or must it be established by evidence from an expert? Put that way, the question in my judgment [*sic*] raises a false dichotomy. *Any evidence of what foreign words mean in English is expert evidence, if it comes from a person who has a basis whether in training or experience sufficient to enable them to give reliable evidence on the issue*.

Moreover, he goes on to class native speaker evidence as expert evidence:

> The skill or expertise required may be acquired from a course of study; or from experience of talking, reading, and writing both languages; or from a combination of the two. In my judgment [sic] it does not matter in principle how it is acquired. One way or the other it is properly described as expert knowledge, from whatever source it derives. So my assessment is that the evidence contained in the two witness statements is in principle expert evidence within the meaning of Part 35 [...] (judgment, §24).

The judge goes further, and finds that there is no need to differentiate, as he was requested to do by the Claimant, between the Portuguese of Portugal and the Brazilian language variant:

> I reject the suggestion advanced on behalf of the claimant that he is not adequately qualified in Portuguese Portuguese, as opposed to the Brazilian version (judgment, §27).

Whereas, as noted by Zampieri and Gebrekidan Gebre: "there are substantial differences between European and Brazilian Portuguese in terms of phonetics, syntax, lexicon and orthography" (2012: 234), and thus the potential for misunderstandings or misinterpretations of meaning. Mr Justice Warby thus felt equipped to assess the allegedly libellous words and to decide that expert linguists/translation experts were not required; that native speakers were equivalent to those having

undergone studies in language and/or translation studies; and to deem that the difference between the two language variants was not significant enough to affect his decision.

However, in *Umeyor v Ibe*[102], a reputation-related case subsequent to *Sobrinho,* the same judge took a more nuanced approach and found that lay persons did not qualify as expert witnesses:

> the only evidence as to the English translation of what was said in Ibo comes from lay witnesses. [...] These witnesses have not proved any expertise, and they clearly do not have the independence normally required of an expert witness (judgment, §38).

Hence, as in other areas of court handling of written translation that we have explored, there is great disparity and heterogeneity on the subject of 'expert witnesses' who might be able to provide the judge with a skilled, independent, unbiased and objective[103] – and one might add informed – opinion on translation.

Conclusions

As we pointed out in our introduction, the cases cited in this paper, 10 of which are discussed in detail and around 40 more referenced, are but a sample of the total that we have identified. The next phase of our project will extend the number of jurisdictions, languages and areas of law. The conclusions we present below are initial trends that we proffer for avenues of discussion and that will be examined in our further research. It is worth noting that at this stage of the project, across our whole dataset and in this subset of libel cases, we have come across very few guidelines, procedures, or clear precedent pertaining to translation for judges to follow.

In the libel cases we have examined, translation may be used as a procedural ploy – in common with other areas of law that we have explored. Competing translations may be submitted, and lawyers may

[102] *Umeyor v Ibe* [2016] EWHC 862 (QB) (20 April 2016). As a parenthesis, this case involving a community association in Nigeria was brought as slander: the judge noted that "[m]any communications that would have been spoken in the past are now text-based, so that any defamation claim would be in libel".
[103] COPFS 2022; also https://www.cps.gov.uk.

weaponize to their own ends: translated words and/or texts; a translator; or an expert witness; and even the forum where a case is heard. Translation may be held to damage a reputation, or be used to determine whether content is libellous, may be held to disseminate libel, or even to corrupt society.

Case outcomes can affect, at micro level, ordinary people and high-net-worth individuals, publishing houses, press and media companies, banks, and large corporations. At meso level precedent can be created – we have seen, for instance, lines of cases ensuing from a judge's decision to assess libellous foreign words in the original language or, on the contrary, to insist on assessing them only in translation. At macro level States' reputations can be affected, and States can engage in politicking, or utilize defamation law as a means of censorship.

We note marked and striking divergences in the handling of cases involving translation: not only from one jurisdiction to another but from court to court, and from judge to judge. In fact, when giving an appreciation of translation, judges seem to be largely uninformed regarding key underlying principles, linguistic analysis tools, or the proper profile of experts upon whom they might call. It is common for judges to inform their translation-related decisions using dictionaries, basic machine translation, or language speakers without translation expertise – in short, libel cases involving translation frequently have the potential to be 'mis-judged', and the judges are not even aware of the risks involved! Rare are the instances where judges show the same degree of care and diligence in handling translated words as they typically exhibit when handling monolingual libel cases – complex translation issues are swept under the mat or missed entirely. To sum up by taking a literary analogy, translation is the proverbial pulse in *The Princess and the Pea* by Hans Christian Andersen. Sometimes almost imperceptible, ignored or vilified, its presence can be felt through many strata.

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Appendix – Summary of cases

Case Jurisdiction Cause of action	ST> TT	Translation makers	Reason original translation performed	Purpose or effect of translation	Translation issue brought before the court	Competing or differing translations	How court reached its decision on translation issue	Micro/meso/macro impacts	Outcome	Section
Dunn v Gannett US Libel	EN> ES	Newspaper's editorial team	Newspaper article publication	To render a word libellous	Translated term at issue "*cerdos*" more offensive than source word	Offered by both newspaper editorial staff and by the court	Dictionary	Micro: subject of translated term (mayor) Meso: precedent on standard of actual malice applied to original translated term and not a back translation	Decided on point of law unrelated to translation issue	2.1
Sobrinho v Impresa PT/UK Libel / *difamação*	PT> EN	Not stated, possibly journalists or expert witnesses	Submission to court Libel tourism	To determine whether foreign language term was libellous	Term at issue difficult to render in English; and a "true English translation" was required in order to rule	Submitted by expert witnesses in evidence	"Lay witnesses" as "experts' judge stated that native speakers sufficed Judge refused to choose an expert with specific expertise in the Brazilian variant of Portuguese	Micro: subject of translated term Meso: precedent on native speakers as experts	Dismissed as vexatious	2.2.1
Soriano v Le Point UK Libel	FR> EN	Not stated, possibly journalists or expert witnesses	Submission to court Libel tourism	To provide in particulars of claim a "true and literal translation" of words at issue	Key terms at issue polysemous in French	Submitted by defendant and claimant Submitted by expert witnesses in evidence	Expert witnesses (academics) but "boundaries [unspecified] of experts' role "not to be exceeded" in judge's opinion English judge established meaning for a French-speaking reader	Micro: subject of translated press article Meso: precedent for examining libel based on words published in a foreign language	Judge dismissed case finding that natural & ordinary meaning for a French reader of words at issue was not that contended by claimant	2.2.2

Case **Jurisdiction** **Cause of action**	**ST> TT**	**Translation makers**	**Reason original translation performed**	**Purpose or effect of translation**	**Translation issue brought before the court**	**Competing or differing translations**	**How court reached its decision on translation issue**	**Micro/meso/macro impacts**	**Outcome**	**Section**
Ahuja v Politika UK Libel	RS> EN	Google Translate	Submission to court Forum shopping Libel tourism	To bring the articles to attention of EN-speaking readers worldwide	Translations inconsistent, different on different occasions; Garbled (translation obtained by clicking through to Google Translate)	Produced by reader by clicking through from the news portal at different times	Judge's discretion	Micro: subject of translated press article Meso: precedent for examining libel based on words published in a foreign language	Judge found the case should be tried	2.3.1
El Diwany v Hansen UK Libel	NO> EN	Google Translate	Submission to court Forum shopping Libel tourism	To bring the articles to attention of EN-speaking readers worldwide (Google Translate was version complained of by claimant)	Parts of article "simply gibberish and unintelligible and it doesn't even do that consistently"; "[u]se of the service at different times, produces a different combination of words"	Produced through the news portal at different times Professionally-translated version was provided by the defendants as evidence	Judge considered that nothing "fixes the Defendants [...] with liability for publication. The "[translate this page]" facility is a service provided by Google, and not by the Defendants.	Micro: subject of translated text damaged his own reputation by bringing vexatious proceedings	Dismissed as abuse of process	2.3.2
Irving v Penguin UK Libel	DE> EN	David Irving (lay translator)	Historical research	Manipulation of historical facts concerning the Holocaust	Deliberate skewing by lay translator; Destruction of source texts to avoid verifications	Submitted by expert witnesses in evidence	Extensive expert witness evidence on the inaccuracy of key translated passages of archival material and to the effect that the author stated such as facts, and thus did not libel the lay translator	Micro: lay translator damaged his own reputation through misrepresentation of historical facts Macro: Holocaust historical record	Appeal lost, costs bill of £2.4 million	2.4

Case Jurisdiction Cause of action	ST> TT	Translation makers	Reason original translation performed	Purpose or effect of translation	Translation issue brought before the court	Competing or differing translations	How court reached its decision on translation issue	Micro/meso/macro impacts	Outcome	Section
Morgan v Malthus UK Libel	NL> EN	Not stated	Book publication	Brought work to the attention of allegedly libelled party	Not applicable in this case	Rival printers produced competing translations to sell the books	Unknown	Micro: libelled individual Micro: publisher fined	Damages at least £23,000 (at current value)	2.5.1
Hotchner v Castillo-Puche US Libel	ES> EN	Helen Lane	Book publication	Brought work to the attention of allegedly libelled party	Bowdlerized at request of publisher's editor, who worked with translator	Not applicable	Jury found translation libellous	Micro: author reputational damage	Initial award of $125,000 in punitive damages reversed on appeal	2.5.2
Seroff v Simon & Schuster US Libel	EN> FR	Not stated	Book publication	Alleged libel & damage to author's reputation	Author a fluent French speaker protested submitting "a list of 134 alleged errors, mistranslations, distortions and changes" Deliberate skewing: whether translation "consciously sought to sensationalize and inject pungent language" to make book more attractive to French public	Author compared published translation with his own translations	Expert testimony Submission of French-English dictionaries" Judge criticizes literal translation Judge expounds on "proper" translation	Micro: author reputational damage	Case decided on another issue (foreign rights)	2.6

Case Jurisdiction Cause of action	ST> TT	Translation makers	Reason original translation performed	Purpose or effect of translation	Translation issue brought before the court	Competing or differing translations	How court reached its decision on translation issue	Micro/meso/macro impacts	Outcome	Section
X v Cannon UK Libel (State)	FR> EN	James Devereux	Evidence of violation	Proof of obscenity	Literal translation more offensive than ST (juror criticized)	Not applicable in this case	Prosecution commissioned translation, jury examined translation	Micro: publisher Macro: public morals (obscenity)	Publisher received 6-month prison sentence and fined £6780 (at current value)	2.7.1
Liberovici, Straniero, Einaudi IT *Vilipendio/ Libelo*	ES>I T	Einaudi team/authors	Book publication	*Vilipendio* against Spanish State	Translation was held to be offensive	Expert witnesses provided examples from revered Italian literature as evidence words not offensive	Expert witnesses (academic specialists in literature)	Micro: publisher & authors sentenced Macro: diplomatic discord (Spain/Italy) Macro: Offences against a foreign head of State Macro: offence against public morals (obscenity & blasphemy)	Publisher & authors received 4-month prison sentence Book seized throughout country Reversed by *Corte di Cassazione*	2.7.1