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Copyright in Translations

Unless copyright in a translation has expired, a translation will generally be protected by copyright in its own right, whether or not the underlying work is also protected.

The legal right of copyright owners

The copyright owner's exclusive rights in Ireland, in respect of a literary work, include the rights to:

- Make an adaptation of the work (this includes the right to make a translation);
- Reproduce the work (for example, by printing, scanning, photocopying or recording);
- "publish" the work (this is the right to make the work available for the first time);
- to communicate the work to the public (for example, by broadcasting the work over TV or radio or by putting the work onto a website).

Any other person who uses a work in a way that is reserved exclusively for the copyright owner will be infringing copyright unless a special exemption applies (eg reproducing a poem or short story on an exam paper). Generally, creating a translation of a literary or dramatic work will infringe the copyright owner's right to adapt the work unless permission has been granted.

Obtaining permission to make a translation of a protected work

A translator will need to obtain permission from the relevant copyright holder in order to make a translation of a protected work. When negotiating this right, the translator should consider what else they will subsequently be doing with the translation. For example, is it to be published and distributed, broadcast or put onto a website and so on. These subsequent uses of the

translation will need to be covered by the permission from the owner of copyright in the underlying work, and any such permissions should be negotiated early (either, for example, by way of full agreement or by means of an option on these rights).

The terms and conditions upon which any permission is granted will in every case be a matter of negotiation between the translator and the copyright owner.

A written agreement giving permission to use a copyright work should ideally include a provision under which the person granting the permission warrants that they are the owner or the exclusive licensee of the copyright in the underlying work and that they are authorised to grant permission to translate the work. As an extra precaution, the provision should also state that they will indemnify the translator for any loss, damage or injury suffered as a result of any breach of that warranty.

Duration of Copyright

Copyright lasts for a period of time specified by the Copyright & Related Rights Act 2000. After this time has expired the work is said to be "in the public domain". A work that is in the public domain is no longer protected and can be used freely.

Under Irish law copyright generally lasts for the life of the creator plus seventy years. Where a work is published anonymously or under a pseudonym and the creator's identity cannot reasonably be ascertained, then copyright lasts for seventy years from the date on which the work was first made lawfully available to the public. Should the creator's identity become known during this 70 year period then the term of the creator's lifetime plus 70 years is reasserted.

The duration of copyright varies from country to country. In the US and Australia for example the duration is the lifetime of the creator plus 50 years. In the EU the term is 70 years under the Harmonisation Directive of 1995. This directive was enforced in 1998 which meant that a number of works which went out of copyright under the previous 50 year rule went back into copyright under the 70 year rule (particularly Joyce and Yeats). Where copies of a translation are to be reproduced or sold overseas, the translator may need to determine whether the underlying work is still protected by copyright in all the relevant countries. Relevant permission must be obtained in respect of countries in which the copyright is still extant; without such permission you will only be able to deal with the underlying work in those countries where the copyright has expired.

Who owns the copyright

Under Irish law, the general rule is that the creator of a work will be the first owner of copyright in that work (subject to a number of exceptions such as work made by an employee in the course of employment, in which case the employer is the first owner of any copyright in the work, subject to any agreement to the contrary S23(1)a). The operation of both the general rule and exceptions may be altered by agreement. Authors sometimes grant a

publisher subsidiary or ancillary rights, such as the right to make translations; or the author and publisher may have agreed to administer the right to make translations jointly.

Types of Permission

There are several ways the copyright owner may give permission (a licence) to use the work. Licences can be either exclusive or non-exclusive.

Where an exclusive licence is granted, only the licensee has the right to use the work in the ways specified by the licence. This means that everybody else, including the copyright owner, is prevented from using the work in those ways. To be fully effective, an exclusive licence must be in writing and signed by the copyright owner.

Where a non-exclusive licence is granted, the copyright owner retained the right to use the work any may continue to grant similar licences to others who wish to use the work in the same way.

When granting any licence the copyright owner may choose to limit the permission granted by specifying the types of use that are included. Licences may limit permission to use the work :-

- for a specified period of time;
- within a particular geographic area;
- in a certain language;
- or in any other way that is practical in the circumstances.

(It should be noted that within the EU to grant only part of the market (eg- a German licence for Germany only) is technically in breach of the provisions of the Treaty of Rome permitting free movement of goods across borders within the region.)

If a translator intends to publish a translation of a major work, they may want to negotiate for the “exclusive right” to translate the work into the relevant language, in order to prevent the production of rival translations in the geographical area to which the licence relates.

Both the copyright owner of the underlying work and the translator should give careful consideration to what sort of licence is most appropriate in a particular situation and should seek legal advice.

Copyright Protection internationally

Under the terms of various international conventions and bi-lateral treaties, certain minimum levels of protection are ensured. Member states have agreed to grant each other's citizens and residents the protection of their own copyright laws. If a protected work is, for example, to be translated in Ireland, Irish law applies. Where a translation is to be published, sold or otherwise distributed in another country, the law of that country will apply.

Moral Rights

As a result of the Copyright & Related Rights Act, 2000, creators of material eligible for copyright protection, including translators, have certain moral rights. This means that the creator has the right to:-

- be attributed as the creator of the work (paternity);
- take action against someone else being falsely attributed as the creator of their work; and
- in some cases take action if their work is treated in a derogatory way or treated in a way that is prejudicial to the creator's reputation (integrity).

Translators have moral rights in relation to the translations they create. Since the translation also reproduces the underlying work, the creator of the underlying work also has a right to be attributed and to have the integrity of his or her work respected by the translator.

It should be noted that, in contrast to the UK, the paternity right in Ireland applies in all cases and does not need to be specifically asserted. The effect of the extension of the paternity right to adaptations is that an adaptation must state that it is an adaptation of the work of the original author.

In Ireland, translations are not excluded from the integrity right, as in the UK, although it would be hard to envisage how a competent and direct translation could constitute derogatory treatment. Case law in France suggests that an author has the right to object to the public performance of a play whose translation seriously distorted the text's meaning (*Zorine v Le Lucernaire* [1987]).

Do I need permission to make a translation of part of a work?

In Ireland infringement is said to have occurred if the whole or a "substantial part" of a work is used. The phrase "substantial part" is not defined in the Copyright Act. In their interpretations, courts have adopted a "qualitative" approach to this term, deeming that a small part may still be substantial if it is an essential, important or recognisable part of the original work. As a result, there is no minimum amount that may be translated without first obtaining permission.

What should I do if I can't find the copyright owner?

Making a translation of a protected work without permission involves a risk which may not be worth running. It is an infringement of copyright to make the translation and the copyright owner is entitled to take legal action. If successful, a court can award the copyright owner the remedies of damages, account of profits, delivery up of infringing articles and injunction. The infringer may also be liable not only for their own costs but also the costs of the copyright owner. Also a publisher may not be willing to publish a translation of a work where the translator cannot show that permission to make the translation has been obtained.

The establishment of schemes such as the Google Books Project and the European Digital Library 2010i will increase methods of access to "orphan

works” – works where the copyright holder either is unknown or is untraceable. Licences are being put in place to allow digital access to orphan works and these may be a useful source of information for potential translators.

Who owns copyright in the translation?

The person who created the translation will generally own the copyright in that translation. However, the ownership of copyright in the translation will be determined by reference to the exceptions and circumstances discussed earlier. The translator's ownership of the copyright is also subject to any agreement the translator may have made with another person, such as the owner of copyright in the original work.

Copyright in the translation is distinct from the copyright in the underlying work and as a result ownership of the copyright in the original work will be maintained. Where the translator is the owner of the copyright they are entitled to place the “copyright notice” on all copies of the translation. The notice consists of the symbol © followed by the name of the copyright owner and the year of first publication.

A copyright notice is not required for protection in Ireland, nor does it have any legal standing in the eyes of the courts. Nonetheless it is a good idea to put the notice on all copies of a translation as it operates as a warning that the work is protected and identifies the person claiming the rights.

A final word ...

It should be noted that the courts will not generally hold that copyright exists in individual words or slogans, irrespective of the skill, labour and judgement that may have been employed in thinking of the word or slogan