

MEMORANDUM

To: Ron Haron
From: Chris Burton
Date: July 31, 1998
Re: Effect of JFK Act on Copyright Interests

Between 1993 and 1995, the Department of Justice prepared three legal memoranda discussing the apparent conflict between the protections of copyright law and the JFK Act's requirement that NARA make available to the public copies of assassination materials held in the JFK Collection. In each of these memoranda, the author agreed that, based on section 11(a) of the JFK Act, the Act supersedes copyright law, and therefore its requirement that NARA make and distribute copies of assassination materials is valid. The primary area of disagreement is the legal effect of that conclusion.

The first memorandum, dated September 1, 1993, was prepared by Walter Dellinger, Acting Assistant Attorney General, Office of Legal Counsel. In that document, Mr. Dellinger concluded that although NARA was bound by the JFK Act's requirement that it make and distribute copies of assassination materials, the government could still be held liable for infringement of copyright. Citing the possibility that damages for such infringement could be quite substantial, he advised NARA to seek indemnification from anyone wishing to obtain copies of copyrighted assassination materials.

The second memorandum, dated September 7, 1993, was prepared by Frank W. Unger, Assistant Attorney General, Civil Division. Mr. Unger concluded that in any copyright infringement action, the United States could successfully defend itself by using the "fair use" doctrine. Based on statutory language and precedent, Mr. Unger concluded that the United States would be likely to prevail in asserting the "fair use" defense. Furthermore, Mr. Unger pointed out that whereas copyright infringement by a private party is a tortious act, such conduct by the government is lawful, subject only to the obligation to pay reasonable compensation. Since the government would not be responsible for subsequent infringements committed by those who obtain materials from NARA, government liability for copyright infringement would probably not be substantial.

In light of Mr. Unger's discussion, Mr. Dellinger issued the third memorandum, dated October 17, 1995. In that document, Mr. Dellinger repeated the conclusion that the JFK Act supersedes copyright law. On the issue of possible liability for copyright infringement, Mr. Dellinger offered no conclusion, merely stating that "such determinations generally are made upon a case-by-case basis."

Since the memoranda discussed above have left the issue of liability without a clear resolution, the language of the proposed agreement with the Sixth Floor museum seems appropriate.

Although the JFK Act does not extinguish any private copyright interests in assassination materials, protection of such interests must be consistent with the Act. The language of the proposed agreement recognizes the supremacy of the JFK Act, while allowing the owners of the materials to receive whatever legal protection is available.