Pirate Thy Neighbor*

The Protectionist Roots of International Copyright Recognition in the United States

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Abstract

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1 Introduction

Between the late 19th century and mid-20th century, it was the policy of the United States to ignore copyrights of foreign authors, which enabled a domestic publishing industry–expressly built upon the piracy of foreign works–to flourish. In sharp contrast, the United States in the 21st century leads the charge in pushing nations around the world to adhere to stricter standards of copyright protection and enforcement, largely to protect its own significant outflows of cultural material. How does a nation go from top pirate to top global policeman of culture? **Why did it take until 1988 for the United States to join the (1886) Berne Convention and recognize foreign copyrights to the same extent as U.S.-based ones?**

This paper examines the incentives faced by the domestic book publishing industry in the United States from 1790 to the present and presents a game theoretic model of how American publishers' optimal strategies changed from balking at calls for international copyright enforcement to actively leading the crusade as their own market positions changed. For a time, domestic producers were able to coordinate and enforce their own implicit (and at times explicit) cartel over republishing foreign works, until price-fixing collapsed into "ruinous" price wars. An industry that was famed for balking at international copyright throughout the 19th century, suddenly became its greatest champions in the 1890s, but tipped the scales of the law in its favor, carving out protectionist loopholes to protect the domestic industry while claiming to legitimately respect foreign copyright. This continued until the late 1980s, as America grew into a net cultural exporter, and finally integrated a harmonized international copyright regime into trade negotiations.

The traditional analysis of copyright (and other intellectual property laws, such as patents, in general) recognizes that governments enact laws to stimulate an incentive for authors and inventors to create expressive works and inventions. The high fixed costs of investing significant time, money, and effort into producing original works, and the low marginal costs of publishing and distributing the works to additional people once discovered causes these goods to exhibit "public goods" characteristics (Arrow 1962; Nordhaus 1969). The author or inventor cannot appropriate much of the social surplus created by the new work, particularly if other rival producers can copy and distribute the work at the low marginal cost (rivals have no fixed costs of initial discovery to recover).[1] Thus, to the extent that financial gain or at least avoiding signficant financial loss is a motivation, authors and inventors may lack incentives to undertake the effort without a significant chance to at least recover their fixed costs. Copyright and patent laws, however, grant the author or inventor a temporary monopoly over publishing their works, along with the legal privilege of prosecuting infringers at their discretion. As monopoly power burdens consumers (with higher prices and fewer choices) and downstream producers (who cannot easily build off of protected works), intellectual property

[1] 21th century technology also raises the risk of *consumers* acquiring and consuming works without payment or authorization. Both the rival producer and the consumer's activities that prevent the initial producer from appropriating *any* of their generated surplus may be termed "piracy."

laws also produce significant social costs. Thus, economists and lawyers have always approached intellectual property rights as a utilitarian tradeoff between incentive and access to be balanced by carefully calibrated laws (Besen and Raskind 1991; Landes and Posner 2003).

Beyond the tradeoff between incentives and access, there are also significant political economy considerations, as interested parties often influence laws to create and maintain rents (Lessig 2004; Boldrin and Levine 2008; Bell 2014; Kinsella 2008; Patry 1996). As the pioneering work of Plant (1934, 31) best summarizes, so-called intellectual property rights are peculiar because unlike property rights in physical goods, they are not a *consequence* of scarcity, they are a *deliberate creation* of scarcity by a legislature.

Debates over intellectual property rights often hinge on whether said legal concepts are deserving of the moniker "property rights" (Mosoff 2013). Copyrights and patents over ethereal concepts like ideas might be analogized to true property rights over real and moveable property, or the language of property rights may simply be a marketing coup for a political privilege established by rent-seeking (Boldrin and Levine 2008; Kinsella 2008; Heller 1997). Regardless of one's normative view of intellectual property, it is in the interest of authors, inventors, and publishers to create rules that serve functions analogous to classic property rights, whether or not they may be formally recognized.

In general, "ideas" (artistic or inventive) exist as a common resource to be managed (Hess and Ostrom 2007). Hardin (1968) reminds us that a common resource will tend to be overexploited in the "tragedy of the commons" as each user faces a personal incentive to extract as much of the resource as possible before others do likewise, since no user can exclude another. Demsetz (1969) demonstrates the classic example of how entrepreneurs will enclose a commons with property rights when the benefit of internalizing the value of the resource exceeds the cost of "propertization." With private property rights, individuals face a stronger incentive to better manage the value of resources than if they lie in common. However, we cannot ignore the costs of implementing a (sub-optimal) property regime. Improperly-designed property rights may symmetrically produce a "tragedy of the anti-commons," where gains from exchange are blocked if bargaining with multiple parties (who each retain veto-power and an incentive to "holdout" for a larger share of the surplus) breaks down (Heller 1997; Buchanan and Yoon 2000). Both tragedies may be avoided by discovering specific rules under shared collective institutions that manage the commons effectively, neither resembling pure market exchanges of property rights, nor pure government fiat [Ostrom (1990)}. In some circumstances, such as the case of the free online encyclopedia Wikipedia (Safner 2017), communities may find methods to manage a common resource without the formal establishment and market exchange of property rights.

Research on this subject is largely an interdisciplinary effort, and as such, this paper engages several literatures. Several groups of scholars have researched and commented on this key historical period of copyright development in the U.S. Legal scholars have attempted to locate the modern tradition of international copyright lawmaking in

this period, and sternly note the anomaly of the U.S.' refusal to participate in the process @[Henn1953, Ringer1968]. Historians have attempted to trace the continuous intellectual history of copyright through to this period. Patterson (1968a) provides the most comprehensive overview of copyright's development from English monopoly origins. Clark (1960) notably traces the evolution of the American push for international copyright in the 19th century. A number of economists have also noted the political economy aspects of IP laws, though they mention the history of copyright and its international aspect in passing (Landes and Posner 2003; Boldrin and Levine 2008; Bell 2014; Khan and Sokoloff 2001; Khan 2005; Dourado and Tabarrok 2015). Khan (2005) is most sensitive to the idiosyncratic and endogenous component of copyright history, primarily to distinguish the unique and superior American system of IP from that of European systems. However, her analysis somewhat downplays the role of political economy in favor of focusing on how policymakers judiciously optimize national policy. While policymakers play a role, history demonstrates that most key legal and political developments coincide with changes in the market conditions of the publishing industries. Khan (2004) examines the welfare effects of U.S. international copyright piracy in the 19th century and finds significant surpluses generated for American authors, publishers, and consumers.

This paper aims to provide an analytic narrative (Bates et al. 1998) to describe the evolution of the incentives of strategically-interacting publishers in establishing different methods of managing the common resource of publishing books from the same stock of *foreign* ideas. Publishers across different countries and time periods have used different strategies to protect their publications aside from pure market competition, including influencing political and legal processes. By tracing the evolution of the book market in the early United States, we can elucidate its relationship to the legal evolution of international copyright law.

Since the founding of the United States throughout the 19th century, much of the literature read and published for American citizens consisted of foreign, primarily British, works. Much to the chagrin of British authors and publishers (and a few rising American authors), the bread and butter of the American publishing industry was publishing cheap knock offs of famous British works. The fixed stock of classic British authors and works to be republished in America–e.g. Charles Dickens, Sir Walter Scott, William Shakespeare–presented a common resource for American publishers, who recognized they could collectively benefit by establishing a system to limit excessive depletion of this profitable resource. Established American publishing houses created and enforced norms known as "trade courtesy," that allowed them to divide up pseudo-property rights over the publication of specific foreign authors or works (again, without the consent of the latter parties). This system managed the common resource to maximize shared industry profits until some new publishers entered the industry and outcompeted the cartel of established publishers by republishing the "claimed" (and republished) works at lower prices. Eventually, combined with the rising author class in the United States calling for international copyrights, the incentives of American publishers shifted as they could realize more value by respecting foreign copyrights in return for international respect of their own American

authors protection than if they continued unauthorized republication.

I model the evolution of strategies as a simple game-theoretic relationship between American publishers competing over use of existing authors' works. Publishers can choose to publish an author's works or to republish existing works by their competitors without authorization ("pirate"). Publishers can easily enter the market by pirating existing works, but once they become dominant players, their profit-maximizing strategy switches to seeking methods to protect their existing works. Changes in the value of their works caused by market and institutional conditions impel publishers to seek to strengthen their "property rights" to those works through pushing for international copyright agreements.

In the following section, I create a simple model of a strategic interaction between two publishers to investigate the dynamics of how the interests of publishers evolve through time. I then use the history of the book publishing industry in the United States to demonstrate the dynamics of how international copyright agreements emerge in response to changes in market conditions of domestic publishing industries. I finally draw implications from this narrative that impact the movement for global harmonization and strengthening of intellectual property laws in the present.

2 Theoretical Model

Consider a sequential game with perfect information played between two representative publishers, Publisher 1 and Publisher 2. There are two representative authors, Author A and Author B, who each write original works and are otherwise passive in the game. Each publisher can choose to publish either the work of Author A or Author B.

2.1 Assumptions

I make the following five assumptions about the market for tractability with no major loss of generality:

- **Assumption 1**: *The "narrow" market for each author's book is "winner-take-all," but not the "wider" market for all books.*

Researchers and cultural commentators frequently discuss media, sports, and CEOs as prime examples of "winner-take-all-markets" where several "superstars" account for an overwhelming amount of sales or profits compared to the "long tail" of everyone else in the industry (see e.g. Lazear and Rosen (1981); Rosen (1981); Frank and Cook (1996)). In the case of media such as books, with limited time and countless options to choose from, consumers often choose what they perceive to be the best (measured relative to other alternatives, rather than absolute ability or by marginal product). This, combined with the role of luck, often leads to a vast gulf in sales between the superstars at the top

and the average producer (let alone the marginal producer).

Although different books have different prices and may account for differing proportions of overall book market sales, these features play no major role in this model. Rather, the analytical focus in this model is on the dynamics between firms who sell identical products (i.e. piracy) at differing prices, hence, the assumption of winner-take-all *within* book markets simplifies the mechanics of the model, but is not necessary for analyzing *across* the wider market for *all* books. In other words, in the model there is only room for one firm to publish *each* author's book (based on cost differences), but there is room for multiple firms publishing *different* books (where cost is assumed to be identical, see Assumption 3).

- **Assumption 2**: *Each published work sells at a profit-maximizing market price, p_A, for Author A's work, and p_B for Author B's work.*[2]

These prices are a function of the respective market demand for the author's work. For example, if author A is a famous author such as Charles Dickens, and author B is an unknown local author, then market demand would dictate that $p_A > p_B$.

- **Assumption 3**: *There is a uniform sunk cost of publishing, c, for all original works.*

Admittedly, this assumption is motivated by parsimony. Even considering only ink and paper as variable costs per page, a publisher printing a complete Bible and printing a short story will face different costs. However, in his historical study of the American book industry, (**Sheehan?**) notes that "costs did not vary perceptibly from firm to firm and most retail prices made allowance only for a narrow margin of profit. Consequently, the announced price for any given class of books - novels, travel books, or collections of literary essays - varied little in the trade."

- **Assumption 4**: *The marginal cost of pirating is lower than the marginal cost of original production: $0 \leq \hat{c} < c$.*

Marginal publishing costs are aggregated to a single term, c. One of the primary reasons the pirate's cost is lower than the original publisher's is that the original publisher needs to recover fixed costs in addition to marginal costs, whereas the pirate, able to reap most of what the original publisher has already sown, need only incur the marginal cost of releasing an *additional* work. Rather than differentiate between different types of costs and add more variables, this relationship can be summarized as $\hat{c} < c$, where $\hat{c}$ is the marginal cost to the pirating publisher.

It is also assumed that $\hat{c} \geq 0$. Conventional wisdom suggests that it is easier to copy something than to create something original, hence the risk inherent in unprotected innovation. However, several researchers have argued the cost of *imitation* remains significant, and is certainly not zero. Mansfield, Schwartz, and Wagner (1981) estimates

[2] I also remove the possibility of quantity competition (and its effects on price via a downward-sloping demand curve) for tractability. Each publisher produces one unit only.

the imitation cost to competitors who reverse-engineer and imitate market-leaders in 48 different products is about 65% of the cost of the original innovation and 70% of the time it took the first-mover to come to market. Kealey (2014) argues that scientific research should not be considered a pure public good but a "contribution good" or club good, where only other specialists in the field can reasonably imitate a discovery (c.f. Kealey (1996); Kealey (2009) for an alternative economic theory of science in general.). This should not surprise economists familiar with Hayek (1945), who reminds us that knowledge relevant for economic action is often tacit, and can only come from experience and "rapid adaptation to the local circumstances of time and place."

In this model, the interaction is between publishers, who presumably have similar skill sets necessary for large scale production. Thus, all we can reasonably assume in the model is that $c' < c$, and it is unlikely that $c' = 0$.

- **Assumption 5**: A pirate sells the same work at a lower price than its original publisher: $\widehat{p}(\cdot) < p(\cdot)$

Following Assumptions 1-5, Bertrand-style price-competition between two sellers of an identical good with heterogeneous costs implies that the lower-cost seller captures the entire market by setting any price $\widehat{p} = c - \epsilon$ for arbitrary $\epsilon > 0$, where c is the marginal cost of the *higher-cost* seller.

The game proceeds as follows: Publisher 1 moves first and chooses which author to publish (A or B) and incurs sunk cost c. Publisher 2 moves last and, observing Publisher 1's choice, chooses whether to publish author A or B. If Publisher 2 chooses to publish a *different* author than Publisher 1, each publisher's respective payoffs are the price of the published work (p_A, p_B) minus the uniform marginal cost c. If Publisher 2 chooses to publish the *same* author as Publisher 1, then Publisher 2 is "pirating" and incurs a lower marginal cost $\widehat{c} < c$ and can charge a lower price ($\widehat{p}_A < p_A$ or $\widehat{p}_B < p_B$); thus, Publisher 2 earns a payoff of the "pirate price" minus the "pirate cost" and Publisher 1's payoff is losing their sunk cost $-c$.[3] Figure 1 depicts the game tree.

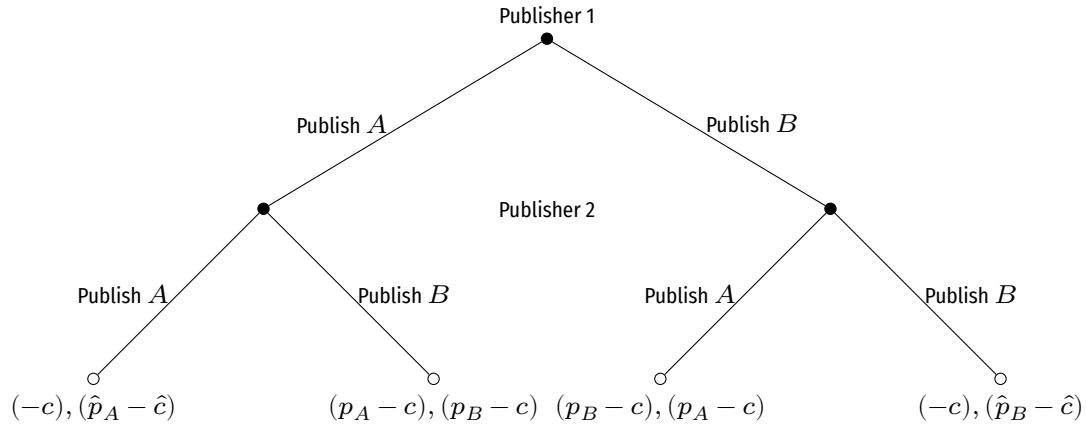

Figure 1: Publishing game between two domestic publishers

[3] I have abbreviated the payoff to Publisher 1, who is being pirated by Publisher 2, from $p_A - c$ or $p_B - c$ to just $-c$. Under Bertrand competition, I am assuming Publisher 1 is priced out of the market and makes no sales.

2.2 Nash Equilibrium in Pure Strategies

In a one-shot interaction, using backward induction, if Publisher 1 has chosen to publish A, Publisher 2 will choose to pirate (also publish A) when

$$\hat{c} < \hat{p}_A + p_B + c \tag{1}$$

Symmetrically, if Publisher 1 has chosen to publish B, Publisher 2 will choose to pirate (also publish B) when

$$\hat{c} < p_A + \hat{p}_B + c \tag{2}$$

The initial Publisher 1's choice then depends on the values of equations 1 and 2. These four logical possibilities are listed in columns 1 and 2 of Table 1, respectively.

If it is a dominant strategy for Publisher 2 to pirate Publisher 1 (i.e. equations 1 and 2 both are true), then Publisher 1 is faced with an identical decision to publish A or B to suffer $-c$, and is indifferent to publishing. We might interpret this as the Publisher considering exiting the market altogether due to the fear of rampant piracy.

If it is a dominant strategy for Publisher 2 to always publish a *different* author (i.e. do not pirate) from Publisher 1, (i.e. equations 1 and 2 both are false), then Publisher 1 faces the choice to publish A to earn $p_A - c$ or to publish B to earn $p_B - c$, and will choose to publish the more valuable author, A or B based on max$\{p_A, p_B\}$.

Lastly, if Publisher 2 has no dominant strategy to pirate or publish different authors, then the equilibrium depends on the relative prices of p_A and p_B.

Equation 1 (Pirating A profitable?)	Equation 2 (Pirating B profitable?)	Publisher 1	Publisher 2
True	True	Indifferent	Always pirates
False	True	Publishes A	Publishes B
True	False	Publishes B	Publishes A
False	False	Publishes higher-priced	Publishes lower-priced

Table 1: Possible Nash equilibria of the game

2.3 Institutionally-determined Parameters

The model parameters p_A, p_B, c, and c' that determine specific payoffs are each a function of the institutions and market conditions in the particular context of time and place. We might primarily interpret these as the legal

institutions in place, private agreements, changes in copying technologies, and changes in market demand.

Market demand primarily affects the relative prices of p_A and p_B. All else equal, an author that is already more famous, or works that are of sufficiently general interest, should command a higher relative price than lesser-known or more parochial works. If Publisher 1 never had to worry about the potential piracy of Publisher 2, under the assumptions of a common flat publishing cost, c, Publisher 1 would always publish the work with the higher market-clearing price. Publisher 2 would then be compelled to publish the alternative work of lesser value.

Relevant to this paper's narrative, A and B can represent any type of author, foreign or domestic. For developing countries that are net cultural importers (as the U.S. was before the 20th century), A and B in the model might be interpreted as foreign authors. Thus, while the *publishers* 1 and 2 might both be domestic, they are competing over (re)-publishing *foreign* authors for a domestic audience. As the country develops and becomes a net cultural exporter, A and B in the model might be interpreted as domestic authors who are being published in their home country. A key part of domestic publisher sales may then include sales in other countries, and as such, publishers begin to care more about protecting copyright in *other* countries to raise c' for publishers in foreign countries who might try to pirate the exporter's works in the importing countries. Thus, it is necessary (though analytically cumbersome) to consider a series of nested games like Figure ~1 both *within* a country and *across* countries, where publishers must consider pirating *foreign* authors or publications, and whether to infringe upon their own *domestic* rival publishers (or authors). The simple version in ~1 thus captures the key relationships and changes in institutional parameters even though it focuses at a domestic level.

Finally, the key dynamic of this model is that some parameters are endogenous to publishers' interactions. A key objective of Publisher 1 is to increase c' to Publisher 2 sufficiently to deter pirating of Publisher 1's chosen work. In the absence of any legal regime enforced by a third party (i.e. intellectual property rights), Publisher 1 is left to cajoling Publisher 2 to "stay in their lane," cultivating norms within the publishing trade, and explicit or implicit collusion. Alternatively, in a world of enforceable copyright, it is reasonable to assume that c' rises substantially due to the risk of apprehension, injunctions, and fines for willful infringement of copyrighted works. It would thus be in the economic interest of Publisher 1 to secure copyright to prevent Publisher 2 from pirating Publisher 1's publications.

Raising c' sufficiently captures the benefit of copyright to some publishers. In reality, there may be significant costs of lobbying to secure and maintaining copyright laws adequate to publishers' interests. Additionally, as referenced above, copyright may raise the publication costs to *all* publishers, c, including that to Publisher 1, by raising transaction costs of securing rights to publish (Safner 2016). Additionally, there is a possibility that Publisher 2 will be

able to succesfully pirate without being detected or apprehended[4], or that even if caught red-handed, Publisher 1 declines to enjoin or sue for damages, perhaps due to high litigation costs.

Akin to property rights in real assets, the value of establishing and maintaining copyrights in published works changes in value proportional to the value of the underlying works, and inversely proportional to the cost of enclosing and maintaining them (Demsetz 1969). Since expressive works are easily copiable once published, publishers are not able to appropriate the full returns to the work, as rival pirate publishers can capture some of the surplus generated by the publication. As long as the value of the work is sufficiently high (i.e. p_A or p_B), it would be in an original publisher's interest to craft individual business strategies, internal trade customs, or wider social institutions to recover those returns by attempting to exclude other publishers' from reprinting.

Publishers throughout history have adopted various private methods of providing this exclusive power. Established publishers may form a cartel to prevent rival publishers from reprinting works "protected" by the cartel. The Stationers' Company in England acted as a medieval guild from the 16th century onward to accomplish precisely this task. Printers and booksellers in England (primarily London) had to be members of the company, register their "copy" of the work they wished to print, and refrain from publishing any works registered to other members of the guild, who held the perpetual "copy right," under penalty of retaliation or expulsion from the guild, who maintained the crown-sanctioned power to seize and burn all materials in violation.[5] While the English crown occasionally intervened to protect its own interests by censoring materials it considered seditious, it outsourced regulation of the book trade to the Company and its own internal practices in the classic style of a medieval guild (Ogilvie 2014).

In the American case, even with a federal copyright act in place since 1790, domestic publishers often attempted to create a system that echos the English Stationers' Company, at least with respect to foreign works. As detailed below, with an explicit lack of copyright protection granted to non-U.S. authors in the 1790 law, American publishers reprinting foreign (chiefly British) works sustained "trade courtesies" to maintain order in their systemic international piracy into the early 20th century.

When private methods fail, publishers seek to influence the legal and political systems to maximize their returns on publishing works. To compete with international publishers, a time-honored tactic is to lobby for a tariff on imported books, argued on typical protectionist and nationalist grounds.

The other alternative, which in Anglo-American history has been a last resort, is to persuade the state to establish statutory copyright protection: national laws granting the holder a temporary legal right to exclude all others from publication without consent. This began in the 1710 Statute of Anne in Britain and the beginnings of modern copyright

[4] The Becker (1968) model of rational crime, of weighing the apprehension-probability-weighted opportunity cost of paying fines or suffering jail time relative to the expected gain of piracy, certainly would apply here.

[5] There is an extensive historical literature on the activities of the Stationers' Company and its role in determining the modern idea of copyright laws. For in-depth treatments, see primarily Patterson (1968a); Rose (1993); Johns (2009).

jurisprudence with the 1774 decision in *Donaldson v Beckett*.[6]

Copyright, however, is costly to all parties as it introduces added costs of searching and negotiating with existing right-holders (Safner (2016)), and even risks a tragedy of the *anti*-commons, where any successful use of the good requires the blessing of multiple veto-holders (Heller 1997; Buchanan and Yoon 2000). Copyright does, however, benefit innovative publishers who can secure more returns to their existing works by blocking competition from other publishers. Thus, as the value of existing works increases (from increases in technology, market demand, and other institutional changes) enough to justify the cost of copyright, established publishers will push to protect copyright over an ever expanding domain across boundaries, to protect their works from rival publishers.

A careful reader might object that, in focusing exclusively on the interaction between publishers, this analysis ignores the critical interest of authors, who surely must play a role in the political determination of copyright laws at home and abroad. However, there are reasons to believe that the role of authors is minimal compared to publishers. Authors face higher collective action costs than publishers. In practice, publishers own the rights to a wide variety of authored works bundled together, and achieve economies of scale from publishing and distributing en masse. Few individual authors have deep enough pockets or sufficient political clout relative to rival large publishing houses. While luminary authors in both Britain and the United States—Charles Dickens and Mark Twain being among the most famous pro-copyright activists—have historically become the visible faces of the movement for international copyright, their involvement has translated into political change only at the moments when their interests happen to align with those of publishers (as is rarely the case). Furthermore, authors do not have a method of distributing their works, and require publishers to distribute their works, in exchange for some bundle of the creator's copyrights and revenue streams. Publishers indeed are the new "courtly patrons" of authors and most of the copyrights and derived revenues flow to publishers, making them central to the story of copyright evolution.

Indeed, while much of the rhetoric, and even law (especially continental European law, enshrined by the Berne Convention and later the modern TRIPS) focuses on giving rights to authors, it was the *publishers* that lobbied heavily for these rights in the 1880s, as stronger copyrights capture more rents to rights-holders, whom nearly always are publishers (Khan (2005, 17, 228–29); DaSilva (1980)). To use the colorful terms of Yandle (1983), the publishers functioned akin to bootleggers, aiming to use the moral high ground of author's natural rights (Baptists), to convince the public and government to grant the rights-holder (in the end, publishers) greater market power. Patterson (1968b, 8) best summarizes that "history shows us [that] copyright began as a publisher's right, a right which functioned in the interest of the publisher, with no concern for the author."

[6]The word "copyright" is nowhere to be found in the statute that gave the world the modern understanding of the concept. Notably, booksellers invented many legal arguments to justify maintaining their guild the way they had for centuries. The idea of an authorial right was a rhetorical innovation in the early 1700s in an attempt to convince Parliament to bring order to a book trade after pre-publication censorship (the main political function of the Stationers' Company) was effectively abolished after the Glorious Revolution. See Patterson (1968b); Johns (2009);

3 Copyright in the United States (1790–1996)

Table 2: Relevant Events in Anglo-American Copyright History

Year	Event	Country	Effects
1710	Statute of Anne	U.K.	Creates statutory copyright
1773	*Donaldson v. Beckett*	U.K.	Affirms statutory copyright, rejects private copyright
1790	Copyright Act	U.S.	Mimics Statute of Anne, no protection for foreigners
1834	*Wheaton v. Peters*	U.S.	Mimics *Donaldson v. Beckett* ruling
1886	Berne Convention	International	Creates int'l copyright protection, U.S. did not attend
1891	Copyright Act/Chace Act	U.S.	Foreign works protected in U.S. if manufactured in U.S.
1910	Buenos Aires Convention	International	Weaker, U.S.-sponsored alternative to Berne Convention
1976	Copyright Act	U.S.	Major revisions to copyright law, modeled on Berne
1988	Berne Convention Implementation Act	U.S.	U.S. joins Berne Convention

3.1 Before the U.S. Constitution: The Absence of Competition

In the first two centuries of the American colonies, there were no copyright laws or formal trade civilities to constrain publishers (Johns 2009: 180-181). In contemporary Britain, publication was concentrated in the capital cities: Edinburgh and especially London. In the American colonies, there were large distances between the major colonial cities such as Philadelphia and New York. The vast distances between cities and thin markets within them meant that there was little competition between publishers, each of which was a tenuous enterprise. In the early colonial era, it was cheaper for booksellers to import books than to print them domestically (though newspapers, pamphlets, and other print jobs were different). While there were frequent reprints of one publisher reprinting another, there were few complaints for lost business (ibid, 180). In this very early stage, the game depicted in Figure~1 applies little: each publisher chooses the profit-maximizing author without regard for the other publisher's actions.

Despite being colonies of Great Britain, the 1710 Statute of Anne, in which the British Parliament had formally created the modern Anglo-American legal concept of statutory copyright, did not apply Bracha (2010, 1440). The legal vacuum was of little import to a largely agrarian economy, and one that was able to satisfy its cultural consumption with existing works from the mother country.[7]

The infant American publishing industry, meeting the American demand for quality literature prior to the emergence of a distinctly *American* literary tradition, relied almost entirely on 'pirating' and republishing British works at a lower price (often without authorization). This was the bread and butter of small American printers, and were commonly viewed as being critical to shaping the budding nation's culture through rapid, cheap dissemination of mass literature (Bender and Sampliner 1996, 433).

[7]There were, however, some "sporadic printing privilege grants issued by colonial legislatures to publishers or printers" for specific works, as had been done in England prior to the Statute of Anne, (Bracha 2010, 1440).

Historians of copyright commonly point to the influence of Noah Webster, the American author famed for his eponymous *Dictionary*, in advocating for the first copyright laws in the American colonies (Bender and Sampliner 1996; Patterson 1968a; Bracha 2010). Beginning in his native Connecticut, Webster was instrumental in passing "An Act for the Encouragement of Literature and Genius" in 1783. An ironic microcosm of American international piracy, the statute extended protection only to residents of Connecticut, and to no author "residing in or inhabitant of any other of the United States" (Kampelman 1947, 408). While Webster was a clear beneficiary from the law, his outwardly public purpose was to cultivate a new American culture, independent from Europe.[8] As publishers in certain U.S. states without copyright protection were known to pirate the works of other states' authors, Webster tirelessly pushed for other states to adopt copyright laws similar to Connecticut's, as well as a unified national law (Bender and Sampliner 1996, 256). This led to the declaration by the Continental Congress in 1783 that "it be recommended to the several States to secure to the authors or publishers of any new book not hitherto printed, being citizens of the United States,...the copy right of such books for a certain time not less than fourteen years from the first publication." By 1786, all states with the exception of Delaware had passed a copyright statute similar to Connecticut's.

3.2 Post-Constitution: Copyright for Me but Not for Thee

> "[A] literary pirate is not only not an outlaw; he is protected by the law. He is the product of law." (Publishers Weekly 1882, 430)

The United States Constitution that emerged from the 1787 Philadelphia Convention included the noted "copyrights clause," declaring that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (U.S. Constitution, Article I, §8, Cl. 8). Soon after the birth of the new republic, authors and publishers lobbied for a uniform law to reduce printing arbitrage across state lines.

Copyright was enacted nationally when the 1st United States Congress passed the Copyright Act of 1790. The draft version of what would become the first copyright act was reported to have been written by Webster himself, who would have granted copyrights not only to authors, but to publishers (Patry 2000). The 1790 Act was largely a verbatim copy of the British 1710 Statute of Anne.[9] Section 5 of the Act explicitly denies copyright protection to foreigners:[10]

> "And be it further enacted, That nothing in this act shall be construed to extend to prohibit the impor-

[8] "The origin and progress of laws, securing to authors the exclusive right of publishing and vending their literary works, constitutes an article in the history of a country of no inconsiderable importance," (Webster 1843, 173). See also Bender and Sampliner (1996).

[9] Bracha (2010, 1428) playfully quips that "When these identical features are examined closely, the genesis of the American copyright system appears to be a major operation of international plagiarism."

[10] Patterson (1968b, 200) suggests that Section 5 was based on a misunderstanding of Section VII of the Statute of Anne. Section VII aimed to erode the domestic monopoly of the Stationers Company by *allowing* books to be imported, rather than to *encourage* domestic piracy of foreign works. Prior to the Statute of Anne, a major reason for banning importation of books was to censor seditious literature from abroad.

> tation or vending, Reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States" (U.S. Copyright Act of 1790, §5).

While the rhetoric of authors' rights was prominent in the arguments for domestic copyright (Bender and Sampliner 1996), as was the case in England, it was truly the publishers who benefited most in practice.[11] Khan (2005, 236–37) shows that nearly half of all copyrights issued under the 1790 Act were issued not to authors, but "proprietors." i.e. publishers. In fact, only about 5% of American authors even claimed a copyright in their works (as was required for protection under the Act) between 1790-1800 (Lessig 2004, 133). Furthermore, over the next century, as American jurisprudence increasingly anchored copyright in utilitarian economic ends over natural rights of authors, the proportion of authors as plaintiffs in infringement suits fell dramatically relative to publishers (ibid, 239).[12]

The piratical reprinting and dissemination of works such as Blackstone's *Commentaries* and Robertson's *History of Charles V* by Scots-Irish-American publisher Robert Bell had been key to igniting ideological resistance to British colonial tyranny, not to mention the most profitable publishing enterprise in colonial America (Johns 2009, 184). Many contemporaries saw the cheap access to such works as integral to fostering republican virtues in the new American experiment. In addition to churning out partisan pamphlets, the tenuous American publishers began to profit off of reprinting.

The international copyright imbalance was a key aspect of the emerging political economy of early 19th-century America, developed by the Irish-born political economist and pirate publisher Mathew Carey and Treasury Secretary Alexander Hamilton via his Assistant Secretary, Tench Coxe (Johns 2009, 188–95). The Carey-Coxe view emphasized the need to develop and protect domestic manufacturing from Europe as the key to American development. The piratical reprinting of European works and the "appropriation" of European technology was an essential part of Hamiltonian mercantilism, and would eventually form a minor part of the rising "American System" of import substitution and financing of internal improvements championed by Henry Clay in the mid-19th century (Johns 2009, 203).

The French Revolution and its effects in Europe also shaped relative prices faced by American publishers. The reduction in European competition, combined with new import tariffs and the introduction of copyright to Ireland (long a haven for British book piracy) in 1801, made it cheaper for the first time to reprint European authors in the U.S. than to import their books from Europe (ibid, 193). Thus, more publishers entered the market for reprinting European works. By the 1830s, American publishers had firmly established themselves by cheaply reprinting unauthorized foreign (especially British) works. The famed Harpers Monthly magazine, for example, was plainly a mosaic of reproductions

[11] See Johns (2009), Rose (1993), Safner (2020) on the story of how London book publishers invented the idea of authors rights and literary property as a rhetorical strategy to lobby for Parliament to intervene in their trade after the lapse of press licensing in 1694.

[12] See e.g. *National Telegraph News Co. v. Western Union Telegraph Co.* and *Koppel v. Downing*.

of British magazines (Hesse 2002, 41). In 1843, a copy of Charles Dickens's popular *A Christmas Carol* was sold in England for the equivalent of $2.50, while American publishers sold it for $0.06 (Clark 1960, 40).

> "Virtually every new book of consequence to appear in London before 1825 was reproduced immediately in Philadelphia, New York, Baltimore, and/or Boston, usually over several imprints...[and interestingly] the American printing community was peopled to a very large extent by immigrant Irish printers, than whom none could have found greater glee in turning out things English to their personal profit" (Kaser (1969, 17) quoted in Redmond (1990, 4)).

3.3 Developing Order: Emergence of the "Courtesy of the Trade" Cartel System

A gradual decline in c and c' and extent of the market affecting p_A and p_B.

> In the 19th century a whole new era in publishing began. A series of technical developments, in the book trade as in other industries, dramatically raised output and lowered costs. Stereotyping, the iron press, the application of steam power, mechanical typecasting and typesetting, new methods of reproducing illustrations—these inventions, developed through the century and often resisted by the printer, amounted to a revolution in book production. Paper, made by hand up to 1800, formed more than 20 percent of the cost of a book in 1740; by 1910 it had fallen to a little more than 7 percent. Bindings, too, became less expensive. After 1820 cloth cases began to be used in place of leather, and increasingly the publisher issued his books already bound. Previously, he had done so only with less expensive books; the bindings of others had been left to the bookseller or private buyer. In Europe and America, expansion and competition were the essence of the century, and the book trade had a full share of both. While the population of Europe doubled, that of the United States increased fifteenfold. Improved means of communication led to wider distribution, and a thirst for self-improvement and entertainment greatly expanded readership, leading to a rapid growth in every category of book from the scholarly to the juvenile. The interplay of technical innovation and social change was never closer. As the development of the railways encouraged people to travel, a demand arose for reading material to lessen the tedium of the long journeys. The only victim in the book trade was design, part of the price that was paid almost universally in the first phase of machine production. (**Britannica?**)

For accounts of this movement and its legislative history, see e.g. Kampelman, 1947, 414; Clark, 1960 Dozer, 1949; (Khan, 2005, Ch.9); Putnam (1891); Ringer (1968); Henn (1953)).

The increasing extent of the American market for European books in the mid-19th Century meant that once-parochial publishers finally came into significant conflict with one another by choosing printing *the same* European works.

American demand for books was sufficiently elastic that lowering the prices for cheap reprints of foreign works led to increasing profits for publishers. However, publishers recognized that since copyrights of foreign authors were not protected in the United States, the profits from republishing could quickly be absorbed by *other* publishers engaging in precisely the same practice. Eager to protect these returns and prevent piracy of their own works (of republished foreign works) from *other* American (pirate) publishers, they sought to form explicit organizations to order the trade, as Johns (2009, 199) summarizes:

> "What all such suggestions shared were three convictions: the paramount importance of reprinting European works; the consequent need to eliminate domestic reprinting and rival importing (in their terms, piracy); and the requirement that a solution to these problems come from the trade itself."

In practice, the most established booksellers sought to recreate a "Stationers Company of North America" modelled on the old London monopoly, complete with a register allocating exclusive "copy rights" of foreign books to individual American publishers and a compact restraining members from reprinting other members. Johns (2009, 197–202) describes how these explicit organizations like the Philadelphia-based "American Company" quickly fell apart: the titles the organization chose to reprint were interpreted by other publishers as "a sure thing" and quickly repirated. *Individual* booksellers would have been able to barter exclusivity on some works in exchange for respecting other booksellers' exclusivity on others, but these formal organizations explicitly prevented such exchanges.

Instead of an explicit cartel with formal rules, the more effective solution for publishers was to form an *implicit* cartel arrangement, fostered by informal norms of the trade. While the United States had no history of European-style craft guilds, many publishers were transplants from Scotland and Ireland, who had developed their own "courtesies of the trade" of publishing and adapted it to an American setting. This system of gentlemanly price-fixing was more flexible than the formal arrangement, since it created exchangeable pseudo-property rights in pirated foreign works. The primary goal, in terms of the model described in Section 2, was for initial publishers of a work to raise c' sufficiently that *other* publishers would choose to publish different works.

The system worked as follows: A major publishing house in New York or Boston would declare their intent to publish a major European work by writing in a trade journal or in private letters to other major publishing houses. The other publishers would respectfully abstain from publishing said work, and would often claim their own works to be respected by the other courteous publishers. For example, Harper Brothers commonly republished the English novelist Edward Bulwer-Lytton, and Carey & Lea republished Frederick Marryat's works (Khan 2005, 280). New European authors were typically "allocated" to the first American publishing house to publicly stake a claim. Publishers that violated this system were threatened with retaliation and expulsion from the group. Ainsworth Spofford, the U.S. Librarian of Congress from 1864–1897 scoffed at the system as thus:

> "[A] group of publishing houses in the United States, which made a specialty of cheap books, vied with each other in the business of appropriating English and Continental trash, and printed this under villainous covers, in type ugly enough to risk a serious increase of ophthalmia among American readers," quoted in Khan (2005, 259).

Spoo (2013, Ch.1) praises this as a private solution to prevent a tragedy of the commons through an artificial analogue of "copyright." Participating publishers essentially allowed homesteading of foreign works, entitling the first-mover to exclusive publishing rights (to the extent they were enforceable), and incentivizing different firms to compete to be the first mover on different foreign works.

In addition to the informal cartel, domestic publishers sought extra protection from foreign competition via a gradually-increasing tariff (ranging from 10-25%) targeted against the importation of foreign books. U.S. trade policy first first singled out books for special protection with the Tariff of 1842 (Dozer 1949, 73). Dozer (1949, 95) contends that the question of international copyright in America "has been...a tariff question involving the protection of American manufacturing interests." A U.S. federal court also cites the 1909 Copyright Act and a later Tariff Act (of 1930) as having a common purpose, "to encourage the industries of the United States," and "to protect American labor," (*Oxford University Press v. United States*, 1945 (No. 4491) at 20; quoted in Spoo (1998),70). One established American publisher, George Putnam, even argued that the overtures to protect foreign copyrights were redundant due to the tariff on books (Spoo 1998, 61). Even foreign authors, such as Ezra Pound, recognized the lack of protection for foreigners in American copyright law, and the tariff on imported books as "twin protectionist devices that harmed the interest of creators," (Spoo 1998, 61). Table~3 compiles the major tariff acts from Dozer (1949) that served in the institutional background to perpetuate the benefits of U.S. piracy of foreign works.

Table 3: Major Tariff History of Imported Books

Year	Rate
1842	10%
1846	10%
1861	15%
1864	25%
1870	25%*
1890	25%*†
1913	15%*†‡

Duty-Free Exemptions

* Books manufactured 20 years prior to importation

† "by authority or for the use of the U.S. or the Library of Congress"
"for educational, philosophical, literary, or religious purposes";
"books and pamphlets printed exclusively in languages other than English"

‡ "Bibles, comprising the books of the Old or New Testament, or both"

3.4 Decline of the Pirate Publishing Cartel and Gradual Recognition of Foreign Copyrights

In contrast to American publishers, the emerging group of American *authors* increasingly found their works getting crowded out by cheap pirated European classics in local markets for books (Clark 1960, 27). Throughout the 19^th century, American authors eagerly joined British and European authors arguing for the U.S. to respect international copyright (Henn 1953; Clark 1960). They argued on *moral* grounds that it would bring justice to European authors, and also that stamping out piracy of European works would subsidize a unique American literature, over a vulgar offshoot of the Old World (Vaidhyanathan 2001, 50).

The moral arguments of American authors fell on deaf ears for most of the 19th century, drowned out by the economic *arguments* benefits to American publishers and their arguments about cheaply enlightening the American public. Publishers argued that access to cheap foreign literature helped expand literacy on the impoverished frontier; that there were no inherent "property rights" in literature recognized by Anglo-American courts; that international copyright would grant foreigners monopoly power over American readers; and that American publishers needed "de facto" protectionism as an infant industry (ibid, 51). Thus, authors found themselves at odds with the more dominant publishing interests in the U.S. for the vast majority of the 1800s century (Dozer 1949, 83–84).

By the time that the United Kingdom had passed its first International Copyright Act in 1837 and began negotiations for bilateral copyright recognition with France (which was successful) and the United States (which was unsuccessful), the political arguments in the U.S. reached a fever pitch. English authors such as Charles Dickens, Robert Southey, Thomas Carlyle, and others, famously toured the United States to lobby the public and Congress to recognize British copyrights. Senator Henry Clay introduced legislation to approve an Anglo-American Copyright Treaty in 1837, but was met with uniform rejection for the reasons cited above. Clay and his successors introduced the bill five more times from 1837–1842 in vain, drowned out by the fierce opposition of booksellers and typesetters (see e.g. Clark (1960, 79); Wilf (2011, 186); Ringer (1968, 1055); Vaidhyanathan (2001, 50–55); Anderson (2010, 38)). While a few established American publishing houses (such as Appleton and Putnam) supported Clay's bills, most took the position typified by a bold 1842 declaration to Congress by Philadelphia-based Sherman and Johnson:

> All the riches of English literature are ours. English authorship comes to us as free as the vital air, untaxed, unhindered, even by the necessity of translation; and the question is, Shall we tax it, and thus impose a barrier to the circulation of intellectual and moral light? Shall we build up a dam, to obstruct the flow of the rivers of knowledge? (Clark 1960, 77)

An interesting puzzle of American literary piracy was raised by the 1878 British Commission on Copyrights: unlike literature, the U.S. was fully committed to protecting the rights of foreign *patentees*:

> "The original works published in America are, as yet, less numerous than those published in Great Britain.

> This naturally affords a temptation to the Americans to take advantage of the works of the older country...Were there in American law no recognition of the rights of authors, no copyright legislation, the position of the United States would be logical. But they have copyright laws; they afford protection to citizen or resident authors, while they exclude all others from the benefit of that protection. The position of the American people in this respect is the more striking, from the circumstance that, with regard to the analogous right of patents for invention, they have entered into a treaty with this country for the reciprocal protection of inventors." Quoted in Khan (2005, 258–59).

Senator John Ruggles (who had been a part of international patent reform) saw no such inconsistency. With little demand for American literature in Europe, American piracy of European works encouraged "general diffusion of knowledge and intelligence, on which depends so essentially the preservation and support of our free institutions," (quoted in Khan (2005, 259)).

During the Civil War, dime novels became popular among many of the soldiers and family on the home-front. In 1874, Chicago's Donnelly, Gassette and Lloyd publishers started selling 270 books for just $0.10-20 as part of their new "Lakeside Library" (Vaidhyanathan 2001, 52–53). Erastus Beadle, a baron of the dime novels, introduced his own Fireside Library to compete with DGL. One of Beadle's own employees, George P. Munro, broke off and started his own Seaside Library, which became the most successful. By 1877, at least 14 "cheap book libraries" were in competition with one another, all of them disrupting the gentlemanly price-fixing of the Eastern Establishment publishers (ibid).

The courtesy of the trade system had kept most publishers content to pirate foreign works and reject pushes for international copyright. Henry Holt, a major publisher, testified before the Senate about the value of such a "gentlemanly" system and the chaos that its decline had caused in the publishing industry (Vaidhyanathan 2001, 52).

With the decline of the publishing cartel during the Reconstruction Era, publishers' interests finally began to align with those of the authors calling for international copyright recognition throughout the century (Hesse 2002, 41). In the 1880s, *both* authors and publishers began to heavily lobby Congress to join the international copyright initiatives put forth by Britain and France under the guise of the *The Author's Club*, the *American Copyright League*, and the *Publishers Copyright League* (Vaidhyanathan 2001, 53–54). The major European nations had initiated meetings in 1883 in Bern, Switzerland to negotiate an international copyright regime. In 1886, the resulting *Berne Convention for the Protection of Literary and Artistic Works (Berne Convention)* was ratified by the UK, France, Germany, Belgium, Italy, Haiti, Liberia, Spain, Switzerland, and Tunisia.[13] While the idea was the product of the International Literary

[13]The Berne Convention forms the cornerstone for the most important international agreement today, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). In 1967 the executive apparatus of the Berne Convention (along with its counterpart 1893 Paris Convention for the Protection of Industrial Property, for patents) transitioned into the newly established World Intellectual Property Organization (WIPO 1967a), which itself became a special agency within the United Nations in 1974 @[WIPO1974]. TRIPS emerged in 1994 out of the Uruguay Round of Multilateral Trade Negotiations (1986-1994) under the General Agreement on Tariffs and Trade (GATT), a framework of international agreements which structured the liberalization of international trade regulations for the second half of the 20th century. These negotiations produced the World

Association in Paris in 1878, under the presidency of French author Victor Hugo, it was the head of the German *Publishers*' Guild, Paul Schmidt, that suggested that the association form a union of literary property, directly leading to the 1883 meetings (Deazley 2008b). In general, the treaty required signatories to treat the copyright of works by authors of other signatories at least as well as those of its own nationals.

The U.S. Congress remained reluctant to recognize foreign copyrights, finding the testimony of famed Philadelphia pirate and economist Henry Carey (son of Mathew Carey) more convincing in its hearings about international copyright. Carey essentially reiterated the practical arguments for American piracy listed above (U.S. Senate 1886, 115–20). Ultimately, the Congress passed the International Copyright Act of 1891, also known as the Chace Act, amid fierce political debate.[14] The bill passed Congress in the eleventh hour when Rep. Simonds introduced a section of the bill which featured the notorious "manufacturing clauses."[15] The Act tried to have it both ways by recognizing the copyrights of foreigners, but required all foreign works to be manufactured on U.S. type in order to obtain protection (Act of March 3, 1891, 51st Cong, 2nd Sess. 26 Stat. 1107 §3.). Essentially, the first major attempt at recognition of foreign copyrights had been purchased with a subsidy to the American publishing industry. Ringer (1968, 1057) comments that the law had enough loopholes to "make the extension of copyright protection to foreigners illusory." The foreign author had to be present in Washington D.C. on or one day prior to publication to receive copyright in the U.S.[16] The manufacturing clause in the 1909 Copyright Act and other restrictions ensured that the the United States would fail to qualify for membership in the Berne Convention until 1988 (Khan 2005, 260).[17]

Under the official guise of international harmonization, U.S. policy continued to tacitly endorse domestic piracy for those works that did not qualify under the 1891 and later 1909 Copyright Act.[18] This tension between American and

Trade Organization (WTO), the successor to GATT, which would implement the agreements reached during the Uruguay Round, including uniform minimum intellectual property standards, as described in TRIPS. WTO membership is conditioned upon accepting and implementing TRIPS (in addition to the other substantive areas of trade policy).

[14]Vaidhyanathan (2001, 55) argues that the final straw came from the fierce price-competition forcing printing houses to employ non-unionized women to operate the printing presses, which prompted the Typographical Union to support the bill.

[15]For his efforts in establishing international copyright, the French government awarded Simonds the Cross of the Legion of Honor (Khan 2005, 264).

[16]For context and comparison, under the Anglo-French Copyright Convention and the International Copyright Act 1852 in Britain, a French author desiring a copyright over English translation in the U.K. must publicly declare their right to English translations, register and deposit a copy of the work with the Stationers' Company and the British Museum within three months, and publish and deposit a copies of the translation within a year. They also faced somewhat skeptical British courts, as evidenced in the 1870 case of *Wood v Chart* (Deazley 2008a). For an even starker comparison, Prussia had no copyright at all at the time, not even for domestic works (Kawohl 2008; Höffner 2010).

[17]Additionally, as the Berne Union was amended in 1908 to remove all formality of registration, so as to make copyright automatic once fixed in a tangible medium, the United States further failed to qualify for membership without a substantial revision of its copyright statutes (Ringer 1968, 1057–58). The treaty's revisions defined a work obtaining copyright protection the moment it is "fixed" in a tangible medium, rather than conditional upon registration and approval by authorities; set a minimum duration (since 1980, the author's life plus 50 years), and empowers authors control over derivatives and moral rights (WIPO 1967a, 1967b). These major changes adopted the "French" approach to copyright as a natural *droit d'autuer* rather than the "English" approach to copyright as a utilitarian tradeoff governed by statute. Khan (2005, 222–23) argues that moral rights emanate from an old-world elitist view of protecting authorship as an act of individual genius, rather than the American conception of judiciously weighing the costs and benefits of copyright for utilitarian ends like public learning.

[18]The latter act explicitly affirmed, in violation to the Berne Convention, that copyright in the U.S. is *only* secured "by the publication of the work with notice of copyright" affixed (Rudd 1969, 141). Domestically, the Act extended American copyright renewal terms from 14 to 28 years and allowed "proprietors of musical compositions were granted initial mechanical recording rights, subject to a compulsory licensing provision," (Rudd 1969, 141), which allowed anyone to make a mechanical reproduction of a musical composition without consent of the owner, provided the copy adhered to the statutory restrictions in section 1(e) of the act (CopyrightOffice 1973, 66).

European publishers and authors remained palpable well into the early 20th century. Authors seeking international protection were forced to strategically copyright their works first in the United States (if they were lucky enough to be a citizen) before their own countries. Ezra Pound's lament of the "thieving copyright law" of the U.S. is representative of European attitudes towards the sole great power not party to the Berne Convention (Spoo 1998, 645). Even in the mid-1930s, some Dutch publishers had long given up on legal remedies and chose instead to retaliate against American publishers and disavowing the latter's copyrights (Balázs 2011, 499). Nonetheless, George Putnam (1891v), a large American publisher who had advocated for full U.S. membership in the Berne Convention, keenly recognized that the 1891 Act "which makes American manufacture a first condition of American copyright for aliens, brings us, therefore [to] the first stage in the development of International Copyright–a stage which was reached in Europe more than half a century ago."

The United States (and its publishers) ultimately would switch from parochial protectionist to a strong international enforcer of copyrights by the middle of the 20th century as the country transitioned from a net-importer of cultural works to a net-exporter. From the Reconstruction era through the Interwar period, major new inventions like the phonograph and photographic camera (for both motion and still pictures) created entirely new markets for recorded music, and cinema. As European publishers had done in the 19th century, U.S. publishers in the early 20th century began to seek copyright protection of their interests in foreign countries. The U.S. sponsored its own alternative to the Berne Convention between a number of Latin American nations under the auspices of the Buenos Aires Convention (1910). This was substantially weaker compared to the Berne Convention's stringent prohibitions on formal registration requirements, but fit existing U.S. law and jurisprudence.[19]

While most of Europe was at war in the 1910s, the American movie industry was able to take the lead and escalate its level of quality through massive levels of investment in feature films. Since they could not compete in the quality arms race while their troops were dying in the trenches, European nations (who otherwise were on par with the U.S. prior to WWI) experienced a major relative decline in American movie markets. In the 1900s, European companies provided about 50% of films shown in the U.S., by 1910s, it fell to 20%, and then to negligible levels by the war's end (Bakker 2005, 2008). The European market, unable to catch up with the sharply increased fixed and sunk production costs, in addition to years of war followed by protectionism and heavy taxes on cinema tickets, nearly disintegrated while American movies flooded Europe (ibid). The entertainment industry began to account for a greater portion of U.S. GDP, as the industry's output, measured in spectator-hours, grew consistently at rates between 3-11% yearly between 1900-1938 (ibid). Bakker (2008) indirectly estimates that the movie industry (through a cost-savings approach in entertainment) accounted for 2.2% ($2.5 billion) of U.S. GDP in the 1930s.

[19] Under the direction of the U.S., the Buenos Aires Convention would ultimately morph into the Universal Copyright Convention (UCC) in 1952, a UN-sponsored alternative to the Berne Convention for developing nations who thought that Berne was too strict and favored Western exporters.

Beginning in 1955, Congress commissioned several reports by the Copyright Office to study the feasibility of generally revising American copyright laws to be consistent with the Berne Convention. A report measuring the economic significance of copyright found that in 1954, "the copyright industries, as a group, constituted an estimated $6.1 billion to the total national income of $299.7 billion...more than mining or banking or the electric and gas utilities...slightly less than the automobile manufacturing industry or railroad transportation," (Blaisdell 1959, 27).

After the second world war, the U.S. was the world's largest economy and primarily exported intellectual property from computers to films to pharmaceuticals. By the 1970s, as U.S. businesses started to feel pressure from international competitors, pirates, and a general economic malaise, domestic businesses began to focus on lobbying to protect their intellectual property overseas (Archibugi and Fillippetti 2010). Politicians, eager to address the growing trade deficit and economic slump, also began to take heed of these arguments. The path of least resistance was to aim for harmonization of global copyright laws through the ongoing multilateral trade agreement negotiations. In particular, many pharmaceutical firms lobbied hard to place international IP protection as one of the key issues to be addressed in these discussions (Braithwaite and Drahos 2000, Ch. 7). As IP is such an arcane and technical matter, business interests were brought in to play a key role in shaping the terms of international agreements (to their advantage).

Domestically, the United States drastically revised its copyright law with the Copyright Act of 1976, which dramatically altered the duration, scope, bundle of rights granted, and acquisition procedure, indeed the whole conception of copyright, importing the natural rights approach of France and the Berne Convention (Safner 2016). As Bohannan and Hovenkamp (2012, 136) notes, "The Copyright Act [of 1976] bears all of the hallmark characteristics of a special interest statute, including: (1) statutory benefits concentrated in small groups while the statutory costs are diffuse and borne by a large number of people, (2) uncertainty about the optimal regulatory framework, (3) a specific and highly detailed structure (indicating interest-group compromise) rather than a general structure that would allow more judicial discretion, and (4) a legislative history that reveals extensive interest-group influence." Litman (1987) and Litman (1989) argue that the bill was primarily hashed out by representatives of all industries with an interest in copyright, rather than on the floor of Congress.

Upon passage of the 1976 Act, U.S. Register of Copyrights Barbara Ringer (1977, 477, 479) argued it was "as radical a departure as was our first copyright statute, in 1790 [making] a number of fundamental changes in the American copyright system, including some so profound that they may mark a shift in direction for the very philosophy of copyright itself." In the end, Ringer commented that the law represented "a balanced compromise that comes down on the authors' and creators' side in almost every instance" (Time 1976). Ultimately, once the U.S. had revised its own copyright law and pushed for the harmonization of other nations, it finally implemented the Berne Convention in 1988 with the Berne Convention Implementation Act.

4 Implications

Today, the United States is at the forefront of harmonizing and enforcing copyright across the world by injecting intellectual property protections into international treaties and trade negotations.

Naturally, the explosion of new technologies and consumer products over the 20th century and the geopolitical dominance of the U.S. has influenced the market. This has made it so that publishers transition from p_A and p_B.

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