5. THE AUTHOR'S RIGHT TO WRITE

By IRWIN KARP

THE KENNEDY-MANCHESTER dispute raises a fundamental question that should concern authors, publishers, and the public: does the Constitution prohibit the courts from enforcing a right-of-approval contract when author and publisher move to issue the book without obtaining the required consent?

The question does not assume that William Manchester breached his agreement. But if the Constitution bars suits to enforce such a contract, a court would never decide whether a breach had occurred. It would have to dismiss the suit at the outset, breach or no breach. And if the Constitution bars this type of litigation everyone would be better off. Authors and publishers could not be compelled to suppress portions of their work. The "subjects" of future books, forewarned of the consequences, would not give authors intimate details they did not wish exposed to public view, thus effectively protecting their right of privacy. The press would be relieved of its present, painful duty of disclosing the very material a plaintiff sues to keep from being published. And the public's right to have freedom of speech and press kept untrammeled would be preserved.

It is likely that the Supreme Court, following a twenty-year-old precedent, would rule that the First and Fourteenth Amendments bar courts from restraining publication of a book which has not obtained the approval required by a contract and also bar them from awarding damages for violation of the right of approval.

The Court may not deal with the issue for years. But the possibility that the right of free speech may take precedence over private contract rights should be aired before the next suit; in fact, before the next contract is signed. Considering it prospectively, rather than during an emotional litigation, might dissipate the notion that there is something unfair about preserving freedom of speech and press. Some of the "let's have no First Amendment nonsense" editorials reflected that attitude: Mrs. Kennedy would not have disclosed the material she objected to had her legal advisor foreseen that the Constitution might nullify her right of approval; therefore, the First Amendment should not prevent her from enforcing that right.

DESPITE Mr. Manchester's harrowing experience, other authors will sign right-of-approval contracts; and there will be more suits. Mrs. Kennedy's success in compelling *Look* to make deletions will itself induce subjects or sources of future biographies or authorized histories to demand rights of approval. Further stimulus may come from comments by New York's Appellate Division in the suit brought by Warren Spahn, under the state's right of privacy law, against the author and publisher of an unauthorized biography. Affirming an injunction against the book, and an award of damages to Mr. Spahn, the court said: "If the publication . . . by intention, purport or format is neither factual nor historical, the [right of privacy] statute applies and if the subject is a living person his written consent must be obtained." It also said that "the consent . . . can be avoided by writing *strictly factual* biographies."

An unauthorized biography may not be "strictly factual." It may contain honest errors of fact, and there is no rule for determining how many are allowed before it ceases being "strictly factual." The court's comments may impel cautious publishers to seek consents for potentially controversial biographies. Obviously, the subject will demand the right of approval before giving his consent. (Equally obvious: if he doesn't like what he reads, he will sue to enforce that right.) Actually, the *Spahn* case involved considerably more than factual errors or distortions; the court found that the biography was larded with "dramatization, imagined dialogue, manipulated chronologies, and fictionalization of events." But until subsequent opinions make it clear that fictionalization (and not factual inaccuracy) is really what the court held to violate the privacy statute, a nervous publisher may take the court's *dicta* at face value and seek consent for any book that may not be "strictly factual."

Obviously, while it costs nothing to preach that an author should never grant the right of approval, it may be more difficult to follow this advice. Writing is a precarious profession. It is not easy for an author to turn down a book that may have the potential of financial success. The temptation will be harder to resist when it is suggested that the pitfalls of the Kennedy-Manchester memorandum could be avoided by more careful drafting. The memorandum leaves room for improvement, and more protection could be provided for an author.

BUT once an author signs such a contract, no matter how well drawn, he hands the other party a weapon that can be used to suppress his book. It makes no difference that he may have complied, or thought he had complied, with the agreement. If the subject wants material deleted he can commence a suit. Often this will be enough to compel the requested changes. Litigation may threaten costly delays in publication, entail heavy expenses for defense and (unless the First Amendment bars it) create some risk of an injunction or a judgment for damages. Any of these factors may bring sufficient pressure on the author to capitulate, even though he might ultimately win on the merits. As the Supreme Court emphasized in *New York Times Co. vs. Sullivan*, the fear of damage awards in private suits and the costs of defending against them "may be markedly more inhibiting" on free speech than the fear of prosecution under a criminal statute.

It may be asked, why should the First Amendment protect an author or publisher who voluntarily signs a contract giving others the right to determine whether the book should be published? If they choose to surrender their freedom to publish, why should the courts

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Although Irwin Karp is legal representative for the Authors' League of America, this article expresses only his personal opinion.

restore that freedom to them? The answer is that the First Amendment guaranties of free speech and free press are not personal privileges granted to an author or publisher for his private benefit. The First Amendment secures freedom of speech and press for the benefit of the community at large, to ensure that unfettered discussion of issues which is the fundamental condition of a democratic society. It is not in the public interest that authors and publishers be permitted to abdicate those freedoms by private contract.

A right-of-approval contract can be used as a potent instrument for private censorship. It can force deletion of historical or political opinions that are offensive or inconvenient to the subject. It can suppress material the author obtained from other sources, or his own opinions. And it can be used to suppress material that would not violate the subject's rights under state privacy statutes. As the New York Court of Appeals emphasized in the Spahn case, "in balance with the legitimate public interest, the law affords [a public person's] privacy little protection." Moreover, a contract-given right of approval is not necessary to enforce one's right under the privacy laws.

IT seems clear that the public's interest in preserving freedom of speech and press, for its benefit, is inconsistent with the enforcement of a contract in which author and publisher surrender that right and submit themselves to private censorship. Refusal by the courts to enforce such contracts is the only effective way to prevent them. And such refusal is by no means unusual; courts frequently decline to enforce private and voluntary contracts if they run contrary to some aspect of public policy.

Moreover, once the dispute reaches a court and it is asked to issue an order enjoining publication of the book, a new problem is presented. The question now is whether the state, acting through the court, may suppress publication of the book. This is the nub of the Constitutional issue under the First and Fourteenth Amendments.

In 1947 the Supreme Court set aside injunctions issued to prevent the breach of voluntary and lawful private agreements. The case was *Shelley vs. Kraemer*. The agreements were restrictive covenants prohibiting the sale of property to Negroes, agreements which were then lawful. The court said that "the restrictive covenants standing alone cannot be regarded as violative of any rights guaranteed to the petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated."

But, said the court, the Fourteenth Amendment prohibits the state from imposing such restrictions on the ownership of property. It ruled that an order of the court enforcing the agreements and enjoining their violation was an act of the state, prohibited by the Fourteenth Amendment. It said that such a court order, in a private suit, was as much forbidden by the Constitution as would be an act of the legislature barring the sale of property to Negroes. In 1952 the Supreme Court went one step further and held (in *Barrows vs. Jackson*) that state courts were also barred by the Fourteenth Amendment from granting damages for the breach of such agreements.

THE right to own property free from discriminatory restrictions is but one of the rights protected by the Fourteenth Amendment. It also prohibits the states from restricting the rights of free speech and press, guaranteed by the First Amendment. Applying the 1947 opinion, a court order enjoining publication of a book to prevent breach of a contractual right of approval (or granting damages for the breach) would constitute a state restraint on freedom of publication—a restraint the state, and its courts, are prohibited from imposing by the First and Fourteenth Amendments.

Furthermore, the court cited as precedent for the decision prior opinions in which it reversed orders that enforced "common-law policy of the state" because they restricted the Constitutional "guaranties of freedom of discussion."

In addition to the Supreme Court's opinion in *Shelley vs. Kraemer*, there is the traditional refusal of courts to enjoin the publication of allegedly libelous works. For example, in a 1946 libel suit against *PM*, the New York Supreme Court said: "The exercise of equitable jurisdiction to enjoin the publication of a libel is repugnant to the democratic tradition. The judicial restraint of the written or spoken word implies the concept of censorship, unprecedented in our jurisprudence. The Constitutional guaranty of a free speech and a free press may not be thus circumscribed." If courts will not enjoin publication to protect the right not to be libeled, will they do so to protect rights under a contract?

The ultimate paradox is that litigation can destroy the very protection a right-of-approval contract is supposed to provide. A Constitutional barrier to these agreements would not only safeguard freedom of discussion; it would also lead the subjects of future biographies and authorized histories to use more effective means of preserving the privacy of material too intimate to be published now. The First Amendment does not compel anyone to disclose information to an author; it does not prevent anyone from making his own record of intimate information for future historians, without using authors as intermediaries.