

Explanatory notes to the Standard agreement for the publication of a translation of a literary work.

Introduction

The Standard Agreement for the publication of a translation of a literary work which came into force on 1 March 2004 and was provided with explanatory notes on 1 June 2007, was adopted by the Dutch Literary Publishers Group (*Literaire Uitgeversgroep* (LUG)), member of the General Publishing Group (*Groep Algemene Uitgevers* (GAU)), of the one part, and the Dutch Literary Association (*Vereniging van Letterkundigen* (VvL)), part of the Dutch Association of Writers and Translators (*Vereniging van Schrijvers en Vertalers* (VSenV)), of the other part.

Basic principles

The Standard Agreement is based on a number of general basic principles, which already formed the basis for the first version of this agreement dating back to December 1988:

- a. The relationship between a translator and a publisher is not merely a business relation, but also a relationship of trust. The publishing agreement by itself does not suffice. The parties must approach the problems which inevitably accompany this relationship with a proper appreciation of the motives and objectives of the partner, in a manner worthy of the translator's brainchild.
- b. The translator leaves the material arrangements and the marketing of his work to the publisher. The publisher keeps the translator informed of all things that may be important to him and will consult him as much as possible.
- c. The parties attach the highest possible value to the publisher reporting fully and in detail to the translator about the position and sales results of his translation.
- d. The translator must give the publisher every possible assistance in carefully preparing the manuscript, correcting the proofs and revising the text if the work is being reprinted. Both parties have an interest in the production proceeding as smoothly as possible and in achieving a publication edited with maximum care.

These principles have not changed significantly. Practice has of course continued to develop. For this reason the Standard Agreement, which is intended to reflect what is generally experienced to be desirable and customary practice in the exploitation of a translation of a literary works, needs to be revised from time to time. From a legal point of view literary publishers have since 1988 equated translators as much as possible with authors. In drafting this Standard Agreement LUG and VvL have taken account of the special position of the translator, which has resulted in a well-balanced Standard Agreement.

Revision per 1 June 2007

Per 1 June 2007 the explanatory note to clause 10.1 was brought into line with the Dutch Competitive Trading Act.

Scope of application

The Standard Agreement for the publication of a translation of a literary work was purposely designed to regulate the relationship between a literary translator and the publisher of the text produced the translator. Literary work means creative and reflective prose and poetry. The agreement may also be used outside the strictly literary domain, however, for example for translations of science fiction, thrillers, horror or detectives. The high-quality nature of a book in one of these more popular genres may be a reason to do so, but in general publisher and translator are free to make individual or supplementary arrangements for such translations. For strictly literary work, however, the authors of this Standard Agreement consider it to be normative, i.e. LUG and VvL consider the rights and obligations described in the agreement as customary and reasonable.

Where for each translation there is a different balance between performing a commissioned service and realising a creative achievement, it is in any case true for the category of literary translators to say that publishers should treat them on an equal footing with authors as regards their legal position.

Yet, even though this agreement is clearly based on the agreement for authors, from a legal perspective a literary translator can by no means be fully equated with the author he has translated. It is possible to distinguish a hierarchy between the respective interests of author and translator with respect to the work which justifies the general rule that the translator will have to conform to the arrangements made between the author of the original work and the publisher. The fact is that the translator cannot derive more rights from his agreement with the publisher than the publisher derives from his agreement with the author of the original work or his successor in title. This conformity principle, which manifests itself in several places in this Standard Agreement, will have to give way only if - considered objectively - the translator's interests would be prejudiced by a certain method of exploitation agreed between publisher and author (see clause 2). Another principle included in this agreement is that if the author of the original work has sufficient confidence in the exploitation or resumption of the exploitation of his work by the publisher, the translator will not have individual power of disposition of his translation (see clause 15). These adjustments to the translator's control over his translation make it possible to treat the translator as much as possible as an independent author of his work in all other respects. The substance of the Explanatory Notes should be considered to form part of this Standard Agreement.

LUG and VvL believe that a translator must be justified in believing that the agreement presented to him under the name of LUG/VvL Standard Agreement is identical with the version adopted by LUG and VvL, or alternatively that the points on which the agreement presented to him deviates from said Standard Agreement have been clearly pointed out to him before he signs the agreement. If the publisher introduces changes in the LUG/VvL Standard Agreement, or deletes or adds terms or conditions, the publisher may not use the title

LUG/VvL Standard Agreement for his adjusted version, unless he clearly points out the changes he has made to the translator when presenting the agreement.

The Standard Agreement with the Explanatory Notes may be obtained at the offices of LUG and VvL and it has also been placed on the website of the Dutch Publishers Association (*Nederlands Uitgeversverbond* (NUV)): <www.nuv.nl> and on the website of the Association of Dutch Writers and Translators (*Vereniging van Schrijvers en Vertalers* (VSenV)): <www.schrijversvertalers.nl>.

LUG and VvL recommend that the text of the Explanatory Notes to the Standard Agreement be handed to the translator when the agreement is presented, unless the translator may be taken to be acquainted with the contents. The publisher may also merely refer to one of the websites mentioned above, unless the translator asks for a copy of the explanatory notes.

The present version of the LUG/VvL Standard Agreement is applicable to agreements for the publication of translations of literary works concluded after 1 March 2004, with the adjusted explanatory note to clause 10.1 being applicable as from 1 June 2007.

Notes to individual clauses

Re the parties **Publisher**

The publisher will generally contract as a legal person, which means that the rights and obligations are confined to this legal person.

Re clause 2.2 **Indemnification**

The indemnification given by the translator to the publisher applies without prejudice to the publisher's entitlement to receive independent and full damages from the translator if the contents of the translation would, as a result of the text of the translation, make the publication or further publication impossible and the publisher should suffer damage as a result thereof.

Re clause 2.4 **Conformity principle**

In balancing the interest of the author of the original work and his agreement with the publisher on the one hand and that of the translator on the other hand, the former's interest should prevail. The translator will have to conform to the arrangement in question, unless the translator can demonstrate in reasonableness and fairness that the use in question of his translation would cause him to suffer such a loss that he cannot be expected to cooperate in the proposed arrangement. The criteria for assessing what is reasonable and fair will include the customary fees for a similar form of exploitation, and also the fees payable for forms of exploitation for which the agreement does provide.

Re clause 2, subclauses 5, 6 and 7 **Scope of licence for subsidiary rights**

The publisher is granted a licence to exploit the so-called subsidiary rights to enable him to take

prompt and decisive action, also on behalf of the author of the original work and of the translator. The usual percentage of the net proceeds of the forms of exploitation in question that is payable by a publisher to the translator is 50%. In exceptional cases it may happen that certain proceeds from the exploitation of subsidiary rights are obtained through the action of the translator. To avoid misunderstandings, the translator must in such case have made clear arrangements in advance with the publisher, since the latter represents the subsidiary rights to the work and the translation on behalf of the author and the translator. The parties may agree on a higher share in the proceeds for the translator in this situation.

Three categories

Clause 2.5 describes the rights which the publisher will in principle exercise under independent authority, subject to reasonable objections of the translator. Clause 2.6 deals with the rights which the publisher may likewise exercise independently, but only with the translator's written consent. Clause 2.7 devotes attention to the exploitation of rights through collective channels. The further conditions stipulated for the exercise of these rights are applicable notwithstanding the exclusive grant of these rights by the translator to the publisher.

Readers

Clause 2.5.a. Subject to certain conditions (section 16 of the Dutch Copyright Act 1912) it is permitted, against payment of a fair consideration, to reproduce short works or short passages from works in educational publications. GAU and VvL have worked out the details of the statutory conditions in the Anthology Rules for reproducing (passages from) literary works in educational publications. On the basis of these Rules the Dutch Publishers Association *Nederlands Uitgeversverbond* NUV has concluded an agreement for reproduction in readers with the universities and institutions of higher education.

Reproduction rights

Clause 2.7.a. The legislature has designated the foundation *Stichting Reprorecht* as the exclusive collection and apportionment body for the fees payable by Dutch public sector institutions and the private sector for photocopying for their own use as permitted pursuant to section 16b of the Dutch Copyright Act 1912 subject to further conditions, which have been worked out in detail in the so-called 'Reprography Decree'. GAU and VvL have agreed that the revenues will be shared on a 50/50 basis. The translators' share is paid to translators by the Literary Rights of Authors foundation LIRA, the publishers' share is used by GAU for 'collective objectives such as the promotion of reading and purchasing books, and research.

Public lending rights

Clause 2.7.b. The legislature has designated lending rights foundation *Stichting Leenrecht* as the exclusive collection and apportionment body for the fees payable by libraries for the public lending of works. The apportionment of these moneys is effected in accordance with the apportionment rules of *Stichting Leenrecht*. Pursuant to agreements made between GAU, VvL and LIRA the apportionment of the authors' and translators' shares is done by LIRA. *Stichting Leenrecht* has not been designated by law to exercise public lending rights abroad: the publisher, also acting on behalf of the translator, will so designate *Stichting Leenrecht* by

power of attorney.

On the translator's request and insofar as available, the publisher will furnish information on the sales of translated titles to public libraries, in order to enable the translator to assess his entitlement to public lending right payments.

Transfer for the benefit of LIRA

Clause 2.7.c. The LIRA foundation has the object of collectively managing certain rights, in particular subsidiary rights, in literary and literary drama works on behalf of authors and translators.

Translators can directly join LIRA (N.B. see the obligation to inform the publisher in clause 2.7.d), but they can also leave this to the publisher. The rights mentioned in subclause 7.c (in particular cable rights and home copying rights) are transferred to the publisher subject to the suspensory condition that the publisher transfer these rights to the LIRA foundation.

LIRA stipulates the transfer of rights in order to have a stronger position with respect to the producers of film, radio and television productions. If the transfer is effected via the publisher, LIRA further imposes the condition that the author's share must be at least 50%. LIRA will also pay out the cable fees collected by the VEVAM Association for (television) films, insofar as these fees relate to the work.

The publisher will transfer the rights mentioned in subclause 2.7.c to LIRA under a collective affiliation agreement, as it is called, with LIRA. When retransferring the rights upon termination LIRA must take account of any commitments that have already been undertaken. The rights then revert to the translator. Subsequently, the parties must agree on the way in which the exploitation of these rights will be continued.

Publisher and translator may also engage LIRA on an optional basis for a number of the rights mentioned in subclause 1, for example for paying out mechanical rights fees which are exploited by the STEMRA Foundation. This may require the relevant rights to be transferred by written instrument after all.

Collective rights organisations

Clause 2.7.d. The STEMRA Foundation is active in the field of mechanical rights.

The VEVAM Association is active in the field of cable fees insofar as relating to film works transmitted via cable.

The obligation for the translator to inform the publisher in writing of affiliations, if any, with any of these organisations or other organisations charged with collective exploitation before entering into the present publication agreement serves the purpose of enabling the parties to allow for such affiliations when making arrangements about the exercise of exploitation rights and the fees which may result from such exercise.

Re clause 2.9 Publication under licence

In the event of a separate reprint by another publisher or a book club, the publisher of the translation remains responsible for settling the royalties with the translator.

'Publisher' is also understood to mean any legal person which forms an economic entity together with the natural or legal person signing this agreement in the capacity as publisher and which has organisational ties with the original signatory.

The provision of this article does not prevent the possibility of making additional different agreements with the translator.

Re clause 4.2 Copies not intended for sale

Examples of copies which are not intended for sale are: complimentary copies, review copies, copies for subsidy, promotional or reviewing purposes, copies to be entered for a literary prize and file copies. The publisher will determine the number of copies not intended for sale on a case by case basis and in reasonableness, in which process it may make a difference whether, for example, it is a bound collection of poems or a paperback edition of a novel.

Re clause 5.4 Editing

Editing means bringing a written text into proper shape. An editor will pay attention, for example, to: spelling, punctuation, style, grammar, removing inconsistencies in spelling and use of words, etc.

Editing therefore encroaches more deeply on a text than preparing a text for the press, which is done in the manuscript phase and means making simple technical corrections of language and typography to remove faults in spelling, punctuation, underlining, etc. The purpose of editing is the significant improvement of the translation made by the translator.

Since editing may involve the moral rights of the translator, consultation between publisher and translator is necessary. The possibility for the publisher to recover editing costs from the author is related to the customary rates for editing work, which are determined based either on a rate per 1,000 words or on an hourly rate. Information on customary rates paid by publishers for correction, making ready for the press and editing can be obtained from General Publishers Group GAU.

Re clause 5.7 Correction

It is recommended that the publisher give the translator timely warning that the proofs will be sent to him for correction soon.

Re clause 5.8 Additional corrections

These are changes made by the translator in the production stage in which, in the traditional production process, the translation is presented to the setter.

In the year 2008 GAU and VvL will again consider whether the threshold amount above which the publisher may charge the costs of such corrections (€170,-) will be indexed once again.

Re clause 5.9 Unforeseen extra work

Unforeseen extra work means substantial extra work, for example extra changes and corrections due to changes in the original manuscript.

Re clause 6.3 Identification

Re clause 10.7 **Additional distribution channels**

With respect to copies distributed to additional distribution channels with a discount of 55 percent or more, the royalty is calculated on the net proceeds. This arrangement does not apply to copies distributed to regular distribution channels in the Netherlands, such as booksellers, a category which is held to include book clubs as well.

Re clause 11.1 **Settlement**

The deadline for sending the statement of account, viz. four months after the books are closed, may only be exceeded in exceptional cases. So as the rule the date to be filled in here will be 30 April.

Re clause 13 **Reprints**

It is important for both publisher and author that the translation will be in print as soon as possible.

Re clause 15.2 **Possession of publishing rights and termination**

As long as the author of the original work and the publisher have an interest in keeping the Dutch publishing rights in the original work vested in the publisher, for example because the publisher represents the author's entire oeuvre in the Netherlands, the translator cannot terminate the agreement unilaterally. This would indeed be meaningless, since he cannot exercise his rights in the translation independently anyway (not against the wishes of the person(s) entitled to the original work).

If the publishing rights are no longer vested exclusively in the publisher (the exclusive translation licence for the original work has terminated or the original work is in the public domain), then in principle it is possible for the translator to cause his translation to be published elsewhere, provided that the new publisher comes to an agreement to such effect with the person(s) entitled to the original work.

The latter condition obviously does not apply when the original work has entered the public domain (in the European Union this happens 70 years after the author's death, outside Europe the copyright period ranges from 50 to 70 years).

Re clause 15.7 **Exploitation possibilities after termination**

The explanatory notes to clause 2.4 are likewise applicable to the test of reasonableness and fairness of the conditions in an agreement on new exploitation possibilities after this agreement has terminated .

Re clause 22 **Arbitration**

The parties may also include an express clause in the agreement providing that they will submit any disputes about the agreement to arbitration, in accordance with the Arbitration Rules of the Netherlands Arbitration Institute.

