

Translation accuracy and dissemination of disclosure of patent information

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8.1. Achieved results: main points and conclusions

8.1.1. Office, opposition and infringement cases: the influence of translation on patent law and its snowball effect

Patent translation exerts a prevalent, all-encompassing, pervasive influence on patent law. Translation is widespread through the whole patent system and all of its structures and elements, starting from its centres of governance and its international regulations. In this regard, it is important to recognize the global nature of patent rights and the universality of disclosure, which makes the patent system multilingual and complex, as it covers a huge volume of technological information from nations (and many of their languages) which enforce patent rights, as well as an enormous and varied array of regional or national regulations belonging to different legal cultures.

This influence starts from the roots of the global patent system and shows evidence of diverse reading and interpretation of international, regional and national translation regimes and corresponding regulations. Those differences affect the patent system globally and the idea of patent law as a field associated with global trade and international expectations. Although it was considered neither productive nor honest to try to directly associate court decisions with “faulty” translations or with fragments of translated texts which played a role on those cases, it was possible to identify patterns and establish generalizations on how translation influences those cases, by crossing the results of the content analysis of the proceedings with the results of the semi-structured interviews.

There are abundant examples of examination reports indicating translation errors, some of them as critical as to completely change the scope of the patent.⁹⁰⁷ According to the statements of patent examiners, finding those errors depends on the experience and knowledge of the examiner. On the other hand, less mature or more isolated national patent systems tend to offer less accurate translations provided by the local agents. This can be a problem, as the attorneys who rely on these services are usually not able to assess their quality due to language barriers. At the same time, the decisions taken as well as the accuracy of the examination vary from examiner to examiner and may entail further legal consequences, leading to what may be described as a snow ball effect, as the outcomes get more serious insofar as the errors are not corrected in each further legal stage.⁹⁰⁸

There is plenty of subjectivity in the analysis of translated texts, especially when it comes to the inventive step. Controversial office decisions are susceptible to reviews and, if those reviews still remain questionable, to opposition cases. Cases of opposition can involve textual nuances, requiring more sophisticated reading and interpretation, to gross translation errors, which could have serious ethical implications. The cases presented showed some of these discrepancies. Some examples worth mentioning are:

⁹⁰⁷ For all the cases and reports, see Section 7.2.2 of Chapter 7.

⁹⁰⁸ *Ibid.*

a case where a patent related to stem cells of transgenic animals could be interpreted as admitting human cloning; evident errors that could completely change the calculation of a mathematic formula; cases of patent (untranslatable) texts presenting very obscure writing which were anyway granted by the office; cases where the ambiguity or similarity of words in the source language jeopardized their translation in the target language.⁹⁰⁹

The section brought further cases where an earlier wrong interpretation, during the opposition or appeal stage, may be the cause for infringement actions, leading the Court to question the validity of a granted patent which actually should not have been granted, due to the existence of foreign prior art. In one of the cases representing this example, two courts, in two different European countries, have adopted opposite decisions, one favouring the plaintiff, and the other, the defendant.⁹¹⁰

With the reference to the assessed office and court cases, the most important patterns identified on the proceedings of the cases and confirmed by interviews were: inaccurate translations purposely used to bias the decision of office/court cases; errors in interpreting machine translated prior art, during the examination, which can produce further legal effects (cases of opposition, infringement...); obscure writing which produces unclear (human/machine) translations - sometimes remaining obscure even after a judicial decision; a word (consisting mainly of a preposition, another linking word or a technical term) which is source of problems with legal interpretation from source language to target language.⁹¹¹

The most common configuration of court cases involving problems with translation can be described as follows: A1 has a patent (AP) in country J, and B1 has (a "similar") one (BP) in country U. A1 applied for the patent only in J, so A1 has "no rights" to allege counterfeiting in any other country, as for example, in countries U or B. Regarding the nullity of BP, as it was granted after AP, and AP was published in J, BP should not have been granted, as there was prior art for lack of novelty. The technology disclosed by AP is free in any other country where it remained unpatented, and everyone can use it. This structure configures a typical case that leads to alleged infringement, involving different national systems. It frequently leads the court to questioning the validity of one of the patents. The decision can be the one of invalidating the latest patent, by indicating that it should have been revoked when it was opposed or that it should not have been granted. It can, in reverse, consider the second patent as infringed. In any case, the consequences for one of the companies involved tend to be drastic, if the decision is not well informed. The fact is that there are recurrent cases of discrepancies between different jurisdictions in this type of decision.⁹¹²

909 For all the examples of opposition cases and their analysis, see Section 7.2.2.

910 See all the cases and their analysis in Section 7.4 of Chapter 7.

911 Ibid.

912 See Section 7.4 of Chapter 7.

Moreover, it was concluded that infringement cases typically involve huge stakes and an enormous volume of translated texts. The profit of translation companies does not rarely edge millions in fees for translations, which involve documents from many different countries and languages, and which can reach averages of millions of translated words. As clear, analysing all the translated documents of such cases or justifying the judicial decisions which somehow were affected by their route constitutes an impracticable task.⁹¹³

Translation costs are still among the highest in patent cases. They vary depending on the country, the pair of languages, the magnitude and complexity of the case or the quality of the experts or companies in charge for translation. Patent documents are related to difficult, highly specialized translations. The world language service business is estimated to be worth \$34 billion and represents a fast-growing business. It cannot be carried out by one company alone and gets increasingly complex, in view of the nature of the services and of the number of languages and areas involved. Fees from legal work involving language and translation are very high and require highly professionalized work. Specialized firms can work for both parties in the same case, as happened in the dispute involving Apple and Samsung analysed in Chapter 7.⁹¹⁴

Patent attorneys mentioned cases of discrepant opinions between examiners and attorneys. This seems to be a common situation and, not rarely, involves machine translation of prior art and its interpretation by the examiners. European attorneys complain that it is difficult to change the decisions taken by the examiners through office actions in some national patent systems. According to the attorneys, translation is a major problem and a major cost in most of the countries in Latin America, for example. In addition, the services associated with translation lack in quality and, not rarely, documents should be corrected. Still according to the mentioned attorneys, it is also relevant to consider whether or not it is worth to sue the office, due to the backlog and lack of specialization involving the national patent courts.⁹¹⁵

Some cases indicate potential gaps in the patent system resulting from inaccurate examination, showing that granting a patent whose text is not clear may, for example, favour patent trolls, and create the mentioned snow ball effect at the global level, as courts can take divergent decisions in similar cases. An inaccurate text of a granted patent increases the chances of misinterpretation in other languages and in other jurisdictions. The patent then entails a problem of translatability, associated with the global nature of the patent system. This conclusion indicates that patent trolls may be largely associated with language issues, and this association should be subject to further studies.⁹¹⁶

913 Ibid.

914 See Section 7.4.

915 For examples of cases and their analysis, as well as associated statements given by attorneys, see Sections 7.4 and 7.5

916 For examples of such cases, see Section 7.4