

# *Libel Lawyers Wield Blue Pencils on Books*

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Darcy O'Brien, a college professor and author of several fiction and nonfiction books, was in Europe last summer when he was urgently summoned back to New York by his publisher.

It seemed that there was a problem with his about-to-be-published book, "Two of a Kind: The Hillside Stranglers," the first full-length account of the investigation and trial of the men who had terrorized Los Angeles in 1977 and 1978 with a series of brutal sex murders.

Advance copies of the book had made their way to Los Angeles. And now the publisher, New American Library, had letters complaining about certain passages and characterizations in it.

One letter was from Gerald Chaleff, the defense lawyer whom O'Brien had credited with making the Hillside Strangler case the longest criminal trial in U.S. history. Another was written by one of the country's leading libel litigators on behalf of Chaleff's co-counsel, Katherine Mader.

## **Hastened Home**

Even though the normal editing process was behind them and the book was in the final stages of printing, O'Brien hastened home to discuss the complaints with the publisher's lawyer.

What happened next illustrates a fundamental change in the book industry in recent years: Lawyers are playing an ever-increasing role in the editing of books.

When the book appeared in stores some months later, certain passages were missing and others were rewritten. Some changes

were barely noticeable: in one instance, a single word replaced by another. In other places, entire paragraphs were altered or omitted.

Gone, for example, were unflattering descriptions of Mader, characterizing her as so "distastefully frank" that "no matter what she was talking about—sodomy, lunch—she always smiled, a small smile, short of a grin, but disconcerting because it seemed irrelevant, incongruous, like a sunbonnet on a crocodile."

## **Other Changes Made**

And there were other changes—none of which are being discussed publicly, either by those who made the complaints or those involved in reediting the manuscript.

In making the changes, were the author and publisher responding to actual errors that had come to their attention late in the publishing process? Or were they capitulating, unnerved by an apparent threat of litigation from what were some of the country's heaviest legal guns?

In this particular case, those questions may never be fully answered. In a general way, however, such questions are being raised throughout the publishing industry today.

Many lawyers say the trend toward "vetting" or "lawyering" books is a good one. Attorneys, they argue, are simply protecting the rights of their clients—their right not to be defamed, their right to privacy, their right not to be exploited, their right to profit from publicity about their own life sto-

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ries.

Yet, increasingly, scholars and writers are becoming disturbed by what they see as a major shift in book publishing standards. Publishing companies, their critics contend, are so afraid of litigation that they are allowing their legal departments to become offices of censorship.

While newspapers and broadcasters have long had to worry about potential litigation arising from what they say or print, publishers at many book companies believe that they have become particularly vulnerable in this regard in recent years.

One of the reasons, said R. Bruce Rich, an attorney for the Freedom to Read Committee of the Assn. of American Publishers, is that most courts have come to make a distinction between publishers who work under stringent deadlines and those who do not.

## **'Leisurely' Process**

The courts, Rich said, seem to view book publishing as a "leisurely" process in which writers and editors have the time and resources to get things right; if they do not, they will be penalized.

What is more, publishers' lawyers say, it is not the so-called Hollywood "trash" books that are most vulnerable to lawsuits. Those books are generally seen for what they are: providers of cheap entertainment and free publicity. What has been subjected to the threat of litigation, the publishers say, are serious books about important subjects.

## **Litigation Mania**

To some extent, what is happening in the publishing merely reflects the litigation mania that has seized 20th-Century America. But the problems facing publishers and writers come from a whole host of directions.

If they use real names and purport to tell a true story, they can be sued for invasion of privacy or libel.

If they change the names and say they are creating fiction, they can still be sued for libel.

If they make money from telling a true story, they can be sued for violation of property rights.

If they profit financially from telling a story about a crime, they can be sued for exploiting the rights of victims.

Most publishers and editors, however, are not eager to comment publicly about these problems. So concerned have many become about the legal ramifications of everything they do and say that many people contacted for this

## Libel Attorneys Looking Over

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—Jonathan Kwitny, Author of "Vicious Circles"

lishers and authors in multimillion-dollar suits. The lawyer said he could not be quoted by name because it would violate his clients' rights to confidentiality.

"Book publishers, most of them anyway, do not say, 'By God, we have an important truth here that we have to publish,'" the lawyer continued. "Instead, they ask, 'Will it make us money?' Or, perhaps more to the point here, 'Will it lose us money? Are we in danger of being wiped out by a devastating lawsuit?'"

In an epilogue to "Vicious Circles," a book about the Mafia published several years ago by W. W. Norton & Co., author Jonathan Kwitny described how his manuscript was first rejected by a major publishing house "for the frankly acknowledged reason that the house is reluctant to print works that might attract nuisance libel claims." Other publishers, he said, have shown similar fears and other authors have run into similar problems.

Kwitny's conclusion: "A terrible chill has been thrown over the free flow of information in this country by libel laws, by the lack of consistent court standards of what it's permissible to print even if one concedes that judges should be able to decide what it's permissible to print, and by the

story would not be quoted by name or company. Others, on recommendation of their lawyers, would not speak at all on the subject.

Heather Grant Florence, vice president for Bantam Books Inc., explained why she and other publishing lawyers and editors are so reluctant to talk openly about publishing litigation or even discuss the editorial process generally.

### 'Can Haunt You'

"Very simply," she said, "it can come back to haunt you."

Privately, many people in the book industry admit that "more and more books are being censored," said Rodney A. Smolla, associate professor of law at the University of Arkansas, and author of "Suing the Press," recently published by Oxford University Press.

Examples of this new legal censorship abound. Nonfiction writers, for instance, tell of countless occasions in which the publication of their books has been delayed by publishers for months, if not years, in an effort to avoid litigation. In at least a few documented instances, projects by experienced writers have been turned down altogether because of fear of litigation. More common, the critics say, controversial books simply are being "tailored" to meet the objections of those who might otherwise be inclined to sue.

The range of books that have been changed in recent years because of legal concerns is broad. Books about John F. Kennedy, Ernest Hemingway, Frank Sinatra, Errol Flynn, Katherine Graham and most recently, Claus von Bülow have all been subject to one kind of legal threat or other.

There is broad agreement within the industry that the mere thought of litigation has thrown a pall over the way publishers do business.

"I hate to be calling book publishers cowards, but some of them are," said one New York lawyer who has defended numerous pub-

power of anyone to threaten a well-intentioned journalist and his publisher with financial ruin."

In fact, book publishers have reason to worry.

There has been, Smolla wrote in "Suing the Press," a "literal explosion" of litigation against the media in the two decades since the high-water mark of press protection, the 1964 New York Times vs. Sullivan ruling. In that case, the Supreme Court declared for the first time that state libel laws were subject to the free-speech provisions of the First Amendment.

So confusing has the situation become that most publishing companies now provide formal and informal legal education for their

# Publishers' Shoulders

Matthiessen and Viking, has argued that his clients never intended to leave the impression that the governor was *in fact* any of these, only that in the course of his trouble with the Indians he had been publicly accused of those things. The accusations themselves, Garbus contends, played an essential part in the uprising, and therefore deserved mention in the book.

## Brings Up Question

Depending on the outcome of that case and publishers' reactions to it, Garbus said, "we may have to begin to ask the question, 'Is it possible any longer to write full and complete histories of people and events in this country?'"

(Recently, Newsweek magazine gained the dismissal in the U.S. Court of Appeals in South Dakota of a suit involving Janklow. The suit against Matthiessen and Viking is still pending.)

Even when the law is clear and on their side, some publishers balk at the mere possibility of a lawsuit. That certainly has been the case in the yet-to-be written biography of Roy M. Cohn.

Cohn is clearly a good candidate for a full-length account of his life. He first made a name for himself helping Sen. Joseph R. McCarthy hunt down alleged Communists in

the 1950s and later became an adviser to presidents, a lawyer for Mafia bosses and a personal friend of Ronald Reagan.

But because Cohn is also known as one of the country's most litigious public figures, editors at several publishing companies admit that they have steered clear of his biography as one potential best-seller that was simply too hot to handle. It is no accident, they say, that Doubleday signed a contract with writer Nicholas Von Hoffman only recently—after Cohn's health began to fail.

## 'Strategic Delay'

"It is what some of us call 'the strategic delay,'" said an editor at Doubleday, who asked not to be quoted by name for fear that anything said publicly about the book could later be used against the company if it ever were brought to court.

Many delays in publishing, however, are not so strategically planned.

One of the most recent nonfiction works to be held up by threats of litigation is Random House's book on the case of Claus von Bulow, the Rhode Island socialite acquitted last year in his retrial on charges of trying to kill his wife.

Officials at Random House have  
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editors.

One suit that is much discussed these days is a \$24-million libel suit brought by the governor of South Dakota against the author and publisher of "In the Spirit of Crazy Horse," an account of the 1973 American Indian uprising at Wounded Knee, S.D., and the subsequent killing nearby of two FBI agents.

Gov. William J. Janklow's objection to the book, which was written by award-winning author Peter Matthiessen and published by Viking Penguin Inc., is that it repeats unproven and libelous claims that he is a racist, rapist and dog killer.

New York lawyer Martin Garbus, who is handling the case for

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acknowledged receiving letters of complaint from numerous people discussed in the book, including Mrs. von Bulow's children. Although they insist that the book has not been substantially altered as a result, they admit that there have been delays and that author Alan M. Dershowitz, a Harvard law professor who was Claus von Bulow's lawyer, has written a last-minute epilogue to the book in response to the criticisms.

While libel is the area of most concern, publishers are also being intimidated by new laws seemingly unrelated to traditional publishing ventures.

## 'Son of Sam' Laws

Perhaps the most troublesome have been the so-called "Son of Sam" laws, designed to prohibit criminals from profiting from their wrongdoings. These statutes, on the books in several states, have been fashioned after one passed several years ago in New York to prevent serial murderer David Berkowitz, who called himself Son of Sam, from writing and selling his memoirs.

In an effort to protect themselves from litigation, publishers have begun to restrict not only

It would seem that the one area in which writers are free to say what they want is fiction, but even the publication of creative writing is now subject to increasing legal constraints.

In a case involving a novel entitled "Touching," written by Gwen Davis Mitchell and published by Doubleday, a California court agreed with Paul Bindrim, a California psychologist who argued that he was the real-life model for one of the book's characters who was engaged in nude encounter therapy. A jury upheld the psychologists' contention that he had been defamed and awarded him \$25,000 from the novelist and \$50,000 from the publisher.

Writers and publishers alike denounced the decision as having a disastrous effect on novelists, dramatists and television and film writers, who may now feel compelled to refrain from using any of their own experiences in the creation of fiction.

An equally troubling aspect of this case to writers, however, was the publisher's decision at the end of the trial to turn against the author and sue her for reimbursement of the jury award and legal costs under an "indemnity clause" in the contract for the book.

whether what has been published is true and fair.

A variety of books, from such highly acclaimed works as David McClintock's "Indecent Exposure" to such controversial ones as C. David Heymann's biography of Barbara Hutton, have been subject to intense legal scrutiny, and in some cases actual litigation, at least in part because they make use of these new techniques.

Indeed, many lawyers and writers agree with Chaleff, the chief defense attorney in the Hillside Strangler case, when he says he is "not impressed" with either "instant history" or with what one writer has called "fictionalized facts."

Such techniques, Chaleff said, are simply more likely to be challenged in a courtroom than are

## Blue Pencils

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**— Marc Green**

Co-author of "Hollywood Dynasties"

what writers write but how they go about gathering their information.

It is no longer "enough" simply to find the truth, said Clayborne Carson, a Stanford University historian and author who is now editing the first complete edition of Martin Luther King's papers. Now, he says, publishers are demanding that authors obtain in advance of publication signed consents from virtually every subject who is being written about, if they are still alive. If they are not, permission must often be obtained from the families or the estates of the deceased subject.

Although that may "protect" the publisher in a court of law, it also gives the subject enormous power, which ultimately "calls into question the objectivity of much of what is being written," Carson said.

The case led the Authors League, a voluntary organization of professional writers and dramatists, and other writers' and scholars' groups to demand that publishers drop the so-called indemnity clause from their contracts. A few companies have agreed to begin covering writers' legal expenses, but Edward Miller, counsel for Random House, said that change, rather than protecting writers, may actually be provoking more litigation against them.

#### 'Much Deeper Pocket'

"After all," he said, if a potential plaintiff can go after a huge publication corporation and not just a lone writer, it gives the plaintiff "a much deeper pocket to sue."

Amid the many attacks against publishers, some believe that publishers themselves are partly to blame for the increasing litigation.

In their eagerness to sell books, they are encouraging nonfiction writers to throw out traditional histories and biographies, which are full of attributions and explanations and footnotes. In their place has emerged the so-called nonfiction novel, which attempts to "re-create" actual situations to which there are often no verifiable witnesses. Written in novelistic style, these books are replete with quotation marks around conversations that may or may not have occurred but to which the writer himself was certainly never privy.

It is the technique O'Brien used in his "inside story" on the Hillside Stranglers and one that his publisher says on the jacket flap is "compelling."

Although books written in this manner are often more readable than traditional histories, many lawyers believe that such writing not only raises serious ethical issues but is also far more subject to litigation. The reader is unable to judge for himself the veracity of what has been written, and judges and juries are at a loss to know

more traditional approaches to writing.

"There is real schizophrenia in book publishing today," said Marc Green, co-author of "Hollywood Dynasties," an account of some of the film industry's most powerful families.

"Publishers want their books to contain something so juicy that it's going to cause newspapers to want to put it on the front page. . . . At the same time, they don't want to be sued. So what do they do? They're very reluctant to publish anything controversial short of a guaranteed best seller."

Given the tiny percentage of projects that are destined to be best sellers, Green concluded, "that means a great many important and provocative books may never be written."