

# Documentation

## 22nd International Rights Directors Meeting

Getting to YES –  
The Successful Rights Negotiation and Deal

Frankfurt Book Fair  
Tuesday, 14 October 2008

## Considerations: When Selling Translation Rights to an American Publisher

Topic	Considerations
<i>Terms, Rights &amp; Territories</i>	
Term of License	<p>What is the term of license? Is it for term of copyright, or for a limited number of years?</p> <p>If the term is for term of copyright, check whether there is an out-of-print clause that allows proprietor to recover the rights if the book is no longer being sold.</p> <p>If the term is limited, is there a period at the end of the term where the publisher may sell off existing copies? Is the publisher permitted to print additional copies during the sell-off period?</p>
Territory	<p>Is the grant for World English or just the US, Canada and the Open Market?</p> <p>If the grant is for World English, what is the subrights split if the US publisher sells English language rights to a UK publisher?</p> <p>If the grant is not for World English, which English language publisher (US or UK) controls English language rights in Europe?</p> <p>English language rights in Europe is a point that has become increasingly controversial over the past 5-10 years. Due to the free circulation of goods within the European Union, a UK publisher will argue that it must control exclusive rights in Europe and the EU. An American publisher will argue that it can effectively sell copies in Europe and the EU and should be permitted to do so.</p> <p>What is not exclusively granted to one publisher or the other may be granted “open market” to both US and UK publishers: they can then both distribute their books in this non-exclusive territory. The foreign proprietor must decide how much competition in Europe is best for the book. This will depend on the proprietor’s evaluation of the US and UK publishers’ respective distribution strength – and on the negotiation.</p>
Formats	<p>Is the grant for volume rights (i.e., all formats) or only specific formats?</p> <p>Most publishers will expect to be granted all formats and will decide for themselves (though it is courtesy to first inform the proprietor) whether to publish in hardcover, trade (large-format) paperback or mass-market (rack-size, small format) paperback.</p>

Electronic Rights	<p>There are two kinds of electronic rights likely to be addressed in a contract:</p> <ul style="list-style-type: none"> <li>- verbatim electronic rights where the electronic version accompanies and/or substitutes for the print edition</li> <li>- multimedia rights, where the book is combined with other text/sound/images to create a derivative product</li> </ul> <p>Either electronic edition can be sold either in a physical format such as CD-ROM, or a digital download, such as Kindle or Sony Reader.</p> <p>Also be aware of on-demand editions, where the book is held as an electronic file but only printed when someone orders a copy. This also affects the out-of-print clause, discussed later.</p> <p>Many American publishers are under instructions not to buy a book if they cannot have at least electronic text rights (“eBook” rights). Academic and professional publishers will expect to have a broad grant of electronic rights because they are experimenting with many different formats and sales models at this time. Check whether the contract permits the proprietor to revoke the electronic rights if they are not exercised within a certain period of time.</p> <p>The appropriate royalty for electronic editions is still subject to much discussion. A compromise is to ask for a “favored nations” clause, which will state that if the publisher begins to pay a higher electronic royalty to other proprietors, the proprietor will also be paid the higher royalty, usually on a going-forward basis.</p>
Subsidiary Rights	<p>What licensing rights are being granted? The rights generally granted are book club, second serialization, permissions &amp; anthology, hardcover and paperback reprint rights (including large print). First serial and audio are usually negotiated. The publisher should double-check its head contract to make sure it controls the requested rights and whether the licenses are subject to the author’s approval. Condensation and abridgment in particular may be problematic for more literary fiction authors.</p> <p>Does the American publisher have subsidiaries or imprints that publish in paperback? If so, what is the royalty for the paperback edition? Is this arrangement treated as a license or as a direct exploitation by the American publisher?</p> <p>Does the contract contain a clause that states that licenses to affiliates must be on an arm’s length basis? Or that publication by affiliates will be at the full royalty rates? If the American publisher is a large one, these issues should be addressed.</p> <p>Does the proprietor have consultation or approval on any or all sublicenses? Many American publishers will not want to agree to this in the contract because they find it cumbersome, but are happy to consult or notify the publisher on an unofficial basis.</p>

<b><i>Options &amp; Restrictions</i></b>	
Revised Editions	<p>If the proprietor publishes a revised edition of the book, is the publisher <i>required</i> to reissue the book in the revised version? Does the publisher have the right, but not the obligation, to publish the revisions? If so, is an additional payment required? If not, can the proprietor sell the rights to the revised edition elsewhere?</p> <p>This is not an issue on many kinds of titles, but where it applies, it should be addressed. The proprietor wants to know that the most up-to-date edition of the book is the one that is being sold (or at least reissued, once the old edition has sold-out). This is in the publisher’s interest, too, but the publisher may not want to be required to spend additional money to publish the revised edition.</p>
Competing Works	<p>Is there a clause that prevents the proprietor from licensing a “similar” book in the publisher’s territory (and what does “similar” mean)?</p> <p>This is a difficult clause to reach agreement on, especially if the book is one of non-fiction and part of a series.</p>
Option on Author's Next Work	<p>Does the publisher have the 1st option or 1st right of refusal or opportunity to buy rights on the author’s next book? If so, what is the option based on (i.e., entire manuscript, proposal &amp; sample material)? When does the option start running (i.e., on submission of material, on publication of the current book)?</p> <p>Most publishers will try to get some kind of option for the author’s next book (if the proprietor of the current title also controls rights on the author’s next book, of course) because they do not want to take the chance that they make the author successful, and then the proprietor sells it elsewhere without even giving the current publisher a chance to bid on it. However many proprietors will, in fact, offer the American publisher the first option to review the next book, whether the contract requires it or not.</p>

<b><i>Translation &amp; Publication</i></b>	
Translation	<p>The clause should say that the translation will be “faithful and accurate” with only slight modifications allowed (perhaps notified to the proprietor) to achieve a “competent and idiomatic” translation. The translation should be paid for by the publisher, except in extraordinary circumstances.</p> <p>Does the proprietor have approval over the selection of the translator? Does the proprietor have the right to review the translation itself, or part of it? Does the proprietor have approval (or at least consultation) on the English translation of the title?</p>

Alterations	Nearly all contracts will say that the publisher may not abridge, expand or otherwise alter the book without the proprietor's written approval.
Permissions	<p>If there is any material in the book that is owned by a third party (for example, poems, photos, maps), who is responsible for paying for its use in publisher's edition?</p> <p>If there are permissions involved, it should always be disclosed and brought up as part of the negotiations. Permissions can be expensive, and neither side wants to be charged for an expense it did not anticipate. If permissions are prohibitively expensive, will the proprietor permit the publisher to edit the work so that the material requiring permissions is omitted or altered?</p>
Publication	<p>Is the publisher required to publish the book at all? Does the "time to publish" clock begin running on execution of the contract or on acceptance of the translation?</p> <p>If the publisher does not publish by the deadline, how can the proprietor recover the rights?</p> <p>Is the publisher required by contract to publish in a particular format (hardcover, for example)? Does the contract permit the publisher to publish <i>only</i> in an electronic edition (i.e., no paper copies at all)?</p>
Reading Copies	<p>How many copies of the book must proprietor give to publisher for reading purposes, promotion, etc.?</p> <p>This will not be in every contract because in many cases the reading copies are exchanged and the acquisition decided before the contract is drawn up.</p>
Jacket and Cover	<p>Does the proprietor have consultation or approval on the cover? Is the proprietor required to provide the jacket or cover art to the publisher for use on the publisher's edition?</p> <p>Most publishers will want to create a cover that works best for their market. However, it is a good idea to ask for the jacket/cover and copyright page for review, to make sure there are no mistakes.</p>
Copyright & Credit	<p>The name of the author should be on the cover &amp; title page of the book. The original copyright line and a credit to the original publisher (sometimes also including the year of first original publication) should be on the copyright page. The original title, in the original language, will be either on the copyright page or the title page. Licensees should be required to abide by the same. The publisher should be required to copyright the translation. Copyright to the translation is usually in the name of the publisher or the translator.</p>

Free Copies	Proprietor (and proprietor's agent, if any) should each receive free copies. 10-12 copies of the English translation to the proprietor is the usual number. The proprietor is usually permitted to buy further copies at a discount, usually somewhere between 40% and 55%, for its own purposes but not for resale.
Names & Likeness of Author; Promotion	<p>This clause gives the publisher the right to use the name, likeness and biography of the author for promotional purposes. It may also give the publisher the right to use excerpts from the book for promotional purposes, including on the publisher's website.</p> <p>Does the proprietor have the right to approve the photo and biography of the author that the publisher will use? Is anything on this issue required by proprietor's head contract? Is there a word limit on promotional excerpts?</p>

<b><i>Advances &amp; Royalties</i></b>	
Advances	<p>The schedule for payment of advance is a matter for negotiation at the time the deal is made. In general, the larger the advance, the more extended the payment schedule will be.</p> <p>If there is a payment on publication, is the proprietor guaranteed to receive that payment whether the translation has been published or not? The proprietor may sometimes require that the entire advance be paid by a certain date (for example, 18-24 months after signature of the contract), even if the translation has not been published by that time.</p> <p>Does the contract address which party pays bank transfer fees?</p>
Royalties	<p>What is the royalty for books sold in regular channels? And what is this royalty based on: catalog/retail/list price, wholesale price, or net receipts? If the royalty is based on wholesale price or net receipts, how does this compare to a royalty based on catalog/retail/list price? What is the royalty for sales outside regular channels, at high discounts, Canada, to book clubs, etc.</p> <p>An increasing number of copies are sold through <b>special sales</b> channels, at high discounts in the American market including but not limited to price clubs, big box stores, food or furniture stores, etc. It is important that the proprietor understand what royalty rate is paid on these types of sales.</p> <p>How are sales by or licenses to publisher's affiliates handled? Are they considered arm's-length transactions, or a direct exercise of rights by the publisher? If the American publisher has world English language rights then it is important to note how royalties are paid for copies sold in the UK and Australia by the publisher's affiliates. Is the royalty based on a special wholesale or special intra company transfer price for copies sold by the American publisher to such subsidiaries?</p>

<b>Accounting</b>	
Royalty Statements	<p>When do the publisher's accounting periods end? The publisher will be required to render statements at least twice a year (once a year for smaller publishers). Statements and checks are usually sent 90-120 days after the end of the accounting period. What information is the publisher required to report in addition to net copies sold and subsidiary rights income?</p> <p>Is the publisher joint accounting or cross-accounting this book with any other books of the author? Are there any circumstances under which the publisher is permitted to apply credit balances from one contract against debit balances from another?</p>
Taxes	<p>Most of the time, taxes will have to be paid on advances and royalty payments that are sent out of the United States. The American publisher is required to withhold these taxes and turn them over to the government. In some cases, however, the United States government and the foreign proprietor's government have made a reciprocal tax treaty that permits the American publisher not to withhold taxes, or to withhold at a lower rate.</p> <p>In most cases, the US publisher will ask the proprietor for an IRS form W8-BEN (which replaces the old 1001 form.) The proprietor must fill out the W8-BEN and also provide a US Tax Identification number. Without the W8-BEN and the US Tax ID number, the US publisher may be required to withhold 30% of all advances and royalties. With the form, the US publisher will withhold at whatever rate has been established in the tax treaty between the two countries.</p>
Reserve Against Returns	<p>Can the publisher hold a "reserve" against anticipated returns (for which he therefore withholds royalties)? If so, what percentage of sales can be withheld and for how long?</p> <p>Some publishers do not want to limit the reserve for returns, either with a time limit or a percentage. This is often a contentious issue.</p>
Right of Inspection/Audit	<p>The proprietor should be permitted to audit the publishers' books of account to check the accuracy of royalty statements. Will the publisher give the proprietor information on request (number of copies printed, sales by channel, returned copies, the reserve for returns, given as gifts, remaindered &amp; destroyed) to allow the proprietor to verify the accuracy of statements without an audit.</p> <p>Who pays for an audit if there is one?</p>
Agency	<p>If the proprietor is represented by an agent, payment is usually made to the agent but the contract is still signed by the proprietor.</p>

<b><i>Termination &amp; Reversion</i></b>	
Out of Print	<p>If the book is no longer “in print”, the proprietor should be able to recover the rights. Generally, the publisher is given a certain period of time (6-9 months) to return the book to print, after the proprietor has made a written request to do so.</p> <p>How is “in print” defined? Do electronic books count for the purpose of keeping the books in print? What about so-called “print on demand” copies? This is an issue that is still changing very quickly, and the proprietor will find a lot of variation in publishers’ policies.</p>
Remaindering	<p>Is the publisher prevented from remaindering for a certain period of time?</p> <p>Some American publishers will accept a remaindering restriction of 12 months after publication, some will not. This is also likely to be a contentious issue. The proprietor wants to be assured that the book has been given a fair run in the marketplace, while the publisher does not want to tie up its assets in stock that is not selling.</p>
Termination	<p>Does the agreement have clauses addressing what happens if:</p> <ul style="list-style-type: none"> <li>- the publisher does not render statements when due?</li> <li>- the publisher does not make the royalty payments on time?</li> <li>- the publisher does not publish the book on time?</li> <li>- the publisher goes bankrupt?</li> <li>- the publisher is otherwise in breach of contract?</li> </ul> <p>Can the proprietor cancel the contract if any of these things happen? If so, is the termination automatic, or must the proprietor notify the publisher and give the publisher an opportunity to “cure” the default before the contract can be cancelled?</p>

<b><i>Miscellaneous Legal Clauses</i></b>	
Warranty/Indemnity	<p>The warranty consists of promises that the proprietor makes to the publisher:</p> <ul style="list-style-type: none"> <li>- that the author is the sole author of the book</li> <li>- that the proprietor owns the rights he is granting and has not already granted the rights to someone else</li> <li>- that the book has not been published before in the language and territory being granted to the publisher</li> <li>- that, if the book is non-fiction, everything stated as a fact is either true or based on accurate research</li> </ul>

	<p>The proprietor is likely to be asked to make these additional warranties:</p> <ul style="list-style-type: none"> <li>- that the book is not libelous or obscene</li> <li>- that the book does not violate anyone’s rights of privacy or publicity</li> <li>- that the book does not infringe on any copyright or trademark</li> <li>- that the book contains nothing unlawful</li> <li>- that the author is not violating any confidentiality agreements he signed</li> </ul> <p>Whether these warranties should be made only for the country of original publication (e.g., the book is not libelous <i>in Spain</i>), or whether they should extend to the publisher’s country as well, is an issue that frequently arises when negotiating the warranty clause.</p> <p>The indemnity discusses what happens if something in the warranty turns out not to be true. These areas need to be addressed:</p> <ul style="list-style-type: none"> <li>- Who defends the lawsuit, if there is one? Who selects the lawyers? Who is in control?</li> <li>- Who pays for the lawyers? Who pays for the settlements or judgments?</li> <li>- Does the publisher have to have the proprietor’s approval before settling?</li> <li>- Will the publisher withhold payments of royalties until the lawsuit is over?</li> <li>- Should the book have a legal vetting by the publisher? If so, who pays for it?</li> </ul> <p>The warranty/indemnity can be a difficult clause, because some American publishers have legal policies that make any changes in their standard form quite difficult.</p>
Assignment	<p>The clause addresses the succession of the agreement to another party.</p> <p>Can the proprietor assign the agreement without the publisher’s permission? Can the publisher?</p> <p>Publishers consider contracts to be their business assets, and at a minimum will probably insist on the right to assign to a company that buys all of the publisher’s assets.</p>
Infringement	<p>If someone is illegally publishing the book in the publisher’s territory, who may bring legal action against the infringer? Will the costs be shared? Will the recoveries, if any, be shared?</p>
Governing Law	<p>Under what country’s or state’s law will the contract be interpreted? The American publisher will request the governing law of the state in which the business resides be applicable.</p>
Arbitration/Meditation	<p>This is a clause that provides for dispute resolution short of suing each other. Not every contract will contain it.</p>

Force Majeure	This is a clause that says that the publisher is not held responsible for circumstances beyond his control, such as fires, floods, wars, etc. that prevent the publisher from fulfilling his duties under the contract.
Notices	This clause is the official addresses for each party to notify the other. Not all contracts have a Notices clause, but if there is one, read it carefully because sometimes demands or requests are not valid if not sent by the specified method.
Entire Agreement	This clause states that the written agreement overrules any prior oral agreement, and that the agreement cannot be modified except in writing.
Waiver	This clause states that if the proprietor waives a requirement one time; that does not mean that it is waiving the requirement all the time. It is a clause that is helpful to the proprietor.

## Considerations: When Buying Translation Rights from an American Publisher

Topic	Considerations
<p><i>Terms, Rights &amp; Territories</i></p> <p>Term of License</p>	<p>What is the term of license? Is it for term of copyright, or for a limited number of years? If the term is for term of copyright, check whether there is an out-of-print clause that allows the proprietor to recover the rights if the book is no longer being sold.</p> <p>If the term is limited, is there a period at the end of the term (usually 6 months to one year) where the publisher may sell off existing copies? Is the publisher permitted to print additional copies during the sell-off period?</p> <p>The term of license is often connected to the size of the market and, by extension, by the size of the advance being offered. As a market in a country matures, American proprietors may become more willing to give a longer grant of license. In any case, the foreign publisher may always ask for an opportunity to renew the license at the end of the term before the American proprietor can sell it elsewhere. Alternatively, the foreign publisher may ask that the term continue on a yearly basis provided a certain number of copies are sold each year.</p>
<p>Territory</p>	<p>The combination of country &amp; language grant will vary greatly depending on the market being sold.</p> <ul style="list-style-type: none"> <li>- For larger, well-developed markets it is common for the rights to be granted for the entire world in that language. For developing markets, the territory is more limited. If the publisher cannot demonstrate that it has a means to export copies to other like-speaking countries, export rights may not be granted.</li> <li>- Some markets are traditionally separated. For instance, Portuguese in Portugal vs. Portuguese in Brazil. However, a large Portuguese house may buy world rights for Portuguese, if they have the ability to be efficient in both territories and if the same translation is viable in both territories.</li> <li>- Chinese languages are separated by complex Chinese for Taiwan and simplified Chinese for mainland China.</li> <li>- Some markets are traditionally fragmented. For instance, it is not uncommon to sell Spanish language rights separately for Spain, South America (sometimes only Argentina), Central American (sometimes only Mexico) and the United States.</li> </ul>

Formats	<p>Is the grant for volume rights (i.e., all formats) or only specific formats?</p> <p>Again, this depends greatly on the market in question. A mature market has a tradition of publishing a number of different formats over the course of a book's life, and perhaps licensing books to others. A younger market is still working out what formats work best for it and can only afford a modest advance for a modest print run.</p>
Electronic Rights	<p>Whether a foreign publisher is given electronic book rights (i.e. a verbatim electronic reproduction of the book, to be published in parallel with or as a substitute for, to the print version) is still very much a work in progress.</p> <p>If the foreign publisher has (or will soon have) the ability to exercise these rights, he can make a case for requesting them from the proprietor. He can also ask for the 1st option on these rights, so that the rights are not sold by the proprietor to someone else without giving the foreign publisher (who usually controls the translation anyway) an opportunity to purchase these rights.</p> <p>An electronic book can be produced in a physical format (such as a CD-ROM) or a digital download for reading devices such as a Kindle or Sony Reader. The appropriate royalty for electronic editions is still very much a work in progress.</p>
Subsidiary Rights	<p>Are licensing rights being granted? Some countries do not have a tradition of licensing subsidiary rights and therefore, no licensing rights are granted. Other countries are granted a full menu of licensing rights, perhaps even audiobooks.</p> <p>Does the contract contain a clause that states that licenses to affiliates or subsidiaries must be on an arm's length basis, or that the split is higher? If the foreign publisher is a large one, these issues will be addressed.</p> <p>Does the proprietor have consultation or approval on sublicenses? Some American publishers will always want approval on some rights (such as paperback reprint) and some will want approval on all rights. For very high-profile authors, the American publisher sometimes has no choice but to pass along a lot of approvals that the author has insisted on having.</p>
<b><i>Options &amp; Restrictions</i></b>	
Revised Editions	<p>If the proprietor publishes a revised edition of the book, what are the publisher's rights and responsibilities? Is the publisher <i>required</i> to publish the revised edition (which would involve additional expenditures on the part of the publisher for translation, pre-production and printing)? Does the publisher have the right, but not the obligation, to publish the revisions? If so, is an additional advance expected? If not, can the publisher prevent the revised edition from being sold to a rival publisher in his territory?</p>

	<p>If the book is one of non-fiction and might be revised in future years, these issues should be addressed. It is common, however, to offer revised editions to the original publisher first, even if the contract does not require it. Among other reasons, the original publisher already controls the translation.</p>
Competing Rights	<p>Is there a clause that prevents the proprietor from licensing a “similar” book in the publisher’s territory?</p> <p>Many foreign agreements do not have this clause at all. However, if the publisher has an option on the author’s next book it is helpful.</p>
Option on Author's Next Work	<p>Does the publisher have the 1st option, or 1st right of refusal or opportunity to buy rights for the author’s next book?</p> <p>Again, a publisher in a large market might have a contractual option on the next book, but in a smaller market it is unlikely that this would be mentioned in the contract. However, many American proprietors will offer the current publisher the first option to review the next book, whether the contract requires it or not.</p>

<b><i>Translation &amp; Publication</i></b>	
Translation	<p>The clause should state that the translation will be “faithful and accurate” with only slight modifications allowed (perhaps identified to the proprietor) to achieve a “competent and idiomatic” translation. The translation will be paid for by the publisher, except in extraordinary circumstances.</p> <p>Does the proprietor have approval over the selection of the translator? Does the proprietor have the right to review the translation itself, or an example of it? Does the proprietor have approval or consultation on the translation of the title?</p> <p>Except in the most extraordinary circumstances, the foreign publisher should be granted discretion in these matters. Very high-profile authors will sometimes insist on reviewing translations (if they read the language), but it is unusual.</p>
Alterations	<p>All contracts will state that the publisher may not abridge, expand or otherwise alter the book without the proprietor’s approval.</p>
Permissions	<p>If there is any material in the book that is owned by a third party (for example, quotations, poems, illustrations, photos, maps), who is responsible for paying for its use in publisher’s edition?</p>

	<p>Always ask whether there are permissions involved. Permissions can be so expensive for a small foreign publisher that he cannot afford to publish the book. Sometimes the American proprietor will agree that the publisher may alter the text to avoid using the passage that requires permission, but it is better to know these things before a contract is signed.</p>
Publication	<p>The contract will state that the publisher must publish within X months after signing. This is usually 18 or 24 months, depending on the market. The contract will state that if the foreign publisher does not publish the book within the specified time, the proprietor may recover the rights.</p> <p>Does the contract permit the publisher to ask for an extension if the translation process is running late?</p>
Reading Copies	<p>This paragraph will address how many copies of the book proprietor must give to publisher for reading purposes, promotion, etc.</p> <p>This will not be in every contract because in many cases the reading copies are exchanged and the acquisition decided before the contract is drawn up.</p>
Jacket and Cover	<p>Does the proprietor have consultation or approval on the cover?</p> <p>The publisher will want to create a cover that works best for its market. However, the American proprietor may ask for the jacket/cover and copyright page for review, to make sure there are no mistakes. In some cases a high-profile author will demand to see the foreign jacket/cover.</p> <p>Is the American cover art included in the advance, in case the publisher would like to use it? If not, can the publisher purchase it for a modest fee?</p>
Copyright & Credit	<p>The following will be required:</p> <ul style="list-style-type: none"> <li>- the name of the author will have to be on the cover and title page of the book.</li> <li>- the original copyright line and a credit to the original publisher ["This translation published by arrangement with..."] will be on the copyright page.</li> <li>- the original title will be on the copyright page or title page.</li> <li>- sublicensees will be required to abide by all these same rules.</li> <li>- the publisher will be required to copyright the translation in his country. Copyright to the translation is usually in the name of the publisher or the translator, depending on the country.</li> </ul>
Free Copies	<p>Proprietor and proprietor's agent should each receive free copies. 4-6 is the usual number, though larger markets give more copies.</p>

Names & Likeness of Author; Promotion	<p>This clause gives the publisher the right to use the name, likeness and biography of the author for promotional purposes. It may also give the publisher the right to use excerpts from the book for promotional purposes (including on the publisher’s website)</p> <p>Does the proprietor have the right to approve the photo and biography of the author that the publisher will use? Is there a word limit on promotional excerpts?</p> <p>Many proprietors have an author photo/bio that they can provide to the publisher and will want the publisher to use.</p>
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<b><i>Advances &amp; Royalties</i></b>	
Advances	<p>In smaller markets, the advances are small and are all paid on signing of the contract. In larger markets, payments may be split one-half on signing and one-half on publication. Frequently, the proprietor will require that the entire advance be paid by a certain date (for example, 18 or 24 months after signature of the contract), even if the translation has not been published by that time.</p> <p>Does the contract address which party pays bank transfer fees?</p>
Royalties	<p>What is the royalty for books sold through bookstores? Is it on the catalog retail price (less VAT if applicable), or on the wholesale price, or is it a flat price for a certain print run?</p> <p>If the foreign market sells copies for export, to book clubs, or at exceptionally high discounts, there is usually a special (lower) royalty for these types of sales.</p> <p>What are the royalties when the publisher sells copies to one of their subsidiaries at more than 55% discount (or other very high discount)? (For instance, a Mexican publisher may sell to their subsidiary in Argentina.)</p> <p>Is there a “passe” clause that limits the number of royalty-free copies the publisher can give away?</p>

<b><i>Accounting</i></b>	
Royalty Statements	<p>The publisher will be required to render statements at least once a year (unless the publisher is paying a flat price for a certain print run, in which case statements may not be required). The proprietor may ask for the number of copies sold (broken down into home and export sales), the catalog retail price, the price received, the number of copies printed and the number of copies remaining in stock. Statements and checks are usually sent 90-120 days after the end of the accounting period, though this period may be longer for some countries.</p>

Taxes	<p>Most of the time, taxes will have to be paid on advances and royalty payments that are sent out of the publisher's country. To prevent the foreign publisher from having to withhold these taxes and turn them over to the government, the United States government and the foreign publisher's government have, in most cases, signed a reciprocal tax treaty that permits the foreign publisher not to withhold taxes, or to withhold at a lower rate. If this is the case, the American proprietor will provide the foreign publisher with a US IRS Form 6166 each year, which states that the proprietor is a taxpayer in good standing in the United States. This form allows the American proprietor to claim benefits under the tax treaty, and permit the foreign publisher to withhold at a lower rate or not at all, depending on the country.</p> <p>The foreign publisher may have additional tax forms required by its own government. Tax law varies so much from country to country that it is recommended that the foreign publisher consult his publishers' Association, or a qualified local tax professional or government office, to gain a complete understanding of local tax requirements.</p>
Reserve against Returns	<p>Can the publisher hold a reserve against anticipated returns? If so, what percentage can be held and for how long?</p> <p>Not every market has a tradition of permitting bookstores to return unsold copies to the publisher for credit, so permitting a reserve against anticipated returns is not appropriate for every market. If permitted, reserves for returns are usually limited to 18-24 months after publication.</p>
Debit/Credit Balance	<p>The publisher is usually prohibited from holding a debit balance on one contract against a credit balance on another contract ("cross collateralizing") because the proprietor has to report back to the authors, and the accounts for each book must stand on their own.</p>
Right of Inspection/Audit	<p>The proprietor or his agent will be permitted to inspect, if they wish, the publishers' books of account to check the accuracy of royalty statements.</p>
Agency	<p>If the proprietor is represented by an agent, is payment is made to the agent or to the proprietor directly? Who is signing the contract, the proprietor or the agent?</p>

<b><i>Termination &amp; Reversion</i></b>	
Out of Print	<p>If the book is no longer "in print", the proprietor will be able to recover the rights. The foreign publisher is usually given a certain period of time (6-9 months) to return the book to print, after the proprietor has made a written request to do so.</p>

	<p>How is “in print” defined? Is it based on the existence of printed copies of the book? Is there a minimum yearly sales requirement? Do electronic books count for the purpose of keeping the books in print? What about so-called “print on demand” copies (where a physical copy is printed only when specifically requested)?</p> <p>This is an issue that is still changing very quickly, and the publisher will find a lot of variation in proprietor’s policies. It is traditional for the foreign publisher to have a minimum sales requirement in order for his book to be considered “in print”, which can be anything from 50 copies to over 300 copies per year, depending on the nature of the book and the size of the market.</p>
Remaindering	<p>Is the publisher prevented from remaindering for a certain period of time after publication?</p> <p>There will usually be a remainder restriction for 18-24 months. The proprietor usually asks for first option to purchase the remainder copies. The publisher may be allowed, upon notification to the proprietor, to remainder part of his existing stock but if he remainderes all copies, the rights then revert to the proprietor.</p>
Termination	<p>Does the agreement have clauses addressing what happens if:</p> <ul style="list-style-type: none"> <li>- the publisher does not render statements when due?</li> <li>- the publisher does not make the royalty payments on time?</li> <li>- the publisher does not publish the book on time?</li> <li>- the publisher goes bankrupt?</li> <li>- the publisher is otherwise in breach of contract?</li> </ul> <p>In general, the contract is cancelled if any of these things happen. The publisher should check the contract to see whether the termination is automatic, or whether the proprietor must notify the publisher and give the publisher an opportunity to “cure” the default before the contract can be cancelled.</p>

<b>Miscellaneous Legal Clauses</b>	
Warranty/Indemnity	<p>The warranty consists of promises that the proprietor makes to the publisher. The following warranties will usually be in the contract:</p> <ul style="list-style-type: none"> <li>- that the author is the sole author of the book</li> <li>- that the proprietor owns the rights he is granting and has not already granted the rights to someone else</li> <li>- that the book has not been published before <i>in the language and territory being granted to the publisher</i></li> <li>- that, if the book is non-fiction, everything stated as a fact is either true or based on accurate research</li> </ul>

	<p>These additional warranties may be in the contract:</p> <ul style="list-style-type: none"> <li>- that the book is not libelous or obscene</li> <li>- that the book does not violate anyone’s rights of privacy or publicity</li> <li>- that the book does not infringe on any copyright or trademark</li> <li>- that the book contains nothing unlawful</li> </ul> <p>Whether the additional warranties should be made only for the country of original publication, or whether they should extend to the publisher’s country as well, is an issue that frequently arises when negotiating warranty clauses.</p> <p>It is prudent to have a clause that allows the foreign publisher to have the book vetted by their own legal counsel and make any changes necessary for their own market. Making changes requires the proprietor’s approval, but if the proprietor will not approve the changes then the foreign publisher should have the option to cancel the contract and recover any monies paid to the proprietor.</p> <p>The indemnity discusses what happens if something in the warranty turns out not to be true. The indemnity usually says that the proprietor may defend and settle any lawsuits that arise out of the book.</p> <p>American publishers rarely change the warranty/indemnity clause.</p>
Assignment	<p>The clause addresses the succession or transfer or sale of the agreement to another party. Can the proprietor assign the agreement without the publisher’s permission? Can the publisher?</p> <p>The proprietor usually has the right to assign the agreement. The publisher usually does not. A compromise would be to ask for the right to assign to a company that buys all of the publisher’s assets.</p>
Infringement	<p>If someone is illegally publishing the book in the publisher’s territory, who may bring legal action against the infringer? Will the costs be shared? Will the recoveries, if any, be shared?</p> <p>This provision varies. The foreign publisher may be required by the American proprietor to detect, if possible, and prosecute any piracy of the work in its territory. The American proprietor often also has the choice to prosecute an infringer on its own, regardless of any action the foreign publisher may or may not take. If the property is very valuable, the American proprietor will want to maintain control over any infringement action. Which party pays the legal expenses, and which party is entitled to the recoveries, also varies.</p> <p>The clause is not in every contract, as some proprietors prefer to discuss each infringement situation separately if and when it arises.</p>

Governing Law	<p>Under what country's or United States state's law will the contract be interpreted?</p> <p>Most American proprietors will insist that the contract be interpreted according to the law of the state in the United States where the proprietor is located.</p>
Arbitration/ Meditation	<p>This is a clause that provides for dispute resolution short of suing each other. Not every contract will contain it.</p>
Force Majeure	<p>This is a clause that says that the publisher is not held responsible for circumstances beyond his control, such as fires, floods, wars, etc. that prevent the publisher from fulfilling his duties under the contract.</p>
Notices	<p>This clause contains the official addresses for each party to notify the other. Not all contract have a Notices clause, but if there is one, read it carefully because sometimes demands or requests are not valid if not sent by the specified method.</p>

## Considerations: Additional Tips from a European Perspective

### When Buying Translation Rights from an American Publisher

Topic	Considerations
Term of License	If the term granted by the proprietor is too limited, the foreign publisher does not have enough time to build a strong list: today's front-list is tomorrow's back-list, and it is a publisher's long-selling back-list that also makes his reputation and strength (which is important for the author). If the term is for term of copyright, there should be an out-of-print clause that allows the Proprietor to recover the rights if the book is no longer being sold.
Territory	The combination of country & language grant will vary greatly depending on the market being sold. Since some markets are traditionally separated, check if they can use a common translation in multiple countries, which is not always possible in fiction because of real language differences.  French, for example, is usually not fragmented because the language market is smaller (though in some rare cases French publishers can share a co-edition with a Quebec publisher, with the proprietor's prior approval).
Revised Editions	If the proprietor publishes a revised edition of the book, the publisher should have an exclusive option on the right to publish the revisions (without extra charge).
Reserve Against Returns	Check what the American publisher requests when he is the one publishing a foreign book in translation.
Out of Print	Is there a minimum number of sales per year?
Warranty/Indemnity	It should however be the acquiring publisher's responsibility to evaluate this for his own country and in translation.
Infringement	If the property is very valuable, the American proprietor will want to maintain control over (and therefore pay?) any infringement action.

## When Buying Translation Rights from an American Publisher

Topic	Considerations
Term of License	<p>If you already have a contract with this US publisher (acquiring a book from him), see what terms he granted you to this effect – and try to get reciprocal treatment. It is common to give the publisher a limited period to sell off existing copies. But the publisher is not usually permitted to print additional copies during this sell-off period.</p>
Territory	<p>Because UK and Ireland are both full members of the European Union (which, according to EU Law, is considered one single economic territory, with free circulation of goods), European publishers will now often consider that they cannot split this EU territory under EU law – and they will therefore grant it exclusively to their fellow European: the UK publisher.</p> <p>This may cause problems with the American publisher, who traditionally considered Europe (except UK and Ireland) as a non-exclusive “open market” shared with the British publisher. But things have evolved with the construction of the European Union. One way of negotiating things is to consider that the British Commonwealth is no longer (except sometimes for Australia and New Zealand) an exclusive British territory, and can therefore to be considered non-exclusive open market shared by both UK and US publishers. The UK publisher may still try to negotiate Australia and New Zealand as exclusive territory (and may indeed have a better distribution than the US publisher in these two countries, which would then justify granting him exclusivity), but this will depend on the proprietor’s evaluation of the US and UK publishers’ respective distribution strength – and on the negotiation.</p> <p>What is not exclusively granted to one publisher or the other may be granted “open market” to both US and UK publishers : they can then both distribute their books in this non-exclusive territory.</p>
Subsidiary Rights	<p>Many American publishers will not want to agree to this because they find it cumbersome, but you should insist on the proprietor’s prior approval for at least paperback reprints, clubs, audiobooks. If prior approval is refused, negotiate at least prior notification from the publisher to the proprietor.</p>
Reserve against Returns	<p>See what limits (in time and percentage) the publisher imposes for reserves on returns when he is the one licensing rights - and try to get reciprocal treatment.</p>
Out of Print	<p>You will find a lot of variation in publishers’ policies. It is not unusual to have a minimum stock requirement of “paper” copies, and very common to have minimum sales requirement in order for the book to be considered “in print”. That minimum number of sales should be based on the size of the market, and can be anything from 50 copies to over 300 copies per year, depending on the nature of the book and the size of the market.</p>

Warranty/Indemnity	All these extra items in the country (yours) of original publication: it should, however, be the American publisher's responsibility to evaluate this for his own country and according to his own law (this can sometimes prove problematic, since some American publishers sometimes ask foreign publishers to base their warranties on a law - US law - they know nothing about. Research which law rules their contract with you when you acquire a book from them, and try to obtain reciprocal treatment). Quite difficult. In that case, request that they grant you the same warranty and indemnity clauses in advance and in writing next time you buy a book from them.
Governing Law	Usually under the same law as the author's head-contract with the proprietor (granting the proprietor the subsidiary right to license abroad translation rights). When selling rights to foreign publishers, Americans always insist on governing the contract under US law, so try to obtain reciprocal treatment.