



A PLAY OF WORDS: ACTING OUT CONTRACT NEGOTIATIONS

KENNEALLY: Good morning. My name is Chris Kenneally, and I'm going to be your narrator for the next hour for a program that we're going to call "A Play of Words: Acting Out Contract Negotiations." The negotiation you are about to see isn't necessarily real, but the actors certainly are playing themselves here. And I think you're going to enjoy it because I was just doing, like any fine director or producer, doing a quick run-through with the cast, and I can tell you the negotiations were quite lively already here.

Let me introduce for you who we have. And it's important to stress that both these people have remarkable experience, real-life experience in this very topic of contract negotiations. Jan Kardys comes to us from New York. She has over 20 years diversified experience working for eight major publishing corporations. She was the director of contracts at Warner Books, Little, Brown & Company, director of contracts at MacMillan Publishing, and contracts director, just for a bit of a changeup, at Prentice Hall, Simon & Schuster. Jan has also worked at Harcourt Brace Jovanovich, Doubleday Scholastic, Lippincott and Crowell, and St. Martin's Press, in editorial subsidiary rights and production.

So I think that gives you a very quick idea of just how diverse her background is, but really focused on contracts. She's the kind of person if you're going to be working with any major publisher, you will inevitably deal with, and you'll find out just how hard it is in just a moment.

We also have somebody who's very familiar to you all, I believe. Michael Lennie, who comes from California for the conference. He's negotiated hundreds of major contracts for both established and first-time authors of all kinds in all genres. He speaks regularly at workshops like these and is a national advisor, indeed, to the Text and Academic Authors Association. He's also been lead counsel in several landmark cases on behalf of authors against their publishers.

So we want to welcome Jan and Michael. I'll briefly introduce myself – my name is Chris Kenneally. I'm the director of author relations for Copyright Clearance Center. And as part of that job, I moderate programs on the business of writing and publishing around the country, a program we call Beyond the Book. We are going

to be podcasting this particular program, and a number of others from the conference this weekend on our site Beyond the Book, and there's some materials about the podcast series which you're welcome to have.

But as the narrator I want to set the scene here. The notion is that you the textbook author – and you're not even a textbook author just yet. But you've been wined and dined, shall we say, by a publisher who wants to see you put out the next great edition of a work. And a contract has arrived in the mail – e-mail or real mail. And you are very pleased to have this. But you make one critical decision – you actually stop yourself from signing it immediately. You hold off. You decide to do the right thing, ask some questions, get some information, and you have an attorney – or literary agent – participate in the negotiation with you.

So with that in mind, Jan, can you help us understand, too, what the publisher's side of things looks like? These negotiations always begin in somebody's favor, and I imagine at the publishing house in New York, someone there is just waiting for the phone to ring with that author on the other end of the line. They're ready for them, aren't they?

KARDYS: Yes.

KENNEALLY: What have they got? What prepares them for this?

KARDYS: Well, generally the process is when an editor wants to buy a book, there will be a committee – they'll have to get their publisher excited. And there could be several departments involved. This is trade as well as academic publishing. And then generally the editor will get the go-ahead, there will be a profit and loss done on your book – how much money they think they can earn. And then the editor will send you an e-mail or call you up and make you an offer.

KENNEALLY: Right. But when they're making that call, I'm thinking they've got some kind of a checklist, a sheet, that tells them what they're after. And they want to get it all.

KARDYS: Yes. There's – you have my checklist. Basically they go through, the editor will go through manuscript due date, the territory. They'll try to get world rights in all languages. The option clause. The electronic rights are very important for a publisher today, audio rights – all subsidiary rights. Competing works are important for a publisher. There's a range of different things.

KENNEALLY: We're going to take that apart in just a moment, but I guess the point that I wanted to stress to those who haven't been through this before, or may even have been through this before, is that when you see a contract, it's thought of as a single document, but indeed, it has all these various elements in it, and it can be very difficult – you can't see the forest for the trees situation. But on the publishing side, they really are very much focused on every clause, every paragraph, every

line – Michael’s nodding his head, so I think he agrees with that. Let’s bring in the literary agent here on this. Do you have a checklist, Michael, when you’re about to negotiate? And you have your mike, so you’re fine.

LENNIE: I do certainly have a checklist of those things that are most important for the textbook author. I have received a copy of the contract from – the initial contract offer from the author. I’ve had him go through and annotate that contract with regard to questions that he or she has and giving priority to the clauses that are most important to them. Now, that may or may not turn out to be the most important things. I will then go over it and discuss what I consider to be important matters that the author may not have detected if they’re not skilled or experienced in this.

KENNEALLY: When we were talking before, Jan, you described a scenario with an author who didn’t have an agent, who didn’t have any interest in having an agent and how you reacted to that. Tell us that.

KARDYS: Well, this was many years ago. An author came into my office without an agent, without a publishing attorney, and she was doing an astrology book. And she was completely nervous and upset. And I – she said I have no idea what to ask for. So I felt sorry for her. I couldn’t say go get an agent, go get a literary agent, go get an attorney. Go home, read your contract, don’t be intimidated by legalese. So she came back the next day and we had a three-hour negotiation and then it carried on for two more days. And of all the authors I’ve dealt with – Tiger Wood’s contract, Sandra Brown, bestselling authors – I have to tell you, this was the most complex and difficult contract negotiation I’ve ever gone through in my life because this was a woman who just read every word and asked questions.

KENNEALLY: She asked basic questions.

KARDYS: Yes. What does a remainder mean? What is copyright in it? So my best advice to you is do not be intimidated by these publishing agreements. Just really read them carefully.

KENNEALLY: OK.

LENNIE: Could I comment on that?

KENNEALLY: Absolutely, Michael.

LENNIE: Just briefly. Note that the example comes from several years ago. Jan has negotiated hundreds of contracts since. And don’t believe that that’s the kind of mercy you’re going to receive if you go into the publisher. You have to be prepared and not count on them saying, well, get an attorney or look this over more carefully. It’s not going to happen except in very exceptional situations. And did your sister end up with a good contract?

(laughter)

KARDYS: Well, actually the other day at Scholastic I did have an author, he had no agent, and he gave me three pages of changes, and I felt sorry for him but he did the best job he could. So once in a while I'll throw in, I'll give an author a little gift, because they didn't think of a few things. When I turn them down. When I turn them down.

KENNEALLY: Well, I think that's a pretty honest glimpse of the situation. It is very much a business negotiation, particularly when you're talking about literary work or academic work. It's so much involved with – one's heart and life are poured into these things. And yet it comes down to pure business, both on the publishing side and the author side.

What we've done is identified a variety of contract clauses that will be critical to you. And we have put a couple of what Michael refers to as bombs in them. So let's take a look at that and go to a few – you want to start with one in particular. We have the materials to deliver clause. Michael, do you want to start?

LENNIE: Sure. That'd be fine. What I'm looking at in this clause are a couple of things. One, the satisfactory word, which is a completely subjective term – and we'll talk about that a little bit in a minute. And the other is whether there are what I would call blank checks in this clause. And that is the author will submit full manuscript satisfactory to the publisher and supplements as requested by the publisher, for instance.

END OF TAPE 1

KARDYS: – negotiate together. We've already decided. I'm basically – let me go to the next screen.

I will talk to the agent or the attorney and I will say, well, it's totally at our discretion. We have to be in control. You can't dictate to us what we're going to publish and what we're not going to publish and what's satisfactory. But what I will give you is I will give you a chance to revise the book. I'll give you sort of a duty-to-edit clause, which would mean – and this you must ask for – a list of reasons why your book is unacceptable.

KENNEALLY: So it's unacceptable just to say it's unacceptable?

KARDYS: Right. Whatever we decide, it doesn't matter. It could be marketing reasons or not. Totally up to the publisher. So the best you can get is a list of reasons why your book is unacceptable.

KENNEALLY: Michael, how do you respond to that?

LENNIE: Well, my initial response to sort of set her back a little bit on that is that – let me see if I understand. You want my author to write and prepare materials for two years, at which time you'll have total discretion to say whether or not you're going to go forward and publish this book. Do I understand that correctly?

KARDYS: Yes, you're right.

LENNIE: OK.

(laughter)

KENNEALLY: You summarized it for everybody.

LENNIE: That is it. The satisfactory clause is we don't like the way you parted your hair and we're not going to publish. So what I want to do is to build a little bit of procedural due process into this if I can. I can't get away from that clause entirely, but what I can do is follow up on what Jan's willing to begrudgingly give me and to say, well then, I want to have a notice in writing as to whether it's acceptable or not acceptable, and I want that within 60 days, 90 days whatever, of submission of complete manuscript.

And if it turns out that you're telling me that it's not satisfactory, I want a list with page number examples that demonstrate how it's not satisfactory. Then I want to have assistance of your editor in making this work for both of us, making it satisfactory.

After we go through that, we can either go through that multiple times or then they might say, well, it's still not satisfactory, still don't like the way you part your hair. But now I've got something – I've gone from subjective to objective. I have their list as to what's wrong with it.

KARDYS: Well, Michael, I'm going to give you a time to extend this. I'll give you a period of time. I'll let you – we'll give you a chance to revise the manuscript. We'll give you a list of editorial changes. I'm not going to commit to how many pages of editorial changes I'm going to give you. But I'm not going to put in writing right away whether or not it's accepted or not with a time period. Editors are under a lot of pressure. I don't want to give you a time period to tell you whether or not it's accepted or rejected.

LENNIE: Well, that could end up in the manuscript sitting there for six months, or you could end up taking another job and a new editor comes in. So it's nothing personal with you. I'm sure you'd get back to me soon, but I need to have something that'll cover the waterfront on that. I need – if 60 days isn't enough, we can make it 90 days.

KARDYS: OK. 90 days.

KENNEALLY: You're willing to go with 90 days then, Jan?

KARDYS: Yes.

KENNEALLY: Yes. Have we covered that satisfactorily then, the satisfactory versus unsatisfactory area? Do you want to go back to the slide previous? I know, Michael, there was something else you were pointing out was there?

LENNIE: Just – no, I think we covered that with general statement to not signing any blank checks, make sure of what it is you're being required to produce.

KENNEALLY: Is there another clause that we want to see whether there's any hidden bombs?

KARDYS: Well, time is of the essence. We will put that in publishing agreements.

KENNEALLY: Actually that phrase?

KARDYS: Yes. It will be right next to the manuscript due date. Time is of the essence. A good attorney will take it out, and a good contracts person will fight to keep it in because in a return-of-advance situation, that's extremely helpful for us.

LENNIE: Just briefly, time of the essence in a contract means when we say you have to have your manuscript in by December 31, 2008, we mean December 31. We don't mean January 1, 2009, and if it isn't in by December 31, you're in breach of contract. Now, without that clause, it means December 31 is – we'll work together type of thing.

So I will not allow my author to sign that contract with time is of the essence. The way I approach that is to say, well, let's see. December 31, time is of the essence. I understand what that clause means. Where is the publication clause as to the date that you'll be publishing? You know, I don't find that. We'll want to have one of those, and it'll be within 15 months of the date of acceptance. What's good for the goose is good for the gander. We'll want time of the essence in that clause.

KARDYS: First of all, we've never given that, Michael. We've never given that in any publishing agreement, and I'm not going to agree to 15 months. But what I will agree to is we'll publish within 18 months of acceptance, but if your author is going to have to make major revisions and we have to do editorial changes, I'm going to have to alter that 18 months clause and give myself maybe 24 or 36 months.

LENNIE: (laughter) OK. Well, to tell you the truth, I've never gotten time is of the essence on the publishing clause, but just to balance that, I've never entered a

contract where I've agreed to time is of the essence for the author to submit. So that clause can't be there, and if it's so unsatisfactory that it takes the author not 12 months but 24 or 36 months, you'll be rid of that book long before we get to that point. So we need a date by which it's going to be published, and if we can't meet that date and you still feel there's promise, we can talk and extend it. If there isn't, then the book is gone at that point.

KARDYS: OK.

KENNEALLY: Well, time is of the essence here as well, so –

KARDYS: So we'll go to the next one.

KENNEALLY: Perhaps we will do that. What have we got next here?

KARDYS: Recovering money.

KENNEALLY: The publisher recovering money. I thought the money was for the author.

(laughter)

KENNEALLY: Talk about this.

LENNIE: Now you see it, now you don't.

KENNEALLY: Yes, that's right. Now you see it, now you don't. What are we up to here?

KARDYS: I'm going to ask Michael to accept this clause without any changes, that in the event your book – you fail to deliver, we'll come after you immediately. But if you submit an unsatisfactory manuscript or you don't deliver on time – in our judgment, completely our judgment – we are going to terminate and we're going to get all the money –

(break in recording)

M: If everyone here would please consider your cohorts that you work with, those who are newbies to the system, if you would please consider giving a gift membership to TAA. They only cost \$15. This is what makes the whole thing work for us. And I think we can tell from the interchange that we had here today, everybody learns from every single one of these sessions. So please consider that. It's also a tax write-off, I believe, but it's a good way of getting people into this organization.

(overlapping conversations; inaudible)

(break in recording)

KENNEALLY: Can you live with editorial judgment, do you think then, Michael?

LENNIE: No, I would probe her some more as to what she feels it needs and maybe we should put some of that down in the writing as to what it means, that sort of thing. We might be able to work with that.

What we're talking about is recovering money here, so just to quickly get to that. Let's say she gives a \$25,000 advance. What she's asking for here is if, in her sole discretion, the work is not satisfactory, she wants that money back. Well, particularly if I'm dealing with a first-time author, that money has been spent months ago at the time she wants it back, so it's coming out of pocket. What I'm going to try to do is get a provision that says that if my author doesn't submit a manuscript, take it back. Go after them with your fangs showing. But if they submit a manuscript and it's a discretionary decision by the publisher, I want those funds to come back out of what are called first proceeds. First proceeds basically are you get the rights back, you take it to another publisher, that publisher publishes it. The first money that comes to you goes back to pay Jan.

KENNEALLY: Now, Jan, how does that work on your end?

KARDYS: On my end, on the return of your advance situation, if you don't deliver, we'll immediately send you a letter and ask for the money back. We don't care. We will not be sympathetic. One publisher I worked at, Doubleday, half my day was going after authors in return of the advance situations, and it was not fun.

KENNEALLY: What kind of excuses did you hear?

KARDYS: I heard everything. I spent it on a mink coat. She was the mink coat lady. In one house – I won't name the publisher – I was reading *Publishers Weekly*, and I noticed this book, and then I noticed in my files I was doing a cancellation. So I got the original manuscript from the editor and I got the book that was published by the other publisher, and it was the same book. I called up the contracts director at this publisher and I said, you do not have the right to have this book out and published. We are still under contract. And within three days I got a check from the publisher.

So everyone paints the picture of the publisher being terrible. It's not always the case.

LENNIE: Any situation like that where it's fraudulent or it's that I just decided I didn't want to do it, I'm going to go like this to the publisher and at the same time – I'm not terribly sympathetic to the author at that point, either.

KENNEALLY: So that's what's critical here. You have the right to resell, but only after you've legally terminated the contract and repaid the advance.

KARDYS: Well, this is a tricky clause because the agent has to be very careful about how they work this clause, because in some publishers, we won't let you resell. We'll just ask you for the money back. And then when you give us the money back, then we'll give you the right to resell. Not every publisher is flexible.

LENNIE: Our position is without giving us the rights back, we can't resell and we can't recoup the money to repay you, so we've got to work together on this.

And I may be asking also, depending on the circumstances of not being accepted, I may be asking for only half gets returned, under certain circumstances, or that it be limited to first proceeds in the first three years (inaudible).

KARDYS: Michael, no way. I'm sorry.

(laughter)

LENNIE: We want to negotiate a contract (inaudible).

KARDYS: Well, we'll renegotiate repayment plan, then, right now.

KENNEALLY: Seriously, though. Nobody wants to have to pay it back, but if indeed it has been spent, if not on mink coats then on children's tuitions, it is possible to get some kind of a plan. You're not going to be asked to cough it up right away.

KARDYS: Right. We're logical. We're reasonable. And if you made a good-faith effort to deliver what you thought was a satisfactory book but we deemed it unsatisfactory, even after we've worked with you, we don't want to get bad press as a publisher, so we will negotiate a repayment plan that you can afford. There is a statute of limitations, though, which Michael knows about.

LENNIE: It's pretty long. It's the 18% you want that I –

(laughter)

KENNEALLY: Shall we go to another clause then?

LENNIE: Sure.

KARDYS: That's not really that important, but –

KENNEALLY: Well, briefly, what is important there? I think there's one line in particular, on the author copies.

LENNIE: It says that the author is going to get a certain number of free copies. Five is very negotiable. You can get quite a few more than that, maybe 20, maybe 15. But what Chris is referring to is the 25%. Two things, actually. For personal use and not for resale, and at 25%.

The publisher is happy to sell the book to a middleman with 50% discount, so they should be equally happy to sell it to you at a 50% discount.

KENNEALLY: That would seem really sneaky.

KARDYS: We do go up to 50%, the publisher I work for now.

LENNIE: The other thing is personal use, and this is a more subtle matter. Authors sometimes can buy books and resell them with a clause that allows it so long as it's very carefully structured to be in channels not normally addressed by the publisher. If your book would sell to a museum crowd or something and you have access to museums, the publisher will probably sell you books and allow you to sign them at the back table and that sort of thing, for resale, in other words, and you can make some money that way, and they'll make their money on the 50%.

KARDYS: That's special sales. Does everyone know what special sales are? A publisher deems special sales outside normal book channels. Normal book channels are like to bookstores. In the academic field, it's defined in a particular way. But let's say you were doing a cookbook and it's being sold in a bookstore, but let's say you sold your book to Williams Sonoma. That's a special sale. So if you have the ability to do that, it's very important that you tell your publisher, I can sell 500 to 1000 copies. I need your permission to do this. Is this OK? Because if the special sales director at your publisher is contacting the same company, it's extremely embarrassing. And we could probably get a better deal. Authors think that they can just go ahead and do whatever they want with their book. They really can't.

KENNEALLY: There was a clause or an area of the contract that we were actually getting into a pretty good discussion about before, which is permissions and who becomes responsible for permissions. You were just talking about getting permission for resale or for special sales. Jan, have you got something on that?

KARDYS: I don't think I have. That might be in the delivery clause. Yes. And I gave you a handout, actually, on permissions. Permissions, from my experience – I used to clear permissions at Scholastic for textbooks and grant permissions, and then for trade books authors forget how important your permissions are. When you're writing your book and you're taking information from other sources, don't forget to get your original source, clear it, get the proper rights.

If your publisher has said, I want world rights in all languages, you should make sure your permission clears for all rights in all languages, and all subsidiary rights uses.

Don't wait until the day after your manuscript is due, because I've worked at publishers where if you don't submit your permission licenses where you have the right to use other material, they consider that part of the delivery. I've cancelled books because the permissions weren't cleared by the manuscript due date.

KENNEALLY: Michael, what's your take on that?

LENNIE: Clearly, as Jan points out, this is an area that has to be addressed because it could end up in your book being cancelled. Normally, I am going to try to shift that to the publisher. I'm going to try to shift both the obtaining of permissions and the payment of costs for permissions. Now it can be wildly different from one book to another what the permissions' cost may be, and it could be a budget killer to the publisher to take that on, depending on the book.

But generally what I try to do is have the author identify everything that needs permissions, give all the contact information to the publisher. The publisher's got a permissions department. They know how to do this. I want my author writing the book, writing the supplements. I don't want them trying to learn a new skill of how to get permissions.

KENNEALLY: Jan, what do you think about that?

KARDYS: Michael, first of all, we're giving you a lot of money for the advance, and that covers permissions. Let's be honest. You don't have a lot of permissions to clear for this book, and our permissions department is dedicated to granting permissions, bringing money in for the publisher. We just cannot – I'm sorry. We're not giving you additional money. Let's go to the next point.

(laughter)

LENNIE: And she's right that there's not much permissions involved and there's nothing to be fighting about. We've got far more important clauses to move onto.

KENNEALLY: Has that area gotten thornier? It would seem to me that it probably has. First, people probably want more than ever for the re-use of a song lyric or illustration or whatever. But also people's attention to proper permissions I think has been raised by so much going on in publishing. Jan, you're nodding.

KARDYS: Yes. I worked at Google also, for three years. Electronic rights are very important for publishers now. You've heard about Google Book Search. And Scholastic, in fact, has an electronic division. We must get those rights and you must clear those rights, and that means your permissions that you're clearing are

going to be more expensive. Michael, of course, will try to get me to give a little grant for permissions for you.

LENNIE: Little?

(laughter)

KENNEALLY: Well, it's all in negotiation. What's this clause here? What's this about? And where's the bomb in this one?

KARDYS: The revision clause. In most publishing agreements, we want you to revise your book, but we're not going to pay you more money. And if we decide you're not able, you're sick, we're going to find somebody else to revise your book, and we might use your name. We might not. It's at our discretion.

M: Whoa!

LENNIE: Yeah. You better whoa on that.

KENNEALLY: Did we hear that whoa?

LENNIE: The point of analysis for you is that first line. At publisher's request, author agrees to revise the work or any portion within, etc. At publisher's request, you agree. It doesn't say they're going to agree to ask you to do the revision. So the strict interpretation of that language is you may be doing a book that you expect to do four or five or ten editions of. You have not reserved a right to do the revisions in this contract. What that contract has to say is that if the publisher determines to do a revision, the publisher will first come to the author and request the revision be done by the author, and the author will have a certain amount of time to say yea or nay.

And the corollary to that is if you've done a book and you are not the revising author, you have to provide for what portion of the royalties you're going to get in those subsequently revised editions by other authors.

KENNEALLY: It sounds like this gets complicated pretty fast in that area.

KARDYS: Yes.

LENNIE: Yeah, it can.

KARDYS: In trade publishing, which is different from academic publishing, we'll be a little bit more flexible and generous than in academic publishing. We would probably compromise and say if we do ask you to revise the book and we ask you to revise more than 25%, we will negotiate an additional advance. But from some of the contracts I've seen – and I did do an academic contract in between Google

and starting at Scholastic. It was the clause we fought the most about, and the publisher won.

LENNIE: On the advance side of that, I didn't address. Normally, the publisher will take the position that there's no advance for subsequent editions. There's some merit to that and there's some problems to that. Many times, your advance in your first edition is you have no income flow yet. You may be taking a sabbatical. You may be giving up other sources of income, so that's a real justification that the publisher goes along with. But in the second edition, now you have a flow of income from the first edition and they say, well, you don't need an advance. My position is you need an advance because you need that publisher to keep on track with that book and the more money they put out up front, the more important that book is to them.

So you want to leave that as a re-opener to be able to negotiate, or maybe you, at the inception, you agree that you'll receive 50% of the advance you received on the first edition. But don't lightly give up that advance on subsequent editions.

KENNEALLY: Jan, is that how you see it as well? The commitment the publisher is making is reflected in those kinds of payments?

KARDYS: Yes.

KENNEALLY: Here we have something about royalties. What's the phony issue here, Michael?

LENNIE: Money.

(laughter)

KENNEALLY: It's always about the money.

LENNIE: There are standards at different levels, and I'm talking about grade levels. School level, you get paid a certain amount, junior high a certain amount in royalties, high school a certain amount, and colleges. These are all progressing up from the low grades. We don't have time, really, to go through what might be considered standard in those things, but it's all negotiable.

You have to take a look and see whether or not your book is going to travel to determine how important the export sales are. The publisher wants to give you half the royalty for export sales. If you're doing a college text, they want to give you half the royalties. If it's sold at a school level, at high schools or something. And those aren't justified. Some reduction may be justified. It is, but not that much.

KENNEALLY: Jan, what will you negotiate?

LENNIE: There's a lady over here who –

F: I was just curious. I know this may not apply to a lot of you, but (inaudible) are pushing for custom editions. Does that mean that for any custom edition that I – I didn't read my contract and I'm getting less money because they just put a new cover on it and they said custom edition. (inaudible) I thought I was getting the same amount of money that I was getting (inaudible).

KENNEALLY: Just for the sake of everybody in the audience and for the podcast, there's a question about custom editions and how royalty payments are made for those.

KARDYS: Well, custom editions, at one publisher I worked for, we would make money if we took two college textbooks, condensed them and did a print run of 500 copies. If you don't have approval over that or a consultation, we can really do whatever we want with your book. And yes, it is lower royalties.

In trade publishing, there'll be premium rights, and if we do a custom edition for, let's say, IBM or even Google, your royalties would be less. They could be half.

LENNIE: On export sales, they could easily be a quarter, because they will pay you 50% of the normal royalty for the export sale, but then they'll sell it to their in-house subsidiary at an artificially low price, maybe half what would be reasonable.

There was one other thing I wanted to say on that, though. That is this. The saying in publishing is, as to royalties, the right hand giveth, the left hand taketh way. And the left hand is much stronger than the right hand. So when you negotiate successfully that royalty rate for your college textbook at 15% net, don't stop there and pat yourself on the back, because there's two pages that follow that that are going to describe sales in which you are not going to get 15%, just one after another after another. And there may be some justification in a number of those categories for reducing the royalty, but nothing compared to what it is they're asking it be reduced to. So you really have to go through that carefully. Find out the words you don't understand, the special sales, the high discount sales. You've got to get definitions for those things as a starter, and then you've got to negotiate higher royalty rates for them.

KARDYS: Michael, there's no negotiation on the royalties. They're set.

(laughter)

LENNIE: Well, we're done here.

(laughter)

KENNEALLY: We have one more clause, and hopefully there'll be an opportunity for a question or two from the audience here. Competitive works. Again, I know this

was something that you both started to really fight about and so I want to hear that again. Jan, what's the issue here for you?

KARDYS: Well, depending on the book and the advance that we're paying, we're very concerned that you will go off and do a spin-off book or another textbook that's so similar to our edition that we're publishing that you are going to hurt us and hurt yourself. So we're very careful, very cautious about this.

KENNEALLY: And this particular clause is very obviously strongly in favor of the publisher here. We're trying to make it impossible for you to do anything else except work for them.

KARDYS: Right.

KENNEALLY: How do you feel about that, Michael?

LENNIE: My feeling is that unless my author is man for all seasons and can write for you about anatomy and physiology today and write about Northern Italy cooking next week, that this clause is a deal killer and a career killer for him or her. They have to have flexibility. We're more than happy to have you publish this book and if you do a good job and we do a good job, we're both going to enjoy success and we'll be coming back to you with other contracts, but meanwhile, we need all the flexibility we can have to go out.

So things such as likely to compete are going to get replaced by you can't publish something, author, that materially competes with. Likely is a very wiggly word. What's that mean with regard to –

KENNEALLY: Jan, what does likely mean?

KARDYS: Well, it's really whatever we want it to mean.

(laughter)

LENNIE: She's the Mad Hatter. She can say what it means.

KARDYS: Michael, let me just say, with this biology book that we're publishing, you could go off and do a laminated chart with another publisher talking excerpts from our book. I'm sorry. That's competing with our book. Or you could go off and do a trade book. You can't just willy-nilly do whatever you want.

Now, if you have something in mind, I could put it in this contract and I could check with the publisher and the editor and we might let you do it. I'm not promising anything, but we feel very strongly about this. Do you have a book in mind that you're planning on doing that's similar to our book?

LENNIE: It's not similar to the extent that it can be protected by a competition clause or should be protected by one. You have copyright on what we're giving you. If we violate that copyright, I'm sure we'll hear about it very quickly.

Beyond that, I have a professor in biology who can write on all kinds of different subjects regarding biology and he's not going to give up the right to do that. What I'm going to want is a provision saying that this is a Biology I class directed primarily to non-biology students at first and second year college level, and that unless I put something else out that materially competes with that, I'm not in violation of this competition clause.

Then with regard to what Jan asked me, if I do have even a glimmer in my eye as to something else I want to do that might run afoul of that, I'm going to say, notwithstanding the above, this clause does not prohibit A, B, C.

KARDYS: Right. We'll compromise a little bit on this. Depends on the author and what we know is going on with the author.

KENNEALLY: What caught my rather untutored eye on this is that it's any work of a nature. It's not simply another textbook that you're writing two books that are going to compete against each other. It's any work.

KARDYS: Right. And authors who don't have agents or attorneys just sign this without realizing what they're doing.

KENNEALLY: I think this has given us hopefully all – and I see a question. Sure. I just want to say that I hope this has given you all an idea, even if you're an experienced author, particularly if you do not have an agent, that these contracts are well worth taking the time to examine as closely as you possibly can.

I think you also get as sense – and I get a sense here – that if indeed there was a negotiation between these two, eventually the author would be the one who would come out ahead, but that the publisher would probably be really happy to have that book. If they really wanted that book, they will sign that contract as well.

So I want to thank Jan and Michael and then see if we do have some questions.

(applause)

KENNEALLY: If we do have time for one or two questions. I see you in the back there. Yes, please.

M: Cannot the competitor clause work both ways? Robert Christopherson announced the other day that they – we all know he's got the bestselling textbook and his publisher just came out with a competing textbook, it sounded like. I've known authors though who my publisher has other contracts with that may come on out

with a competing textbook. Can't it work both ways? They take (inaudible) on both sides of that one, don't they?

LENNIE: We could spend a whole session talking about what works for the goose doesn't work for the gander, and this is one of them, and she's not going to give on that. I'm not going to win that battle because she may – her company may go out and buy another company next week, and they have a text that's competing.

M: (inaudible) is other companies that are already going up against Robert who's a bestselling author.

LENNIE: Yeah. And they're going to reserve the right to do that because there are different niches for the same book.

M: There's no (inaudible) on that one at all?

KENNEALLY: Jan?

KARDYS: No, no. There isn't.

KENNEALLY: Any other questions? Yes.

F: For Jan. What are you finding these days are going on with e-book royalty rates and negotiations?

KARDYS: What is the rate or –

F: No, what are you finding?

KENNEALLY: If I can just ask and be sure we understand. Are you asking about just how important or how variable the e-book rights are? I'm not sure I understand.

F: Right now, publishers are turning some of their better-selling books into e-books, and they are offering different rates. I've been offered a certain rate. Other people have been offered different rates. There's not really, it seems to me, much of a standard yet.

KARDYS: You're right.

F: What I'd like to know from your perspective is what is going on right now and what are some of the rates that you have been seeing?

KARDYS: In fact, I had to do a summary for other publishers. They really vary. Random House rates are rather high.

F: (inaudible) anything about textbook rates, specifically, too, but we'd love to hear all of them. We're having a roundtable on it (inaudible).

KARDYS: Warner Books has 25% of net electronic sales receipts.

F: (inaudible) this is for trade?

KARDYS: Yeah. And Random House is 25%. St. Martins is 10% of the list price on the first 5000, 12.5% on the next 5000, 15% thereafter. Harper Collins gives 25% of receipts, and that's defined as 100% of all amounts actually collected from the publisher. Simon and Schuster does 15%.

KENNEALLY: Are these sounding familiar at all or within the range you're –

F: I'm trying to determine which is trade and which is text.

KARDYS: These are all trade. And Penguin does 15%.

F: Do you have any information on text?

KARDYS: No, not on academic text. But they're going to watch. At Scholastic, we are still deciding what we're going to do on that.

F: Do you have any idea what it might be around?

KARDYS: No. Every publisher is still trying to actually to figure this out.

F: Do you have any advice for authors?

KARDYS: Well, just try to read as much as possible and find out if your publisher has electronic division. I know Scholastic does have one.

F: Would that mean they could afford to give you more?

KARDYS: No, not necessarily, because we're still analyzing costs and how we're going to sell these books.

KENNEALLY: It's still very much an unproven market at this stage.

F: (inaudible).

KARDYS: I can't really say yet about that. I don't know.

KENNEALLY: Michael, quickly. Anything on e-books?

LENNIE: Yes. It is all over the map. There is no bright line at this point. Perhaps the best thing for you to do if there's not going to be an immediate e-book would be to reserve the right to negotiate the royalty rate at the point that it's going to be used. She doesn't like that.

KARDYS: No, we won't do that.

LENNIE: Because it gives you a lot of leverage. If there were a commonality, it would be that the royalty rate on the textbook side for e-books is the same as the domestic rate for the print edition. That's not a good deal for you. Maybe you'd want to put a limit on the period of time before those rights run out or you can renegotiate, because there's going to come a standard out of this and you want to be around for it. It's going to be higher.

KENNEALLY: Last question, just because I know there's another session, which I believe will be in this room. Is that right? Do we have a nod on that? OK. So maybe one quick question.

M: Still on the e-books, for either of you. The concept of – some of us say, heck, seven years, eight years down the road, but that could be only two years away. You know how technology goes. We don't need your printing presses anymore. We still need yours or somebody's marketing expertise to get the product out there to create "demand," but frankly, as I say, we don't need your printing presses anymore. Do we just start to circumvent and we go straight to Michael and say, let's negotiate, Michael? Instead of with this nice lady here, let's go to a marketing firm. Question to either one of you. How does (inaudible)?

KARDYS: Well, we're the experts in marketing your book. For example, a publisher like Scholastic, it has Scholastic Productions, an audio division, electronic division, book club, book fairs. We work in many various areas, so there's a lot of cross-marketing. You need us. You need a publisher like us.

KENNEALLY: Michael, what's your quick take on that? Going independent?

LENNIE: He has a point. I don't think there are any marketing people out there that can manage the publisher at this point, but your point is that what's being offered by the publisher is going in this direction. It's narrowing. So I think that gives you clout to negotiate a better deal. I think that there's a lot you can do with an electronic clause that we haven't covered here, but that's very much up for grabs.

KENNEALLY: Just the idea that authors becoming publishers is something that's increasingly – it's a developing issue and one, I'm sure, that TAA will watch.

But thank you all again. I'm sorry we can't have time for more. I know I'll be around. Jan and Michael will, so if you want to try to find us. There are materials in the back. Please take those. And we have an evaluation sheet up here. If you

would take that and let us know what you thought of the program, OK? Thank you.

END OF TAPE 2