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THE WHITE HOUSE

WASHINGTON

May 13, 1985

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: The Berne Convention for the Protection
of Literary and Artistic Works

Al Kingon has prepared a memorandum for the President, transmitting Secretary Baldrige's memorandum on behalf of the Cabinet Council on Commerce and Trade recommending that the United States adhere to the Berne Convention for the Protection of Literary and Artistic Works. A decision to do so would require domestic implementing legislation as well as the execution of international agreements.

U.S. copyright law has historically been distinct from the copyright regime prevailing in the rest of the world. The U.S. system more closely tracks patent law, with an emphasis on formal registration and notice. The system in the rest of the world not only recognizes rights more by virtue of authorship itself than registration, but also accords authors significantly more expanded control over their works. The contrast between the American system and that prevailing elsewhere, however, was markedly reduced with the passage of the comprehensive 1976 Copyright Act. For example, copyright protection now extends for an author's life plus 50 years, rather than a set term (28 years, with a possible extension of 28 years) from date of registration. Registration and notice are still required, but they are no longer the sine qua non of protection.

Baldrige's memorandum focuses on three areas in which a decision to adhere to the Berne Convention would require domestic legislative changes. The first is making registration and notice voluntary. Users of copyrighted works -- librarians, reprint publishers, etc. -- rely on the notice and registration system to ascertain their rights to use material. With a voluntary system, such as the Berne Convention, users could no longer rely on copyright notices. As noted, however, the 1976 law has already made notice and registration far less significant.

Some compulsory licenses under U.S. law would also have to be changed to comply with the Berne Convention. In particular, opposition is expected from jukebox operators, since it may

be necessary to eliminate the compulsory licenses for jukeboxes.

Finally, U.S. law would have to be revised to accord recognition of what are known as "moral rights" of authors. U.S. law focuses solely on commercial protection, but the Berne Convention affords protection against use of a work in a way that would harm the author's honor or reputation in the artistic community, even if the use imposes no commercial harm.

Baldrige glosses over these three areas in which changes would be necessary with what is easily the most fatuous non sequitur I have ever read in a memorandum for the President: "These three possible areas of contention only emphasize the need to consolidate the present private sector support for adherence to the Berne Convention."

The need to change U.S. law to afford protection of "moral rights" will be extremely difficult. The concept itself is almost impossible to define and, in my view, entirely alien to the American legal system. Keep in mind that "moral rights" only come in to play when a use is commercially permitted. The clearest example is an author of a copyrighted book selling film rights, and then objecting that the particular depiction of his work on film is not consistent with his artistic creation. Under American law if the author wanted the right to review and oppose the film version, he could have negotiated and contracted for that right. Under the Berne Convention, the right is an inherent attribute of creation of the work. The author can sue to prevent screening of the film, and a court would decide if the film version -- though commercially authorized -- should be blocked as "prejudicial to the author's honor or reputation." Berne Convention, art. 6 bis (I).

"Moral rights" cases from the Continent have prevented an owner from separating the panels of a multi-paneled painting and selling them separately, because the painter created the work as an integral whole, and prevented the owner of a mural from painting over nudity he found offensive but the painter considered essential to his artistic message. In a celebrated "moral rights" case Soviet composers Shostakovich, Prokoffieff and Khachaturian blocked the showing in Paris of an anticommunist film that used their music as background. The film screened in New York, with music, see Shostakovich v. Twentieth Century Fox Film Corp, 80 N.Y.S. 2d 575 (Sup. Ct. 1948), aff'd 87 N.Y.S. 2d 430 (1949). See generally

Note, An Author's Artistic Reputation Under the Copyright Act of 1976, 92 Harv. L. Rev. 1490 (1979).

In short, recognition of "moral rights" in copyright law would move us from the crisp American system of commercial rights and contract to the foggy French system of artistic integrity and honor. French courts may do it all the time, but how would an American court decide if the film "Carmen Jones" should be blocked -- censored, really -- "on the ground that it transplanted Bizet's operatic celebration of Spain to Harlem, rearranged the placement of several arias and duets, and was an offensive 'rejuvenation of a classic'"? Id., at 1493 n. 20.

In any event, I do not propose that we argue against the Cabinet Council decision at this point. My concern is that the decision memorandum glosses over what are likely to be very serious implementation problems. This concern is reflected in the attached draft memorandum for Chew.

Attachment

THE WHITE HOUSE

WASHINGTON

May 13, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

Orig. signed by FFF

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: The Berne Convention for the Protection
of Literary and Artistic Works

I have reviewed the memorandum for the President from Al Kingon, transmitting Secretary Baldrige's memorandum recommending that the United States adhere to the Berne Convention for the Protection of Literary and Artistic Works. I am not interested in second-guessing the decision of the Cabinet Council on Commerce and Trade on this issue, but it does seem to me that the memoranda for the President gloss over what are likely to be serious implementation problems if a decision is made to adhere to the Convention.

I am particularly concerned that there is insufficient discussion of what recognition of an author's "moral rights" -- required under the Berne Convention -- would entail. The concept of an author's "moral rights" is entirely alien to the American copyright system and, in a certain sense, to the American legal system. The concept is difficult to define, as pointed out in Secretary Baldrige's memorandum, but it grants authors rights against uses that they consider prejudicial to their artistic "honor or reputation," even if the particular use is commercially authorized.

For example, an author who has sold the film rights to his novel could nonetheless assert a "moral rights" claim and attempt to block the film if he thought that the film rendition somehow did not capture the artistry of the book. Congress is not accustomed to drafting legislation to ensure artistic integrity and American courts are not accustomed to deciding whether a particular use accords sufficient respect to an author's artistic integrity, yet both efforts will be necessary if the U.S. decides to adhere to the Berne Convention. The existing American copyright system eschews recognition of such amorphous "moral rights" and concerns itself only with commercial exploitation of works. Transition to a Berne Convention regime will be very difficult, yet that difficulty is hardly conveyed in the memoranda for the President.

FFF:JGR:aea 5/13/85
cc: FFFielding/JGRoberts/Subj/Chron

THE WHITE HOUSE

WASHINGTON

May 13, 1985

MEMORANDUM FOR DAVID L. CHEW
STAFF SECRETARY

FROM: FRED F. FIELDING
COUNSEL TO THE PRESIDENT

SUBJECT: The Berne Convention for the Protection
of Literary and Artistic Works

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FFF:JGR:aea 5/13/85
cc: FFFielding/JGRoberts/Subj/Chron

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1 / 1Name of Correspondent: Dave Chew☐ MI Mail Report

User Codes: (A) _____ (B) _____ (C) _____

Subject: The Berne Convention for the Protection
of Literary and Artistic Works

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
<u>CUHALL</u>	ORIGINATOR	<u>85,05,10</u>			<u>1 / 1</u>
<u>CUAT 18</u>	Referral Note: <u>D</u>	<u>85,05,10</u>		<u>S</u>	<u>85,05,13</u>
	Referral Note:				<u>COB</u>
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				
		<u>1 / 1</u>			<u>1 / 1</u>
	Referral Note:				

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
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WHITE HOUSE STAFFING MEMORANDUMDATE: 5/10/85 ACTION/CONCURRENCE/COMMENT DUE BY: c.o.b. 5/13/85SUBJECT: The Berne Convention for the Protection of Literary and Artistic Works

	ACTION FYI			ACTION FYI	
VICE PRESIDENT	☐	☒	LACY	☐	☐
REGAN	☐	☒	McFARLANE	☒	☐
STOCKMAN	☒	☐	OGLESBY	☒	☐
BUCHANAN	☐	☐	ROLLINS	☐	☐
CHAVEZ	☐	☐	RYAN	☐	☐
CHEW	☐	☒	SPEAKES	☐	☐
DANIELS	☐	☐	SPRINKEL	☐	☐
FIELDING	☒	☐	SVAHN	☒	☐
FRIEDERSDORF	☒	☐	TUTTLE	☐	☐
HENKEL	☐	☐	_____	☐	☐
HICKEY	☐	☐	_____	☐	☐
HICKS	☐	☐	_____	☐	☐
KINGON	☐	☐	_____	☐	☐

REMARKS:

Please provide any recommendations/changes to my office by
c.o.b. Monday, May 13th.

RESPONSE:

1985 MAY 10 PM 4:32

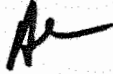
David L. Chew
Staff Secretary
Ext. 3702

THE WHITE HOUSE

WASHINGTON

May 6, 1985

MEMORANDUM FOR THE PRESIDENT

FROM: ALFRED H. KINGON 
CABINET SECRETARY

SUBJECT: The Berne Convention for the Protection of
Literary and Artistic Works

In the attached memorandum, Secretary Baldrige asks for your endorsement of the Cabinet Council on Commerce and Trade's recommendation that the United States adhere to the Berne Convention for the Protection of Literary and Artistic Works. The Cabinet Council recommended adherence in its last meeting of February 13, 1985. You may indicate your preference by initialing page four of the Secretary's memorandum.

The Berne Convention for the Protection of Literary and Artistic Works is the oldest and most important multilateral copyright treaty. The Convention's members pledge to maintain high levels of protection for the rights of authors in their literary and artistic works. The Convention's protected works range from books, motion pictures, and music to new technological works including audio and video cassettes, and computer software.

Presently, the United States, the Soviet Union, and China are the only major countries that are not members of the Berne Convention. U.S. laws are now governed by the Universal Copyright Convention, an agreement administered by the United Nations Educational, Scientific, and Cultural Organization. The U.S. did not join the Berne Convention as our copyright laws did not conform with Berne's level and length of copyright protection. The 1976 Copyright Act and, to a lesser degree, subsequent legislation moved us significantly toward conformity with the Berne Convention's standards.

Upon adherence to the Berne Convention, the United States will enjoy participation in a better and stronger vehicle to manage modern intellectual property matters. This will enable our trade and intellectual property officials to negotiate from a stronger base when seeking to address trade problems involving artistic and intellectual works.

The Motion Picture Association of America strongly endorses our adherence as it will provide improved protection for foreign uses of their films. Objections to adherence could arise from the copyright user community -- librarians, educators (in spite of their present support for adherence), cable television operators, and other groups that advocate expanding copyright exemptions.

If you approve, the Departments of Commerce and State will prepare the implementing legislation and the necessary documents for your signature.

9
A. King

1202310



THE SECRETARY OF COMMERCE
Washington, D.C. 20230

MAY 1 1985

MEMORANDUM FOR THE PRESIDENT

SUBJECT: The Berne Convention for the Protection of
Literary and Artistic Works

I am writing to ask that you endorse the recommendation of the Cabinet Council on Commerce and Trade that the United States should adhere to the Berne Convention for the Protection of Literary and Artistic Works. To implement this decision, it will be necessary for the Department of Commerce in conjunction with the Department of State to work with the Copyright Office, the leadership of the appropriate Congressional committees, and the private sector to encourage broad support for adherence and to secure agreement on any necessary implementing legislation. The Department of Commerce will prepare and submit any implementing legislation. The Department of State will prepare the necessary documents for your signature seeking the advice and consent of the Senate.

The Berne Convention for the Protection of Literary and Artistic Works, administered by the World Intellectual Property Organization (WIPO), is the oldest and most important multilateral copyright treaty. The Convention's members pledge to maintain high levels of protection for the rights of authors in their literary and artistic works. The range of protected works is broad, going from conventional works -- such as books, motion pictures, and music -- to new technological works including audio and video cassettes, and computer-related works. The Convention contains detailed provisions that specify minimum levels of protection to be provided by member countries. The United States, the Soviet Union, and China are the only major countries that are not members of the Berne Convention.

At present, United States international copyright relations are governed largely by the Universal Copyright Convention (UCC), a multilateral agreement administered by the United Nations Educational, Scientific and Cultural Organization (UNESCO). The UCC was negotiated in the early 1950's, principally to bring the United States into the international copyright community. It contains provisions that were specifically tailored to permit the United States to maintain its rather unique system of copyright. The UCC was intended to be a bridge that would permit the United States to bring order to its international copyright relations

and to give the United States time to revise its own copyright law. As the United States withdrew from UNESCO at the end of 1984, the United States is no longer able to participate in the UNESCO General Conference review and approval of the UCC program and budget. Withdrawal has not affected our membership in the UCC.

A number of benefits will accrue to the United States upon adherence to the Berne Convention.

- The World Intellectual Property Organization (WIPO), a specialized United Nations agency dealing only with intellectual property matters, is better equipped than UNESCO to deal with modern intellectual property matters;
- As the importance of trade in products embodying or based upon intellectual properties continues to increase, the importance of maintaining effective levels of international protection for U.S. producers and creators of these properties will also continue to increase;
- Adherence to the Berne Convention will enable U.S. trade and intellectual property officials to negotiate from a stronger base when seeking to address trade problems involving intellectual property and when representing the United States in international copyright meetings; and
- Our full participation in the governing body of the Berne Convention will put us in a better position to deal effectively with strengthening the international copyright system.

The Motion Picture Association of America strongly endorses Berne adherence because of the Association's conviction that the Convention is important to improve international protection for foreign uses of their films. Copyright users, as represented by educators, also support the concept of Berne adherence.

Objections to Berne Convention adherence could arise in the copyright user community -- librarians, educators (in spite of their present support for adherence), cable television operators, and other groups that advocate expansive application of private copying exemptions -- if they perceive that adherence would require higher levels of domestic copyright protection. Opposition could also develop in the printing industry if Berne Convention adherence becomes linked to the planned elimination of the requirement for domestic manufacture of works by American authors preponderantly in the English language.

In 1976, a comprehensive revision brought U.S. copyright law very nearly in line with the requirements of the Berne Convention.

However, some adjustments remain to be made in the U.S. copyright law to bring it into full compliance with the Berne Convention. ✓

The exact scope of these changes is not yet fully determined, but they are being studied by a private sector ad hoc group of prominent copyright experts from both proprietors and users of copyrighted works. Representatives of the Department of State, the Department of Commerce, and the Copyright Office are monitoring closely the progress of the group of experts.

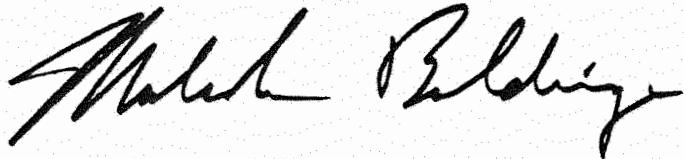
Some features of the legislation needed to conform U.S. copyright law to the requirements of the Berne Convention might raise concerns in other U.S. copyright interest groups.

1. Librarians, educators, and reprint publishers rely on registration records, or the lack of a copyright notice or the date in the copyright notice to determine if a work is in the public domain. Although preliminary discussions indicate that there would be no opposition in this area, they may oppose making the use of the copyright formalities of notice, registration and recordation completely voluntary or providing non-copyright incentives for their use. However, under the present law, the value of the copyright notice as an indicator of protection or ownership has been substantially reduced, since all works are protected irrespective of their marking with a copyright notice. In most cases, the term of copyright expires 50 years after the author's death, not from a fixed period from the date in the copyright notice. Also, a copyright registration and recordation system could be maintained as a voluntary system or with non-copyright incentives to provide additional information about the copyright status of particular works.
2. Changes may be needed with respect to certain compulsory licenses in the U.S. copyright law. In particular, some European copyright experts believe that the compulsory license for the public performance of copyrighted music on jukeboxes will need modification. If this compulsory license must be eliminated in favor of rate setting in the private market, jukebox operators will oppose this legislation. However, the Administration as well as music composers, publishers, performing rights societies, and the American Bar Association are on record as being opposed to this compulsory license.
3. The Berne Convention requires the recognition of "moral rights" of authors -- generally, the right to claim authorship in the work and to object to actions that would prejudice the author's honor or reputation. Since the scope ✓

of its application is undefined, there may be sources of support for and opposition to "moral rights" from groups that cannot be identified at this time.

These three possible areas of contention only emphasize the need to consolidate the present private sector support for adherence to the Berne Convention. 7

On balance, the Cabinet Council on Commerce and Trade concluded that adherence to the Berne Convention is important to the United States posture in the emerging worldwide information economy and authorized me as its Chairman pro tempore to seek your endorsement of its decision.



Secretary of Commerce

Approve: _____

Disapprove: _____