

Skirting the Juniper Brambles: A Translator Narrowly Misses Getting Trapped in the Copyright Thicket

By Anne Milano Appel with legal commentary
by Erach F. Screwvala, Esq.

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Over the years I've stumbled more than once into the prickly tangle of copyright and gathered my share of scratches and scars. I chronicled my unhappy excursion into that thorny world in articles co-authored with attorneys Jeffrey S. Ankrom (2011) and Carol J. Marshall (2002).¹ This time I am joined by Erach F. Screwvala, who has represented a number of translators in negotiations

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with publishers and has on occasion advised the PEN America Translation Committee (a literary translation advocacy group) and presented workshops on translation copyright issues.

The metaphor in the title of this article came to me several years ago from an exasperated Italian author whose novel I translated. After a lengthy, frustrating exchange, he exclaimed “*Un bel ginepraio!*” just before we stopped communicating altogether and fell into a hostile, mutually wounded silence. Literally speaking, a *GINEPRAIO* is a dense, impenetrable juniper thicket. Figuratively it means a tight fix (i.e., a fine

predicament). After making my way out of those particular thorny tangles to emerge, like Dante, “*a riveder le stelle,*”² I was determined that I would never again blunder back. Yet a year or so ago, despite my good intentions, I narrowly avoided it.

I think about that near miss whenever the issue of copyright comes up. At a meeting of the PEN America Translation Committee last September, for example, the agenda item “Translation Copyright and Publishing Practices” generated far-ranging discussion and raised a number of questions, one of them being “What are the benefits to

holding a copyright?”³ I am hopeful that sharing my experience with others might address that question and possibly prevent others from setting off on a path leading to a *ginepraio*. Interspersed throughout my narrative, Erach offers his valuable insight from a legal perspective.

A New Bramble Takes Root

It started off promisingly enough. The publisher in question had acquired my translation from another publisher who had published it earlier in the U.K. I held the copyright, and the new publisher (let’s call it the Big Bad Wolf, or BBW) had no problem accepting this fact. Things proceeded smoothly and according to the usual script. I was sent a contract containing my customary requirement—namely that the copyright page would read “English translation © 20XX Anne Milano Appel”—and we all signed happily.

It was only later, when BBW offered me another book by the same author, that the first signs of prickly foliage began springing up around me. Even so, matters went along cordially. We discussed a fee and, though it was lower than my usual, I agreed to it because I wanted to continue translating this author’s work. A distant alarm bell may have sounded in my head, but it was really just a tinkle, which I dismissed blithely. After all, copyright had not been a problem with the first book, so I thought its publication had set a precedent when working with BBW.

Then I received a proposed contract. Instead of my usual requirement, BBW assumed that it would “keep” (read *take*) the copyright to my translation. While I had imagined that we would follow the precedent set by the first book, BBW insisted that the publication of the earlier book represented an exception to their usual policy. Apparently they had only published one other exception that resembled mine, as they explained:

The exception you found is the only case corresponding exactly to [yours]: that is to say, a translation already done that we bought from another publisher. This never happens when translations are done for us, right from the beginning.

After reading this, the euphoria and goodwill generally attendant upon the start of a new project dampened quickly. My optimism fizzled and a long and increasingly hostile debate ensued. While I continued to challenge BBW’s assertion that the publisher always “keeps” the translation copyright, BBW stood firm on a “take it or leave it” contract. I maintained that under U.S. copyright law, the translator holds the copyright of the translation from the moment the work is created, and that the publisher cannot “keep” something that is not theirs in the first place.⁴

Though I stated, as I do in all of my contracts, that I would grant them the exclusive license to print, publish, and sell the translation for the full term of the U.S. copyright in the territories of their exclusive license (BBW’s contract did not contain this wording), they refused to change their position. The objectionable clause in BBW’s proposed contract read:

Upon Client’s completion of all payments provided herein, the translation of the item described in paragraph 1 above shall be the property of Client. Translator has no obligation to take any steps to protect any copyright, trademark, or other right of Client with respect to the translation, except as may be expressly otherwise provided in this Agreement.”

I found the language to be ambiguous and muddled. At the very least, the wording suggests a lack of transparency. Nor was there a clause explicitly ceding the translation copyright to the publisher elsewhere in the contract.

The Lawyer’s Take

As I tell my clients, contract negotiation is 95% leverage and 5% general decency. For most translators, this means being presented with a “take it or leave it” contract. There are some translators, however, who have reached such a level of success and popularity that it levels the playing field. In rare instances, a translator even has the ability to dictate certain terms.

It is exceedingly rare for U.S.-based publishers to seek to acquire the translator’s copyright. Personally, I have never encountered that situation so, by and large, leverage does not enter into the equation. By contrast, European-based publishers are more likely to attempt such a maneuver, although I have been generally successful in preventing it.

The clause in question that Anne cites is rather odd for a publishing contract. I’ve never seen any language like this before in any contract I’ve negotiated. It’s sheer speculation on my part, but my best guess is that this is intended to establish the translation as a “work for hire.”

A “work for hire” can exist in two circumstances: 1) a work prepared by an employee in the course of her employment; or 2) a work specially ordered or commissioned. In a “work for hire,” the employer or commissioning party is the author and copyright owner of the work, even though the employer or commissioning party did not contribute any artistic content to the work.⁵ A translation is one of the enumerated works that can be commissioned as a “work for hire.”⁶

As an attempt to create a “work for hire,” this clause is sloppy at best. The term “property” is imprecise and ambiguous. One could argue that the term “property” refers to the physical copy of the translation, not the actual copyright. The second sentence of the clause clouds the intent of the drafter further. Although the translator is relieved of the obligation to take steps to protect the copyright, it does not



explicitly state why that is. Regardless of intent, I would question the efficacy of this language in establishing a “work for hire” arrangement.

The Publisher Responds

BBW responded to my objections and the modifications:

We cannot accept your modifications to the contract. Once again, I repeat that this is the contract we have been using for eight years and there has never been a single problem. The copyright of translations belongs to The Publisher through agreement with the copyright holder of the original work [bold italics mine], and the agreement between The Publisher and the translator does not further cede copyright. So it is through the signing of the agreement that you acknowledge The Publisher’s ownership of the translation.

I replied that the copyright of the translation cannot belong to the publisher through an agreement with the copyright holder of the original (Italian) work. I explained that because the holder of the copyright to the original work does not own the copyright in the translation, he can only grant the publisher the *right to commission* a translation.

I suspect the publisher was confusing the right to have a work translated, one of the rights an author may cede to a publisher, with the copyright to the resulting translation itself. An author may certainly cede the copyright of the original work to the publisher, but surely he cannot cede the copyright in an eventual translation. (In retrospect, such confusion should not have been all that surprising to me since when I was first starting out, even some authors with whom I worked were unaware of who actually owned the copyright to their work—themselves or their publisher.)

The Lawyer’s Perspective

The copyright owner holds a basket of rights, one of which is the right to make derivative works of the original art.⁷ As a derivative work, a translation can only be made with the permission of the copyright owner, so the copyright in the translation is tied to the copyright in the original language work.⁸

The owner of the copyright in the original language work may place any conditions he or she chooses, including the condition that the translator accept the project as a “work for hire” and relinquish his or her claim on the copyright in the translation. Since a publisher would be a grantee of the right to commission a translation, it is not impossible for the publisher to enter into a contract in which it acquires the copyright to the translation as a “work for hire.”

Although it is rare, there are instances where the original language author requires that the publisher acquire the translation copyright. Otherwise, the publisher may provide in the contract that the translation is on a “work for hire” basis, or it may provide for an assignment of the copyright from the translator to the publisher. Either mechanism has the same effect—the translator is stripped of his or her copyright.

Abuse of Leverage?

In the end, I lost at least two translation projects as well as the promise of any future work with BBW. I walked away from the deal since BBW showed no intention of negotiating. Still, I continue to wonder how this publisher can claim, under U.S. copyright law, that it owns the translation copyright “through an agreement with the copyright holder of the original work.”

Yet what BBW is doing is clearly borderline. Attorneys have told me that there is no actionable cause, despite the publisher’s unfair bargaining power in forcing a translator to forfeit his or her right to retain copyright, and the differential treat-

ment afforded to authors and translators (authors are allowed to keep their copyright, translators are not). At the very least, BBW’s practices are questionable.

In the first instance, the deck is stacked against the “little guy” (the translator), and BBW may be viewed as a Goliath. The translator does not have comparable bargaining power against a giant that insists that the translator accept its non-negotiable contract terms as a condition of being assigned the translation. Since the clause in question is neither voluntary nor negotiable, the playing field is not level—if the translator wants the job, it’s take it or leave it. Could this be considered an abuse of leverage?

Though the practice is indeed outrageous, many translators go along with it.⁹ I just didn’t want to take that walk through the thicket again.

Benefits of Holding Copyright

Why wasn’t I willing to let BBW take my copyright? What is the value of retaining your copyright? Are there benefits?

I’ll admit that it is largely a matter of principle, and that in many cases copyright has little practical value. In the U.S., for example, the term of the copyright is no longer a set number of years, but lasts for the “life of the author plus 70 years.”¹⁰ Since I generally grant a publisher the right to publish and distribute the work for the duration of that term, it will only matter to an heir who is around 70 years after my death (subject to any subsequent change implemented in U.S. copyright laws). So I suppose I should not waste any time worrying about it now, should I?

On the other hand, if I make sure to include a “reversion clause” in my contract, the prospects change. A reversion clause can limit the assignment of rights to the publisher “for the full term of copyright and all renewals and extensions thereof” by clearly stipulating the conditions under which the rights to the work “revert” to the translator once the work is “out-of-print.” Though the

reversion of rights used to be tied to a work going out of print, old distinctions between “in print” and “out of print” have blurred as a result of new technologies. Accordingly some contracts now call for a reversion of rights if other conditions are met (e.g., if sales in a given period fall below a certain level or dollar amount). The PEN Model Contract suggests several options in this regard.¹¹

The Lawyer’s Viewpoint

I find the framing of this issue in the translation community at large rather frustrating. We focus on why translators should keep their copyrights when, to me, we should ask “Why shouldn’t translators keep their copyright?” The question, as framed, appears defeatist and acquiescent to the publishers’ superior bargaining power. Regardless, the question is more nuanced than it appears.

A typical grant of rights is given for the length of the copyright, so for all practical purposes, it appears that the publisher is effectively owning the copyright. But this misses a couple of important concepts.

First, any license for the life of the copyright should contain adequate reversionary language that permits the translator to terminate the license. A reversion clause is simply a set of circumstances under which the publisher’s right to publish the translation is terminated and the rights return to the translator. Most publishing agreements—not just translation agreements—provide a mechanism for rights to revert back to the author.

In all likelihood, the agreement with the author of the underlying work contains a reversion clause. As a result, the publisher should be willing to provide a similar clause to the translator. After all, what good is it for the publisher to have the right to publish a translation without the right to the underlying work? But even where the publisher finds a way to avoid the application of a reversion clause, federal law permits a

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copyright owner to terminate a prior grant during a specific window of time.

Second, a copyright in the translation brings with it the same basket of rights that the original copyright owner enjoys. Generally speaking, the translation contract grants only the right to reproduce and sell fixed copies of the translation. Imagine a motion picture based upon the translation of an underlying work (e.g., *The Girl with the Dragon Tattoo*). A motion picture based upon a translation is another type of derivative work for which the translator should receive payment. Then there is the possibility of new technology that offers new outlets, like the home video market did for television and film.

Even with a reversion clause, the publisher may see to it that the condition that would trigger reversion of rights never occurs. A colleague who worked for BBW some years ago reminded me that: “Things are different between the U.S. and the U.K. In the latter, publishers are much more inclined to allow the translator to keep his or her copyright ... but the practical implications are minimal. As long as the book stays in print, it’s the publisher who will control the translation.”

He went on to cite the importance of visibility: having your name as translator in all editions of the book, on the title page, and ideally on the cover. He concluded that for the sake of that and other factors, “I could forego the copyright, as I obviously did several years ago (though, to be honest, I’d forgotten that they ‘owned’ my copyright!). I have not worked for them [BBW] since.”

Another colleague suggested that whoever asks “what is the advantage

in owning copyright?” should ask that same question of the publisher. The answer, of course, relates to control and economics. Whoever owns the copyright can sell/license the copyrighted text to another party. For example, the PEN America FAQ that accompanies its model contract describes it this way:

Retaining the copyright benefits the translator in several ways: it affords additional protections and continuing control over the work (for instance, if it is to be sold in formats that were not yet invented when the contract was signed), allows for the negotiation of royalties for a financial stake in the sale of subsidiary rights, and ensures that the translator will retain copyright even after the book goes out of print [pursuant to reversion]”¹²

Naturally, publishers may be less than eager to accept a reversion clause. In which case, we are back to “why worry about it?” if holding copyright has little practical value. In the end, this may be the reality, yet, to me, giving up my copyright felt demeaning somehow, which is why I turned down BBW’s contract.

Raising Awareness

Why do some translators accept this practice? Translator Jonathan Dunne, writing for the blog *Absinthe Minded*, expressed his frustration at the fact:

There are translators out there, good ones too, who are willing to accept those terms ... I wonder why they agree to give up their copyright and, at the same time, I hold out the benefit of the doubt. Perhaps there are mitigating ➔

circumstances that would explain it."¹³

Perhaps these translators are swayed by the rate they are offered, by how much they need the work, or by how eager they are to translate a particular author. Maybe they are content to relinquish copyright in exchange for visibility—their name on the front cover, a brief bio on the jacket flap, a mention in the publisher's catalog.

One colleague was particularly plainspoken about relations with BBW:

I haven't had copyright on any of the books I've done for [them]. Nor have I had more than a tiny rise in the rate they've paid me over the past 10 years. They also don't pay an advance—the only publisher I work for that doesn't. To be honest, the conditions aren't very good, but I've continued to work for them because they employ me very regularly and offer me (mostly) very interesting books to translate ... I do need to eat, and to do that I need to have a regular stream of work. I've tried to get better conditions out of them over the years, but they are absolutely adamant (by "they" I mean the Italian parent company, which is what I deal with). I guess I'm letting the side down by continuing to work for them, but that's the way it is.

I am not sure how to counter this. So what's needed?

Education

The more I think about examples like these and others, the more it seems to me that there are two fronts on which to focus. First, influencing publishers that flatly refuse to let the translator retain copyright as a matter of policy. Second, raising the awareness and mindfulness of translators who allow publishers to claim their copyright, out of inattentiveness, obliviousness, indifference, fear of losing work, or some other factor.

While it's unlikely that much can

be done about the first category, the second area—educating and “empowering” translators—is one which falls within the informative mission of professional associations and over which, to some extent, each of us has control.

The Lawyer's Summation

Although she lost business in the process, stands like Anne took with BBW are important in reframing the relationship between publishers and translators. Too often, the art, skill, and creativity that translators bring to their craft are ignored, discounted, and taken for granted. That attitude, prevalent in the industry, will continue to stack the deck against translators and keep the leverage on the side of the publishers.

Getting to “No”

It seems clear that awareness of our rights and a willingness to stand up for them are critical. Our professional organizations speaking out and model contracts are key, but in the end we as individuals need to each speak up and take a stand.¹⁴ We need to espouse strongly the publishers who support and respect us—those who offer fair contracts and are willing to credit our contributions. At the same time, we need to avoid those who consistently ignore our professional standards—those who only offer an equitable deal if the translator knows what to ask for, or who insist on non-negotiable terms that do not recognize our legitimate rights.

In the end, it's up to us. If a translator signs away his or her rights in a legal contract, the publisher is free to operate with impunity. I agree with the individual who stated at the aforementioned PEN American Translation Committee meeting: “You can only advise translators not to sign contracts that give away their copyright.” As in, you can lead a horse to water but ...

Fortunately there are some translators who are beginning to speak up, as Gregory Conti did in a recent blog post

entitled “Getting to No.” Conti wrote about being offered the opportunity to translate a book by a publisher for whom he had already worked:

The publisher is based in Rome, but has created a U.S. affiliate that publishes English translations of contemporary European fiction. When I did my first job for them in 2010, they paid me 10 cents (U.S.) per word, with no royalty, and I had to give them the copyright to my translation, something I have since learned that at least one other American translator refused to do. She got to 'no' very quickly."¹⁵

Still, while getting to “no” can be liberating, it also means lost opportunities for a translator. We should not have to make that choice. Another well respected colleague, referring to BBW, told me: “They would not budge on the copyright. Their stance is *take it or leave it*.” This is why I, for one, left it.

As I see it, a publisher who refuses to negotiate terms with a translator shows a serious lack of respect for the work we do. Forcing translators to give up their copyright robs them of their dignity as well as what is rightfully theirs. That, to me, feels wrong. After all, my translation is “*farina del mio sacco*,” my own work, not theirs. Maybe I need to get over it. But I hope I won't. ■

Notes

1. Appel, Anne Milano, and Jeffrey S. Ankrom. “Another Jog Through the Juniper,” *The ATA Chronicle* (February 2011); Appel, Anne Milano, and Carol J. Marshall “A Jog Through the Juniper,” *The ATA Chronicle* (July 2002).
2. Dante. *Inferno*, 34:139, Mandelbaum tr.: “to see - once more - the stars.”
3. The subject also came up at the committee's workshop on the Model Contract at the 2014 American Literary Translators Association conference in

Milwaukee (November 2014). It is also the subject of a recent study by Wendell Ricketts: “Copyright ‘Rustling’ in English-Language Translation: How Translators Keep (and Lose) Rights to Their Work—Data from Translations Published in 2014” (©Wendell Ricketts, February 2015), <http://bit.ly/1bp9PBD>.

4. Subject Matter and Scope of Copyright, bit.ly/title17-101. Under the scope of U.S. copyright, a translation falls under “derivative work.” The right to make the translation is under the control of the owner of the copyright of the original language work.
5. *Circular 9, Works Made for Hire* (United States Copyright Office), www.copyright.gov/circs/circ09.pdf. As a sidebar, the “Factsheets and Circulars” prepared by the United States Copyright Office are tremendous resources to help understand basic information about how the copyright laws operate.
6. 17 U.S.C., §101, bit.ly/title17-101.
7. *Circular 1, Copyright Basics* (United States Copyright Office), www.copyright.gov/circs/circ01.pdf.
8. *Circular 14, Copyright in Derivative Works and Compilations* (United States Copyright Office), www.copyright.gov/circs/circ14.pdf.
9. Ricketts, op. cit., Appendix B: “Rustled Copyrights” lists “396 Translators Whose Work Was Not Copyrighted in Their Names in 2014,” <http://bit.ly/1bp9PBD>.
10. 17 U.S.C. §302, <http://copyright.gov/title17/92chap3.html>.

Literary Translator Contract and Copyright Resources

PEN America Translation Committee

www.pen.org/translation

PEN “Translation Resources”

www.pen.org/translation

PEN Model Contract

www.pen.org/model-contract

Contracts Outside the U.S.

European Council of Literary Translators’ Associations

bit.ly/ceatl-reading

(Sample and model contracts from England, Scotland, the Netherlands, France, and Turkey)

Copyright-Related Treaties

1. *Circular 38A, “International Copyright Relations of the United States”* (United States Copyright Office), www.copyright.gov/circs/circ38a.pdf.
2. Factsheet FL-100 “International Copyright” (United States Copyright Office), www.copyright.gov/fls/fl100.html.
3. Intellectual Property Treaties (The World Intellectual Property Organization), www.wipo.int.
4. Berne Convention for the Protection of Literary and Artist Works, www.wipo.int/treaties/en/ip/berne.

11. PEN America Center Model Contract, www.pen.org/model-contract.

12. PEN America Center FAQs to Model Contract, www.pen.org/faqs.

13. Dunne, Jonathan, “Europa Editions Part II: The Translator,” *Absinthe Minded* (February 27, 2009), bit.ly/dunne-jonathan.

14. Ricketts, op. cit., writes:

“Translators must stand up for themselves ... Translators who say copyright ‘doesn’t matter’ or who accept unfavorable conditions because they don’t want to ‘rock the boat’ or because ‘that’s just the way things are’ are doing the equivalent of peeing in the pool. But we all swim in the same water.” <http://bit.ly/1bp9PBD>.

15. Conti, Gregory. “Getting to No,” bit.ly/conti-gregory.