Negative: Berne Convention

By “Coach Vance” Trefethen

AFF plan has the US do mysterious and undefined reforms to the Berne Convention, which it cannot do because it's a treaty with dozens of countries worldwide. Many of these countries are not in Europe, so the plan is extra-topical. Or, in the alternative, the US withdraws from the Convention. The Berne Convention defines the terms of copyright protection for works of art, music, and literature that reaches across international boundaries, so that things published in one country are also protected by copyright in the other countries. Since we don't know what AFF is concerned about, we don't know what exact arguments to run against it, but we're taking our best guesses here. AFF appears to be concerned that Intellectual Property (IP) and Intellectual Property Rights (IPR) are not sufficiently protected in the Status Quo, hence we argue in this brief that it is not important and adequately protected in SQ.

Negative: Berne Convention 3

TOPICALITY 3

1. Hugely Extra Topical - goes way beyond Europe 3

Link: Berne Convention involves lots of countries not in Europe. Almost every country in the world is in it 3

Violation: Exceeds scope of the resolution 3

Impact: Abuse justifies a Negative ballot 3

2. Not "Resolved" 3

Link: "Resolved" is the first word in the resolution. "Resolve" is defined as: 3

Violation: Affirmative hasn't reached a firm decision yet 3

Impact: Abusive to the Negative 3

HARMS / SIGNIFICANCE 4

1. Berne doesn't restrict 4

No U.S. copyright protections are expanded nor reduced by the Berne Convention itself 4

INHERENCY - Status Quo solves 4

1. TRIPS already updated Berne 4

TRIPS updated Berne with higher IP protection rules 4

2. Berne allows national amendments to copyright law (no need to withdraw) 4

Countries that are members of Berne can update their own national copyright laws. Example: China has done it 3 times 4

US can change its own copyright laws too, even while in Berne and even if the WTO doesn't like it. Example: Section 110(5) of the US Copyright Act 5

SOLVENCY 5

1. Berne is no longer the controlling international law 5

The TRIPS Agreement, run by the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO, run by the UN) are running things now 5

DISADVANTAGES - of increasing protection of Intellectual Property Rights (IPR) 5

1. Impedes technological progress because it reduces competition 5

Link: IPR grants government-enforced monopolies that reduce competition, which reduces innovation 5

Impact: Loss of value to society. We miss out on new inventions and opportunities when competition and innovation are stifled 6

2. Hypocrisy and Ridiculous Results 6

Link: If you think IP protection is a good idea that promotes innovation and violators should be prosecuted, get ready for handcuffs. 6

Impact: Affirmative ballot = hypocrisy 6

A/T “IPR is good because the Founders put it in the Constitution and America prospered” – Bad reasoning. 6

3. Injustice outweighs benefits 7

Injustice of IPR telling someone they can’t do what they want with their own property (like copy an idea with their own paper and ink) outweighs any economic benefit 7

Negative: Berne Convention

TOPICALITY

1. Hugely Extra Topical - goes way beyond Europe

Link: Berne Convention involves lots of countries not in Europe. Almost every country in the world is in it

Hugh L. Stephens 2022 (Distinguished Fellow at Asia Pacific Foundation of Canada, Vice Chair of Canadian Committee on Pacific Economic Cooperation) 11 July 2022 Copyright’s International Conventions: The Importance of Membership-Part 1 (The United States and the Berne Convention) (accessed 23 Mar 2023) https://hughstephensblog.net/2022/07/11/copyrights-international-conventions-the-importance-of-membership-part-1-the-united-states-and-the-berne-convention/

By the time the US eventually joined Berne in 1989, the Convention had 120 member states. Today, the total is 180 out of the 195 (more or less) sovereign states that exist today.

Violation: Exceeds scope of the resolution

Debate resolutions exist for the express purpose of limiting the topics of debate. We're supposed to be debating no more and no less than one or more countries in Europe. When AFF offers a resolution to change policy towards virtually every country in the world, they are simply ignoring the resolution and debating whatever they want instead of respecting the resolution they agreed to uphold.

The only way AFF could withdraw or reform the Berne Convention and stay topical is if they could somehow change the rules for the Berne Convention members that are in Europe and leave all the rest alone. That's simply impossible.

Impact: Abuse justifies a Negative ballot

Once you open the door to AFF cases that can affirm policies toward all countries, you open the resolution to pretty much anything. This is abusive because Negatives cannot research against all cases on all US foreign policies affecting the entire world. Please teach the Affirmative team not to do this by casting a Negative ballot to incentivize them to write a better Affirmative case next time that respects the resolution and the Negative team.

2. Not "Resolved"

 Link: "Resolved" is the first word in the resolution. "Resolve" is defined as:

Merriam Webster Online Dictionary copyright 2023. https://www.merriam-webster.com/dictionary/resolved

"2: to reach a firm decision about"

Violation: Affirmative hasn't reached a firm decision yet

They tell you they will either reform Berne or withdraw from it. Until they know what they're doing, they're not resolved.

Impact: Abusive to the Negative

Are we supposed to be debating against withdrawal from Berne? Or are we supposed to be debating about reforming Berne? And what specific reforms will be enacted if this Plan takes effect? There's no way to debate this in any way that's fair to us as the Negative team because we can't figure out what we're supposed to be debating. That's another reason resolutions have words in them that restrict the debate. Lack of Resolve justifies a Negative ballot because the Affirmative team isn't affirming it and we can't debate it fairly.

HARMS / SIGNIFICANCE

1. Berne doesn't restrict

No U.S. copyright protections are expanded nor reduced by the Berne Convention itself

Law Prof. Peter Yu 2022 (Professor of Law and Communication and Director, Center for Law and Intellectual Property, Texas A&M University) "Marshalling Copyright Knowledge to Understand Four Decades of Berne," IP Theory: Vol. 12: Iss. 1, Article 4 (accessed 23 Mar 2023) (ellipses in original) https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1066&context=ipt

Itar-Tass Russian News Agency v. Russian Kurier, Inc. involved the unauthorized republication by a weekly Russian-language newspaper in New York of news articles that Itar-Tass Russian News Agency and several Russian newspaper publishers had originally published in Russia. Filed in April 1995, a month after the Berne Convention took effect in Russia, the case was eventually appealed to the United States Court of Appeals for the Second Circuit. Itar-Tass, which continues to be taught in U.S. law schools, reminded us that the Berne Convention is not self-executing in the United States. Section 4(a)(3) of the Berne Convention Implementation Act of 1988, which was codified in section 104(c) of the U.S. Copyright Act, states explicitly the following:
No right or interest in a work eligible for protection under this title may be claimed by virtue of . . . the provisions of the Berne Convention . . . . Any rights in a work eligible for protection under this title that derive from this title . . . shall not be expanded or reduced by virtue of . . . the provisions of the Berne Convention . . . .

INHERENCY - Status Quo solves

1. TRIPS already updated Berne

TRIPS updated Berne with higher IP protection rules

Sean Williams 2012 (Executive Editor, University of Pennsylvania Journal of International Law. J.D. Candidate, 2012, University of Pennsylvania Law School) Univ. of Penn. Journal of International Law, April 2012 "CLOSING IN ON THE LIGHT AT WIPO: MOVEMENT TOWARDS A COPYRIGHT TREATY FOR VISUALLY IMPAIRED PERSONS AND INTELLECTUAL PROPERTY MOVEMENTS" (accessed 23 Mar 2023) https://www.law.upenn.edu/live/files/976-williams33upajintll10352012pdf

Some have characterized the World Trade Organization’s (“WTO”) Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”), which addresses the convergence of IP and trade, as an attempt to safeguard against developing countries that are advocating for a more flexible international IP law framework. Consequently, any country wishing to join the WTO must comply with TRIPS. To maintain strong intellectual property rights, TRIPS incorporated the Berne Convention’s existing copyright protections. Furthermore, it has been interpreted to allow countries to negotiate bilateral agreements mandating stronger IP protection than TRIPS’s already firm requirements (TRIPS-plus). Developed countries have exploited TRIPS-plus to pressure developing countries into adopting heightened IP protection, even where developing countries’ interests might otherwise be best served under more flexible IP regimes.

2. Berne allows national amendments to copyright law (no need to withdraw)

Countries that are members of Berne can update their own national copyright laws. Example: China has done it 3 times

Law Prof. Peter Yu 2022 (Professor of Law and Communication and Director, Center for Law and Intellectual Property, Texas A&M University) "Marshalling Copyright Knowledge to Understand Four Decades of Berne," IP Theory: Vol. 12: Iss. 1, Article 4 (accessed 23 Mar 2023) (ellipses in original) https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1066&context=ipt

Since its accession to the Berne Convention, China has amended its copyright law three times. The first amendment took place in October 2001, 20 two months before China became the 143rd member of the World Trade Organization (WTO). 21 This amendment brought Chinese copyright law into conformity with the Agreement on Trade-Related Aspects of Intellectual Property Rights 22 (“TRIPS Agreement”).

US can change its own copyright laws too, even while in Berne and even if the WTO doesn't like it. Example: Section 110(5) of the US Copyright Act

Law Prof. Peter Yu 2022 (Professor of Law and Communication and Director, Center for Law and Intellectual Property, Texas A&M University) "Marshalling Copyright Knowledge to Understand Four Decades of Berne," IP Theory: Vol. 12: Iss. 1, Article 4 (accessed 23 Mar 2023) https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1066&context=ipt

Thus far, the WTO Dispute Settlement Body has had only one opportunity to determine whether a copyright limitation or exception passes the three-step test. In January 1999, Ireland and other members of the European Union filed a WTO complaint challenging section 110(5) of the U.S. Copyright Act, which includes an exception for using homestyle equipment to play copyrighted music without compensating copyright holders and a business exception that enables restaurants and small establishments to do the same. Although the WTO panel eventually found the business exception inconsistent with the TRIPS Agreement, Congress declined to bring the law in conformity with the Agreement. Today, section 110(5)(b), which codified that exception, remains intact despite the WTO panel’s negative finding.

SOLVENCY

1. Berne is no longer the controlling international law

The TRIPS Agreement, run by the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO, run by the UN) are running things now

Law Prof. Peter Yu 2022 (Professor of Law and Communication and Director, Center for Law and Intellectual Property, Texas A&M University) "Marshalling Copyright Knowledge to Understand Four Decades of Berne," IP Theory: Vol. 12: Iss. 1, Article 4 (accessed 23 Mar 2023) (brackets in original) https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1066&context=ipt

Incorporated by reference into the TRIPS Agreement are Articles 1 to 21 of the Berne Convention and its appendix. Because of this arrangement, the Berne norms no longer evolve solely within the intellectual property forum. Instead, changes brought about by the WTO—in particular, its mandatory dispute settlement process—are just as important. As Laurence Helfer observed, “[w]hat began as a regime with a single intergovernmental organization—WIPO—then became a bimodal regime with two predominant organizations—the WTO and WIPO.”

DISADVANTAGES - of increasing protection of Intellectual Property Rights (IPR)

1. Impedes technological progress because it reduces competition

Link: IPR grants government-enforced monopolies that reduce competition, which reduces innovation

Jeff Spross 2018 (economics correspondent for THE WEEK) 3 Apr 2018 “Why intellectual property laws aren't worth defending” <https://theweek.com/articles/764074/why-intellectual-property-laws-arent-worth-defending> (accessed 9 June 2021)

On the one hand, IP laws are supposed to incentivize innovation by making sure creators are rewarded for their creativity. On the other, all IP rights are government-enforced monopolies: In exchange for inventing something, the inventor is granted a license that says they're the only person allowed to sell it. But competition is supposed to be capitalism's mechanism for spreading innovations, perfecting them, and ultimately making them affordable. Paradoxically, IP laws promote innovation by creating monopolies that threaten competition.

Impact: Loss of value to society. We miss out on new inventions and opportunities when competition and innovation are stifled

Sen. Amy Klobuchar 2021 (D-Minn.) 15 Dec 2021 [“Monopoly Power Threatens to Choke Off Innovation”: Klobuchar Highlights Need for Updated Antitrust Laws at Hearing on Impact of Competition on Innovation](https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E8ACA5F9-43F5-4B5A-910D-C323BB285E03) (accessed 23 Mar 2023) https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=E8ACA5F9-43F5-4B5A-910D-C323BB285E03

Looking back at our history, it’s always been innovation that has fueled the American economy. From the railroads and the telegraph to smartphones and the internet, America would not be where it is today without innovations, and strong, competitive policy and laws on the book. But the innovation that is vital to our American economy cannot thrive without open, competitive markets, because it’s competition that pressures manufacturers to invest in research and development — to constantly innovate, to improve their products and introduce new products to compete.

2. Hypocrisy and Ridiculous Results

Link: If you think IP protection is a good idea that promotes innovation and violators should be prosecuted, get ready for handcuffs.

**For example, if you own a home computer that might be able to copy digital files or have ever taken a photo that had a Ford car in it, you could be in trouble**

Stephan Kinsella 2010 (attorney in Houston, director of the [Center for the Study of Innovative Freedom](http://c4sif.org/) ) 23 Nov 2010 Ideas Are Free: The Case Against Intellectual Property <https://mises.org/library/ideas-are-free-case-against-intellectual-property> (accessed 9 June 2021) (brackets in original)

Ford Motor Company has attacked Ford enthusiasts, claiming that they hold those rights to any image of a Ford vehicle, even if it is a picture that you took of your own car. The NFL has prohibited churches from holding Superbowl parties on TV sets larger than 55 inches. And, of course, there are recent extensions of copyright such as the [Digital Millennium Copyright Act](http://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act), or DMCA, which criminalizes even the mere possession of technology that can be used to circumvent digital-protection systems.

**END QUOTE. And here’s another one from later in the same article. QUOTE:**A court has said the University of Southern California is the only one who can use "USC." Sorry, University of South Carolina [laughter].

Impact: Affirmative ballot = hypocrisy

If you vote to expand and enforce a law that you yourself have violated and intend to keep on violating, you have a problem that ought to bother your conscience. If you’ve ever taken a picture that had a Ford car in it, you’re an IP violator. If you’ve ever referred to the Univ. of South Carolina as “USC,” you’ve disrespected Intellectual Property Rights. And even if you’ve never done it, if your home computer is capable of violating the DMCA, you’re a criminal. If you vote Affirmative, you will be voting to punish people for doing exactly what you have done and intend to keep on doing.

A/T “IPR is good because the Founders put it in the Constitution and America prospered” – Bad reasoning.

Stephan Kinsella 2010 (attorney in Houston, director of the [Center for the Study of Innovative Freedom](http://c4sif.org/) ) 23 Nov 2010 Ideas Are Free: The Case Against Intellectual Property <https://mises.org/library/ideas-are-free-case-against-intellectual-property> (accessed 9 June 2021) (brackets in original)

Now the founders may be forgiven for their hubris and assumptions, but not today's econometricians. The evidence is against them, but like the left-liberal do-gooders of Thomas Sowell's [The Vision of the Anointed](http://books.google.ca/books?id=ISTtFtcIkKAC) — the "[Humanitarians with a Guillotine](http://mises.org/daily/2739)" — they persevere in claiming IP law generates net wealth without a shred of proof. Some claim that the success of the United States shows that IP law generates wealth. They forget that correlation is not causation. If they're right, we can also attribute Western prosperity to the income tax, antitrust laws, and war. So I guess we should export these policies to other nations, too. Oh, wait.

3. Injustice outweighs benefits

Injustice of IPR telling someone they can’t do what they want with their own property (like copy an idea with their own paper and ink) outweighs any economic benefit

Prof. Stephan Kinsella 2013 (South Texas College of Law, Houston) Jan 2013 “The Case Against Intellectual Property” <https://www.researchgate.net/publication/278637139_The_Case_Against_Intellectual_Property> (accessed 9 June 2021)

