## Spurned author's lament: 'Please release me'

Textbook contracts literally seem to leave the author without recourse if the publisher dumps the project.

The "letter" of the contract, as I discussed last issue, leaves all of these critical decisions to the publisher:

- > Whether to publish.
- ➤ Under what title.
- In what manner and style.
- > At what price.
- > With what promotion and marketing.
- > Whether and when to revise.

But the courts have said that the "spirit" of the contract requires those decisions to be made in good faith, taking into consideration industry custom and practice.

What is the obligation to deal in good faith? In every contract whereby rights under a copyright are transferred or licensed, there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that every contract contains an implied covenant of good faith and fair dealing.

Moreover, at least where the author is to receive royalties measured by the publisher's exploitation of the work, certain additional covenants are implied.

One of these covenants is that the publisher will use reasonable efforts to make the work as productive as the circumstances warrant. This point was clear in at least three federal cases, including Schwartz v. Broadcast Music.

Even when it gives the publisher the sole right to determine the print run and the advertising budget, the publisher is still obliged to under-take a first printing and to provide an adverti-sing budget adequate to give the book a reasonable chance of market success, an important fact in Zilg v. Prentice-Hall, a 1983 federal case.

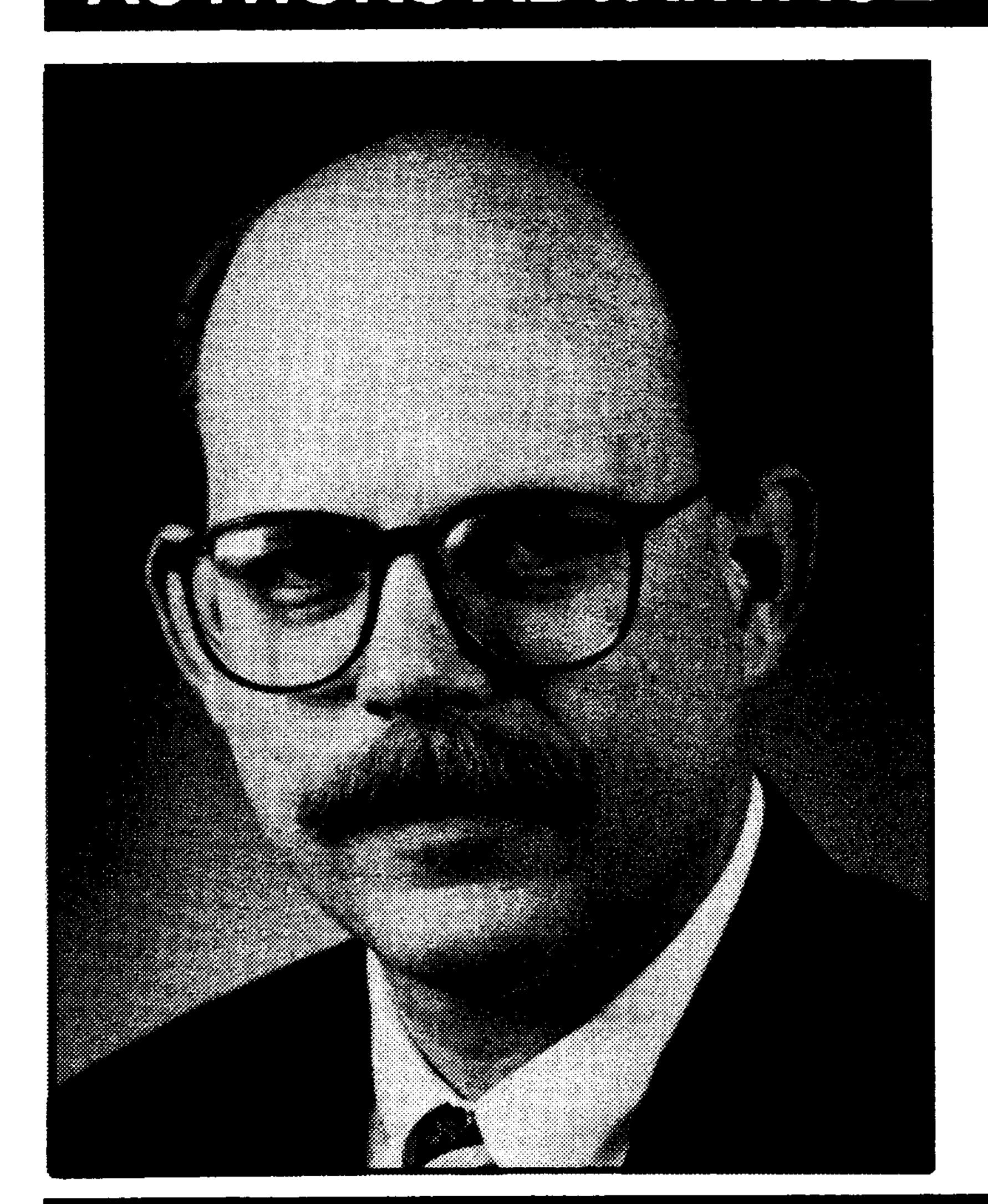
To read the contract without such an implied covenant would be to destroy the fruits of the agreement for the author, a construction the courts resisted in at least two cases, including *Zim v. Western*.

By logical extension, this line of cases supports the proposition that the publisher has an implied obligation to preserve the value of an author's work by either committing to a timely revision or releasing those revision rights to the author provided that this can be done in a way that does not impair the publisher's ability to exploit those rights it lawfully retains.

Such an argument played a significant role recently in producing a \$3.2 million settlement for seven authors of a K-8 math text published by Merrill Publishing in the 1980s.

The genesis of the dispute was the acquisition of Merrill by Macmillan and Macmillan's subsequent decision to abandon the scheduled revision of the math series and at the same time to insist on holding the authors to their no-compete commitments —

## AUTHORS ADVANTAGE



A shot gun marriage between the author and a reluctant stand-in is probably not the path to happiness.

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## BY STEVE GILLEN

patently unfair and ultimately unsustainable.

Where the issue is a publisher's reluctance to move forward with timely revision of an existing work, there may also be a state law claim that the no-compete provision of the publishing agreement is unreasonably broad, and thus unenforceable, insofar as it might operate to preclude an author from preparing or assisting in the preparation of a potentially competing work that would not be published until the useful life of the existing edition has expired.

The state law claim is premised on a common law restraint of trade theory most commonly encountered in employment cases or in connection with the sale of a business.

The reasonableness of these types of nocompete provisions has generally been determined on an ad hoc basis and it is therefore difficult to predict a specific outcome with any degree of certainty. A relevant case was *Allright Auto Parks v*. *Berry* in the Tennessee courts.

Nonetheless, the specter of a state law restraint-of-trade challenge to the publisher's no-compete provision might provide additional leverage in striking a reasonable compromise.

The typical publishing enterprise is much like a marriage – recognized and respected by law but with little remedy beyond dissolution should the parties lose interest in maintaining the relationship.

The author contributes scholarship, creativity and intellectual labor. The publisher advises, reviews, invests, and markets.

If both parties live up to their respective obligations, and if the resulting work finds a receptive audience, then a contribution will have been made to art, science or education from which both stand to profit and the union

will prosper.

If, however, either party disappoints the other, then the odds are good that neither will realize its expectations.

While the letter of a publishing contract lays out the publisher's obligations in general terms, albeit leaving a good deal to the publisher's discretion, and shows the publisher's corporate face, the spirit of that agreement is best revealed in the human face of an editor who believed enough in the author and the work to see them signed.

If that editor moves on to another assignment, another list, or another publisher, the author may find it necessary to help the publisher recall the true spirit of the deal.

A letter from counsel experienced in publishing matters can go a long way in that regard.

But if a new editor fails to step forward and champion the book, then a shotgun marriage between the author and a reluctant stand-in is probably not the path to happiness.

In such event, your refrain should be "please, release me..."

All of this is not to say that only authors suffer disappointment from their publishing deals.

It is perhaps more often the case that publishers are left standing at the alter by once-enthusiastic authors who have since moved on to other loves and distractions.

And it is an editor's truism that many must be signed on to other loves and distractions.

Nonetheless, when the ardor has cooled it is generally the publisher who holds the marital property and an author must pound the pulpit to get attention.

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