

Court Reverses Fair Use Ruling on Hubbard Bio

Latest in a line of rulings turning on fair use, a U.S. Appeals Court has overturned a lower court's injunction that prevented publication of a critical biography of L. Ron Hubbard as long as it contained copyrighted material from the published writings of the late founder of Scientology.

New Era Publications, which owns Hubbard's copyrights, had won the injunction earlier this year when the district court ruled that the use of 103 passages taken from 43 published works by Hubbard was not fair.

Carol Publishing Group, which at that point was almost ready to print the book in question—*A Piece of Blue Sky: Scientology, Dianetics and L. Ron Hubbard Exposed* by John Atack—postponed publication in order to delete the infringing portions. Carol's publisher Steven Schragis said the passages amounted to only 3% of the book.

Following the May 24 reversal of the district court by the U.S. Court of Appeals for the Second Circuit in Manhattan, Carol is now preparing to publish the book in its original form and hopes to get press time this month for publication in late July. Schragis said the first printing would be increased from 15,000 to 25,000 copies because of the attention the dispute has received.

Asked if New Era would appeal to the U.S. Supreme Court, its last resource, Michael Lee Hertzberg of Rabinowitz, Boudin, Standard Krinsky & Lieberman said that because of legal and technical matters involved he was "not at liberty to discuss" the question.

In its 25-page decision the appeals court ruled that all four factors listed in the fair use section of the Copyright Act favored Carol.

• **Purpose and Character of Use:** Biographies and critical biographies in par-

ticular fit "comfortably within" the provision that copyrighted materials may be used for purposes like criticism, scholarship or research, the court said.

Atack "uses Hubbard's works for the entirely legitimate purpose of making his point that Hubbard was a charlatan and the Church a dangerous cult." New Era had argued that the author unfairly and unnecessarily appropriated Hubbard's literary expression. The court disagreed, saying: "The author uses the quotations in part to convey the facts contained therein, and not for their expression. More importantly, even passages used for their expression are intended to convey the author's perception of Hubbard's hypocrisy and pomposity, qualities that may best (or only) be revealed through direct quotation."

• **Nature of the Copyrighted Work:** Whether or not a work is published is critical to its nature, the court observed, because the scope of fair use is narrower with respect to unpublished works. Further, the scope of fair use is greater with respect to factual than nonfactual works.

• **Volume of Quotation:** The amount and substantiality of the portion used relates to the copyrighted work, not to the allegedly infringing work, and has both quantitative and qualitative components, the court said. Quantitatively, *A Piece of Blue Sky* uses "only a minuscule amount of 25 of the 48 works" that New Era claimed were infringed and only small percentages of other works. Qualitatively, the court said, the quotations "do not take essentially the heart of Hubbard's works," as New Era had charged.

• **Effect on the Market:** New Era asserted that it intends to publish an authorized biography of Hubbard and that Atack's book would discourage its poten-

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tial readers. A skeptical appeals court noted that it was not beyond the realm of possibility that Atack's book might stimulate further interest in the authorized one and pointed out that since all quotations were from published works, Atack's book "will not tap any sources of economic profit that would otherwise go to the authorized biography."

The court emphasized that the purpose of Atack's book "is diametrically opposed to that of the authorized biography; the former seeks to unmask Hubbard and the Church, while the latter presumably will be designed to promote public interest in Hubbard and the Church. Thus, even if the book ultimately harms sales of the authorized biography, this would not result from unfair infringement forbidden by the copyright laws, but rather from a convincing work that effectively criticizes Hubbard, the very type of work that the Copyright Act was designed to protect and encourage."

—MADALYNE REUTER