IN JURE

A Potpourri of Contract Negotiation Advice

By Michael R. Lennie

Copyright © 1992 by Michael R. Lennie. All rights reserved.

Michael R. Lennie is an attorney licensed in California and New York who devotes approximately half his practice to the representation of authors throughout the Country. He may be contacted at his offices by dialing 800-TAA-LAWS or (619) 749-1033. (Be sure to advise that you are a TAA member for member discounts.)

No time for a well researched and documented treatise. The TAA convention is next week! There must be a hundred things I have to do before I can leave for Las Vegas, including final preparation for my "Mock Negotiation of An Author-Publisher Contract" Minicourse.

There are a lot of little tidbits I think would be helpful in your future contract negotiations. In no particular order here are my thoughts on four contract clauses and the collaboration agreement.

Non-Publication/Return of Advances

The standard contract requires the Author to submit final manuscript acceptable to the Publisher in form and content by a date certain. Only a few standard contracts require publication within any certain time frame (usually within 18 months of written acceptance — Observation: I have yet to hear of an Author who has received a written acceptance of manuscript.

Adding injury to insult, the standard contract obligates the Author to refund all advances in the event the Publisher in its discretion decides not to publish. The contract further provides the Publisher

is not required to return rights to the work until all amounts are repaid. At the same time the competition clause prohibits the Author from going to another Publisher with any work which might be detrimental to the sale of the original work. The result is that the Author is highly restricted if not precluded from further authoring of works within his or her discipline. This is perhaps the most outrageous aspect of the standard Author-Publisher contract.

Most publishers will agree to softening this clause by agreeing the advance may be repaid out of first proceeds from publication by a second publisher. You may also be able to get the Publisher to agree to limit the term within which first proceeds will go to the original publisher for repayment of the advance — e. g. to two years from date of reversion of rights to the Author.

The publisher may also agree that if the manuscript has been rejected as unacceptable the Author may retain some part of the advance without repayment (e. g. half the advance). The Publisher will likely require the Author to fulfill two conditions in return for such improved clauses. First the Author will not be entitled to outright retention of any portion of the advance if he or she has not met the submission date; and second, the Author's submission must constitute a good faith effort to produce an acceptable manuscript.

Registration of Copyright

The Author should always require the Publisher to register the copyright upon publication and in any event within three months of publication. In the event of infringement the important remedies of statutory damages and attorney's fees are dependent upon such timely registration.

Furthermore, an infringement suit for an American work may not be brought at all in the absence of registration. Registration within five years of first publication constitutes prima facie evidence of the validity of the copyright.

Royalty Statements/Audit Clause

Textbook contracts normally provide for royalty statements every six months to be issued with royalty payment within three months of close of the six month period to be accounted for. Many publishers will now shorten this period to two months.

The Author should require the inclusion of an Audit clause allowing the Author or his or her representative the right to audit the Publisher's books upon reasonable notice. The clause should require the Publisher to pay the cost of the audit if the audit shows an error in the Publisher's favor of 5% or more.

Subsidiary Rights Clause

The standard contract grants all rights in the work to the Publisher until your great grandchildren are great grandparents and allows the Publisher to permit others to publish, broadcast, make recordings, make translations and other versions, etc. If your text is one that may create foreign interest (e. g., a Spanish or Japanese translation), you should negotiate for Author approval of subsidiary right licenses under the Publisher's control.

Collaboration Agreements

If you and a co-author(s) are preparing a "joint work", you need a collaboration agreement setting forth each author's primary responsibilities; promising best efforts to complete a satisfactory manuscript by the date set for submission of final manuscript; describing the work to be jointly produced; acknowledging that the work is to be a joint work under Section 101 of the Copyright Act of 1976; setting forth order of credits; providing a means to resolve disputes; providing for arbitration of disputes; addressing whether one co-author may prepare derivative works without the consent of the other (he or she may in the absence of a contract provision prohibiting same); specifying whether one co-

continued on page 2