INJURE

Negotiating a Contract— Provisions Often Overlooked

By Michael R. Lennie

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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.)

at Author workshops and in this column the importance of a handful of major clauses in the Author-Publisher contract. These are the Satisfactory (or Acceptable) Clause, the Revision Clause, the Royalty Clause, the Reversion Clause and the Competitive Materials Clause (The "Big Five") (see prior issues of the *TAA Report*).

When I negotiate contracts on behalf of authors all 20-30 clauses in the contract are of course subject to negotiation. While you will quickly wear out your welcome trying to negotiate changes in all 20-30 clauses, it is prudent to seek improvement in several clauses besides the major clauses listed above.

All of the clauses in the standard contract are drafted by the publisher's attorneys to protect the publisher. There is nothing sinister in this. That's their job. But it's your job to realize that every clause of the author-publisher contract is negotiable -- some more easily than others. You should no sooner accept the standard contract than you would buy a new car for the sticker price. Negotiation with

compromise on both sides is expected and required to reach a fair agreement.

Let's take a look at a sampling of clauses that deserve your attention besides the "Big Five."

Assignment Clause

What is an "Assignment Clause"? An assignment clause allows or disallows one or all parties to an agreement to transfer their rights and/or obligations to another unnamed party. An unsuspecting author might be surprised to find the relationship he or she believed they had entered with Publisher A suddenly becomes a relationship, long term mind you, with Publisher B. Maybe that will be OK or maybe it will even be an improvement. But often it will cause significant problems for the author.

It may turn out Publisher B is publishing a competing text with an established share of the market. Your new Publisher may then decide to stick with the established "star" and not publish your book. A breach of your contract you say? Probably so if you submitted satisfactory manuscript in accordance with the terms of the contract. But it may involve attorneys fees and court costs to prove your case or even to get your manuscript and rights back if Publisher B decides to stonewall.

The Assignment Clause is seldom set out under that heading in the contract. Almost always near the end of the contract, it is often found in a clause entitled "Miscellaneous" or some other clause with a non-specific title. It may say nothing more than:

"The rights and obligations hereunder shall inure to the benefit of and be binding upon the Author, and coauthor, any replacement author chosen by Publisher, their heirs, administrators and executors and the Publisher, its successors and assigns."

The above clause impliedly acknowledges that the Publisher may make assignments while the Author may not. A clause that protects

both Author and Publisher on the other hand, might read:

"No assignment of contract, voluntary or by operation of law, shall be binding upon either of the parties without the written consent of the other."

If the later clause is used Publisher A could not assign your contract to Publisher B without your written consent. The author would then be able to obtain assurances of roughly equal treatment under Publisher B before consenting to the assignment. Equal treatment is not limited to assurance of publication. The Author should also be concerned with questions such as is the sales staff trained and skilled at sales of a textbook in this discipline and aimed at this audience? Will Publisher B publish four color as Publisher A had agreed? Is Publisher B a company with regional marketing whereas Publisher A marketed its books nationally?

Warranty Clause

One of the worst clauses in the standard contract is the "warranty" or "indemnification" clause.

This is the clause by which the Author appropriately represents or "warrants" that the Work contains no libelous material, that the Author is the sole proprietor of the Work, and the Work does not violate the proprietary rights of any person or persons, and does not infringe any existing copyright.

All of this appears to place responsibility on the proper party so long as there is an exclusion for materials not furnished by the Author.

However, the clause normally goes on to provide that the Author indemnifies and holds Publisher harmless against all costs, attorneys fees and judgments should suit be brought by e. g. another Publisher claiming infringement of copyright. This places a potentially devastating financial burden on the party to the contract least able to afford it -- the Author.

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