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POINT OF VIEW

A Law Defining 'Fair Use' of Unpublished Sources Is Essential to the Future of American Scholarship

By David J. Garrow

Scholars' freedom to use quotations from unpublished primary sources is seriously in jeopardy. Under recent appeals-court rulings, authors in most instances will no longer be allowed to quote from sources such as unpublished letters and diaries -- staples of scholarship in many fields -- without securing advance permission from the original writer or from his or her heirs.

A number of scholarly organizations are joining forces with publishers and groups of authors to push for quick Congressional action to nullify what will otherwise be a landmark disaster for all non-fiction writers. In the meantime, publishers have already begun to apply the import of the latest rulings to their editorial judgments. Just last week, I know that one editor at a major trade publisher was excising all quotations from a biographical manuscript on a famous writer with a reputedly litigious estate.

Many individual scholars, however, continue to ignore the problem -- and that is foolhardy. When some of us have warned our colleagues about the threat to research and writing, many profess utter disbelief that American courts could have imposed such restrictions. It is time for all writers to start paying attention.

Corrective legislation has been introduced in the House of Representatives by Robert W. Kastenmeier, Democrat of Wisconsin, and in the Senate by Paul Simon, Democrat of Illinois. Hearings on their bills may be held within the next month. The real possibility that the current crisis can be remedied in timely fashion makes it imperative for American academics to appreciate the stakes: They must write or call their Congressional representatives, beseeching support for this legislation.

Until recently, a modest amount of quotation from unpublished sources was allowed, without prior permission, for such purposes as criticism, comment, news reporting, teaching, or research, under copyright law's doctrine of "fair use." But in 1987, the U.S. Court of Appeals for the Second Circuit upheld the effort of the reclusive writer J. D. Salinger to prevent the British biographer Ian Hamilton from quoting from, or closely paraphrasing, his letters, even though they had been placed in university archives by their recipients. Then in February, the Supreme Court declined to review or overturn a similar appeals-court decision in 1989.

When the Salinger suit was first heard in federal district court, Judge Pierre N. Leval indicated that Mr. Hamilton would have to reduce substantially the amount of material he quoted from the Salinger letters. The judge stressed, however, that he felt the fair-use doctrine upheld the right of scholars to use quotations from unpublished sources in their work.

The Second Circuit, however, rejected Judge Leval's analysis in language that ought to stun any American scholar. Mr. Hamilton had "no inherent right to copy the `accuracy' or the `vividness' of the letter writer's expression," the court found. Indeed, "a biographer . . . may frequently have to content himself with reporting only the facts of what his subject did," the court said.

In the Salinger case, the appeals court also warned that violation of the law would result not simply in monetary damages, but also in an order blocking publication of the offending work. "If [the biographer] copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined," the court declared.

Unfortunately, most coverage of the court's decision highlighted Mr. Salinger's idiosyncratic reclusiveness, rather than the dangerous breadth of the assault on the scholarly enterprise. Then, hardly a year later, followers of L. Ron Hubbard, the deceased Scientology guru, sought to prevent distribution in the United States of Russell Miller's critical biography, which employed quotations from Mr. Hubbard's unpublished writings, including letters written to the U.S. government and released under the Freedom of Information Act.

In New Era Publications v. Henry Holt, as the Hubbard suit was titled, the Second Circuit ultimately permitted publication of the biography -- but only on a technicality. The court held that New Era Publications, the holder of Hubbard's copyrights, had delayed too long in commencing its suit against the publisher of the book. Two of the three judges on the Second Circuit's panel added: "We made it clear in Salinger that unpublished works normally enjoy complete protection."

In February, the Supreme Court declined without comment to review the New Era ruling, even though, as a lawyer for the Association of American Publishers argued in urging the Court to hear the case, in the wake of the Second Circuit's rulings "no biographer or historian (or anyone else) can quote or closely paraphrase -- however selectively and limitedly, and regardless of purpose -- any technically unpublished material unless the creator of that material (or the estate or others to whom the rights have passed) has granted permission." The publishers also argued: "No prudent publisher can afford to risk even very limited quotation from unpublished

materials . . . since to do so invites injunction of the entire work."

Following the Supreme Court's action, writers and publishers turned to Congress for corrective action to overturn the phenomenally chilling effects of the Second Circuit's rulings. Historians and biographers use unpublished letters, diaries, and memoranda in virtually all of their published work, and, as Judge Leval recognized, it would be irresponsible scholarship not to do so. Limiting oneself to describing only the facts of what some public figure or well-known writer did, without being able to quote and comment upon the language that person used to characterize his or her actions, will often produce history that is imprecise, incomplete, and potentially inaccurate. As Judge Leval noted concerning the New Era case: "Often it is the words used by the public figure (or the particular manner of expression) that are the facts calling for comment."

Scholars now face a choice of either truncating their work by dispensing with any and all quotations from unpublished primary sources -- and extensively harming its accuracy and value -- or attempting to secure approval for every remark they desire to use. A scholar adopting the latter path might encounter three results.

First, the scholar might, consciously or unconsciously, be far less inclined to take a critical stance toward a public or historical figure whose approval or whose estate's approval is needed for each quotation.

Second, the scholar might find that permission fees will be demanded in exchange for permission to quote.

Third, and perhaps most seriously, the scholar will likely face extensive requests from subjects or their heirs to see -- and hence approve -- the particular context, or perhaps the entire manuscript, in which one or more quotations would appear.

In short, by giving such all-powerful leverage to copyright holders, only "approved" or "friendly" treatments will be able to make use of unpublished, primary-source documents. Censorship that is totally contrary to American scholarly and journalistic traditions will thus be imposed by virtue of the Second Circuit's insistence that all previously "unpublished" quotations receive prior approval.

These chilling effects are already showing up in the publishing process, as publishers' attorneys instruct editors -- and editors in turn inform authors -- that most, if not all, quotations from "unpublished" letters and memos must be deleted.

James Reston, Jr., author of The Lone Star: The Life of John Connally,

recently was forced to truncate his use of letters that Mr. Connally had written to Lyndon B. Johnson. The literature scholar Victor Kramer has been unable to publish his work on James Agee because of an executor's refusal to grant permissions. Publication of a major biography of a prominent African-American leader of the 1960's is being blocked because of fears that hostile heirs might file suit over the author's use of unpublished letters. Indeed, another heir -- the widow of the novelist Richard Wright -- already has sued the writer Margaret Walker Alexander for quoting in her biography of Wright unpublished letters that he wrote years ago to Alexander herself.

The bills introduced in Congress, HR 4263 and S 2370, would remedy this drastic turn of events by amending the appropriate section of the copyright statute to make explicitly clear Congress's intent in passing the original legislation -- namely that "fair use" quotations can be drawn from unpublished as well as published works and documents.

Introducing the House bill on March 14, Representative Kastenmeier observed that "the chilling effect of the New Era decision is obvious and it is real." He said he and others "want fair use to be broadly defined so that judges can apply it to fit the facts of a particular case." Senator Simon, in introducing the identical Senate bill on March 29, noted: "Sometimes only a person's actual words can adequately convey the essence of a historical event." He also warned that "the spectre of historical and literary figures and their heirs exercising an effective censorship power over unflattering portrayals . . . could cripple the ability of society at large to learn from history."

Publishers and their lawyers recognize the inescapable truth of the lawmaker's words and are reluctantly imposing the Second Circuit's strictures upon their editors and authors at the same time that they are energetically supporting the proposed legislation. Some scholarly associations and other groups, such as the National Writers Union, already have formally endorsed the legislative effort, but nothing will have a more salutary effect on busy members of Congress than hearing from their own scholarly constituents whose future or forthcoming writings would be either shredded or enjoined under the now-existing case law.

Every non-fiction writer in America ought to contact his or her members of Congress and explain why prompt Congressional passage of the Kastenmeier-Simon bill is essential for the future of American scholarship.

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