

**FOREIGN DISTRIBUTION ISSUES:
CHOICE OF AGENCY/DISTRIBUTORSHIP
& INTELLECTUAL PROPERTY**

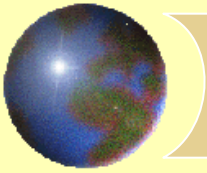
2010 TEXAS DECS STATEWIDE MEETING

**North Texas District Export Council
May 13, 2010**

**Daniel Mark Ogden, Esq.
NTDEC Vice-Chair**



DANIEL MARK OGDEN
*Attorney & Counselor at Law
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FOREIGN DISTRIBUTION ISSUES

Foreign Market Distribution Methods

▪ Indirect Presence

- Foreign Sales Agent
- Foreign Distributor
- Low capital investment & direct distribution control

▪ Direct Presence

- Foreign Branch Office
- Foreign Subsidiary
- High capital investment & direct distribution control

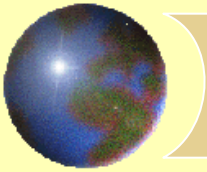


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FOREIGN DISTRIBUTION ISSUES

Choice of Agency/Distributorship

- **What type of foreign purchaser/customer do you wish to sell to?**
 - Foreign End User- foreign sales agent
 - Foreign Intermediary- foreign distributor
- **Initial foreign purchaser/customer considerations**
 - Sales to foreign end users are generally more profitable
 - Sales to foreign intermediaries are generally more regular

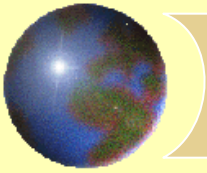


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FOREIGN DISTRIBUTION ISSUES

Choice of Agency/Distributorship

- **What degree of control in relation to your foreign purchaser/customer do you wish to have with respect to several key issues?**
 - **Pricing control- Agent**
 - **Sales volume control- Distributor**
 - **Market control- Distributor**
 - **Customer control- Agent**
 - **Sales terms control- Distributor**
 - **Export compliance control- Agent**

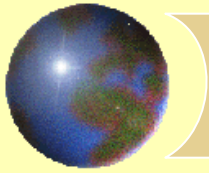


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FOREIGN DISTRIBUTION ISSUES

Foreign Agency Legal Issues

- **Grant of authority**
 - **Single most important legal issue**
 - **Be as precise and thorough as possible**
 - **Include both positive and negative grants of authority**
 - **Authority Issues**
 - **Pricing**
 - **Product representation**
 - **Sales closing**
 - **Warranty servicing**
 - **Implied authority**

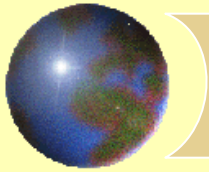


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FOREIGN DISTRIBUTION ISSUES

Foreign Agency Legal Issues

- **Choice of law & forum**
 - **U.S. jurisdiction (i.e. Texas) preferable**
 - **Agency law in U.S. is generally “freedom of contract”**
 - **Even if a U.S. jurisdiction is chosen, foreign jurisdiction may still impose contractual restrictions/obligations**

- **Exclusivity**
 - **Product exclusive-benefits exporter**
 - **Territory exclusive-benefits foreign sales agent**
 - **Foreign jurisdiction restrictions on product and/or territory exclusives**

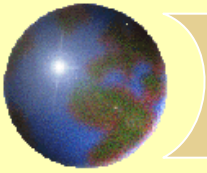


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FOREIGN DISTRIBUTION ISSUES

Foreign Agency Legal Issues

▪ Agency Term

- Automatic/conditional renewable & non-renewable
- Foreign jurisdiction renewal requirements

▪ Agency Termination

- At will or conditional termination
- Foreign jurisdiction termination notice requirement
- Foreign jurisdiction allowable termination conditions
- Foreign jurisdiction treatment of agent as employee
- Foreign jurisdiction commission requirements
- Apparent authority avoidance-notify, notify, notify!

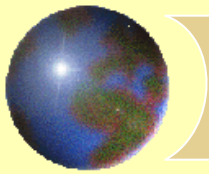


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FOREIGN DISTRIBUTION ISSUES

Intellectual Property Issues

- **Foreign trademark registration**
 - **Must register trademark in a particular country to receive exclusive rights to use mark in that country**
 - **Defensive protection- forestalls competitor registration**
 - **Madrid Protocol- does not provide automatic foreign registration, eases process of foreign registration only**
 - **Rule of Thumb- Always register trademarks in any country in which you *might* do business**

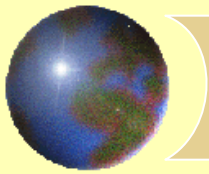


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FOREIGN DISTRIBUTION ISSUES

Intellectual Property Issues

- **Grey Market Goods**
 - **Genuine goods sold outside authorized chain of distribution**
 - **Your product is imported into a foreign country by someone other than your distributor or a customer of your sales agent within that country**
 - **Your product is imported into the U.S. after being exported by you to another country**
 - **Trademark recordation with U.S or foreign country
Customs will result in Customs seizure of grey market goods**

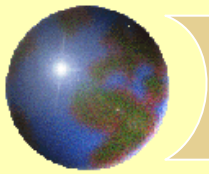


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