IN JURE

How to Negotiate an Improved Author-Publisher Contract

By Michael R. Lennie,

Michael Lennie is an attorney in California who devotes a good deal of his practice to the representation of textbook authors throughout the country. He may be contacted at his office by dialing 800-TAA-LAWS or 619-749-1033. Be sure to advise that you are a TAA member, for member discounts.

The first thing to remember when negotiating an author-publisher contract is "You can't make it any worse." This is unusual in life. In these complex times there is hardly anything you can't screw up even when you're trying your hardest. Author-Publisher contracts are the exception. Even random changes are likely to render an improvement.

Try it sometime. Place your contract on a coffee table with staple removed. Apply a blindfold and then shuffle the pages of the contract. Now spread the pages of the contract on the coffee table and with a pencil cross out not less than one and not more than three lines on each page. Remove the blindfold and view with satisfaction the improvements rendered.

Having established that contract negotiation is a fail-safe activity for textbook authors, think what could be done with a little training and forethought. That's what we're here for.

Basics of Negotiation

Most of us know that if we wish to negotiate the best deal for a new Toyota, that it is wise to shop around. The same is true of marketing your manuscript. The author who has taken the time to develop 2 or 3 interested publishers is positioned to negotiate a superior contract.

Like any type of negotiation, negotiating the author-publisher contract takes preparation. First

you need to determine your negotiating goals:

While a good argument can be made that every clause of the author-publisher contract is biased in favor of the publisher, it is not realistic to think that you can change 100 years of bad contract negotiations in one negotiation. Rather you should concentrate on the key clause (see below).

Establish "deal points," "secondary points," and "trade points." Deal points are those negotiating points that represent your bottom line, and without which you will walk away from the negotiating table. Secondary points are those points that are important to you, but not crucial. Trade points are those points that are not terribly important to you, and that you are willing to "trade" away in exchange for securing your deal points, and hopefully some of your secondary points.

Ask your editor (if that is who is offering a contract) for the names of other authors he or she has signed. Then ask about the status of the works of those authors. If you are industrious, you might consider contacting those authors and discussing their negotiations with this editor. Perhaps they would be willing to send you a copy of the contract they negotiated. You can also contact the authors of competing texts for other houses, and discuss their contracts. The point here is, the more you know about what other authors have been able to negotiate, the better chance you will have of negotiating a superior contract.

Ed. Note: Don't forget about TAA's Author Experience File. You can access it to put yourself in touch with other authors.

The Financial Clause

The royalty clause, including provisions for advances, is negotiated first before dealing with the contract language. You should try to negotiate a substantial advance, particularly for a first edition, because it may well be 3 to 4 years from entering a contract until you

receive your first royalty check. Freeing up the kind of time necessary to write a textbook may require that you cut back your class load, and pass up income from summer courses. It is not unrealistic to try for 50-75% of the projected royalties from the first edition. Payments of advance are often 1/3 upon signing, 1/3 upon submission of a certain number of chapters, and the final 1/3 upon acceptance of the completed manuscript.

Most contracts offered will state that the provisions of the advance clause do not apply to subsequent editions. That language should be replaced by either language stating that advances for subsequent editions will be separately agreed to, or preferably by an agreement that advances for subsequent editions will be reduced by, for example, 50%. By that time you should have a fairly steady flow of royalties, reducing the need and justification for large royalty advances.

The usual contract will provide that in the event the work is not published, the author shall return all royalties. An improved clause would state that advances are recoverable only from royalties generated by sale of the work, whether by this publisher or any other.

The percentage royalty an author can command varies depending on the grade level, the clout of the particular author, and the author's negotiating skill. For instance, an author of a K-8 basal math text may have a relatively complex royalty clause with royalty rates varying up to 7%, depending on a progressive scale of sales per edition (avoid progressive scales, especially those which start over each calendar year). Those royalties may then be split in some fashion, perhaps with coauthors. An author of a college text, on the other hand, may have a straightforward royalty of as high as 20% of the net receipts.

After reaching agreement on the financial aspects of the contract, it is time to make some improvement in the language of the remaining key clauses.

continued