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# Intellectual Property in Relation to Translations from a Spanish Legal Perspective

## Introduction

Can the entirety of a short written work be incorporated into a longer work without the author's permission under the quotation limit? A recent case decided by the First Civil Chamber of the Supreme Court (TS) on 16 May 2023[1] invites us to reflect on these and other issues affecting translators' rights.

In this case, "Rocío"[2] translated from Japanese into Spanish six historical stories from the literary work of Ogai Mori, one of the two greatest prose writers in Japanese literature, along with his contemporary Soseki Natsume, who is better known in the West than the former because his work has been translated into several languages. The six stories by Ogai Morai that she translated were included in a book entitled *El barco del río Takase* published in 2000 by Luna Books under the sponsorship of The Japan Foundation. The six translated stories were: "El barco del río Takase," "El capataz Sansho," "Sakazuki," "La historia de Iori y Run," "La senora Yasui," and "Las últimas palabras." These six stories were specifically selected because they combine a richness of historical detail with fine descriptions of characters, settings, and situations, all of which help to familiarise the reader with the atmosphere of bygone times. The translator paid special attention to the barriers to understanding that the language and situations in ancient Japanese society might pose to the modern reader.[3]

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1 ECLI:ES:TS:2023:2286.

2 Although the sentence indicates that the plaintiff was Rocío, it is enough to enter the name of the book *El barco del río Takase* in a search engine to find out that the translator was the Spanish philologist Elena Gallego who had already translated with great care and skill an attractive selection of historical stories by Ogai Morai, previously unpublished in Spanish, which helped to augment the still scarce number of Japanese literary works in direct translation into Spanish.

3 This is clear from the review of the work found at M. Watkins, *Ogai Mori: 'El barco del río Takase', Luna Books, Tokio, 2000, 141 pp*, "Cuadernos CANELA: Revista de Literatura, Pensamiento e Historia, Metodología de la Enseñanza del Español como Lengua Extranjera y Lingüística de la Confederación Académica Nipona, Española y Latinoamericana" 1999, nº 11, p. 175 *et seq.*

Subsequently, Cátedra Ediciones (Grupo Anaya S.A.) published a book entitled *Claves y textos de la literatura japonesa*, the first edition of which dates from 2007 and the second from 2015. This book contains, among other texts, the translation of the work "La historia de Iori y Run,"[4] which had previously been translated and published by Rocío, without the publisher having obtained the author's authorisation in relation to the intellectual property rights deriving from the translation.[5] In view of these facts, Rocío filed an ordinary lawsuit seeking a declaration of infringement of her intellectual property rights by Ediciones Cátedra and an order to cease reproduction and distribution of the book *Claves y textos de la literatura japonesa*, until Ediciones Cátedra obtained the translator's authorisation. She also sought an order to pay compensation of €6,000 for moral damages, €6,000 plus 5 per cent of the total volume of sales of the book as compensation for damages, or, alternatively, the amount which the judge deemed appropriate in accordance with the evidence at trial. She also asked that the decision be published in a newspaper with a wide national circulation.

The Commercial Court (*Juzgado de lo Mercantil*) nº 7 in Madrid issued a judgment on 19 July 2017 and dismissed the lawsuit considering that the insertion of the *work* (italics added) "La historia de Iori y Run," of eight pages, into a 715[6] page book dedicated to the analysis and study of Japanese literature, with a quote from the author of the translation, can be considered to fall within the legal limits of the right of reproduction known as the right of quotation.

The judgment at the first instance was appealed against by the plaintiff, and the Madrid District Court, in a judgment of 25 July 2019, partially upheld the appeal. The Court analysed the right of quotation, as regulated in art. 32.1 of the Spanish Copyright Act (LPI, by its acronym in Spanish)[7] and concluded that the reproduction of the plaintiff's translation in the defendant's work is not covered by this legal limit, as it is not strictly speaking a fragment, given the purpose of the work and, furthermore, it causes unjustified harm to the legitimate interests of the owner of the derivative work that the translation represents. Thus, it declared that the insertion of the story "La historia de Iori y Run," as translated by the plaintiff, in the book *Claves y textos de la literatura japonesa* published by Grupo Anaya S.A. infringes the intellectual property

[4] In this story Ogai uses a historical event to show the ideal virtues of a woman from a samurai family, someone capable of enduring long hardships to defend her honour. It also shows the reward she finds.

[5] In Spanish jurisprudence it is common to find cases in which publishers publish translations without the translator's permission. See SSAP Madrid de 17 de noviembre de 2004 AC 2005/87 y 23 de febrero de 2007 JUR 2007/323281.

[6] The figure of 715 pages is an erratum in the transcript of the judgment of the court of first instance, since in the cassation appeal it is said that the book had 141 pages, and, indeed, that length is what can be deduced from the review found in M. Watkins, *Ogai Mori: 'El barco del río Takase'*…

[7] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, BOE-A-1996-8930 Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia.

rights belonging to Rocío. Accordingly, it ordered the cessation of the reproduction and distribution of the book published by the defendant until it obtained the plaintiff's authorisation. With regard to the compensation for damages, the Court dismissed the compensation for moral damages and awarded damages of €2,000, plus 2% of the profit obtained from the sale of the book *Claves y textos de la literatura japonesa*.

The appeal judgment was appealed against in cassation by Grupo Anaya S.A. on the basis of a single plea, which is the infringement and misapplication of art. 32.1 LPI and art. 40 bis LPI, as an interpretative criterion of the limits of quotation, in accordance with art. 3.1 CC and the case law that interprets it. According to the publisher, the inclusion of "La historia de Iori y Run" in *Claves y textos de la literatura japonesa* is fully justified, and the publisher gives several reasons for this. Firstly, because a 7-page story which the publisher calls a "fragment" from a 141-page work (*El barco del río Takase*) is incorporated by way of quotation into Chapter 11 of the book *Claves y textos de la literatura japonesa*, a chapter devoted to "La modernidad: Soseki y Ogai," in order for the reader to be able to assess Mori Ogai's work. Secondly, according to the appellant, it should be noted that the fragment is included with a footnote referring to the book from which the "fragment" is taken, to the author, to Rocío's translation, and to the original publisher and the year of publication, as well as giving the excerpted pages of the book. Thirdly, according to the appellant, the inclusion of the fragment falls within the scope of "fair use" because the translation had never been published in isolation, so that its use does not infringe the normal exploitation of the work and benefits the translator. Finally, the appellant argues that the work incorporating the story is of a critical, research, and teaching nature and that the text reproduced is intended to serve as a sample of the work of one of the leading figures in modern Japanese literature, illustrating his way of writing, the themes which interested him, his style, etc., and that the inclusion of the translation is, therefore, for academic reasons.

The Supreme Court dismissed the appeal lodged by the defendant publisher, stating that in the present case the full reproduction of "La historia de Iori y Run," even if it occupies only a few pages in relation to the whole of the published work, constitutes a completely independent unit that cannot be considered a fragment of another work. Moreover, the inclusion is not for the purpose of reviewing, analysing, commenting on, or criticising the text, but the reproduction is incorporated into an anthology of texts whose purpose is communication. The very title of the defendant's work (*Claves y textos de la literatura japonesa*), in which the work translated by the applicant is included, expresses the purpose of the book: an explanation of Japanese literature which is illustrated and supplemented by the transcription of texts which are considered to be highly representative. For all of the above reasons, the appeal was dismissed and the judgment of the Court of Appeal was upheld.

## 1. Translation as a work protected by intellectual property rights

First of all, it should be noted that the facts on which this dispute is based have to do with the unlawful reproduction and distribution of the translation of a short story. According to World Intellectual Property Organization (WIPO) "translation is the expression of written or oral works in a language other than that of the original version."[8] It should be borne in mind that translation cannot concern any work, only those that use language as a means of expression entirely (a literary work) or in part (a film, a comic book).[9]

From a subjective point of view, a work is original when it is the author's own creation on which he/she has left his/her own imprint. This criterion of subjective originality considers it sufficient to carry out an activity of a creative nature for the result (the work) to be imbued with the creator's personal imprint and to be considered original.

In the case of translations, originality is more difficult to determine since, on the one hand, a minimum level of creativity[10] is required of the author of a translation while, on the other hand, a translation must be faithful to the translated work. Indeed, mechanical and literal translation is not considered to produce protected work because there is no creative contribution on the part of the translator, since anyone translating the work would arrive at the same result, so there is no translation but merely a reproduction of a pre-existing work.[11] The translator must have the sensitivity, preparation, and knowledge necessary to express as faithfully as possible what the author of the original work wished to convey. He or she must respect the author's thought as much as possible and, in order to convey it, must use the necessary turns of phrase, grammatical constructions, and periphrasis.[12] There is no doubt that the originality of the translation also depends on the originality of the translated work,[13]

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8 WIPO Glossary of 1981, entry 253.

9 This use of language as a basic (though not necessarily exclusive) means of expression is the determining factor for a piece of work to be a translation of an original work. It is not possible to translate a pictorial, sculptural, or architectural work, nor a piece of music or a perfume, since their comprehension is exhausted in the simple appreciation of the work. On the other hand, other works composed of linguistic elements (even partially), such as a film, a comic book, an audiovisual presentation, etc., may be translated, E. Olmedo Peralta, *La propiedad intelectual de las traducciones*, "Actas de Derecho Industrial y Derecho de Autor" 2013–2014, vol. 34, p. 213.

10 C. López Sánchez warns that a certain level of creativity is required, which is not always easy to establish, *La transformación de la obra intelectual*, Madrid 2008, p. 69.

11 As an example in which a minimum of level of creativity is not appreciated, we can see the judgment of the District Court (SAP) Madrid 28 de octubre de 2013 JUR 2014/10009.

12 It is precisely in this task of having to decide between the various possibilities of expressing the pre-existing work that the translator's creativity lies. If we were to put two translators to work on the same text, the results would be different, R. Casas Vallés, *El estatuto jurídico del traductor*, II Jornadas sobre el derecho de propiedad intelectual de los escritores en la práctica, nº 5, Madrid 1997, p. 80.

13 The language used in scientific works requires literalness in translation; so any creative contribution will be limited in scope; on the other hand, artistic literary works allow a certain degree of interpretation by the translator, which implies a greater degree of participation on his or her part, E. Olmedo Peralta, *La propiedad…*, p. 214.

because translating a poem is not the same as translating a novel or a doctoral thesis, since, in this case, the translator must not only master the source and target language but also rhyme and meter. In short, in terms of originality, we can distinguish between absolutely original works and relatively original works. A translation is a relatively original work: it is original in its form of expression,[14] but it is limited by the duty of fidelity, which means that the translator cannot delete fragments or add others; nor can he/she change the meaning of the words or the order of the sentences. In short, the content and structure must remain intact.

The issue of the originality of translations came before the Spanish High Court on the occasion of a judgment from 29 December 1993.[15] In this case, the author of the Spanish translation of William Shakespeare's play entitled *Julio Cesar* sued the author of a later version of the same play which partially incorporated the translation made by the plaintiff. In this case, the Court considered that there were qualitatively and quantitatively significant similarities between the defendant's version and the author's translation, as evidenced by paraphrasing, syntactic structures, lexical and verbal similarity, and that in the defendant's translation there appeared to be no real original contribution, facts from which no other conclusion could be drawn than that the defendant, who admitted having used the plaintiff's translation for the theatrical adaptation of Shakespeare's work, reproduced, in part, the plaintiff's translation.

The most authoritative legal doctrine considers that the status of a work of translation can derive simply from art. 10.1 LPI, which covers "all original literary, artistic or scientific creations expressed by any means or medium," but in the event of any doubts,[16] art. 11 LPI expressly refers to translations by establishing that "without prejudice to the copyright on the original work,[17] the following are also subject to intellectual property rights: 1) Translations and adaptations."The provision is consistent with art. 2.3 of the Berne Convention of 1886 (Paris revision 1971), according to which, "Translations, adaptations, musical arrangements and other transformations of a literary or artistic work shall be protected as original works, without prejudice to the copyright of the original work." Again, it can be seen that the legislative text is incorrect because both kinds of work are original, although some are absolutely original and others relatively original. Thus, derivative works are relatively original.[18]

A translation will be a work if it is original, it being irrelevant whether the translation is good or bad, whether the source or target language is easy or difficult, whether the degree of usefulness is high or low, and even whether it has been fixed in a medium or not. Hence oral translations, even if they are simultaneous and therefore more

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[14] See, among others, J. Carbajo González, *La nueva regulación española en materia de Propiedad Intelectual (II)*, "Actualidad Civil" 1989, nº 3, pp. 3046–3047.

[15] RJ 1993/10161.

[16] R. Casas Vallés, *El estatuto jurídico*…, p. 80.

[17] It would have been better to say pre-existing work or translated work because in reality both translated works and translations are original, even if the former are absolutely original works and the latter are relatively original works as noted above.

[18] C. López Sánchez, *La transformación*…, p. 70.

spontaneous, can perfectly well be works. Even if the translation is original, it can be deprived of the status of work when there is an overriding interest in facilitating as much as possible the public's access to the information contained in the translation. Such is the case of art. 13 LPI, according to which, "Legal or regulatory provisions and their corresponding drafts, the resolutions of jurisdictional bodies and the acts, agreements, deliberations and opinions of public bodies, as well as the official translations of all the above texts,[19] are not subject to copyright." According to this provision, official translations of the aforementioned texts will not be protected as works, but it should be noted that the removal of protection only affects translations made by public bodies, because the private translation of an official document is protected as a work.

In the case discussed here, what is reproduced and inserted in an anthology of texts is a short story written in Japanese that has been translated into Spanish by Ms. Rocío; therefore, the translation relates to a literary work. In the proceedings, none of the parties raised the issue that the translation might not be a work protected by intellectual property rights. In fact, it was assumed that the translation was a work and that the author's (translator's) reproduction and distribution rights might have been infringed. However, it is settled case law of the Court of Justice of the European Union (CJEU) that in the event of any possible infringement of intellectual property rights, the first thing to be ascertained, as a preliminary step, is whether the facts relate to an intellectual creation worthy of protection.[20] For a piece of creation to be classified as a work, two requirements must be met simultaneously. On the one hand, it must be original, in the sense of being the author's own creation, although to be more precise, and taking into account what has been said above about derivative works, it is sufficient for the work to be relatively original because of the service relationship that must exist between a translated work and a translation and, on the other hand, because qualification as a work is reserved for the elements that express this original creation, in this case, language as a vehicle of expression. The SC (TS) assumed that the translation was original and, consequently, that it was protected as intellectual property rights. It did not consider whether it was original or not, whether it was of high quality, or whether the source language was difficult (which it undoubtedly is). From our point of view, the translation was original, since it is a historical story that

[19] R. Casas Vallés, discusses the exact meaning of the term "official translation." According to this author, it is clear that any translation of non-protected material carried out by a private individual or company on their own initiative falls outside this concept. This would be the case of many laws and verdicts translated from Spanish into Catalan by private initiative. The problem arises more with translations sponsored or commissioned by public entities. Are they all official? Certainly not. Only those translations that are recognized, by a competent authority, as having the proper effectiveness of the translated text can be considered official, *El estatuto jurídico*…, p. 82.

[20] Sentences of 16 July 2009, Infopaq International A/S v. Danske Dagblades Forening (Case C-5/08); 1 December 2011, Eva-María Painer v. Standard Verlags GmbH and others (Case C-145/10); 7 August 2018, Land Nordrhein-Westfalen v. Dirk Renckhoff (Case C-161/17); November, 13, 2018, Levola Hengelo BV v. Smilde Foods BV (Case C-320/17).

uses archaic language and is set in a Japanese society that has little to do with today's society.

## 2. The right to translate as the exclusive right of the author of a pre-existing work

According to art. 21.1 LPI, "the transformation of a work includes its translation, adaptation and any other modification in its form from which a different work is derived." Translation is a form of the exclusive right of transformation. It is, together with adaptation, the most classical and traditional form of transformation of a pre-existing work. Although it is often referred to as the "right of translation," it is in fact a modality or faculty of the right of transformation. It is the author of the pre-existing work who has the exclusive right to translate the work him/herself or to authorise a third party to translate it. This understanding of the right is consistent with art. 8 of the Berne Convention and art. V.1 of the Universal Copyright Convention of Geneva of 6 September 1952.

As this is a form of an exclusive right, only the author can authorise the translation of his or her work. For a long time it was thought that being translated was an honour and that it was not necessary to ask the author's permission.[21] Today, there is no doubt that the author's permission is necessary. It can only be dispensed with if the translator only wants to make a private translation of the pre-existing work for his or her own personal use.[22] Such a private translation may not be disclosed without the consent of the author of the translated work. Nor is the author's consent required if the work to be translated is in the public domain, since in that case the work may be freely translated by anyone, provided that the authorship and integrity of the work is respected.[23] However, the most common situation is that the translation is of a work whose copyright is still in force (during the author's life plus seventy years after his/her death according to art. 26 LPI) and that the aim of the translation is not merely to make a personal use of the work, but to disseminate the translation to third parties. In this case, the author of the pre-existing work must authorise the translation. The

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[21] Both in the Law of 5 August 1823, and in the Law of 10 June 1847, translation is free, that is to say, no general right of translation is recognized for the author. It was not until the promulgation of the Law of 10 January 1879 that the author's permission was required to translate his/her work.

[22] The author cannot prevent others from transforming his/her work, including translating it without the purpose of exploiting or disseminating the translation: freedom of expression and research prevails over the monopoly of the rights holder, which does not extend to private uses. The rights holder cannot prevent a person from translating another person's work; what he/she can prevent is its collective or commercial use, J.M. Rodríguez Tapia, *Artículo 21* [in:] *Comentarios a la Ley de Propiedad Intelectual*, Madrid 2007, pp. 178 y 179.

[23] Any translation of a work, even if that work has fallen into the public domain, involves an intellectual effort on the part of the translator, which gives rise to a new creation worthy of intellectual protection, E. Olmedo Peralta, *La propiedad…*, p. 217.

same work may be translated by different persons provided that they all have the authorisation of the author of the pre-existing work.[24]

An author can directly authorise a translator to translate and exploit his/her work, but more commonly the author authorises a publisher to translate his/her work into certain languages and it is the publisher who finds the translators and concludes contracts with them. Once such authorisation is obtained and the translation is carried out, there are two works in play: the pre-existing work and the translation, both protected by copyright and whose rights must be made compatible.[25] Article 21.2º LPI refers to this issue, according to which, "The intellectual property rights of the work resulting from the transformation correspond to the author of the latter, without prejudice to the right of the author of the pre-existing work to authorise, during the whole term of protection of his rights over it, the exploitation of these results in any form and in particular by means of its reproduction, distribution, public communication or new transformation." It can be inferred from this provision that the author who is authorised to translate will have the copyright to the translation, provided that it meets the standard of originality, but the specific forms of exploitation of the translation must have been previously authorised by the author of the translated work and the latter must participate in the results of the exploitation of the translation in a previously agreed proportion. In the event that the translation is made and exploited without the authorisation of the author of the pre-existing work or without considering the author's rights as the author of the work, this constitutes an infringement of copyright with regard to the pre-existing work, which may give rise to the author or his/her heirs being able to take action for injunctions against the commercial exploitation of the translated work and to claim compensation for damages suffered in accordance with art. 138 to 141 LPI.

It is clear from the case on which this judgment is based that it was not Ogai Mori who translated the disputed story from Japanese into Spanish, but the applicant Rocío. Therefore, the author did not exercise the right to translate his own work, at least as far as the Spanish version of this story is concerned. The author died in 1922 and the copyright law in force in that year was the Japanese Copyright Law of 1899, which established a term of copyright protection of thirty years from the date of the author's death. Therefore, Ogai Mori's work entered the public domain in 1952. From that date onwards, no authorisation was required from Ogai Mori's successors for his work to be translated. His work could be translated by anyone as long as the moral rights of the integrity and paternity of the work were respected. It was in 2000 when Luna Books published the book *El barco del río Takase* which included Ogai Mori's short story "La historia de Iori y Run" translated from Japanese into Spanish by Rocío. We do not know whether it was the publisher Luna Books that took the initiative to select and hire Rocío to translate the story and then to exploit the translation by publishing

[24] See Judgment of the District Court (SAP) Madrid de 18 de mayo de 2000 JUR 2000/279272.

[25] The most characteristic feature of translation is the presence of two authors (the translator and the translated).

the book (via a translation contract) or whether it was Rocío who took the initiative to translate and exploit the translation (via a publishing contract). In any case, the authorship of the translation of the story is not disputed and is attributed exclusively to the plaintiff Rocío.

## 3. The translator as author

The author is the natural person who creates the derivative work that constitutes the translation and acquires the copyright by the mere fact of the creation of the work, according to art. 5.1 LPI. The person who appears as such in the work through their name, signature, or identifying sign is presumed to be the author, unless proven otherwise. The translator has the right to disclose the translation anonymously or under a pseudonym, without losing his or her copyright to the translation (art. 6.2º LPI). Occasionally, a publisher introduces modifications to the translation with which the translator does not agree. Although this circumstance is an infringement of the translator's right to the integrity of the work, it is quite common for this to occur and for the translator to decide to publish the translation anonymously or under a pseudonym.

Once the translation has been made, the law grants the translator all the rights that are granted to authors: moral rights (for example, the translator may choose to withdraw from the market an old translation that he/she no longer likes by paying compensation, or he/she may request access to a single copy of the translation if he/she did not keep a copy of it when he/she gave the original to the publisher), economic rights, and simple remuneration rights. The translation is a work independent and autonomous from the translated work; so it will enjoy its own term of protection, which, according to art. 26 LPI, covers the life of the author plus seventy years after his/her death or the declaration of his/her death. Therefore, the period of protection of the translated work cannot be associated with that of its translation, since the translated work may be in the public domain, but the translation of the same work may be protected. Therefore, a new translation of the translated work may be made without asking the author's consent because it is in the public domain, but the translation of the same work may not be used if it has rights in force without asking the translator's authorisation, unless the intended use of the translation is covered by some limit.

In the case under discussion, there is no doubt that it was Rocío who undertook the translation and the copyright to the translation must be attributed to her. The original Japanese version of the story is in the public domain, which means that it can be freely translated by anyone as long as the authorship and integrity of the work is respected. Rocío did not need the author's permission to translate his work. While the translated work is in the public domain (the original Japanese version of the story), the Spanish translation is protected, as the translator is still alive and art. 26 LPI applies, which establishes a term of protection of the author's life plus seventy years from his or her death or the declaration of his or her death. Even if the translated work is in the public

domain, the translator's rights must be respected for as long as the protection is in force. Translators are attributed the same rights as authors; therefore, Rocío has moral rights, economic rights, and simple remuneration rights over the translation. If the publisher Ediciones Cátedra wanted to use the Spanish version of the story "La historia de Iori y Run," it should have asked Rocío for permission and paid her for the use of her work. However, it decided, without her permission, to include the full Spanish version of the story in an anthology of texts, which was a clear infringement of both the right of reproduction and the right of distribution attributed to the translator.

## 4. The quotation limit

### 4.1. Current regulation

Right of quotation is one of the exceptions or limits to copyright that is most widespread from a global perspective, which has made its presence clearly apparent in the articles of all the laws that regulate copyright within different legal systems. It is not for nothing that Claude Colombet describe it as "a classic exception,"[26] unlike other exceptions that only appear in certain laws. However, in every legislation the regulation is different and, although it is based on a common denominator, the requirements that accompany the limit in the legislation of each country are not fully coincident.[27]

According to art. 32.1 LPI, "It is lawful to include in one's own work fragments of other works of a written, sound or audiovisual nature, as well as isolated works of a plastic or figurative photographic nature, provided that they are already published and their inclusion is made by way of quotation or for their analysis, commentary or critical judgment. Such use may only be made for teaching or research purposes, to the extent justified by the purpose of such incorporation and indicating the source and the name of the author of the work used."

As a starting point, it should be noted that our legislator does not define what is meant by quotation, although legal doctrine understands it as the reproduction of extracts of another's work in order to include them in one's own work,[28] on the assumption that such foreign contents are protected by intellectual property rights.

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[26] *Grandes principios del derecho de autor y los derechos conexos en el mundo*, Madrid 1997, p. 70.

[27] The regulation of this limit in national laws has followed different trends. While the continental countries of Europe, members of the Berne Convention, have adopted the method of establishing precise rules for the exercise of the citation exception, British law has made extensive use of the notion of fair dealing to judge the situations in which this right may be exercised, H. Wistrand, *Les exceptions apportées aux droits de l'auteur sur ses ouvres*, París 1968, p. 150. Even among continental countries, the differences are significant. German law has at that time conceived of citation much more broadly than French law, B. Ribera Blanes, *El derecho de reproducción en la propiedad intelectual*, Madrid 2002, p. 252.

[28] See S. López Maza, *Artículo 32* [in:] *Comentarios a la Ley de Propiedad Intelectual*, ed. R. Bercovitz Rodríguez-Cano, Madrid 2017, p. 623; C. Saiz García, *Artículo 32. Citas y reseñas de ilustración con fines educativos o de investigación* [in:] *Comentarios a la Ley de Propiedad Intelectual*, eds. F. Palau, G. Palao, Valencia 2017, p. 525.

If we observe this precept, we see that the legislator focuses, in its first words, on determining the nature of the works that can be cited (literary works, musical works, audiovisual works, works of plastic art) and establishes a different treatment of what can be quoted according to the type of work (fragments in some cases and isolated works in others), and then establishes certain requirements for quotations to be lawful (they must be published works, by way of quotation or for analysis, commentary, or critical judgment for teaching or research purposes, and the source and the name of the author must be indicated).

### 4.2. Nature of works that can be quoted and the permissible length of the quotation. The concept of a fragment

Regarding the first issue, it is important to point out that, unlike the 1879 LPI, which limits the quotation exception to printed works, the current provision allows the quotation of any type of work. It lists the most common types of works (literary, musical, audiovisual, plastic, and photographic works), which does not mean that only the works it mentions can be quoted, since it must be understood that it is not an exhaustive or *numerus clausus* enumeration, but an exemplary or *numerus apertus* enumeration. What is not determined is the nature of the work that incorporates the quotation; therefore, it must be understood that any type of work may contain quotations of works of any nature.[29] In the case under discussion, what is reproduced is a story; so the story falls within the concept of "work of a written nature." It is a literary work, which in this case was also expressed in writing, which applies both to the translated work and to the subsequent translation prepared by the plaintiff.

Precisely this question of the *quantum* of what can be quoted was the subject of debate during the parliamentary *iter* of the provision. The draft legislation read as follows: "It is lawful to include in one's own work the whole or part of another work already published by way of quotation or for analysis, commentary or critical judgment, for teaching or research purposes, to the extent justified by the purpose of such incorporation and indicating the source and the name of the author of the work used."

Some amendments were proposed in order to eliminate the term "totality" from the legal text, since its presence could validate the inclusion of complete works, which would conflict with the very purpose of defining the term "quotation."[30] The literal

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[29] F. Lledó Yagüe, *Comentario al art. 31 LPI* [in:] *Comentarios a la Ley de Propiedad Intelectual*, ed. R. Bercovitz Rodríguez-Cano, Madrid 1989, p. 512.

[30] What may be allowed to be admitted when criticising or commenting on an artistic work (which is the reproduction of the work of another in its entirety), would always be disproportionate and out of all acceptable use in the case of a literary work; the text of this art. 32 of the draft legislation, by not establishing any distinction, seems to allow it if the reproduction of the work in its entirety is intended for commentary or critical judgment and is made for teaching or research purposes. It would be detrimental to the author's rights to legally authorise the reproduction of the whole of a literary work, without his/her authorization, even by way of quotation or commentary, H. Baylos Corroza, *Acotaciones al nuevo Proyecto de Ley de Propiedad Intelectual*, "Revista General de Legislación y Jurisprudencia" 1986, nº 261, p. 539.

interpretation of this provision could result in serious infringements of the legitimate rights of the authors of the works quoted. However, the elimination of the term "totality" would mean that all works would have to be quoted in the form of fragments, which would pose significant problems in the context of artistic works, since partial reproduction of these would not be able to convey a complete view of the work and could damage its integrity.

Ultimately, it was decided to delete the term "in its totality" and to reformulate the text in order to establish a distinction as to the manner of quoting works of third parties; allowing quotation in fragmentary form in some cases and in its entirety in others, depending on the nature of the work in question. Literary, audio, or audiovisual works may not be quoted in their entirety; however, artistic or photographic works may be reproduced in their entirety.

Thus, in the case of works of a written, audio, or audiovisual nature, only the inclusion of parts or fragments is allowed. This condition has been endorsed by Spanish case law since the entry into force of the rule, as can be seen in the resolution of a case in which students of the University of Zaragoza had acquired photocopies of entire works that had been reproduced without the consent of the authors.[31] The Court warned that the quotation limit, as regulated in art. 32.1º LPI, could not be applied for several reasons: there was no teaching or research purpose on the part of the students; the quantitative limit established by the provision had been breached, since the precept only allows the inclusion in one's own work of fragments of other' works, not the inclusion of an entire copy of the same, and, finally, the requirement to incorporate the fragments of another's work in one's own work failed, since the latter did not exist.

The number of extracts that may be quoted is not indicated in the provision and must depend to a large extent on the nature of the work and the purpose to be achieved. There are certain types of works that require a greater number of quotations than others. Let us think, for example, of a doctoral thesis, a historical work, a biography, or any scientific/scholarly work. This type of work needs to provide the opinions, data, and theories that have already been expressed on certain issues that constitute the starting point of the second work.

In the case under discussion here, the translation from Japanese into Spanish of "La historia de Iori y Run" is reproduced in its entirety. It is a short story or tale that occupies only a few pages (8) within the book in which it is included (175), but this does not prevent it from being a work that constitutes an autonomous and independent unit and, as such, one that deserves to be protected by intellectual property rights. In the judgment passed by the courts of first instance, it is striking that, despite qualifying the reproduced story as a "work" and not as a "fragment," importance is nevertheless given to its small size in relation to the whole of the publisher's work in order to consider that the insertion can be included within the limit of quotation. This argument is to be strongly criticized. It is not acceptable to consider that an autonomous and independent work (such as this short story), being short, can be reproduced in its

31 Judgment of the District Court (SAP) Zaragoza 2 de diciembre de 1998 BDA 2303.

entirety by a third party without the translator's permission and that it be covered by the quotation limit. This aspect is refuted by the judgment of the District Court. It emphasizes that "the insertion of the story in the defendant's work was not of a part but of the whole, which is hardly compatible with the literal meaning of the term fragment" and "that the story is presented as an autonomous and differentiated work with its own substantivity;" so it does not consider that the insertion is covered by the limit of quotation contemplated in art. 32.1 of the LPI.

In the appeal, the publisher insists, in order to justify its actions and to be able to protect those actions under the legal limit of quotation, that what it used is a fragment. It recurrently uses this term to try to convince the judge of what it knows it is not. The publisher mentions that "this quotation constitutes a fragment of 7 pages," that "the quotation of this fragment is made in chapter 11 of the book," that "the inclusion of this fragment is made in order to evaluate Mori Ogai's work," that "the inclusion of the fragment is made with a footnote referring to the book from which the fragment is taken," that "the inclusion of this excerpt is within the meaning of fair use," that "the excerpt 'La historia de Iori y Run' has never been published in isolation," that "the work in which the excerpt is included has a critical, research and teaching character," and, in conclusion, that "it is an excerpt and an honest use has been made that does not harm the plaintiff, but, on the contrary, benefits her." We fail to see in what sense it can be understood that seeing your work copied and distributed without your permission can be a benefit. The only beneficiary is the publisher, since it reproduces and distributes someone else's work without having asked permission, and therefore without having paid any corresponding remuneration to the author of the translation.

Before responding to the argument that what was used is a fragment, the SC (TS) recalls that it is going to take as a starting point the facts considered proven in the relevant instance: that a story that had been translated by Rocío has been reproduced and that it is she who holds the intellectual property rights over the translation. In an attempt to address the merits of the case, the Court reviews some issues that have already been dealt with here: it recalls that the translation is a derivative work that also generates copyright; that the translator holds in particular the right of reproduction (the Court forgets to mention the right of distribution, which is also affected by the publisher's actions); and that the reproduction should have been made with the translator's authorization, unless the limit of quotation of art. 32.1 applies, also provided for in art. 5.3d) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (DDASI) and in art. 10.1 of the Berne Convention.

From there, the Court admits that the first controversial issue revolves around whether what is reproduced by the publisher is a fragment. In order to examine the question more closely, and taking as a starting point the text of art. 32.1º LPI itself, it states that "the term fragment is used by the law as opposed to the whole of a work" and that "the inclusion of the whole of a written work, within another, falls outside the notion of quotation." The Court then considers that the purpose of the reproduction

also helps to interpret in each case what is meant by fragment. According to the Court, a "fragment is not the whole. Of course it is not a fragment when that text has been published as such, in its entirety and independently […] In the present case, the reproduction of another's written work is a reproduction of a text (in its entirety) that occupies several pages and has a unity and independence with respect to the rest, it is a narrative or short story."

However, the Court understands that what is to be considered a fragment may be determined by the purpose of the reproduction, so that it creates a kind of link between the two requirements of the limit: the length and the purpose of what is quoted. As admissible purpose, it cites "in addition to the mere quotation in the strict sense (a brief and concise review), the analysis, commentary or criticism of the text." What the High Court means is that the length of the quoted text may not be so important if the reproduction is justified by the purpose that the reproducer intends to achieve. Next, the Court itself warns, anticipating its own conclusion that "in no case is this reproduction justified when the text is incorporated into an anthology of texts, since then it is clear that the purpose is not its analysis, commentary or criticism, but its communication." The Court goes deeper into this issue and warns that it is necessary to distinguish what is more important: whether the purpose is to reproduce another's work to illustrate an idea or to transcribe a text to comment on it. Without going into the issue of the purpose of the limit, which will be dealt with later, what interests us here is that the Court concludes that "in this case the complete reproduction of 'La historia de Iori y Run', although it occupies a few pages in relation to the whole of the published work, as it constitutes a totally independent unit, is not properly a fragment of another work."

### 4.3. Requirements for quotations to be lawful. The relevance of purpose as a key element in these

Once the nature of the works that may be quoted and the *quantum* of what may be cited according to the type of work have been determined, art. 32.1º LPI establishes the following requirements for quotations to be lawful: 1) the works cited must have been disclosed; 2) the inclusion must be made by way of quotation or for analysis, comment, or critical judgment; 3) the use may only be made for teaching or research purposes; 4) the use must be made to the extent justified by the purpose of such incorporation; and 5) the source and the author's name must be indicated.

First, the rule requires that the quoted works have been previously disclosed. This condition is not expressly required in art. 7.1 LPI of 1879. According to art. 4 LPI, disclosure of a work means any expression of the work that, with the author's consent, makes it accessible to the public for the first time in any form. This condition is the same as that imposed by art. 10 of the Berne Convention, which has led many countries to enshrine in their legal texts this requirement of disclosure for quotations.

The requirement of prior disclosure is based on the moral right of the author, since the right of disclosure is one of the moral attributes that the LPI grants exclusively to

the author of an intellectual work (art. 14.1º LPI). The disclosure of a work is a decision that belongs exclusively to the author, so that the person who quotes another's work cannot replace the author of the quoted work in his/her will to disclose the work, not even in the form of extracts. The moral right of disclosure includes the power to decide on the disclosure and the form in which it should be made. In no case is it required that the work that cites be disclosed in the same way as the quoted work. It is perfectly possible for the author to have disclosed his/her work orally and for the quotation to be included in a written work. The quotation will be lawful if the other requirements of the rule are met.

In our case, Rocío's translation was published in the book *El barco del río Takase* in 2000. Therefore, the work allegedly quoted had been previously disclosed by its author so that this first requirement of the precept must be understood as fulfilled. It is fulfilled given the circumstance that the work incorporating the alleged quotation had also been disclosed in the same way as the cited work, that is, through the publication of a book entitled *Claves y textos de la literatura japonesa*, whose first edition dates from 2007 and of which a second edition dates from 2015. The SC (TS) itself in the second legal basis for the judgment (point 4 of the judgment) recalls that the reproduced work must be disclosed and that this is a requirement "whose fulfillment is not disputed" in this case.

The second condition for the lawfulness of the limit of quotation under Spanish law is that the inclusion is made "by way of quotation or for its analysis, commentary or critical judgment." This means that the legislator allows quotation, analysis, commentary, and critical judgment as independent categories, understanding thatquotation is the mere literal reproduction of content in a work,[32] without the incorporator having to make any personal contribution.[33] Although it is quite common for the inclusion of another's work to be accompanied by such contribution, the legislator does not require it.

It has to be pointed out that the District Court of Madrid stresses the importance of the purpose of the insertion of the alleged fragment and analyzes this requirement exhaustively to ascertain whether the fragment is indeed included to be analyzed, commented on, or judged in compliance with the provisions of art. 32.1º LPI. In this context, the Court observes that the book *Claves y textos de la literatura japonesa* has two clearly differentiated parts, as the title itself implies. The first part is a study of Japanese literature based on ten keys (geography, history, language, religion, society, literary theory, aesthetics, verse, prose, and theater). The second part is an anthology of several works by different Japanese writers, preceded by a presentation of the author, thus offering some contextualization. For the Court of Appeal, it is important to note that the term "anthology" is used several times throughout the book and that the author calls himself a "compiler" in reference to this second part of the work. It is

32 S. López Maza, *Artículo 32*…, p. 629.

33 P. Mariscal Garrido-Falla, *El límite de cita a la luz de la directiva 2001/29 y de la Ley de propiedad intelectual. Evolución jurisprudencial* [in:] *Estudios sobre la Ley de propiedad intelectual: últimas reformas y materias pendientes*, Madrid 2016, p. 420.

in Chapter 11 of that second part of the book that the story "La historia de Iori y Run" is inserted. The chapter is entitled "Modernidad: Natsume Soseki y Mori Ogai." In the first sections reference is made to these two authors; in the third section there is a text by Tarsilla; and in the fourth section the disputed story is inserted, preceded by some brief comments regarding its subject matter.

Based on these considerations, the Court of Appeal argues that the story is inserted in the second part of the work and, therefore, the insertion is not made with the intention of issuing a critical judgment on Japanese literature, a purpose that is more proper to the first part. The inclusion of stories in the second part was not essential to achieve the purpose of the first part of the work and is actually presented as a distinct complement to that first part. The purpose of the story is to form part of an anthology of texts that allows the reader a direct approach to certain significant examples of Japanese literature. Therefore, the Court does not consider that "the insertion of the story is covered by the limit of the right of quotation contemplated in art. 32.1º LPI." Furthermore, it adds that the anthology is a collection of other people's works that by virtue of art. 12 LPI do not lose their autonomous protection by the fact of being included in the compiled work.

The Supreme Court refers to this second requirement of art. 32 LPI in point 3 of the second legal basis of the judgment, stating that "this inclusion of a fragment of another's work must respond, if it is not a mere review, to a purpose of analysis, commentary or critical judgment." From there, it analyzes the requirement and warns in point 4 of the same legal basis for judgment that the purpose of the reproduction clearly exceeds mere review, and that the question revolves around whether it responds to the purpose of analysis, commentary, or critical judgment, which may be considered in accordance with fair use.

In point 6, the Supreme Court states that the purpose of the reproduction may be "mere quotation in the strict sense (a brief and concise review), analysis, commentary or criticism of the text." Before analyzing the case, it gives a warning that connects with its subsequent solution: "In no case is this reproduction justified when the text is incorporated into an anthology of texts, since it is then clear that the purpose is not its analysis, commentary or criticism, but its communication." Following this reflection, the SC (TS) recognizes that some publications may contain features of both academic studies and anthologies, in the sense that texts can be incorporated for analysis and also in order to illustrate something. But in these cases it is necessary to see what takes precedence: the purpose of illustrating or the purpose of analyzing. The SC (TS) implies that the purpose of illustration is not the one required by law in order to be covered by the right of quotation, but that requirement is that the purpose be one of analysis, comment, or critical judgment.

Once these reflections have been made, the SC (TS) returns to the case to affirm that the reproduction of the story is not a mere review and that the compilation element prevails over analysis, commentary, or critical judgment of the text itself. The SC (TS) concludes that honest uses are marked by the purpose pursued, but that here the reproduction of another's work does not conform to fair use because there is no

evidence of the existence of a critical study of the work reproduced, but rather the book (which is not an academic or scholarly study), after explaining what Japanese literature is, seeks to reproduce a text that serves to illustrate the essential characteristics of the literary work of its author and, to that end, proceeds to transcribe the Spanish version of one of Ogai Mori's most representative stories. In short, the purpose is not to analyze but to illustrate or to compile.

The third condition incorporated in art. 32.1 LPI is that the use covered by the quotation limit may only be made for teaching or research purposes. Although neither art. 10 of the Berne Convention nor art. 5.3(d) of the DDASI require the achievement of specific purposes when regulating the limit of quotation, however, the Spanish legislator requires that the purpose of the quotation must be teaching or research. As legal doctrine has had occasion to point out, this is due to the fact that the Spanish legislator of 1987 confused the limits provided for in art. 10.1 and 2 of the Berne Convention and incorporated in a single provision the two limitations: quotation and illustration,[34] requiring in both cases the same purposes. The terms used by the legislator should not be understood in a broad sense to cover other types of purposes, such as informative purposes, since when the legislator has wanted to cover this purpose in an exception, it has expressly mentioned it and, furthermore, we must not forget that we are dealing with a limit to the exclusive right of the author and, as with any rule that establishes an exception, interpretation must be restrictive. It is taken for granted that the need for the quotation to pursue teaching and research purposes excludes the obtaining of any kind of profit, without the need for the legislator to have expressly excluded it.[35] In this sense, the term "teaching" should be understood as the action of teaching and "research" as any action aimed at broadening scholarly knowledge.

Regarding this requirement, the judgment of the Court of Appeal warns that the purpose of the use of the fragment must be focused on teaching or research. For the Court, more than the length of the quotation, its purpose is important, since it gives importance to the teleological element (art. 3.1º CC) when interpreting art. 32.1º LPI, that is, the reason for the existence of the quotation limit. In its arguments, it considers that "the educational purpose of the work did not make the inclusion of the story essential," so that the Court does not question the educational nature of the anthology published by the publisher. In the cassation appeal filed by the publisher, it is mentioned that the work *Claves y textos de la literatura japonesa* has a critical, research and teaching character as an argument for this requirement to be understood as having been met, and that the inclusion can be protected by the quotation limit. Although the SC (TS) does not raise doubts about the educational nature of anthologies, it understands that in this case the purpose of compilation is more important than the academic one.

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34 N. Martínez Martínez, *Los fines educativos y de investigación como límite al derecho de autor*, Madrid 2018, p. 253.

35 S. López Maza, *Artículo 32*…, p. 633.

In addition, the last words of art. 32.1º LPI refer to the obligation to indicate "the source and the name of the author of the quoted work." This obligation is based on the moral right regulated in art. 14.3 of the LPI, that is, in "demanding recognition of their status as author of the work." It must be kept in mind that in this case the legislator expressly requires compliance with this requirement, unlike what happens in art. 7.1 of the Intellectual Property Law of 1879, which does not mention this condition. In spite of this, legal doctrine has always considered that the quoted text must be accompanied by a mention of the author and the source. Such a requirement is also provided for in art. 10.3 of the Berne Convention, according to which "The quotations and uses referred to in the preceding paragraphs must mention the source and the name of the author, if this name appears in the source." The reference to this requirement in the Berne Convention has led to this requirement being incorporated into the regulation of the quotation exception in all copyright legislation, although this requirement is not totally uniform; so for example, it is worth noting that Italy legislation is more demanding than Spanish legislation. Article 70.3 of the Italian Law for the Protection of Copyright and Neighbouring Rights incorporates the obligation to cite the name of the publisher and translator when quotations are taken from translated works, provided that these indications appear in the reproduced work.

Therefore, the precept in force in Spanish law requires that the person who quotes must indicate the source from which he/she has extracted the cited content and the name of the author of the work used. It is striking that the EU legislator, both when regulating the limit of quotation (art. 5.3(d) DDASI) and when referring to illustration (5.3(a) DDASI), states that the source and the name of the author must be included, unless it is impossible. And yet, the Spanish legislator, when dealing with quotation, simply establishes that the source and author of the work used must be indicated, without considering the possibility that this indication is impossible, which is something that it does incorporate in the national regulation of the limit of illustration.[36]

The purpose of this requirement is to enable the reader to recognize the author of the quoted fragments and, thus, easily access the original work to verify the accuracy of the quotation, expand his or her knowledge of the author of the work, and learn more about the main subject, etc. The aim is to respect the paternity or authorship of quoted works, thus preventing the reader from confusing what is the author's own with what is not his/her own, and the quoted work with the one that incorporates the quotation. In this way, the quotation serves to pay homage to the author, a purpose that would not be possible to achieve if this condition were not met.

Most copyright laws that impose compliance with the requirement for the quotation limit do not establish specific legal guidelines that exhaustively determine

[36] However, the difference in treatment should not be interpreted to mean that the one who cites must include the source and the name of the author in every case, nor that there is a greater relaxation of the fulfilment of the duty to respect the authorship of the work in the field of illustration, but this difference is rather due to the fact that, in the case of an illustration, art. 5.3(a) of the DDASI has been literally transposed, and, in the case of quotation, the regulation has not been modified to adapt to art. 5.3(d) of the DDASI.

how it should be complied with. Legal doctrine has highlighted some criteria that are usually used in practice. In the case of literary works and as regards the name, it is desirable that the full name of the cited author be included both in a footnote and in a bibliography at the end of the quoting text. If the work is anonymous, the source alone may be cited. Mentioning the author's name presents fewer doubts and inconveniences. In the case of the source, it should also be noted both in a footnote and in a bibliography at the end of the text[37] with reference to the title of the work, the name of the publisher, the place and year of publication, and the specific page from which the fragment is taken. In any case, it should be required that the way of indicating the name and source be uniform for all quotations contained in the same work.[38] In general, it should be accepted that the indication of name and source is valid, regardless of the style code followed, provided that the reader is given as complete information as possible, so that he/she is not in doubt as to whom the fragment belongs.

Having made these clarifications, we must analyze whether the requirement is met in this case. The judgment at the first instance noted that the insertion of the story was made "with a quote from the author of the translation," without specifying anything else in this regard. When the publisher filed the appeal, it argued that "the inclusion of the fragment is made with a footnote referring to the book from which the fragment is taken, the author and Rocío's translation, the publisher and the year of publication, as well as the pages of the book." On its part, the Supreme Court, in ruling on the appeal, admitted that the moral right of paternity of the translator has been respected and, therefore, the Court considered this requirement to be fulfilled.[39]

Finally, we must consider whether the application of the limit to this case complies with the three-step test (art. 40 bis LPI), that is, that the use of the publisher is a specific case, that it does not affect the normal exploitation of the work, and that it does not unreasonably prejudice the legitimate interests of the rights holder. The judgment of the District Court expressly admits that the reproduction of the plaintiff's translation "unjustifiably prejudices the legitimate interests of the owner of the derivative work that the translation represents and that this limit is insurmountable as established in art. 40 bis LPI."

There is no doubt that by reproducing the story translated by Rocío in its entirety, the use made by the publisher affects the normal exploitation of the work, meaning the current or potential market for it, and the legitimate interests of the author, because

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37 Some authors have considered that it is not sufficient to include the work cited in the bibliography at the end of the work, L. Bochurberg, *Le droit de citation*, París 1994, p. 93. It is important to avoid the reader having to make an excessive effort, so the source should also be noted at the bottom of the page, B. Ribera Blanes, *El derecho de reproducción*…, p. 268.

38 M. Cárcaba Fernández, *Vulneración de los derechos de autor en la creación jurídica: obras protegidas, citas y fotocopias*, "Revista Crítica de Derecho Inmobiliario" 2001, nº 663, p. 58.

39 This requirement is frequently violated by publishers, as can be seen in judgments of the District Courts (SAP) Barcelona de 31 de marzo de 2006 JUR 2006/272980, Madrid de 5 de mayo de 2014 JUR 2014/164000 y Barcelona 3 junio 2021 JUR 2021/250343.

the publisher obtains a commercial benefit from a work the intellectual property rights to which do not belong to the publisher.

## Conclusions

In view of the study of the judgment of the Supreme Court of 16 May 2023, it can be affirmed that through this judgment the High Court values the rights of translators, even if the translated work is of a short length as it is with the short story in this case. Translators are also authors and are protected by intellectual property rights. In this case, a translation was reproduced and distributed without permission, so the publisher's conduct infringed the translator's intellectual property rights, unless the publisher could be protected by some legal limit. The publisher attempted to justify its conduct by invoking the legal limit of quotation regulated in art. 32.1º LPI. However, this limit only allows the inclusion of fragments in the case of literary works, but here the translation of the story is reproduced in its entirety. More than the extent of what is reproduced, it is important to take into account the purpose that the reproduced text fulfilled in the work itself. The SC (TS) reminds us that the qualification of fragment is determined by the purpose of the incorporation, which must be the mere review, commentary, analysis, or criticism of the text. In this case, the translated work is reproduced in its entirety, and although it is a translation of a short story that occupies only a few pages in relation to the length of the work that incorporates it, it must still be considered an autonomous and independent work susceptible of protection, and one that is not incorporated to fulfill the purposes that the legal limit of quotation must entail, but rather forms part of an anthology of texts to communicate and illustrate an idea. Consequently, the translator's reproduction and distribution rights have been infringed. The publisher should not publish the translation of the story to illustrate the essential features of Ogai Mori's literary work without the translator's permission.

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## Summary

***Begoña Ribera Blanes***

**Intellectual Property in Relation to Translations from a Spanish Legal Perspective**

In Spain, it is quite common for translators to see their intellectual property rights infringed by publishers without the infringement reaching the courts, let alone the high court, our Supreme Court. In the case discussed here, a publisher incorporated the complete translation of a short story into an anthology of Japanese literature without the author's permission; such use is not covered as an example of quotation or by any of the exceptions to copyright provided for in current Spanish legislation. The incorporation of another's copyrighted work, however brief it may be, and its subsequent publication in an anthology of texts without the author's permission constitute an infringement of the copyright on the translation.

**Keywords:** translation of a work, anthology of texts, right of reproduction, limit of quotation, difference between excerpt and complete reproduction.

## Streszczenie

*Begoña Ribera Blanes*

**Własność intelektualna w odniesieniu do tłumaczeń z perspektywy prawa hiszpańskiego**

Dość często zdarza się, że wydawcy naruszają prawa własności intelektualnej tłumaczy, a sprawa dotycząca naruszenia nie trafia do sądu. W omawianym przypadku wydawca włączył kompletne tłumaczenie opowiadania do antologii literatury japońskiej bez zgody autora, co oznacza, że jego postępowanie nie może być chronione ani przez cytat, ani przez żaden z wyjątków od praw autorskich przewidzianych w obowiązujących normach. Włączenie cudzego utworu chronionego prawem autorskim, niezależnie od tego, jak krótki by on nie był, a następnie opublikowanie go w antologii tekstów bez zgody autora stanowi naruszenie praw autorskich do tłumaczenia.

**Słowa kluczowe:** tłumaczenie utworu, antologia tekstów, prawo do zwielokrotniania, granica cytatu, różnica między fragmentem a pełnym zwielokrotnieniem.