



A Checklist for Foreign Rights Deals

by Steve Gillen

Foreign rights deals offer an often underexploited but potentially lucrative opportunity for independent publishers. They can add 10 percent or more to your revenue, and since no direct costs are associated with two of the three ways you can exploit foreign rights, much of that revenue flows directly to your bottom line. (For details, see “Why Foreign Rights Are a Big Deal for Small Publishers,” via *Independent* magazine at ibpa-online.org.)

But along with the upside potential comes a little downside burden. To capture this revenue without exposing your copyrights to unnecessary risk, you have to learn the language of foreign rights contracts and a few new rules.

What follows provides information about deal points for two of the three basic types of foreign rights deals—a translation license and an adaptation license. Next month, I’ll cover distribution contracts. As with all other kinds of deals, your ability to get the terms you want will depend on a variety of factors, including how much clout each side has and how skillful each negotiator is.

For translations and adaptations, the licensee will probably want to use its form, and seeing that form can be useful,

since it may contain clues to the nuances of local copyright laws or publishing customs and conventions. But since the other side’s form is not likely to offer many of the protections described below, you should probably insist on using your own. A sample “Translation and Publishing Rights Licensing Agreement” available to IBPA members provides a pretty good starting point (see the Member Benefits Handbook at ibpa-online.org).

KEY DEAL POINTS FOR A TRANSLATION LICENSE

► **Commitment to translate.** Most translation deals are exclusive. When you sign, you surrender your right to exploit the market the deal pertains to, so the licensee should commit to publish by a certain date, and the right to terminate the deal if this does not happen should be reserved to you as the publisher of the original work.

► **Faithful translation.** For a number of reasons, you will want the licensee to promise that the translation will be professionally competent and faithful to the original. These reasons relate to your reputation, your potential liability for errors, and your contractual obligations to your authors. ►

■ **Assignment of copyright in translation.** If the translation can be prepared as a work-for-hire under the laws of the country where it will be prepared, the licensee should agree to prepare it that way and to comply with any relevant legal requirements to that end, with any documents subject to your review and reasonable approval.

Since a work-for-hire arrangement may not be possible, the resulting copyrights in the translation should also be assigned to you as the publisher of the original work so that you will continue to control the right to prepare derivative works. Bear in mind that the default rule in most countries is that copyrights vest automatically in the human creator, which means that conveying the copyrights in a translation to the publisher of the English-language work generally requires a written agreement, often with certain very specific provisions that vary by country. But you do want to control those rights so that your ability to manage the work in other jurisdictions won't be eroded.

■ **Authorship attribution.** You will want your author to be acknowledged as the author of the original English-language edition, and you may want to specify the location and form of this attribution.

■ **Copyright notice.** You should specify the form of copyright notice to be used. Often, translations include one copyright notice covering the original English-language work that has been translated and a separate copyright notice covering the translation.

■ **Copyright registration.** Ideally, the licensee will be obliged to register the copyright in your name in accordance with the laws and regulations of any territory where it is authorized to distribute the translated work. But fewer than half the countries of the world have any registration system at all, and none of them has a system as robust as the one US publishers are familiar with, so this may not always be do-able.

■ **Trademarks.** Any US trademark registrations you may have provide no protection in foreign markets. And although protecting trademark rights in the United States is a matter of "first-to-use," "first-to-register" is what prevails in most foreign jurisdictions. Thus, an unscrupulous licensee might register your marks and effectively hold them hostage if you haven't moved to protect your rights. Keep this in mind if you grant translation rights to a series with a common title, a special imprint, or a series name that you wish to preserve as your own. (For more information, see "Trademarking and Your Brand Strategy" and "Pollyanna, Trademarks, and Titles" via *Independent* magazine at ibpa-online.org.)

■ **License limited to print run.** An exclusive translation license should be limited in a number of ways. One particularly effective technique is limiting the license to the number of copies ordered for the first print run. The advance can then be calculated to equal the royalties on the entire run so that you won't have an overseas collection problem.

■ **Territory.** The license should also be limited to territory where the licensee is positioned to aggressively promote the work, reserving the rest of the world to you for subsequent licensing. This is particularly important when the language of the translation is spoken in more than one country (think of Spanish, for example).

In areas where the licensee convinces you that it can best exploit translation rights, watch out for distribution deals the licensee sets up with related companies, because inter-company transfer prices can be manipulated in ways that mean you earn less. For example, if the UK part of a publishing company sells books to the Australian part of the same company, it may set a very low transfer price to push profits to a taxing jurisdiction with a lower rate or for other reasons. But whatever the reason, royalties would then be calculated on the low transfer price rather than on the higher retail price.

■ **Term.** It is best to limit the term of the license to a period of years, typically five to ten, so that you don't have stale translations blocking your access to a particular market.

■ **Advance for entire print run.** As noted above, you should get an advance to cover the entire authorized print run. This will help you avoid collection problems, and making the front-end investment will give the licensee an incentive to move the books and avoid permitting the market to languish.

■ **Reservation of rights.** You should expressly reserve any rights not specifically granted and make the grant of license expressly conditioned on the licensee's compliance with the terms and conditions of the agreement.

■ **Warranties.** For obvious reasons, you should require the usual array of publishing warranties from the licensee (generally they will be limited to the contributions of the translation).

Similarly, you should expect to warrant what you provide. But be careful about libel and privacy warranties, because the laws in other countries can be much more restrictive than they are in the United States (see "Minimizing Libel Risks, Part 2," via ibpa-online.org).

- ▶ **Comp copies.** Specify that you will get the number of complimentary copies you want for yourself and your author. Your copies will be useful for verifying that the licensee has complied with the quality, attribution, and notice requirements, and the author's copies are a feel-good perk that shows you are marketing the book worldwide.
- ▶ **Withholding taxes.** Some countries require their domestic businesses to withhold taxes on amounts paid as royalties, and you will want notice of this requirement where it exists, plus copies of receipts from the taxing authorities to assure that payments are being made as reported. In addition, a few countries have imposed restrictions on the expatriation of US dollars, limiting your ability to actually receive payments even if earned. There may be ways to deal with this if you know about it in advance.
- ▶ **Costs of translation and publication.** Of course, the licensee should expressly agree to bear the costs of translation, publication, promotion, and distribution.
- ▶ **Royalty rate.** Translation royalty rates are generally 5 to 12 percent of list or cover price, with the norm being 10 percent.
- ▶ **Accounting.** You should get regular accountings (at least twice during the first year after publication and once each year thereafter) even if you get the entire royalty advanced. Those accountings will let you keep track of the licensee's progress in exhausting its inventory.
- ▶ **Choice of law.** Most licensees will want their own country's law to apply. You should resist this for obvious reasons.
- ▶ **Exchange rate risk.** An exchange rate risk related to the timing of conversion always exists when amounts the licensee is earning in one currency are converted to US dollars for payment to you. Accordingly, you should specify when the conversion will take place—on sale or on payment. That way, at least it can't be manipulated to your disadvantage.

KEY DEAL POINTS FOR AN ADAPTATION OR BRITISH COMMONWEALTH LICENSE

All the advice offered above for translation deals also applies to deals for English-language adaptations. But adaptations involve three special concerns as well

- ▶ **Territory.** The non-US, English-speaking territory—generally described in publishing deals as British Commonwealth (the empire lives on in publishing)—consists of more than 70 countries, so it is particularly

important to restrict the licensee's territory to those countries where it is positioned to do business. Similarly, you will probably want to expressly exclude Canada, Mexico, and the Philippine Republic from the territory where rights are being granted for sales of the US edition.

- ▶ **Royalties and advances.** Royalty rates for an adaptation or British Commonwealth license are often proposed on a sliding scale (10 percent until 5,000 copies have been sold; 12.5 percent on the next 5,000 sold; and 15 percent thereafter). Advances are typically small (\$5,000 or less). Watch out for the impact of the British VAT (value-added tax), which occurs at each stage of distribution in England and is generally recouped out of the American publisher's royalties.

THE THIRD BASIC KIND OF RIGHTS DEAL

Foreign sales of a book's US edition are likely to be done through distribution deals rather than through licensing arrangements. These transactions are fundamentally different because distribution deals involve selling tangible goods, and you will have to consider issues pertaining to fulfillment, returns, price adjustments, risk of loss, distributor termination, and more. Guidance on all of that will appear next month. ■



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