

YOUR PUBLISHER, YOUR PUBLIC, AND YOUR POCKET: TAKING CONTROL IN A CHANGING INDUSTRY

By Robin Davis Miller (1993)

Ms. Robin Davis Miller, Executive Director of the Authors Guild, was the featured speaker at the Sixth Annual Convention in New Orleans, held on June 24-26, 1993 at the Le Pavillon Hotel. Following are excerpts from her Keynote Address.

"Before I came to the Authors Guild I was a lawyer in both New York and Philadelphia. I was what is euphemistically called a "commercial litigator," which means that I did a little bit of everything, after, and only after, people and companies were mad enough at each other to threaten to go to court. I handled disputes--banking, insurance, corporate, entertainment, and sometimes even personal conflicts. I tried to specialize in publishing clients and authors. Since I was a litigator, much of this business got to me after the publishing contracts were signed and the tempers had flared.

When you're in this kind of work you see everything, and one of the things I always saw was that no matter how smart the author was, he or she almost always signed a contract giving away the store. In fact, the smarter they were--and I'm talking about professors--the more they tended to give away."

"I would typically see a very unhappy author with a very unfavorable, very airtight contract. I could sometimes help the author to some extent--usually by settling the matter under some sort of confidentiality agreement, which means that my client might have benefitted from my help but no other writers could learn from the experience. After helping several clients like this, I formed a firm belief which would be the essence of this keynote speech if I were to scrawl it on a napkin: it is infinitely easier to fix contractual heartbreak before you sign on the

dotted line than it is with a whole army of lawyers after."

"I left my practice to become the Director of the Authors Guild this past March so that I could try to clear the professional thicket for authors, so that they would focus their attention on what it is that they do best--writing."

"But the core of what we do is to focus on helping authors with professional business advice, and this invariably boils down to contracts."

"Our goal is to empower authors and to give them control over what they create."

"Publishing companies have taken particular advantage of the textbook author. Why? Perhaps because most of you have a second profession. Since almost all of you teach, you receive a salary that is not connected with the publishing of your book."

"Think for a minute about why you write. Although getting published is important to gain tenure, most of you continue to write long after that requirement has been fulfilled. It may be that you write to supplement your income. Perhaps your main goal is to further education. Or, maybe you just love the work. Whatever your reasons, close examination and revision of your publishing contract will further them.

Good authors are selling three things when they enter a contract to sell a book. First, you are selling your ideas. Some of you are true visionaries, while others simply see things in a novel or, perhaps, a

particularly clear way.

Second, you are selling the particular way that you express your ideas. You know how to write about a difficult subject in a way that fourth graders immediately understand, or perhaps you have a gift for converting people to your way of solving a particular type of problem.

And last, but perhaps the most important, you are selling your time, time that you could be using to sell the same or different expression of ideas to somebody else. Or time that you could be using to spend with your families, to advance another lucrative career or passionate hobby.....It's your time, and you should consciously decide how you want to use it. Your time should not be the free bonus gift that gets given away with every five dollar purchase... If you only sell your ideas and your way of expressing your ideas--and throw in your time for free--then you are undermining not only your professional worth, but selling short whatever it is that you could be using your time to do if you weren't giving it away to publishers who have little regard for its true value."

"Why should you take control of your contracts?

< > because you're professionals and care about what your finished product looks like.

< > because your finished work reflects on you.

< > because you deserve more money for what you're doing.

< > because you work hard on your books and should have certain protective guarantees.

< > because your credibility is at stake."

"One of the most significant issues in textbook publishing involves your revisions clause. Because it is your book, and will have your name on it, any future editions, whether praiseworthy or horrific, will reflect on you. Therefore, you should insist that you are given the first offer to prepare any revision to your text. Your contract should also specify that if you decline, you have the right to choose or approve of

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the revisor, provided that you would not unreasonably withhold your consent."

"You deserve royalties even if you do not get to prepare the updates--the key question is how much will you get? Ask yourself how much of the material will be new--the revisor should get no more than that percent of royalties, and in no event should she get more than 1/4 of the royalties from your book for the first revision....As long as your words, ideas and especially your name are on that book, that is your book, and you should be getting royalties!"

If you are going to work on the revisions, ask for a new advance and have this put into your original contract for the work. Don't forget, revisions take time--time in which you could be doing other things!"

<> The Cover. "When you write a textbook, do you ever think about what the book will look like? Perhaps you do, but I'd bet that very few of you--if any--have had any real control over the cover of your books. After all, what your book looks like will affect both how it is read and who reads it. It also can set the tone for the entire book."

<> Abridgements and Anthologies. "Many contracts also give the Publisher the right to print abridgements and condensations. While this might seem innocent enough, any lawyer--or, I might add, eight year old with playground experience--will tell you that words, when taken out of their context, can be manipulated, and an entire new meaning can evolve. Therefore, it is dangerous to give your publisher this right without retaining some control for yourself...it is wise to retain the right to be consented before your work is abridged or condensed, or--ideally--the right to refuse such publication."

<> Supplemental Materials. "The clause concerning supplemental materials can be especially significant for textbook authors. Many of you have created workbooks, study aids, tests or laboratory materials to go with your

texts. How much did your publishing company pay you to create them? What additional royalties did you collect because of their existence? You probably got nothing. In fact, you may not have written them at all. You may even have had money deducted from your royalties so that someone else--someone you did not choose--could be paid for creating them.

When your supplemental materials only amount to a 10 page workbook, or a few test questions, this is not a ridiculous request. However, when the materials requested of you require more detail and time, you deserve compensation. You should try to negotiate a flat fee, or try to get them assigned to an outside author. However, if you choose the second route, be sure that you have some control over either who will author the supplements, or else have final approval of the supplements. After all, your name is on the cover. Finally, be certain that you do not pay for their work."

<> Royalties. "Money. We all need it, we all want it, and quite frankly, we deserve it for our efforts. Yet, because many textbook authors have a primary income teaching, publishers sometimes conveniently forget these things. If you've ever been refused an advance on the grounds that you don't need it, inform your publisher that this is simply not the case...Professors and teachers often give up summer income in order to write, or take time off from their teaching to finish a work. Even if you haven't, there is no reason why a publisher should treat you any differently than they treat their other authors."

"Even if you trust your publisher completely, it's a good idea to have an audit clause in your contract which gives you the right to check their books and which forces them to pay for the audit if they are inaccurate."

<> Copyright. "Whose name is your copyright under? Yours or your publisher? This may seem to be merely a technical

point, but in reality, it matters. Author Richard Balkin said in his book *A Writer's Guide to Contract Negotiations*, that he has never heard of a good reason why a Publisher should retain the copyright, and we agree. It is your work, and the copyright should be in your name....If your publisher simply won't budge on this issue, be extremely vigilant when negotiating your revision of rights clause, so that it is clear when and how you can get these rights back."

<> Other Works. "It is very important to know whether or not you will have the freedom to continue creating in your field. This freedom is often stifled by clauses such as the Options Clause, and the Non Competition clause. We at the Authors Guild recommend that your contract contain none of these clauses....By signing a clause preventing yourself from writing a work which might compete (usually for the term of the contract--which is unknowable since your contract doesn't end while your book is in print) you are accepting a professional gag order in your field of expertise. If you can't eliminate them, at the very least, spell out as narrow a field as possible for you to abstain from writing about."

<> Electronic Publishing. "To be a savvy negotiator today, you absolutely have to understand the current and future state of electronic publishing. You have to understand how it works and how you can take advantage of it, and above all, you must come away understanding that to negotiate a contract today without keeping electronic publishing in the forefront of your mind, is a real mistake. It is only by understanding this that you can take control of your work--in all of its potential forms."

The major forms of electronic publishing which I will discuss today are CD-ROM and diskettes, and Custom Publishing Services.

CD-ROM discs look like musical compact discs, but are used with computers. They are better than traditional computer discs, because the words in the text can be com-

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bined with video and audio and can store much more information.

There are many advantages to producing textbooks on CD-ROM instead of in print. First of all, in many areas, the educational value will be greater with the features available on CD-ROM than with a traditional book. Although this technology creates fantastic games, the industry is not all flashy lights and sound. The different ways CDs can be used to educate are amazing."

"You should be aware that copyright law will differ slightly in electronic publishing, as the consumer will probably license the product from the publisher rather than buy it. You probably have different royalty terms for sales and for licenses, and you should be familiar with your contract language on this point."

"The second major technology you should be aware of is Custom Publishing. Most of you are probably familiar with the recent practice of college professors creating what is commonly known as course packs for their students.

This response to rising textbook prices and a desire to use more sources in the classroom involves students receiving large packets of photocopied materials, which the professor has had prepared. Through this method, professors are able to pick and choose which parts of different texts they wanted to use. This, however, often deprived the author of their rightful royalties, infringed on copyrights, and had other, more technical drawbacks.

Not about to be left out of such a large market share, Publishing companies are responding to this trend through a phenomenon known as custom publishing. McGraw-Hill's Primis, and Simon and Schuster's Just in Time Service are the two most prominent entries into the field. Each service creates a database, in which individual chapters of thousands of textbooks are stored. Professors may then select any chapters they want, from any of the works on the database, and

even add chapters or notes of their own creation. The services then print the new books, repaginate them, and create a custom table of contents, index and hard-back bound cover, with the finished product looking exactly like a textbook.

How royalties are paid, and how text is chosen to be a part of the database, is a process which differs according to the electronic publisher. A publisher might pro-rate your royalty from your standard contract, or might assign a price for the use of your chapter and give you royalties on that figure. Another significant difference among services is how works come to be on the list. While one service draws a separate contract with the individual author, and does not use any work which hasn't been specifically licensed for use on the system, this is not true of all custom publishing services. It is anticipated that we will see more electronic use without author permission made of works for which the author has blanketly given up rights.

"I mentioned earlier the problems associated with giving your Publisher discretion over what anthologies in which your work will appear. This problem is multiplied in electronic publishing. Unlike the creation of an anthology, virtually all of splitting and recombining in custom publishing will occur without your knowledge. A royalty statement will be the only evidence you have that a transaction has even taken place, and unless publishers drastically revamp their royalty statements to let you understand the information contained there, even this will not tell you anything about the electronic sale.

For those of you who are dead set against participating in the new technology, consider that there is an enormous potential for educational abuse in this field. If the good textbook authors aren't there to help fill the demand for these new products, computer programmers may fill the void themselves, and the end result could be something more suited to sales than education.

While the publishing industry is not ready yet to make the enormous change over required to create large amounts of electronic textbooks, many such texts already exist, and are being used successfully. While traditional textbooks will not uniformly disappear in our lifetime, they may become extinct in a certain subject, such as languages, which need an audio component to go along with the written word.

As for the "newness" of the industry, although this poses some risks for those brave enough to enter, it may also be the best rewards. As with any new ground--tread carefully. Be cautious not to accept terms just because your publisher proposes them; a publisher conducts business just like anyone else, and will try to get the best terms they can. The industry standards are not yet set; if you assert your rights now, you will pave the way for authors in the future. It is the pioneers who will set the standards that generations of textbook authors will follow."

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