

A Study of the E-C Translation for the Modal Verbs in the Berne Convention*

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The Berne Convention plays a very important role in the protection of the copyright in its member states. Good Chinese translation for the Berne Convention will undoubtedly improve the implementation of it in China. One of the key factors that affect the translation of the Berne Convention is the translation for the modal verbs, because they are concerning the rights conferred to or obligations imposed on authors or countries of the Union. Based on the statistics of the modal verbs used in the Berne Convention, this paper discovers that “shall” and “may” are the most frequently used modal verbs among the ones in English language and they are translated into many types of phrases in Chinese, but not all of them are accurate or appropriate, because the expressions used in the Copyright Law of the People’s Republic of China to indicate rights, obligations or prohibitions are not all those that “shall” or “may” are translated into. Some suggestions can be put forward to improve the current Chinese translation for “shall” or “may” in the Berne Convention.

Keywords: the Berne Convention, modal verbs, Chinese translations, suggestions, shall, may

Introduction

The Berne Convention for the Protection of Literary and Artistic Works is known as the Berne Convention, an international agreement formally mandating several aspects of modern copyright law, was first accepted in Berne, Switzerland, in 1886. As of September 2016, there are 172 states that are parties to the Berne Convention. China acceded to the convention on October 15, 1992. The concept that a copyright exists the moment a work is “fixed” without the requirement of registration was introduced in this convention, and that all countries recognize copyrights held by the citizens of all other parties to the convention is also required. With the flourishing development of literature and art, the Berne Convention plays a very important role in the protection of the copyright in its member states. Good Chinese translation for the Berne Convention will undoubtedly improve the implementation of it in China and the protection of copyrights for the works from all other countries of the Union, because Berne Convention is an international legal instrument for normative purpose, and it should be translated into Chinese while having equal legal force. Just as Sarcevic said: “Such

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texts are not mere translations, but the law itself” (Sarcevic, 1997, p. 20). It is well known that factors affecting the translation of legal instruments include the understanding of conditional clauses, analysis of long and complicated sentences, recognition of the common words used with legal meanings. In addition, the translation for the modal verbs is also of much importance, because they are concerning the rights conferred to or obligations imposed on authors or countries of the Union. Dr. Li Kexing from the Hongkong Polytechnic University of China once pointed out that “shall” is widely used in legal English, which is a key word representing a kind of legal linguistic features (LI, 2007, p. 59). “Language is the medium, process and product in the various arenas of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour” (Maley, 1994, p. 11). So, even the translation of modal verbs should be taken serious. The reason for only choosing one convention to study is that in the same context it would be much clearer to see how the modal verbs are used, translated and the use differences between them as well.

The Theory of Memes

Dawkins first introduce the concept of meme in *The Selfish Gene* (1976). He explains that a meme is a unit of cultural transmission, or a unit of imitation. Examples of memes are tunes, ideas, catch-phrases, clothes fashions, ways of making pots or building arches (Dawkins, 1976, p. 206). It can be said that all the things that can be imitated are memes. Like genes, memes are replicators. Ideas turn out to be good ideas survive, and bad ideas (at least in theory and in the long run) do not last. If a meme is to survive, it must beat its rival memes, i.e. it must win new adherents, gain wider acceptance (Chestman, 2012, pp. 5-6). The theory of memes can well explain the purpose of this research, i.e. better Chinese translation for the modal verbs used in the Berne Convention is to be found and accepted, infecting and transmitted by more and more legal translators.

Research Questions

The research in this paper focuses on answering the following four questions:

- (1) What modal verbs are used in the Berne Convention?
- (2) How are they used?
- (3) What are the features of the Chinese translation for them?
- (4) Is there any space for improving the current Chinese translation for the key modal verbs?

Analysis of the Modal Verbs Used in the Berne Convention

What Modal Verbs are Used in the Convention?

Table 1

The Modal Verbs Used in the Berne Convention (BC for short) and Their Use Frequencies

No.	Modal Verbs Used in English Language	Modal Verbs Used in the BC	Use Frequencies in the BC (times)	Number of Articles in the BC	Number of Sentences in the BC
1	Shall	Shall	253	38	213
2	Should		0		
3	Must	Must	2		
4	May	May	54		
5	Might	Might	1		
6	Will	Will	3		
7	Would		1		
8	Can		0		

(table 1 continued)

No.	Modal Verbs Used in English Language	Modal Verbs Used in the BC	Use Frequencies in the BC (times)	Number of Articles in the BC	Number of Sentences in the BC
9	Could		0		
10	Dare		0		
11	Need		0		
12	Ought		0		
13	Have to		0		

In English language, there are altogether more than 10 modal verbs, including can/could, may/might, will/would, must, have to, shall, should, ought, dare, need, but not all of them will be used in legal documents. “Shall, may, must and should” are seen to be the ones of high frequencies. Based on the Berne Convention, “shall” appears 253 times, “may” 54 times, “will” 3 times, “must” 2 times, “might” 1 time, “would” 1 time, and all the others are “none”. “Shall” is used of the highest frequency, almost appearing 6 times in one article in average.

According to Collins dictionary, in daily English, “shall” is used with “I” and “we” in questions in order to make offers or suggestions, or to ask for advice. If not in questions, “shall” can be used with “I” and “we” to refer to intentions, etc. However, in legal documents, “shall” is used to indicate that something must happen (YU, 2011, p. 2416). The use frequency of “may” ranks the second in the Berne Convention. Generally, people use “may” to indicate possibility, politeness or permission, but “may” can be used to indicate that someone is allowed to do something in legal documents (YU, 2011, p. 1625). In view of their high frequencies of use, this paper will only focus on the study of “shall” and “may”.

How are the Modal Verbs Used in the Berne Convention?

Table 2.

Forms and Use Frequencies of “shall” in the Berne Convention

No.	“Shall” in positive form	“Shall” in negative form	“Shall” + verbs in active voice	“Shall”+verbs in passive voice
1	235 times	18 times	195 times	58 times

In the Berne Convention, “shall” is used 235 times in positive form and 18 times in negative form, 195 times followed by verbs in active voice, 58 times followed by verbs in passive voice. Obviously, “shall” is usually used in positive form and active voice to indicate the rights or obligations that people are conferred or must comply with. See Example (1) and (2):

Example (1) “The author *shall enjoy* the exclusive right of making a collection of his works mentioned in the preceding paragraphs.”

Example (2) “The Director General *shall* at once *communicate* this declaration to all other countries of the Union.”

Example (1) actually confers the author a right to collect the works of his own. Example (2) in fact indicates the obligation that the Director General must carry out. When “shall” is used in negative form, it means no right is conferred or even means that something is prohibited from doing. For instance, “That work shall not be protected anew”; “the term shall not exceed the term fixed in the country of origin of the work.”

Table 3

Forms and Use Frequencies of “may” in the Berne Convention

No.	“May” in positive form	“May” in negative form	“May” + verbs in active voice	“May” + verbs in passive voice
1	50	4	47	7

“May” is used 50 times in positive form and 4 times in negative form, 47 times followed by verbs in active voice, 7 times followed by verbs in passive voice. Quite similarly, “may” is also more often used in positive form and active voice in the Berne Convention to indicate that someone is allowed to do something by agreement. For example, “However, in the case of cinematographic works, the countries of the Union *may provide that* the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author.” The above sentence means that the countries of union are allowed to provide the expiration of the term of protection. On the contrary, “may not” indicates that someone is not allowed to do something by agreement. Here is an example. “Such authors, if they have undertaken to bring such contributions, *may not*, in the absence of any contrary or special stipulation, *object to* the reproduction.” Undoubtedly, the authors are not allowed to object to the reproduction.

The Features of the Chinese Translation for “Shall” and “May”

Table 4

The Features of the Chinese Translation for “Shall” or “Shall not”

No.	Typical Examples	Chinese Translations	Features /Frequency
1	The expression “literary and artistic works” <u>shall</u> include every production in the literary, scientific and artistic domain, ...	“文学和艺术作品”一词包括文学、科学和艺术领域内的一切成果, ...	Omitted/167 times
2	Translations, adaptations, arrangements of music and other alterations of a literary or artistic work <u>shall be protected</u> as original works without prejudice to the copyright in the original work.	翻译、改编、乐曲改编以及对文学或艺术作品的其他变动 <u>应</u> 得到与原作同等的保护, 但不得损害原作的版权。	29 times
3	Such works <u>shall</u> be protected as artistic works.	这些作品 <u>将</u> 作为艺术作品得到保护。	1 time
4	The protection of this Convention <u>shall not</u> apply to news of the day or to miscellaneous facts having the character of mere items of press information.	本公约的保护不适用于日常新闻或纯属报刊消息性质的社会新闻。	Omitted/15 times
5	The term <u>shall not</u> exceed the term fixed in the country of origin of the work.	这种期限 <u>不得</u> 超过作品起源国规定的期限。	5 times
6	They <u>shall not</u> in any circumstances be prejudicial to the moral rights of the author.	这些条件均 <u>不应</u> 有损于作者的精神权利。	1 time
7	It <u>shall</u> be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases.	本同盟成员国法律 <u>得</u> 允许在某些特殊情况下复制上述作品。	4 times
8	The person or body corporate whose name appears on a cinematographic work in the usual manner <u>shall</u> , in the absence of proof to the contrary, be presumed to be the maker of the said work.	以通常方式在电影作品上署名的自然人或法人, 除非有相反的证据, <u>即</u> 推定为该作品的制片人。	4 times
9	All such decisions <u>shall</u> take effect only if the following conditions are fulfilled.	大会的决定须具备下列条件方 <u>可</u> 执行。	8 times
10	The Assembly <u>shall</u> have due regard to an equitable geographical distribution.	大会 <u>要</u> 适当考虑按地区公平分配。	1 time
11	The budget of the Union <u>shall</u> be established with due regard to the requirements of coordination with the budgets of the other Unions administered by the Organization.	本同盟预算的确定 <u>须</u> 考虑到与其他由产权组织管理的同盟的预算相协调的要求。	2 times

As it can be seen from Table 4, the Chinese translation for “shall” or “shall not” is usually omitted. Unfortunately, people may think that a word “may” or “shall” is left out of the Chinese translation is an oversight or a translation error (Cao, 2008, p. 130). However, that does not make any difference in the meanings of the sentences, because people can still clearly understand what they can do or what they cannot do from a declarative sentence in a law. For the translation that is not omitted, “应” is more often used than “得”, “须”, “可”, etc. Undoubtedly, these Chinese characters are obviously indicating people’s obligations or rights. It has to be noted that “可” is indicating the conferring of rights, which may be translated into “may” in English.

Table 5

The Feature of the Chinese Translation for “May” or “May not”

No.	Typical Examples	Chinese Translations	Features /frequency
1	The countries of the Union <u>may</u> grant a term of protection in excess of those provided by the preceding paragraphs.	本同盟成员国 <u>有权</u> 给予比前述各款规定更长的保护期。	3 times
	Members of the Executive Committee <u>may</u> be reelected, but <u>not</u> more than two-thirds of them.	执委会的成员国重新当选的数目最多 <u>不得</u> 超过三分之二。	
2	Subject to Article 29 <u>no</u> country <u>may</u> ratify or accede to earlier Acts of this Convention once Articles 1 to 21 and the Appendix have entered into force.	在遵守第二十九条之二规定的情况下, 任何国家在第一至二十一条及附件生效后, <u>不得</u> 批准或加入本公约以前的各次文本。	2 times
3	Such authors, if they have undertaken to bring such contributions, <u>may not</u> , in the absence of any contrary or special stipulation, object to the reproduction	这些作者, 如果应允许参加此项工作, 除非有相反或特别的规定, <u>不能</u> 反对对电影作品的复制。	1 time
4	The International Bureau <u>may</u> consult with intergovernmental and international non-governmental organizations concerning preparations for conferences of revision.	国际局 <u>可</u> 就筹备修订会议征询政府间组织和非政府间国际性组织的意见。	25 times
5	Any country <u>may</u> change class.	国家 <u>可以</u> 改变级别。	5 times
6	The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which <u>may</u> be granted by legislation in a country of the Union.	如果本同盟成员国的本国法律提供更广泛的保护, 本公约条款不妨碍要求适用这种规定。	Omitted/17 times
7	...the rights which their respective laws do now or <u>may</u> hereafter grant to their nationals...	各该国法律现在给予和今后 <u>可能</u> 给予其国民的权利。	1 time

Table 5 shows that “may” is more often translated into “可” in Chinese, or the Chinese translation is usually omitted. Sometimes it is translated into “有权”, or “可以”, which mean that people have a right to do something. When used in negative form, “may” follows “no” or is followed by “not”, translated into “不得” or “不能” in Chinese, which indicate that people are prohibited from doing something. Without doubt, examples in both table 4 and table 5 illustrate that “shall” and “may” can both be used to confer rights, impose obligations or prescribe prohibitive norms in legal English.

Comparative Analysis Between the Chinese Translation and Expressions Used in the CRL of PRC

CRL of PRC is short for the COPYRIGHT LAW OF THE PEOPLE’S REPUBLIC OF CHINA. Memetics emphasizes that good ideas survive, bad ideas do not last. The purpose of this paper is to find good translations for the most used modal verbs in the Berne Convention. To comment whether the translation is good or not, it is necessary to study the native language which express the similar meanings. That is, a study of the expressions used in the CRL of PRC to confer rights or impose obligations would help evaluate whether the Chinese translations for “shall” or “may” which are used in English to indicate the same are good or not.

According to Tury, “equivalence is a combination of, or compromise between, the two basic types of constraints that draw from the incompatible poles of the target system and the source text and system” (Tury, 1986, p. 1123). If the expressions used in CRL are quite different from that used to translate legal English, at least to some extent, it means the Chinese translations are not that accurate or appropriate. From the perspective of the theory of memes, it means that a legal translator is not infected by the word memes in CRL. Naturally, he/she will not transmit them, and the Chinese translation for expressions in the English copyright law might not be that native.

Table 6

Comparative Analysis of the Chinese Translation and the Expressions Used in the CRL of PRC

No.	Chinese translation for “shall” or “shall not”	Used in CRL of PRC (Yes/No)	Chinese translation for “may” or “may not”	Used in CRL of PRC (Yes/No)
1	omitted	Yes	omitted	Yes
2	应 (当)	Yes	有权	Yes
3	不得	Yes	可以	Yes
4	将	No	不能	Yes
5	不应	No	不得	Yes
6	得	No	可能	No
7	即	No	可	No
8	可	No		
9	要	No		
10	须	No		

“Shall (not)” is translated into 10 types of phrases in Chinese, but as many as 7 types are hardly seen in CRL of PRC. That means some Chinese translations may not be that appropriate. Just like legal translators translate in this way, but Chinese write in another way. Obviously, Chinese like to use “应当” to indicate obligations, and “不得” to indicate prohibition, “有权” or “可以” to confer rights. These Chinese phrases are memes to be stored and imitated by translators. In addition, an analysis of what expressions in CRL of PRC are translated into “shall” or “may” in English would also help a legal translator find the more appropriate Chinese translation for them. Just as Wagner (2003) said, “The legal translator must understand all the shades of meanings of the SL so that he or she may reproduce it as faithfully and naturally as possible in the TL, and must understand all the mechanisms of the law, the way legal texts are drafted, interpreted and applied in practice” (p. 178).

Table 7

Expressions in CRL of PRC Translated into “shall(not)”

No.	Expressions in CRL of PRC	Translated into “shall (not)”	Features
1	中国公民、法人或者非法人单位的作品，不论是否发表，依照本法享有著作权。	Works of Chinese citizens, legal persons or entities without legal personality, whether published or not, <u>shall</u> enjoy copyright in accordance with this Law.	Addition /Conferring rights
2	合同中著作权人未明确许可的权利，未经著作权人许可，另一方当事人 <u>不得</u> 行使。	Without permission from the copyright owner, the other party to the contract <u>shall not</u> exercise the right which the copyright owner has not explicitly licensed in the contract.	Prohibition
3	使用他人作品 <u>应当</u> 同著作权人订立合同或者取得许可，本法规定可以不经许可的除外。	Anyone who exploits a work created by others <u>shall</u> , except where no permission is required in accordance with the provisions of this Law, conclude a contract with, or otherwise obtain permission from, the copyright owner.	Obligation

Table 8

Expressions in CRL of PRC Translated into “may(not)”

No.	Expressions in CRL of PRC	Translated into “may (not)”	Features
1	在下列情况下使用作品， <u>可以</u> 不经著作权人许可，不向其支付报酬，	In the following cases, a work <u>may</u> be used without permission from, and without payment of remuneration to, the copyright owner.	Conferring rights
2	作品完成两年内，未经单位同意，作者 <u>不得</u> 许可第三人以与单位使用的相同方式使用该作品。	During the two years after the completion of the work, the author <u>may not</u> , without the consent of the legal person or entity without legal personality, authorize a third party to exploit the work in the same way as the legal person or entity without legal personality does.	Prohibition
3	没有参加创作的人， <u>不能</u> 成为合作作者。	Any person who has not participated in the creation of the work <u>may not</u> claim the co-authorship.	Prohibition

Altogether there are 56 articles in the CRL of PRC. “Shall” is used 82 times and “may” 26 times. However, “shall” appears 253 times, “may” 54 times in 38 articles of the Berne Convention. “Shall” in the Berne Convention is translated into “应” for 29 times, omitted for 167 times. “May” in the Berne Convention is translated into “可” for 25 times, omitted for 17 times. In CRL of PRC, all the “应当” are translated into “shall” in English, and many Chinese declarative sentences are added with “shall” when translated into English. “不得” sometimes is translated into “shall not”, sometimes into “may not”. The Chinese “可以” is translated into “can be” or “may be”, but “can be” is never used in the Berne Convention, just because the Chinese phrase “可以” does not necessarily mean conferring rights, it also has the meaning of “be possible”. “It is essential that the legal translator have a basic understanding of the nature of law and legal language and the impact it has on legal translation” (CAO, 2008, p. 7).

Conclusion

According to the statistics of the modal verbs used in the Berne Convention, legal translators use too many Chinese phrases to translate the English counterparts. However, the analysis of the expressions for indicating rights, obligations or prohibitions in CRL of PRC display that “应当” is usually used to impose obligations, “可以” and “有权” to confer rights, “不得” and “不能” to indicate prohibitions. There are not many variants of these Chinese characters. In conclusion, there is no necessity to translate “shall” into so many kinds of Chinese phrases, for law is not like literature which requires variety and richness. Law requires accuracy and consistency. So, the best Chinese translation for “shall” will be “应当” to impose obligations on people, and “有权” or a declarative sentence to confer rights. The Chinese phrase “不得” will be the appropriate translation for “shall not”. For “may”, “可以” or a declarative sentence is a good translation to indicate rights. For “may not”, “不得” and “不能” are both accurate. Moreover, since there are still more than one choice to translate “shall”, or “may not”, it is suggested that the same structure be translated into the same expression within one context. Since the Berne Convention is translated into Chinese for the Chinese to implement or comply with, the expressions used in Chinese Copyright Law to indicate rights, obligations or prohibitions should be imitated by legal translators to translate the English expressions for conferring rights, imposing obligations or prescribing prohibitive norms.

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