Another Jog Through the Juniper: A Translator's Further Excursions into the Copyright Thicket

By Anne Milano Appel with legal commentary by Jeffrey S. Ankrom

Note: Consulting this article does not create an attorney-client relationship, and nothing in this article is offered as legal advice. Legal information given here focuses on U.S. law only. Laws are subject to change, and laws of specific jurisdictions may differ substantially from what is stated in this article. For help with actual legal issues, consult an attorney licensed to practice in a relevant jurisdiction.

The Translator: In 2002, I co-authored an article for this magazine detailing my unhappy excursion into the thorny world of copyright ("A Jog Through the Juniper: A Translator's Unhappy Excursion into the Copyright Thicket").[1] The unwitting metaphor in the title came from an exasperated author whose novel I had just translated at the time. *Un bel ginepraio!* Giovanni, the author with whom I was working, exclaimed after a lengthy and frustrating exchange just before we stopped communicating altogether and fell into a hostile, mutually wounded silence. *Ginepraio* is one of those wonderful Italian words that have both a literal and a figurative meaning. Literally speaking, it refers to a juniper thicket, a dense growth of evergreen shrubs that is characteristically thick, prickly, and impenetrable. On a figurative level it signifies a "fix." A fine predicament. A tight spot. What a pickle. Any way you look at it, not a pleasant place to be.

After finally making my way out of that particular prickly tangle, I never thought I would stumble back in. Yet I have, or narrowly avoided it, a number of times. Judging from the huge interest in (and confusion about) the subject of copyright and contracts in general—I constantly see questions from translators desperately seeking advice—I suspect I am not the only one to set off on an innocent ramble only to get trapped in the impenetrable thicket of the "c" words: copyright and contract law. Having gained many additional scratches and scars while making my way through that *ginepraio* over the years, I thought it might be helpful to share more of these experiences with others. Attorney Jeffrey S. Ankrom, whose interests include publishing law and the intellectual property issues facing literary translators, graciously agreed to provide legal commentary to help me find my way.

The Lawyer: When an author, translator, or publishing professional has accurate information about copyright and contracts, the path is less difficult for everyone involved. These two legal varieties—copyright law and contract law—are related: they involve certain rights and how rights can be transferred from one party to another. For example, under copyright law, the rights to a literary work normally start with the creator, from the moment the work is set to paper (or hard drive, audio tape, etc.). Under contract law, our literary creator

may grant permission to someone else to publish her work, to perform it in public, to translate it, and so forth.

Like bushes that have grown up together, copyright and contract law are enmeshed. For example, copyright law requires written contracts for certain transfers of rights (such as the granting of "exclusive rights" or the designation of a translation by an independent contractor as a "work made for hire"). Almost any right arising under copyright law can be transferred to someone else—either root and stock, or in infinite combinations of selected branches and twigs. Copyright and contract law allow authors, translators, and publishers tremendous flexibility in the creation of contracts. Despite this legal flexibility, some publishers offer contracts on a take-it-or-leave-it basis—and they are free to do business that way. (Some countries, including various members of the European Union, have guidelines for publishing contracts to ensure that they meet certain standards and address the essential issues.)

Getting back to our thicket, not only do we face an interwoven mass where copyright and contract law meet, but this vegetative mass is made up of multiple varieties of copyright and contract law. Translations are, more often than not, international enterprises: sometimes more than one country's law was involved when the work was created and published. Businesses may have been sold. The author's rights under law or the contract may have changed hands without attracting the author's notice. This creates issues when, for example, a translator and her publisher want to bring the tempest-tossed work into another country with a different legal system.

England and many of its former holdings (including the U.S.) have their various systems of *copyright* laws; much of the rest of the world has *author's rights,* which vary from nation to nation. (This is, generally, the distinction between the common law countries and the civil law countries.) The variation between national systems is reduced by the fact that most countries belong to the Berne Convention and have signed the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement (under the World Trade Organization).

> Like bushes that have grown up together, copyright and contract law are enmeshed.

Publishing contracts are subject, of course, to contract law—the domain of agreements between individuals, businesses, and/or other entities. Some countries have a system of contract law for the entire nation, but others (such as the U.S.) have contract laws that vary from one state or province to the next. While the thicket looks messy at first, for the purposes of understanding the situations presented in this article, all we have to do is enter into the logic of

- an Italian "author's rights" juniper,
- an Italian contract shrub,
- perhaps a French or German contract hedge, if some previous translation has appeared,
- a thorny American copyright bush, and a bramble of state contract law, typically that of the state where the U.S. publisher is based.

To supplement this discussion, we have listed some related resources on page 31.

An Innocent Ramble Turns Prickly

The Translator: My latest foray into the *ginepraio* started out innocently, even happily, enough. It was November. An editor from Publisher A had been reading a review of a translation of mine that had been published recently by Publisher B. She had just purchased the rights to a delightful Italian novel and contacted me to see if I might be interested in translating it. After a very cordial and mutually satisfying phone conversation, the usual steps ensued. A hard copy of the book arrived in the mail, I read it eagerly, I agreed to do a sample, all parties involved (editor, author, agent) loved the sample, and by the end of December we were off and…well, not running, more like limping.

The first signs that prickly foliage was somehow springing up around us appeared when we started talking about my fee. It appears that the parties had seriously underestimated what a quality translation would cost. Moreover, the payment arrangement was an unusual one: the translator was to be paid by the author, not the publisher, with the money coming from the author's advance. From the very first this set off a few alarm bells, but they were distant. In the usual euphoria that surrounds the start of any new project, I felt I addressed the issue by telling the editor that regardless of who was paying for the translation, I expected my contract would be with the publisher, since there were numerous publication and copy-

right issues to be addressed in addition to payment. At the time, what I thought I heard from her was agreement, but in retrospect it was probably just a noncommittal "uh-huh." We hear what we want to hear.

The Lawyer: In some countries (including many European Union states), standard fees are negotiated between translators' groups and publishers' groups. I know of nothing comparable in the United States. To complicate matters further, if freelance translators get together and agree on what they will charge their clients, the translators may have violated antitrust laws. Negotiating the fee separately from other issues may be a mistake: imagine agreeing on the price in a restaurant and then negotiating what you will get for your money.

Re-entering the Thicket

The Translator: We did manage to agree on my proposed fee, at least in a general sense: of course they wanted me to be "adequately compensated." By this time it was February. Since the hitch appeared to be money, I suggested some alternatives, ingenuously believing that I was part of the negotiation process. In the interest of being flexible, I stated, I would be willing to consider lowering my original proposal, provided some effort at compensation was made to offset the difference. For example, perhaps the publisher could cover the difference. Or there might be the possibility of some combination of translation fee and royalties. Also, if the English translation were licensed to a publisher elsewhere—the U.K., Australia, Canada—perhaps there could be additional compensation coming to me to offset any low rate I might agree to initially.

The Lawyer: Producing a good contract—one that satisfies all parties—often requires the kind of creativity our adventurer describes. Some publishers welcome such negotiation. Others forbid their editors to alter the language of the contract, even when the "standard contract" includes contradictions or nonsensical provisions.

I am not the only one to set off on an innocent ramble only to get trapped in the impenetrable thicket of the "c" words: copyright and contract law.

The Translator: There was neither acceptance nor a counter-offer to any of these ideas, though everyone continued to agree that I should receive fair compensation for my work. At this point the editor announced that all contracts (between publisher and author, to which I was not privy) had to be redrafted, and the author's agent suggested that I could maybe "get started in the meantime." Though I knew this would be a risk on my part, I allowed as how I might be willing to consider beginning without a contract, provided we could agree to the payment, timeframe, and other terms that such a contract might include—most importantly, who would be commissioning the work. I reiterated that my contract should be with the publisher, regardless of how payment issues were managed. All of this met with silence. I, of course, did not begin the work.

The Lawyer: In some countries (such as France, but not the U.S.), publishing contracts often begin with a signed agreement about some fundamental terms; the full contract generally comes soon thereafter. In negotiating a contract, it helps to get a copy of the publisher's usual ("boilerplate") contract language and amend it as negotiations move forward. At minimum, someone needs to maintain a listing of contract terms under discussion and contract terms already agreed upon. The negotiations can then be about a number of specifics at once. Consistently sharing an up-to-date draft of the contract with all the negotiating parties (translator, author or agent, and publisher) can also reduce the risk of nasty surprises, hurt feelings, and long delays.

The Translator: It was mid-March when I first learned that the agent assumed that my contract would be with the author and not the publisher. I appealed to the editor, reminding her that my contract should be with the publisher, since it would have to cover numerous other issues related to publication: delivery and acceptance, credits, copyright, grant of rights, review and revision of proofs, and so on. Moreover, someone actually had to authorize the English translation, and such authorization could only come from the rights-holder, which I assumed was the publisher, though it might have been the author. Somewhere along the line I suggested a three-party agreement to address both payment and editorial/publication

issues. More silence: not a very productive way to work things out. At this point it appeared we were at an impasse and it seemed that this project might be "the one that got away." I began musing on the fact that while thickets are impenetrable to mortals like me, hopelessly caught in their branches, they provide great cover for birds and other creatures trying to be evasive.

The Lawyer: If the author has an agent, expect the agent to negotiate on behalf of the author from the beginning. Communication with authors can be important—and risky. Many authors (being human) cannot find their contracts and have forgotten whether they or their publishers control translation rights. Authors cannot grant any legal rights that they no longer hold, so an author's permission and blessing might have no direct legal relevance. Sometimes translation rights for all languages and all countries have been acquired by the publisher of an earlier translation.

The Translator: In mid-April, the editor wrote unexpectedly to say "it's a go!" She told me they were "preparing amendments and tax forms and requisite paperwork, but the main news is: WE DID IT." Well, that sounded positive. Still under the assumption that a contract with me would follow once the author's concerns were squared away, I quickly sent the editor a list addressing my issues: "I know you are still ironing out contract issues with the author and that it will be a while before you will be ready to deal with mine. Still, I wanted to pass along to you a couple of things that are important to me in a contract." Silence. By the end of April I was still waiting not-so-patiently and with fingers crossed, to no avail. When mid-May had come and gone, I managed to reach the editor by phone. She told me she was still waiting for an amendment to the author's contract. With regard to a translation contract, she waffled. This time instead of agreement, she was definitely making ambiguous noises of some sort, vague assurances that I later saw were meaningless. When she said that she had forwarded my list of contract issues to her legal department and that she would follow up with them, I began having serious doubts.

> Copyright and contract law allow authors, translators, and publishers tremendous flexibility in the creation of contracts.

The Lawyer: A translator's concerns should be shared—in writing—from very early in the process. A prolonged flurry of little queries, suggestions, and requests can be counterproductive. If important new points arise, however, the translator's counterparts need to know promptly. Do not save critical issues for the moment when others think the Gordian knot has been undone.

In Deeper and Deeper

The Translator: I heard nothing for another month and a half. Then, at the very end of June, the agent wrote to say that they had finalized their contract with the publisher and that the editor told her that my contract would be with the author, not the publisher: "She told me that since the contract will be between you and us, we should work it out." Bombshell. At first I suggested a simple letter of agreement with the author that would cover the payment arrangements and allow me to get started. Meanwhile, I reasoned, a contract could be worked out between me and the publisher to cover editorial and publication issues. This seemed feasible to me, but the editor came back with: "Unfortunately, Contracts Department cannot draft a letter of agreement as you are not in [the publisher's] 'employ.' Any publication issues would have to be covered in your letter with [the author]." A fine conundrum—*un bel ginepraio!*—since the author, of course, could not bind the publisher.

The Lawyer: A translator's contract with an author might require the author to secure—and to present to the translator—the publisher's written agreement to certain terms, such as the translator's role (as the author's designated representative) in checking proofs and approving the final text. Even without agreement from the publisher, the author can be bound by the agreement to provide the proofs to the translator and to respect the translator's emendations, if any.

The Translator: We seemed to be going around in circles. The elephant in the room, which was not mentioned until the author's agent and I had gone through five drafts of an agreement, was the matter of rights. When I was finally given a copy of the author's contract with the publisher, I saw that she had already granted the pub-

lisher rights to the English translation, which she had not yet acquired and which were therefore not hers to grant! The next surprise came from the agent, who said, "Since this contract is between us, the translator must grant rights to the author, who will then transfer them to the publisher." I felt I really did not have a choice at this point. It was a bit like cooking the frog, and I was the frog. In the end, work it out we did, but not without the process leaving me disillusioned and trapped once again in the *selva oscura* of the thicket. Not to mention wondering if I will end up having to claw my way through the impenetrable legal brush. Though in the end I granted the author "the right to publish the Work" for the term of the copyright, I am not at all certain about what this "right to publish" includes and what is actually granted to her publisher. The right to print and distribute the work? In any and all formats? What about sound or film editions? Or licensing to another publisher?

The Lawyer: Business is business. The negotiation of a book contract should, in my opinion, start with proposals on all the significant issues, such as those listed a little later in this article. Introduce the elephant when the party begins. For example, "Forgive my asking this so early, but am I right to assume that rights will be handled in the following manner...?" Presenting draft language for the contract helps to move the discussion forward.

"The copyright" or "the rights" to a translation are not a package that one either has or does not have. Copyright is a "bundle of rights." A publishing contract normally deals with specific rights in different ways (e.g., with different royalty rates for print publication, electronic publication, and income from dramatic adaptations, reprints from other publishers, and so forth). Indeed, these various rights might eventually be licensed out individually to a number of specialized publishers.

What about "the right to publish the Work"? Two items in the copyright "bundle of rights" are the right to reproduce the work and the right to distribute copies of the work. Unless the translator gives someone (the author or publisher or webmaster) a "right to publish the Work," the translation can go no further than the translator's desk drawer.

Another item in the copyright bundle is the right to make a derivative work, which includes the right to translate the work. An individual right such as this can be divided into an infinite number of fractions, with narrow grants of rights such as "North American English-language translation rights for nonprofit radio use only." In theory, each of these individual rights can be granted to a different person or business. There is no catalogue or complete checklist of the possibilities. The parties to a contract simply have to discuss what they want and make a deal.

Some people want their contracts to be as short and simple as possible, but the lack of detail increases the risk of conflict later. Courts in different states have reached conflicting conclusions about how to interpret older contracts that do not mention electronic media. The short answer is that the first discussion about contracts should address which formats are included or excluded, whether the publisher can license the work to others for reprinting in the original format, what royalty rates will apply in each case, and so forth. Including these details in the contract can prevent problems in the future.

One thing is certain: publishers cannot afford to negotiate a new agreement every time they need to print more copies, export to a new market, authorize an electronic edition, or donate copies to schools in developing countries. A good contract allows the publisher to make appropriate uses of the work and gives the author and translator reasonable compensation.

Breadcrumbs, Anyone?

The Translator: Thickets may be great places for birds like cardinals and quail who hang out deep in those criss-crossed branches, but other than resorting to the Hansel and Gretel stratagem of dropping crumbs, what can a translator do to find her way out of the tangle? To begin, one needs to be aware of the particular type of *ginepraio* with which she is dealing. Is the party to the contract a publisher or an author? Is it a formal written contract? A simple letter of agreement? A

In negotiating a contract, it helps to get a copy of the publisher's usual ("boilerplate") contract language and amend it as negotiations move forward.

gentleman's agreement based on a handshake or a series of informal e-mail correspondence? If written, who is drafting and proposing the contract? Are negotiations part of the parties' expectations? What other expectations do the parties have?

The Lawyer: In trying to resolve contract disputes, a court generally looks for the strongest evidence of what the parties actually agreed upon. The format of the evidence—letters, e-mail, signed agreements, testimony about earlier conversations, and so forth—is a secondary question, though some kinds of contract are enforceable only if in a signed writing (e.g., a "work made for hire" agreement or an exclusive license). Obviously, it is best to get a signed contract that memorializes everything that the parties agreed upon. Remember that your own memory may fade, and that your future nemesis in a contract dispute may be that kindly author's hypercaffeinated son-in-law. Handshake deals are best limited to simple, short-term transactions.

Legally, the more important categories of a translation agreement would be *assignments of rights* (such as work-made-for-hire contracts), *nonexclusive contracts,* and *exclusive contracts.*

When the translator *assigns* all rights to the translation, she permanently transfers her rights to someone else, like giving up a child for adoption. (The child does not "revert" to the birth parent when reaching a certain age.) A "work made for hire" agreement is forever.

If the translator *grants a nonexclusive license,* she allows others to use the translation but keeps open the option of making additional deals. ("You may perform my translation of *Carmen* in your theater, but I'm keeping the right to authorize performances in other theaters, too.")

> A prolonged flurry of little queries, suggestions, and requests can be counterproductive.

If the translator *grants an exclusive license* to a publisher, she agrees not to give anyone else the same rights, and allows the publisher to grant licenses to third parties. ("You can publish my translation of *Beowulf*, and you alone shall have the right to decide who else can publish this translation.")

Contracts with Publishers: Occasionally Obscure Waters

The Translator: Let's start with contracts with publishers. A couple of years ago, I attended a reading by Edith Grossman at the Center for the Art of Translation in San Francisco. Asked if she herself negotiated her publishing contracts, the veteran translator emphatically stated that she would never dream of entering those "shark-infested waters" without the able assistance of an attorney. Though I can see her point, unless a translator can command top dollar she might be hard-pressed to afford legal counsel. My own experience has relied solely on a self-help approach, and we can see where that has landed me.

The Lawyer: Many lawyers do some pro bono work or work at reduced rates for people of limited means. Some cities have chapters of Volunteer Lawyers for the Arts or similar organizations; some law schools have intellectual property clinics. State-supported offices coordinating pro bono services can sometimes find an attorney with relevant knowledge and experience. Clever people have been known to try to find the best attorney for a specific problem and then to say, "I can afford one hour of your time. Is it worth my time and money to come in for an hour?"

Note that in the U.S., attorneys are limited to practice within specific jurisdictions. If a translator is seeking advice on contract matters, she could, for example, consult an attorney in the state where she lives, the state where she works, or the state whose law is designated in a particular contract.

One should be very cautious when seeking legal information from nongovernmental sources online: well-meaning people have posted a lot of toxic misinformation. Resources such as PEN American Center are valuable, and public libraries generally have legal self-help books published by Nolo, a publisher of self-help material for simple legal matters. That said, people sometimes lose important rights when they try to adapt forms they got from a book but did not quite understand.

The Translator: Of course, before worrying about a contract one must find a publisher. Though there is no magic formula for landing a book contract with a publisher, you never know what you might find—serendipity often comes into play—or what chance opening and opportunity (Machiavelli's *fortuna* and *occasione*) you may be presented. It is important to be persistent and prepared so that you can recognize (or create) the opportunity and take advantage of it when it comes along.

Once you have a publisher and

embark on contract negotiations, what kinds of dangers are apt to be lurking in those "shark-infested waters"? On a positive note, the waters are generally clearer here than they would be when dealing directly with an author (murkier territory), since publishers generally have a standard contract that they will present to you. Still, "clear" might not be the best choice of adjective, as these lengthy, multi-page documents (in the tiniest of print, of course) are full of very complex terms that, not surprisingly, favor the publisher. Add to that the "foreign" language in which they are written (i.e., legalese), and the hapless translator can easily be led astray into the thorny thicket. I have been offered contracts with one-sided "hold harmless" clauses that shamelessly hold only the publisher harmless; others which do not actually define what constitutes "acceptance," though one's final payment is tied to this term; and so on. I once fell into the trap of a contract that called for royalties only on the publisher's edition though not on any editions subsequently licensed by that house.

The Lawyer: Some publishing contracts are reasonable, fair, and well written; some are one-sided, exploitative, and badly drafted. There is no shame in asking questions and requesting changes. Depending on the terms of the contract, however, the publisher might not be bound by an editor's explanation of contract terms.

The Translator: And then there is the very important matter of proofs. Reader, beware! The few Italian publishers with which I have dealt never mentioned such a thing as the translator's right to review the proofs, nor did a very early contract I signed with a U.S. publisher, and it never occurred to me to ask for such a clause. I blithely assumed that I would be asked to review the proofs after the editors had a go at my work. In the latter case, I confidently continued to proffer my availability for the task, only to be politely ignored. Not only that, but the author decided to throw in some new material at the last minute, and since I was on vacation at the time, the publisher allowed another translator to translate it. The published work bears my name and my copyright, but there is no way of distinguishing the parts (albeit few) that were translated by someone else. As I see it, this may have violated one of the so-called "moral rights" of a translator, namely, a "right to the integrity of the work." However, since moral rights are practically nonexistent in the U.S., unlike in some other countries, the point is moot.

The Lawyer: Caution! "Moral rights" is a technical legal term, not a reference to a philosophical or ethical position. Countries belonging to the Berne Convention have agreed to give artists and literary creators certain enforceable legal rights in their national laws. (The U.S. got around this requirement on the notion that American trademark law and other legal regimes established something analogous to moral rights.)

Moral rights in France, for example, include: 1) a right of *paternity*: a legal right to be identified as the author of one's work, as well as a right *not* to be identified as the author of something one did not create; 2) a right to the *integrity* of the work—a right not to have one's work distorted or mutilated in a way that would damage the creator's reputation; and 3) a right of *withdrawal*, so an author who is now horrified by what she wrote earlier in her career can remove it from the market. (Withdrawing the work can involve compensating the publisher and others.) Strictly speaking, the U.S. has "moral rights" laws only for very limited examples of the visual arts, not literature.

The Translator: Beyond this, most standard contracts make it sound as though reviewing proofs is a "duty" required of the translator. The wording from a recent contract states: "The Publisher shall submit to the Translator the proofs of the translation and the Translator agrees to read, revise, correct, and return them promptly to the Publisher. If the Translator fails to return such proofs within the time specified by the Publisher, the Publisher may publish the translation as submitted by the Translator subject to the usual copy editing and preparation for printing by the Publisher." In actuality, reviewing the edited and copyedited proofs is a right the translator should insist upon.

A good contract allows the publisher to make appropriate uses of the work and gives the author and translator reasonable compensation.

The Lawyer: Whether reading proofs is a right, a chore, or both, a translator should simply make certain that the contract specifies who is responsible to get the job done. If the translator wants the final word on alterations, she will need to raise the point in contract negotiations. Since the publisher may have dealt with translators whose command of the target language is unreliable (or who cannot stop making revisions), the prudent editor may refuse to surrender "veto power." Above all, proofread the manuscript very, very carefully. Alterations in proof can be very expensive, they cause delays, and they increase the risk that new errors will be introduced into the text.

Contracts with Authors: Murkier Waters

The Translator: Though generally shark-free, contracts with authors can be murkier in that there is no standard to use as a model. Moreover, if there is no publisher in the picture, the author cannot bind a hypothetical prospective party. So while author and translator may agree, for example, that "No changes shall be effected by the Author to the final version of the translation without the explicit written approval of the Translator," this does not preclude changes introduced by an eventual future publisher who is not bound by this stipulation. This is a major issue, in my view, as is the fact that expectations may be harder to identify. A recent protracted discussion with an author, for example, which never reached the point of drafting an agreement, eventually revealed that he was hoping to use the translation as the basis from which to draft a screenplay.

Control issues come into play and may even lead to the dreaded "Work for Hire" proposal—the deepest, darkest part of the juniper thicket. Here there are so many thorny branches criss-crossing each other that you might get stuck forever in that dense undergrowth. I am reminded of a husband and wife team, *la terribile coppia* as their Italian editor referred to them, who kept phoning me from Italy, trying very hard to get me to agree to "sell" my work and my copyright. We do not want you to cede us the right to publish your translation during the next "x" number of years, they told me, we want to buy your copyright outright (*acquistiamo quindi direttamente il tuo copyright, non il tuo permesso di pubblicarlo durante i prossimi dieci anni*). Needless to say, I did not agree to translate their book. A translator faced with such a choice should be aware that U.S. copyright law includes very specific conditions that must be met before a work can be considered a "Work for Hire," the most important one being that both parties must expressly agree in a signed document that the work shall be considered made for hire.

> Handshake deals are best limited to simple, short-term transactions.

The Lawyer: Only certain types of work (including "a translation") can be a "work made for hire." The relevant provision appears in 17 U.S.C. §101. (That is, section 101 of title 17 of the United States Code. Section 101 consists of a number of copyright-related definitions in alphabetical order. See the website of the U.S. Copyright Office for details.[2])

A "work made for hire" agreement does indeed have to be in writing, signed by both parties (the person who did the work and the person who will own the work). The agreement must also state specifically that the work is to be considered a work made for hire.

It is certainly good advice to get agreements in writing before work begins, but I do not see it in the law, and it is not uncommon for people to create such documents after the fact. I do not believe that U.S. copyright law is any friendlier to translators than the intellectual property laws of other countries. Some writers and translators prefer to avoid the application of American law precisely because of the work made for hire issue.

Back to the legendary couple described in our adventurer's narrative. They wanted the translator to *assign* all rights to them. An *exclusive grant of all rights* would differ in that (many years hence) the translator would have the possibility of terminating the transfer of rights made under the grant. With either an assignment or a temporary grant of rights, the contract can provide for royalties and other benefits. Some people prefer to handle everything in one contract; others want to renegotiate every time a new use of the text is contemplated. The prospect of having to enter protracted negotiations could kill a deal before the translator even learned of the possibility.

The Translator: Despite the lurking pitfalls, I have undertaken a

number of projects with authors without undue consequences (the sole exception being the project with "Giovanni," referenced earlier). Indeed in many cases the experience turned out to be quite pleasant. One young woman traveled from Torino to Rome to meet me after I had translated some of her short stories, and we spent a very enjoyable day or two in the Italian capital. Two brothers who divide their time between residences in Italy and the U.S. have continued to call me regularly after I translated a novel they co-wrote. And a young poet whose poems I translated subsequently asked me to write a preface to the volume; he too came to meet me personally in Rome. In some cases there was a contract, in others, terms and conditions were simply agreed upon by e-mail.

The Lawyer: Individual agreements made through e-mail exchanges can, in some circumstances, have the force of contract, depending on the jurisdiction, the subject matter, the dollar amounts involved, and so forth. Not every contract is on a set of numbered pages with signatures at the end.

The Translator: Some of the things I generally include in an agreement with an author are:

- A definition of the work to be translated: title, author, publisher and date of publication, number of words or pages, etc.
- Fee per 1,000 words, total payment due and terms of payment: amount payable upon signature of the agreement, and balance due upon delivery and acceptance.
- A statement saying that the authors own the rights to the original work [title] and are therefore legally authorized to commission the translation.
- Delivery terms: the translator agrees to complete the work no later than [date], pursuant to the final signing of this agreement and receipt of the initial payment by [date].
- Acceptance terms: time allowed; dispute resolution if not accepted.
- Copyright registration in the translator's name.
- Granting the copyright to the authors for the term of the copyright; or for as long as the work remains in print, etc., after which the copyright reverts back to the translator.
- Review of proofs prior to publication; all changes to be approved by the translator.
- Credits: the translator's name on the cover and title page.
- Free copies of the book upon publication.

The Lawyer: It is crucial to include a clear legal assurance of who owns translation rights for the intended market area and the target language (e.g., exclusive world rights for English translation). Authors have been known to make honest mistakes on this point, granting permission when they had no authority to do so, and ultimately leaving a translator with a complete (and completely unpublishable) manuscript. Before starting work, one could ask for a letter from an agent or the original publisher identifying the rights holder.

> Legally, the more important categories of a translation agreement would be assignments of rights (such as work-made-for-hire contracts), nonexclusive contracts, and exclusive contracts.

Copyright registration in the translator's name would, in the presence of the other terms, do little or nothing more than ensure that the translator's name appears on the copyright page. Granting an exclusive license of all rights—rather than assigning all rights—could keep open the possibility of regaining the rights many years later. In these days of electronic publication and print on demand, the old distinctions between "in print" and "out of print" are fading. Some contracts call for a reversion of rights if sales in a given period are below a certain level.

A contract should address the question of royalties (even if only to state that there will be none), subsidiary rights (income from audio books, electronic editions, retranslations into other languages, serialization in magazines, dramatic adaptations, those improbable film rights, and all other formats or technologies, including those not yet invented, and use anywhere in the universe—when you are done laughing, look at some contracts).

Some contracts require the

Related Resources

Contracts in the United States

A splendid resource on contracts for translators is PEN American Center's "Translation Resources," available at www.pen.org/page.php/prmID/154. These resources include "Negotiating a Contract" (www.pen.org/page.php/prmID/320) and "A Model Contract" (www.pen.org/page.php/prmID/322).

Contracts Outside the United States

For some sample and model contracts (England and Scotland, the Netherlands, France, and Turkey), see the links on the website of the European Council of Literary Translators' Associations, www.ceatl.eu/further-reading/downloads/#s2.

Copyright-Related Treaties

1. Circular 38A, "International Copyright Relations of the United States" (Washington, DC: United States Copyright Office, 2010), www.copyright.gov/circs/circ38a.pdf.

2. Factsheet FL-100 "International Copyright" (Washington, DC: United States Copyright Office, 2010), www.copyright.gov/fls/fl100.html.

3. The World Intellectual Property Organization website (www.wipo.int) contains information on intellectual property treaties. For example, for a link to the full text of the Berne Convention for the Protection of Literary and Artist Works, see www.wipo.int/treaties/en/ip/berne.

4. Information on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement can be found at the World Trade Organization (WTO) website (www.wto.org/english/tratop_e/trips_e/trips_e.htm). The text of the TRIPS Agreement appears at www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPs.
   Congress is obliged to enact any laws necessary to implement the terms of these particular agreements. Thus, a translator in the U.S. cannot meaningfully object that her U.S. publisher has failed to comply with an international treaty, but rather that a U.S. law was violated. In some other countries, however, an individual can claim specific rights under these treaties. Interested readers can explore www.wipo.int.

Fees and Manner of Payment

For a fascinating comparative survey by the European Council of Literary Translators' Associations, see Fock, Holger, Martin de Haan, and Alena Lhotová. "Comparative Income of Literary Translators in Europe" (Brussels: CEATL [Conseil Européen des Associations de Traducteurs Littéraires], 2008), www.ceatl.eu/wp-content/uploads/2010/09/surveyuk.pdf.

Volunteer Lawyers for the Arts (VLA)

To find chapters for a specific state or city, see links in the National VLA Directory (which also includes links for Canada and Australia): www.vlany.org/legalservices/vladirectory.php.

Works Made for Hire and Independent Contractor Status

See Circular 9, "Works Made for Hire Under the 1976 Copyright Act" (Washington, D.C.: United States Copyright Office, 2010), www.copyright.gov/circs/circ09.pdf.

author or publisher to include certain terms in any subsequent contract (for example, to include a credit to the translator in every copy, in any format, in which the translator's text is used—with the obvious exception of any fair use, such as brief quotation). One could try to get a "most favored nation" clause, providing that if all or part of the translation is used as a selection in a collection of works, the translator will be compensated at a rate no lower than any other translator represented in the collection.

The Translator: And, of course, there is all the usual legal language: what happens if the agreement terminates, hold harmless provisions, a zipper clause ("This Agreement sets forth the entire understanding of the parties…"), and so on.

The Lawyer: This "zipper clause" is generally known as an "integration clause." If any important part of the agreement appeared only in an e-mail, a letter, or a prior draft of the contract, or if something was agreed to by telephone or on a handshake—even an editor's explanation of an obscure contract term—that part of the deal must be included in the written contract if there is an integration clause; otherwise the integration clause is supposed to annihilate that external evidence of what the parties agreed upon.

Many Paths Lead into the Thicket

The Translator: Whether the contract is with a publisher or an author, the tendrils of the "c" words are as fast-growing and overwhelming as rhododendron hells or kudzu: "In Georgia, the legend says / That you must close your windows / At night to keep it out of the house."[3] Vigilance is needed, whether it is a formal written instrument or a simple memorandum of agreement. A gentleman's agreement, verbal and sealed with a handshake, is not advised. Nor do I recommend telephone negotiations. E-mail correspondence, though informal, is preferable, since it at least provides a written record of what has been discussed and possibly agreed upon. Conversations by phone are too fluid and formless and tend to evaporate before they can be captured. Ensuing reactions such as "But I thought you said…" and "I never said…" are all too common. If you must negotiate by phone, a follow-up memo—"It was lovely to talk with you today…my understanding is that…"—can help firm up the discussion and possibly prevent future misunderstandings.

One issue that is certain to rear its ugly head in any negotiation is the matter of crediting the translator by putting her name on the cover. While I am tempted to say it is a losing battle, that does not mean every battle will be lost. In one of my early contracts I insisted on this provision, only to be told by the editor that it was the publisher's policy not to put the translator's name on the cover. He said they had refused to do so for a translation of a book by Umberto Eco, so they certainly would not budge on my account. This editor was a fair man, a translator himself, and while he acknowledged the importance of this issue to me as a translator and agreed to be a forceful advocate in representing my request, he did not feel he would be successful in obtaining it. A recent editor at another publishing house responded to the same issue with similar forthrightness: "I do not plan to mention the translator's name on the novel's cover as I really do feel this deters the American reader." She cited a work by Robert Bolaño as an example of another work whose translator is not mentioned on the cover. Referring to the work in question, she went on: "I think it's even more important that a work of this nature—upmarket women's fiction—refrain from mentioning translation on the cover as we want our approach to be as mainstream and broad as possible."

> Whether reading proofs is a right, a chore, or both, a translator should simply make certain that the contract specifies who is responsible to get the job done.

Still, small miracles do occur: another recent publisher would not include the request in the contract, but to my surprise and pleasure, when my copies arrived my name was on the cover!

The Lawyer: To reach the front of the book jacket, translators could take a gradualist approach: first get a mention on the back of the jacket, then a mention on the front flap, then an "author" blurb on the back flap. The most important, in my view, is to be named on the title page, because of its bibliographical authority. Jacket designers and marketing folk guard the front of the jacket jealously, concerned (and

not without reason) about crowding and clutter. Still, if you see a credit line identifying the jacket designer, you may have reason for hope.

The Translator: What about agents? Are they a hindrance or a help in avoiding the prickly trap of the copyright thicket? Generally I mention the importance of cultivating the agents of the authors you translate and I stand by this. They can be extremely helpful in identifying and putting you in touch with other authors, and mutually rewarding relationships can develop. I did encounter one agent, however, who seemed to work at cross-purpose, both with me and with the interests of his author, a very well-known Italian writer. The matter concerned a wonderful short story I translated. The author, duly contacted, had given his permission for me to translate the story and seek a publisher. I found a journal that was very appropriate for the story's theme, whose editor was eager to publish it. At that point, the author's agent entered the picture, insisting on being paid a sum that the journal in question could not meet. The experience was a bitter one, leaving me and the journal editor disappointed and the story unpublished. I never found out what the author thought about it. *Pazienza.*

The Lawyer: If an agent feels that the author has attempted to deprive her of a fee, and perhaps a living, trouble is foreseeable, especially if this is not the first offense. If the author is trying to cut the agent out of the process today, the translator may have reason to worry tomorrow.

Abandon Hope All Ye Who Enter Here?

The Translator: Returning to my most recent foray into the *ginepraio*—a contract with an author that does not legally bind the publisher (except through the author's contract with the publisher, which does not mention me or my English translation specifically)—there is no way to tell at this point how deeply entangled the situation will become as I begin the translation and start making my way through the thicket, nor how I will come out of it. In the end, prevention and clarity seem to be the best defense—*patti chiari* as we say in Italian, literally, *patti chiari amicizia lunga,* meaning clear understandings breed long friendships and lead to enduring relationships. Or as the attorney with whom I co-authored my first *ginepraio* account put it in her summation:

> "I'm not certain how or when Anne and Giovanni will emerge from their juniper prison. Clearly, the most important lesson to be learned from their ramble into what quickly became a dark and unfriendly place, is that it is easier to map a clear path through any thicket from a vantage point above and beyond it all."[4]

With hindsight I would add that prevention is even better: the best way out of the quandary is not to enter it at all. Which means being forewarned and informed, and making sure that the intentions and expectations of all parties are clear and transparent from the start. The alternative to transparency is the *selva oscura,* that dark, hopeless wood that Dante writes of: "Abandon hope all ye who enter here."

The Lawyer: It is possible that the early involvement of a lawyer—or the author's agent—could have helped the author, translator, and publisher to reach an agreement (or set of agreements) with less frustration. In any case, the foregoing may help translators in their travels.

The Translator: To close on a more positive note, two Sicilian proverbs come to mind. The first, displaying the forbearance, wry sense of humor, and healthy cynicism typical of a people who have endured countless invasions over the centuries and are often wary of new people and ways, is *Bòn tièmpu e màlu tièmpu nun nùra tutu u tièmpu* ("Neither good nor bad weather lasts forever."). Wait a while, things will get better. The second is *Bonu vinu fa bonu sangu* ("Good wine makes good blood."). Maybe the next time I negotiate a contract I should invest in a good bottle of Brunello di Montalcino. *Pazienza*, that eternal Sicilian virtue.

Notes

1. The earlier article referred to was "A Jog Through the Juniper: A Translator's Unhappy Excursion into the Copyright Thicket," by Anne Milano Appel and Carol J. Marshall. *The ATA Chronicle* (vol. XXXI, No. 7, July 2002), 32-35, http://amilanoappel.com/ginepraio.htm.

2. 17 U.S.C. §101, www.copyright.gov/title17/92chap1.html#101.

3. The lines "In Georgia, the legend says…" are from James Dickey's poem, "Kudzu": *James Dickey, The Whole Motion: Collected Poems, 1945-1992* (Wesleyan University Press, 1994), 155.

4. See: Appel, Anne, and Carol J. Marshall. *op. cit.,* http://amilanoappel.com/ginepraio.htm.