CONTENTS.

Volume 252, Number 22

Cover design by Louise Fili

The Nation (ISSN 0027-8378) is published weekly (except for the first week in January, and biweekly in July and August) by The Nation Company, Inc. 72 Fifth Avenue, New York, NY 10011. (212) 242-8400. *Washington Bureau:* Suite 308, 110 Maryland Avenue N.E., Washington, DC 20002. (202) 546-2239. Second-class postage paid at New York, NY, and at additional mailing offices. International Telex: 667 155 NATION. Subscription orders, changes of address and all subscription inquiries: *The Nation*, P.O. Box 10763, Des Moines IA 50340-0763. *Subscription Price*: 1 year, $44; 2 years, $75. Add $18 for surface mail postage outside U.S. Missed issues must be claimed within 60 days (120 days foreign) of publication date. **Please allow 4-6 weeks for receipt of your first issue and for all subscription transactions.** Back issues $4 prepaid ($5 foreign) from: *The Nation*, 72 Fifth Avenue, New York, NY 10011. *The Nation* is available on microfilm from: University Microfilms, 300 North Zeeb Road, Ann Arbor, MI 48106. POSTMASTER: Send address changes to *The Nation*, P.O. Box 10763, Des Moines IA 50340-0763. This issue went to press on May 23.

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,