7627 Old Receiver Road
Frederick MD 21702

June 1, 1991

Ben Bradlee, Executive Editor
The Washington Post
1150 15th St., NW
Washington DC 20071

Dear Ben:

When it became apparent on Thursday that you and the Post's counsel had felt compelled to reach some kind of agreement with Oliver Stone, I wrote George immediately, assuming the threat of a spurious lawsuit that could be very costly, was involved. I told him I would do nothing to embarrass the Post.

When The Nation came yesterday I was reminded of what I'd forgotten, the decision against it for using about 250 words of Gerald Ford's unpublished book. It is apparent that you had no real choice.

Not knowing how I will feel tomorrow after I read Outlook or how much I'll be up to, I write you now, knowing nothing about the agreement or of any possible future restrictions it may impose on the Post.

I'll not use any part of the draft of a letter to Stone that kept growing as I learned more and when I do write him I'll not quote either the script or anything he wrote the Post. I hope that what evolves may, with editing, be publishable and definitive.

As I told George, I have been informed by someone who says he has a copy of the shooting script that Stone made only relatively minor changes that seemed to conform with earlier criticisms of the original script.

In any event, it is not possible for Stone to shed his dependence upon Garrison's book without an entirely different script and, despite his recent squirming, he stated publicly that his script was based on that book.

Without quotation of the script, it is possible to write what should and I believe would be a journalistically and historically important book that would also be entertaining and for which I believe there will be an exceptionally receptive market.

The importance and the market will both be greater if the book appears before the movie and the reprint.

When George liked my proposal of a book, I wrote him without his having asked it giving him complete control over the content.

I hope that you may find it possible to let him have a sabbatical of a couple of months so he may write the book rapidly.

I believe the book will be well-suited for serialization and that, with Stone's honors and prominence as well as because of what he has been saying and may yet say plus what the book can say, the serialization will be of value.

If this is not impossible and if it does interest you, for my part you can have the serialization rights free.

There is no conspiracy theorizing in any of my six books on the JFK assassinatin or that of King. I have debunked most of the books advancing unproven theories as facts. They, like the coming Stone movie and Garrison's shameless self-justification, mislead and misinform people and bury truth deeper. Stone's "flimflam" of "trash," as Valenti has described it, has the potential of misinforming and misleading more people than any earlier disinformational exploitation of either side.

If I were not convinced from my experiences in the field and my knowledge that the book could at the least diminish this harm and, with luck, ruin the bastard in the womb, I'd not have spent the time of which I now have so much less not working on another book that means much to me.

Sincerely,

Harold

Harold Weisberg

June 2- P.S. I've read Stone's statement, drafted a lengthy letter to him that I'll read and correct, without taking the time for the editing and perhaps cutting that would improve it so I can mail it sooner, as soon as my wife can retype it (probably tomorrow because she'll be away most of today), so that as rapidly as possible he'll have it before he can misuse his own self-serving statement without being dishonest in his use of it. In the same mail will be a copy to the Post. This assumes nothing of the Post.

H.W.

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EDITORIALS.

Quoting History

Is Leon Friedman, who along with Floyd Abrams and the American Civil Liberties Union was counsel for this magazine in Harper & Row v. Nation Enterprises, *reports below, Congress is on the brink of rectifying a serious copyright wrong. Eight years after Harper & Row sued* The Nation *for quoting without permission former President Gerald Ford's forthcoming memoirs, the mainstream publishers have finally come to understand what Friedman, PEN American Center, the Organization of American Historians and others who appeared as witnesses for or submitted amicus briefs on behalf of* The Nation *tried to tell them all along. Namely, that to harass a small, dissenting magazine for publishing an article that exposed the deal behind Ford's pardon of Richard Nixon, using Ford's own facts and citing his own words, could lead to broader intrusions on the work of journalists, biographers and historians at the cost of the free flow of ideas and the free range of investigative journalism.*

At the time, the old boy network at the Association of American Publishers backed Harper & Row's request that the courts forbid any use, fair or otherwise, of prepublication material. Now even HarperCollins (Harper & Row's successor) has seen the error of its ways and supports with the A.A.P. the effort to get Congress to begin to repair the damage to free inquiry.

—The Editors

The historian's craft may have been saved by a compromise, recently announced by Senator Paul Simon, among writers, publishers and representatives of the computer industry to amend the fair-use provisions of the copyright law. What do the computer industry and copyright law have to do with the writing of history?

The problem that the new amendment attempts to resolve flows directly from a case involving *The Nation*. The Supreme Court found the magazine liable for copyright infringement because it quoted about 300 words from the unmemorable memoirs of Gerald Ford in an article printed before the book was published. A federal district court had held that the entire article infringed the former President's copyright since the fair-use doctrine did not apply. Fair use applies to "news," said the judge, and there was nothing newsworthy in the article since there was nothing "new" in it.

The Supreme Court could not accept that trial judge's theory, but it did uphold the finding of copyright infringement on the basis of the 300 words actually quoted from the unpublished manuscript of more than 200,000 words. Fair use, said Justice Sandra Day O'Connor, applies in a much narrower way to unpublished writings than to published materials; therefore, quoting even this small percentage of material violated the copyright laws.

In two subsequent cases the U.S. Court of Appeals for the Second Circuit carried this decision to ridiculous lengths, establishing a virtual per se rule that fair use cannot apply to *any* quotation from unpublished material—not only about-to-be-published manuscripts but unpublished letters, journals, diaries, memorandums, etc., no matter how old and even if lawfully obtained. Thus the author of a biography of J.D. Salinger published by Random House was not allowed to quote about 250 words from letters acquired from library collections, and the writer of a biography of L. Ron Hubbard published by Henry Holt & Company would have been unable to quote a small excerpt from Hubbard's journals but for the fact that the plaintiff had waited too long to bring the lawsuit. "Unpublished works normally enjoy complete protection," said the court in the *Hubbard* case; "the copying of 'more than minimal amounts' of unpublished material calls for an injunction barring the unauthorized use."

At that point, historians and biographers and magazine and book publishers woke up to the fact that the doctrine announced in the *Nation* case and applied in *Salinger* and *Hubbard* had made it virtually impossible for authors to quote from original source materials. Arthur Schlesinger Jr. wrote a blistering attack on the decision in *The Wall Street Journal* that helped to alert a wider community. How can one write history if primary source material is off-limits to an author? he asked. How can copyright laws be applied to letters written decades ago that the letter writer (who may now be dead) never intended for publication?

The controversy shows how easy it is for problems to be created by the courts and how difficult it is to get Congress to correct them (witness the effort to pass a new civil rights bill to overrule a handful of unexpected and warped Supreme Court decisions dealing with employment discrimination). After the Supreme Court declined to review the *Hubbard* case, writers' and publishers' groups began to petition Congress to correct the problem. PEN American Center (which I represented), the Authors Guild (represented by Floyd Abrams and J. Anthony Lukas) and the Association of American Publishers (led by Nicholas Veliotes and prodded by Harriette Dorsen of Bantam Doubleday Dell) urged Congress to amend the fair-use provisions to eliminate the per se rule established in *Salinger* and *Hubbard*.

A bill to that end was introduced last year by Robert Kastenmeier, chair of the House intellectual property subcommittee and a leading copyright expert. But the computer industry objected since its source codes and software are considered unpublished material and thus were protected under the ruling in the *Nation* case. The industry helped block consideration of the amendment, and when Kastenmeier was defeated in his 1990 bid for re-election, all seemed lost.

Enter Helen Stephenson and Liz Robbins of the Authors Guild and Senator Paul Simon. This year, the guild took an active role in persuading members of Congress of the importance of the amendment. Groups of leading historians and biographers enlisted by the guild, including David Halberstam, Geoffrey Ward, Kati Marton and Hannah Pakula, traveled to Washington to lobby for the amendment. Floyd Abrams, Kenneth Vittor of McGraw-Hill and Jon Baumgarten of the A.A.P. took an active role in drafting the technical language of the bill.

Finally, on May 9, Senator Simon announced that representatives of the writers', publishers' and computer groups had reached general agreement on the language of a compromise bill that would eliminate the problem created by the *Salinger* and *Hubbard* decisions. The language reads: "The fact that a work is unpublished is an important element which tends to weigh against a finding of fair use, but shall not diminish the importance traditionally accorded to any other consideration under this section, and shall not bar a finding of fair use, if such finding is made upon full consideration of all the above factors."

The compromise bill has wide backing in both the Senate and the House, where William Hughes of New Jersey has succeeded Kastenmeier as chair of the intellectual property subcommittee, and it is expected to become law this year.

LEON FRIEDMAN

Leon Friedman is a professor of copyright law at Hofstra University Law School and acts as counsel to PEN American Center.

Spring Medley

Grabbing a weekend away from my suburban home (where one mows the lawn and hopes that the bluebirds will nest again in their bluebird box), I got up for a couple of days to a camp on the Canadian border that I've used for two decades as a bathysphere in the ocean of nature. The shadbushes were just beginning to bloom—sparse tiny flowers with a faint but piercingly sweet scent that presages the wild cherry, apple and lilac blossoms that soon follow. My house had stood empty for many months, and so when I set a fire bucket with water in it outside the door, a raccoon came by and lapped from it: this because he was wild, not because he was tame.

A porcupine walked up the middle of the road as I stood listening to a grouse drum, and to yellowthroats, ovenbirds,