# Who Is the Owner of the Written Word?

**■ Publishing:** Recent court rulings make it harder for biographers to quote from a subject's writings. The problem: copyright infringement.

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Imagine that a biographer is rummaging through an old trunk. He discovers a previously unseen letter from George Washington to Martha. He unfolds the brittle pages.

"Martha, I must tell you, I was fibbing when I said, 'I cannot tell a lie.' "

When that hypothetical biography is published, will you, the book buyer, get to read the Founding Father's confession?

Writer J.D. Salinger, left, won a court's OK to stop publication of a biography quoting his letters. This year, a biography of Scientology's L. Ron Hubbard was found to involve copyright infringement.

Hard to say.

Last month the Supreme Court refused to review an appeals court ruling that copyright law strictly limits the ability of authors to quote from unpublished materials. That case concerned a biography of the man who founded the Church of Scientology. As a result of that decision, a vociferous contingent of biographers, historians, journalists and their supporters say they are shackled in their efforts to portray a person's life accurately.

Already, a movement to persuade Congress that copyright laws must be changed is gaining momentum. In the meantime, authors say they are wobbling along on thin legal ice.

"The Scientology case was a great sadness; it's not going to help the writing of history," said Arthur Schlesinger Jr., the author of a three-volume biography of Franklin Roosevelt. If current law had existed when he was writing the highly acclaimed books, he added, he would have had to delete numerous important quotations.

At the heart of authors' concerns is the question of "fair use," generally considered the murkiest area of copyright law, which protects any written material, from a Henry James masterpiece to a memo spray-painted on a plywood construction barrier.

The Copyright Act was initially enacted to "promote the useful arts" by assuring authors the exclusive rights to their creative products. But judges realized early on that art has always, to some extent, been built upon and borrowed from other art. To assure that this aspect of creativity not be stifled, a "fair use doctrine" evolved in the courts.

The first legal dispute concerning fair

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use occurred in an 1841 case involving letters of George Washington. The issue reared its head most recently on Feb. 20, when the U.S. Supreme Court refused to review a 2nd District U.S. Court of Appeals decision on the Scientology book.

The appeals court ruling stated that unpublished materials "normally enjoy complete protection" from being quoted and that courts should as a rule stop the publication of books that quote "more than minimal" amounts of such unpublished material.

That case arose when lawyers for New Era Publications International, an affiliate of the Church of Scientology, sued publisher Henry Holt & Co. in 1987 to prevent the publication of "Bare-Faced Messiah," a biography of Church of Scientology founder L. Ron Hubbard. The book's author, Russell Miller, had quoted 132 passages from unpublished letters and documents, many obtained from government agencies under the Freedom of Information Act.

Holt lawyers argued that the passages were essential to painting a complete portrait of Hubbard as a bizarre and often dishonest messianic figure. They thought such quotations were clearly protected under the fair use doctrine.

The appeals court disagreed, finding that 41 passages involved copyright infringement. It refused to stop publication of the book, but only on a technicality.

Authors were outraged by the decision, and various organizations including the Assn. of American Publishers and the American Historical Assn. filed briefs urging the Supreme Court to overturn the decision. The court refused.

The decision came on the heels of several similar rulings. In 1987, for example, the same appeals court ruled that novelist J.D. Salinger could, under copyright law, prevent the publication by biographer Ian Hamilton of a book containing quotations and paraphrases from 70 unpublished letters by Salinger, many found in research libraries.

In both cases, it was U.S. District Court Judge Pierre N. Leval's decisions that were overturned. In a speech delivered last April at New York University Law Center, Lev-

# BIOGRAPHY: New Publishing Chill

al bemoaned the complexity and confusion in the fair use doctrine. He went on to criticize the appeals court for failing to give weight to the educational or "public enriching" value of quotations when deciding issues of fair use.

"They accord no recognition to the value of accurate quotation as a tool of the historian or journalist," he writes. "A biographer who quotes his subject is considered simply a parasite, a free rider."

Leval used the Salinger case in his speech to make a point about the dangers of restricting fair use.

After the court ordered certain quotations removed from the Salinger book, the biographer went ahead and characterized the content of the letters himself, Leval pointed out. A reviewer, who had also seen the letters, then lashed out at the biographer for having an entirely different interpretation of the letters than his own.

"Where does that leave the reader?" Leval asked in his talk. "Does this battle of adjectives serve knowledge and the progress of the arts better than simply allowing the readers to judge for themselves by reading revelatory extracts?"

Authors argue that summing up what someone said simply does not have the impact of a direct quote.

"You can call L. Ron Hubbard a bigot, or you can quote him . . . [using a racial epithet]'" Schlesinger said, referring to actual quotations at issue in the Scientology case.

Even more significant to some opponents of the decision is the potential it creates for public figures to allow access to their private papers to people who agree to present them in a flattering light.

**'If we found a hitherto unknown manuscript of George Washington, say an address to Congress, we don't know if that could be published. But if we found a private document, you could *not* quote it, for almost any reason.'**

MICHAEL LES BENEDICT
*History professor, Ohio State University*

Moreover, a writer's heirs can hold the copyright on unpublished materials until 2003, or for 50 years after the author's death, whichever comes last.

Even, theoretically, if the person in question is the first President of the United States.

"If we found a hitherto unknown manuscript of George Washington, say an address to Congress, we don't know if that could be published," said Michael Les Benedict, a professor of history at Ohio State University who has studied this issue. Copyright law dictates that using limited quotations from published material can be fair use, he said. "But if we found a private document, you could *not* quote it, even the smallest amount of quotation, for almost any reason."

The "chilling" effect of the decision was felt even before the Supreme Court decided not to hear the case, authors say. Steve Weinberg, who stirred up controversy last year with his biography of industrialist Armand Hammer, said that his publisher's attorneys persuaded him to paraphrase rather than quote from private, unpublished letters—even those found in presidential libraries overseen by the national archives.

And the chill is spreading beyond biography and history.

Glen Smith, staff counsel for Times Mirror Co., publisher of the Los Angeles Times, said that the effects of the decision will not be felt as acutely in newspapers as in other types of writing. But "from time to time we may have access to these types of [unpublished] materials. We'll have to think long and hard. We may impose some self-censorship . . . and I think it will definitely have a chilling effect on any journalist, historian or biographer."

Jane Kirtley, who heads the Reporters Committee for Freedom of the Press in Washington, takes a similar view. But she remains optimistic.

"I'm not going to be doomsayer," she said. "Copyright law by its very nature is an intrusion on the First Amendment. It's one we tolerate just as we tolerate libel laws."

The Scientology decision, she said, may make it more difficult for reporters to do investigative articles, but it certainly won't prevent such articles from getting done.

But others are much less calm about the potential impact of the decisions.

The current law "is going to cut the heart out of a lot of important nonfiction writing," said Leon Friedman, a New York attorney who represents the PEN America Center writers organization.

On Thursday, Friedman and 14 other lawyers, authors and representatives of the publishing community met with Sen. Robert Kastenmeier (D-Wis.), who heads the Senate judiciary subcommittee on courts, intellectual property and the administration of justice. A spokeswoman for Kastenmeier could not say whether the group persuaded him to schedule hearings into the matter but said the "the issue is on his mind and he is concerned about it."

In the March 19 issue of The Nation, Friedman outlines a few suggestions of his own for how he'd like to see the laws changed.

The law, he argues, "should eliminate the distinction between published and unpublished works as far as quotation is concerned." Also, the definition of fair use, he writes, "should emphasize that it is the author's function, not the court's, to determine the appropriate use of quotes" in most cases.

"One of the problems is that judges are making literary judgments," he said in an interview. "I don't believe judges should be in a position of deciding if something is newsworthy or if a particular use is a [valid] literary device."

And at this point, he and others say there is likely to be much opposition. He hopes the issue will move beyond debate and into the legislative arena by spring.

"The issue is much, much more important now than my book," Russell Miller, author of "Bare-Faced Messiah," said from his home in England. "To me it's absolutely extraordinary that a country that is so proud of its First Amendment finds itself, because of the convolutions of the legal system, in a position where it's virtually impossible to produce a book of serious research.

"That's what has alarmed writers of all kinds."