Pirate Thy Neighbor – International Copyright Protectionism in the United States, 1790-2000*

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Abstract

Between the late-18th 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. How does a nation go from top pirate to top global policeman of culture? 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.

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1 Introduction

Between the late-18$^{\text{th}}$ century and mid-20$^{\text{th}}$ 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 21$^{\text{st}}$ century leads the charge in pushing developing nations 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? This paper examines the incentives faced by the domestic book publishing industry in the United States from 1790 to the present and presents a 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.

The traditional analysis of copyright (and other intellectual property laws, such as patents, in general) recognizes that governments enact laws to add incentive to authors and inventors to create expressive works and inventions. Such works typically exhibit "public goods" characteristics due to 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 (Arrow, 1962; Nordhaus, 1969). The author or inventor is unable to 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, if authors and inventors are unable to at least recover their fixed costs of producing the original work, they may lack incentive to undertake the effort in the first place.[2] Copyright and patent laws, however, grant the author or inventor a temporary monopoly over publishing their works, along with the legal privilege of prosecuting pirates at their discretion. This monopoly is justified as maintaining the financial incentives for creators to innovate and express themselves. As monopoly power adds costs and removes choice for consumers, as well as removes the ability for new producers to build off of existing patented/copyrighted works, intellectual property laws produce significant social costs. Thus, economists and lawyers have always approached intellectual

[1] In modern times with file-sharing applications and the internet, creators face an equivalent problem if consumers are able to acquire the product without payment. Both of these types of activities may be termed "piracy."

[2] A common objection is that authors and inventors often are not solely motivated by financial returns to their creations.

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 static tradeoff, we must recognize the political economy elements, as individuals often use the law as a vehicle to serve their own ends, including increasing their rents (Lessig, 2004; Boldrin and Levine, 2008; Bell, 2014; Kinsella, 2008; Patry, 1996). As the pioneering work of Arnold (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 national 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 or 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 clear that as a practical matter, it seems in the interest of authors, inventors, and publishers to create rules that serve analogous functions to classic property rights, whether or not they may be formally recognized.

In general, ideas (whether they be 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 seek opportunities to 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 do commons. However, the costs of implementing a (sub-optimal) property regime cannot be ignored: a "tragedy of the anti-commons" may result where a valuable product (such as a film) is blocked by an entrepreneur failing to bargain with multiple parties who each retain veto-power and the incentive to "holdout" for a larger share of the social surplus created (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 period of copyright development. 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 (Henn, 1953; Ringer, 1968). 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 19$^{\text{th}}$ 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 19$^{\text{th}}$ century and finds significant surpluses generated for American authors, publishers, and consumers.

This paper aims to provide an analytic narrative, in the style of 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 19$^{\text{th}}$ 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 a norm known as "the courtesy of the trade," that allowed them to divide up "property rights" over the publication of specific foreign authors and 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 "claimed" 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 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, most of the analytical focus here 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.*[3]

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 $p_A > p_B$.

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

Assumption 4: *The marginal cost of pirating is lower than the marginal cost of original production: $c' < c$.*

To simplify, all costs are aggregated to a single term, c. One of the primary reasons the pirate's cost would be lower than the original publishers is that the original publisher may need to recoup fixed costs in addition to marginal costs, whereas the pirate, able to reap what the original publisher has already sown, need only expend the marginal cost of making an additional work. Rather than differentiate between different types of costs and add more variables, this relationship is simplified as $c' < c$, where c' is the cost to the pirating publisher.

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 et al. (1981) estimated the imitation cost to competitors who reverse-engineered and imitated market-leaders in 48 different products was about 65% of the cost of the original innovation and took 70% of the time it took the first-mover to come to market. Kealey (2014) argue that scientific research should not be considered a pure public good but a "contribution good" or club good, where only those who are already specialists in the field can reasonably imitate a discovery (c.f. Kealey (1996, 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, we are assuming the interaction is between publishers, who probably have

[3]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.

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: $p'(\cdot) < p(\cdot)$

Following Assumptions 1, 2, and 4, 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 $c - \epsilon \quad \forall \epsilon > 0$, where c is the 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, their 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 $c' < c$ and can charge a lower price than the original producer ($p'_A < p_A$ or $p'_B < p_B$), where the former earns a payoff of the "pirate price" minus the "pirate cost" and latter earns a payoff of losing their sunk cost. Figure 1 depicts the game tree.

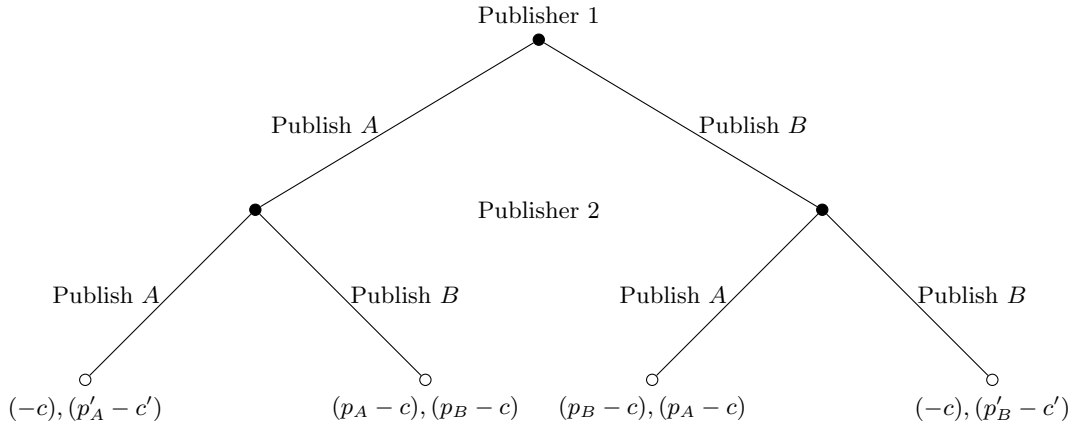

Figure 1: Publishing game between two domestic publishers

The parameters p_A, p_B, σ, c, and c' that determine specific payoffs are each function of the institutions and market conditions in the particular context of time and place. They are a product of the legal institutions in place, private agreements, changes in copying technologies, and changes in market demand. These conditions are partly endogenous, and can be influenced by the choices

of the publishers themselves. Primarily, publishers can seek to reduce the shares of other (pirating) publishers by organizing to enforce a copyright law at a cost. Publishers of original works can incur additional costs to organize and enforce copyright to raise their share (and proportionately decrease the pirate's share) of the revenues σ. That is, $\sigma = \sigma(c)$ with $\frac{\partial \sigma}{\partial c} > 0$. Furthermore, successful legal changes will also raise the costs of the pirating publisher, who now must incorporate the risk of apprehension. That is, $c' = c'(c)$ with $\frac{\partial c'}{\partial c} > 0$.[4]

The value of establishing and maintaining property rights in published works change 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, it would be in (original) publishers' interest to craft individual business strategies 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. This was the case with the English Stationers' Company from the 16^{th}–19^{th} century (Patterson, 1968a), as well as the American "courtesy of the trade" system in the late 19^{th} century. While unsuccessful in completely removing all threats of national or international piracy, they greatly reduced piracy in their local area and allowed original publishers to maximize the value of their works.

When private methods fail, publishers seek to influence the legal and political systems to maximize their returns on works. In the case of expressive works, the legal "property right" which publishers can persuade the state to establish is that of copyright, which grants the holder a right to exclude all others from publishing it without provision. Unlike a trademark, trade secret, or other private commercial strategy for maximizing the value of intellectual works, copyright is not found in common law, but is entirely a statutory creation.[5]

[4]For simplicity, I aggregate all costs together as a single average cost, each for original and pirate publisher. In reality, the costs are different: the original publisher under copyright must incur the separate costs of production, lobbying the government for copyright, enforcing copyright, negotiating with other copyright-holders, etc; and the illegally operating pirate publisher under copyright must incur the separate costs of production and avoiding apprehension.

[5]The concept of "common law copyright" existed in flux throughout the 18^{th} century since the passage of the 1710 Statute of Anne, the first creation of statutory copyright recognizable today. Prior to its passage, the crown-

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 (increasing σ). 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 country begins as a cultural net debtor, which we can define as a country where the domestic publishing game has a mixed-strategy Nash equilibrium of pirating $\rho \geq 50\%$. Over time, as the extent of a country's market expands, and the profits/rents of their publishers increases, they become a net cultural creditor, where the mixed-strategy Nash equilibrium of pirating $\rho < 50\%$.

A careful reader might object that, in focusing exclusively on the interaction between publishers, this analysis ignores the critical interest of creators, who surely must play a role in the political determination of copyright laws at home and abroad. Aside from Occam's Razor, there are reasons to believe that the role of creators is minimal compared to publishers. Creators face higher collective action costs than publishers. Publishers own the rights to a wide variety of works bundled together, and achieve economies of scale from publishing and distributing en masse. Very few individual creators or authors associations have deep enough pockets or can wield enough political influence as can publishers. While luminary authors in both Britain and the United States—Charles Dickens and Mark Twain being the most famous 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, creators 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

sanctioned London Stationers' Guild held a monopoly on printing all books within the realm, and claimed to hold the exclusive printing rights of each author in perpetuity. Following the statute, the Guild argued the new statutory copyright interfered with their preexisting "common law copyright." Amidst a protected market and legal battle with Scottish "pirates," who claimed no such natural right existed, the House of Lords finally extinguished the idea of common law copyright in their 1774 landmark decision of *Donaldson v Beckett*. Similar assertions in the United States were vanquished in the 1834 Supreme Court decision of *Wheaton v Peters*. See e.g. Patterson (1968b).

and revenue streams. Publishers indeed are the new "elite patrons" of creators 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 TRIPS) focuses on giving rights to authors, it was the *publishers* that lobbied heavily for these rights, as stronger authors rights redistribute more income to the right-holder, whom, in time, nearly always became a publisher (Khan, 2005, 17, 228-229; DaSilva, 1980). To use the 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.

3 Copyright in the United States (1790–1996)

"[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)

Prior to 1783, despite the fact that every American colony had printing presses churning out books, pamphlets, and newspapers, there were no official copyright laws to be found. Despite being colonies of Great Britain, the 1710 Statute of Anne, in which the British Parliament had formally created the modern Anglo-American legal notion of copyright, did not apply to the colonists (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.[6]

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 low 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). It was somewhat uncommon for publishers to print original works, yet profitable to produce pirated works, as it was extremely difficult for British publishers to enforce

[6]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).

their copyrights overseas. As such, the cost of piracy C_p was very low, resulting in piracy at both the international level (Figure **??**), and the domestic level (Figure **??**).

Historians of copyright legal history commonly point to the influence of Noah Webster, the famous American author of, among other works, his famous *Dictionary*, in advocating for the first copyright laws in what would become the United States (Bender and Sampliner, 1996; Patterson, 1968a; Bracha, 2010). Beginning in his native state of Connecticut, Webster was instrumental in passing "An Act for the Encouragement of Literature and Genius" in 1783. Notably demonstrating the microcosm of 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). Bender and Sampliner (1996) argues that while Webster is undoubtedly the main interest who benefitted from the copyright act, his purpose may have been to promote a new nationalist American culture.[7].

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 his home state of 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.

The United States Constitution that emerged from the Philadelphia Convention included the noted "copyrights clause," arguing 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 flocked to get a uniform law passed to reduce printing arbitrage across state lines. The first 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).

[7] "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)

Copyright was enacted nationally when the 1st United States Congress passed the Copyright Act of 1790. The 1790 Act was largely a verbatim copy of the British 1710 Statute of Anne, to which 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." Section 5 is significant for our present purposes, as it explicitly denies copyrights to foreigners:

> "And be it further enacted, That nothing in this act shall be construed to extend to prohibit the importation 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, in practice, it was truly the publishers who benefitted most. Khan (2005, 236-237) shows that nearly half of all copyrights issued under the 1790 Act were issued not to authors, but "proprietors," i.e. publishers, and that the vast majority of American authors did not even bother to register for copyright protection. 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).[8]

By the 1830s, American publishers had established themselves by cheaply reprinting unauthorized foreign (especially British) works. The famed Harpers Monthly magazine, for example, was plainly a mosaic of reproductions 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

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

glee in turning out things English to their personal profit" (Kaser (1969, 17) quoted in Redmond (1990, 4)).

American authors, however, increasingly found their works getting undercut by cheap pirated European classics in market for books (Clark, 1960, 27). American authors gradually joined British and European authors arguing for the U.S. to respect international copyright throughout the 19th century. 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). These arguments, however, fell on deaf ears for many decades. The counterarguments by both publishers and the American reader proved more effective – 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 19th century (Dozer, 1949, 83-84). In 1831, Congress passed its first major amendment to the Copyright Act, doubling the initial term of copyright protection from 14 to 28 years, but made no revisions to section 5 for foreign works.

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. As noted above, English authors, notably Charles Dickens, but also Robert Southey, Thomas Carlyle, and others, famously toured the United States, lobbying the public and Congress to recognize English 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 due to fierce opposition by booksellers and typesetters (see e.g. Clark, 1960, 79; Wilf, 2011, 186; Ringer, 1968, 1055; Vaidhyanathan, 2001, 50-55; Anderson, 2010, 38). As one publisher argued:

> 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? (Balázs, 2011, 408)

Notably, two established American publishing houses, Appleton and Putnam, did express strong support for Clay's bills.

One interesting puzzle of this rather clearly designed system to subsidize international literary piracy in the United States was raised by the 1878 British Commission on Copyrights, that the U.S. was fully committed to protecting foreign *patents* in the United States:

> "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, pp.258-259).

Senator John Ruggles (who had been a part of international patent reform) recognized the benefits of 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)).

The strongest evidence for this interpretation comes from the existence of a gradually increasing tariff (ranging from 10-25%) targeted against the importation of foreign books. Books began to be singled out for special protection with the Tariff of 1842 under the Tyler Administration (Dozer, 1949, 73). Dozer (1949, 95) contends that the question of international copyright "has been...a tariff question involving the protection of American manufacturing interests." Table 1 compiles the major tariff acts that served in the institutional background to perpetuate the benefits of U.S.

piracy of foreign works.

Table 1: 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"

3.1 Emergence of the "Courtesy of the Trade" Cartel System

By the mid-19$^{\text{th}}$ century, a number of American publishers on the east coast had emerged as the dominant players in the U.S. publishing market. American demand for books was sufficiently elastic that lowering the prices for cheap reprints of foreign works led to increasing profits for publishers. Eager to protect these returns and prevent piracy of their own "original" works (of republished foreign works) from *other* American (pirate) publishers, they formed a cartel to internally regulate the domestic book trade. Under what was known as the "courtesy of the trade," a system of "gentlemanly price-fixing" emerged 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 punishment. 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.

3.2 Decline of the Cartel and Eventual Recognition of Foreign Copyrights

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). In this time, publishers finally began to realign their interests with those of the authors who had been calling for international copyright throughout the century (Hesse, 2002, 41). They now began to retool their arguments as their economic interest changed to support international copyright protection in order to maintain their lofty positions within the American publishing market. 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). Congress remained reluctant, even

finding convincing the testimony of famed Philadelphia 'pirate' Henry Carey Baird, who essentially reiterated the practical arguments for American piracy listed above (U.S. Senate, 1886, 115-120).

Ultimately, the Congress passed the International Copyright Act of 1891, also known as the Chace Act, amid fierce political debate.[9] The bill passed Congress in the eleventh hour when Rep. Simonds introduced a section of the bill which featured the notorious "manufacturing clauses."[10] The act tried to have it both ways by recognizing the copyright of all foreigners, but through the manufacturing clauses, provides an indirect subsidy to American publishers, requiring all imported works to be printed on U.S. type (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 print manufacturing 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 American copyright recognition.[11]

In the meantime, European nations had by 1866 created the *Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).* Initial signatories included the UK, France, Germany, Belgium, Italy, Haiti, Liberia, Spain, Switzerland, and Tunisia. [12] While it was the product of the International Literary 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

[9]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.

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

[11]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, foreign or domestic (Kawohl, 2008; Höffner, 2010).

[12]The Berne Convention is 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 (WIPO, 1974). 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 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).

that the association form a union of literary property, directly leading to them 1886 meetings at Bern, Switzerland (Deazley, 2008b) and led to the establishment of the Berne Convention in 1886. In general, the treaty requires signatory nations to treat the copyright of works by authors of other signatory nations at least as well as those of its own nationals. Among other major innovations, the treaty defines a work as being copyrighted the moment it is "fixed" in some 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,9). These major changes adopt 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.[13]

The inclusion of the manufacturing clause and other restrictions would result in the United States' failure to qualify for membership in the Berne Convention until 1988 (Khan, 2005, 260). 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, 1057-1058).

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 – the latter of which extended American copyright renewal terms from 14 to 28 years. This tension between American and European publishers and authors remained palpable well into the 20$^{\text{th}}$ century. Authors seeking international recognition 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, 409). Nonetheless, George Putnam (1891, v), 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

[13]Khan (2005, 222-223) 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.

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. While in the short run, the copyright acts at the turn of the 20th century continued to nominally allow foreign copyrights yet permit de facto protectionism, in the long run, the rise of the United States on the world stage transformed from a net-importer of cultural works to a net-creditor and 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. Beyond books, until the turn of the century, American copyright law only addressed music with the 1831 revision to the Copyright Act, essentially treating *sheet* music akin to books (Bracha, 2008). A 1909 revision 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).[14]

The rise of Hollywood and its influence over global film in particular led publishers to begin to ponder enforcing international copyright more strenuously. New

Following World War II, as the United States became more of a services and information-oriented economy (and relatively less of a manufacturing based economy),

As European publishers had done in the 19th century, so U.S. publishing interests began to seek their own copyrights to be protected overseas in the early 20th. The U.S. initiated 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 well with existing U.S. law and jurisprudence. 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 alter-

[14]The 1909 act also affirmed, contrary to the Berne Convention, that copyright in America is *only* secured "by the publication of the work with notice of copyright" affixed Rudd (1969, 141).

native to the Berne Convention for developing nations who thought that Berne was too strict and favored Western exporters.

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, 2005,0). 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). "In the U.S., the motion picture industry became the internet of the 1910s. When companies put the word motion pictures in their IPO investors would flock to it." (Bakker, 2008) 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.

Since 1955, Congress commissioned several reports by the Copyright Office to study the feasibility of generally revising American copyright laws. A report Blaisdell (1959, 27) 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."

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 (1987,9) argues 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, then 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 for International Copyrights

Copyright today is defined and partially enforced by a web of international treaties and agreements. However, this is only a comparatively recent phenomenon, particularly in the United States, which only began respecting foreign copyrights in the mid-20$^{\text{th}}$ century, decades after its European coun-

terparts. Today, interests in the United States and other developed countries have pressured developing countries around the world to strengthen their intellectual property laws up to par with that of Western nations under agreements such as the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement. Indeed, these treaties, such as the Anti-Counterfeiting Trade Agreement, declare that "effective enforcement of intellectual property rights is critical to sustaining economic growth across all industries and globally" (ACTA, 2011, E-3).

If the purpose of international copyright is to promote cultural and scientific development among developing countries, how is it that the nations that are today pushing international harmonization today developed into cultural powerhouses in a world without recourse to international copyright? During the epoch of Dickens, Goethe, and Dumas, Western nations protected their own but frequently pirated the literature and scientific discoveries of their neighbors. It was only by the close of the 19th century that Western nations begun to enter into treaties to respect one another's copyright laws on equal terms, and even then, it took the United States until 1988 to join the club. How is it that copyright law emerged and was reciprocated across national borders? The dynamics of that evolution are the focus of this paper.

The traditional view of copyright, and all intellectual property laws for that matter, is that laws are specifically instituted to encourage expression and innovation. In order to ensure that authors and inventors can capture the greatest returns to their product, IP laws grant the right-holder the ability to exclude others from using the product without authorization. This is necessary due to the inherent "public good" characteristics of expressions and inventions, which allow anyone to use the good at low marginal cost after it is published (Arrow, 1962; Nordhaus, 1969; Besen and Raskind, 1991; Landes and Posner, 2003). It is not difficult to see how this logic naturally extends from one country to the world at large: developing countries must introduce the same Western IP laws or else fail to be competitive in the international cultural and scientific arenas.

However, this static view often overlooks elements of political economy, where individuals may find it in their interest to use the law as a tool to serve their own ends. As economists have pointed out in other aspects of economic development, the contextual and cultural constraints of a society also matters, such that an institution imposed externally may not "stick" (Bauer, 2000; Easterly, 2002; Boettke et al., 2004). Hesse (2002, 26) and Michalopoulos (2003, 17-18) remind us that the very notion of ideas or expressions being capable of being *owned* in any sense is a product of

European enlightenment thought, alien to many other cultures.[15] As the pioneering work of Arnold (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 national legislature. Wagner (2013) astutely observes that the problem of "free riding is an artifact of a particular set of institutional assumptions." That is, rather than observing the problems of free riding and development as being inherent in expressive works and designing a uniform policy to rectify a market failure (as the traditional argument for IP does), we must look at the contextual institutional constraints which influence outcomes.

The present international system of intellectual property governance is a somewhat tedious collection of alphabet soup international agencies, organizations, and agreements. The primary, and most comprehensive framework is the Agreement on Trade-Related Aspects of Intellectual Property, or TRIPS. TRIPS is merely the apex of the pyramid of historical agreements, building off of the cornerstone Berne Convention for matters of copyright.[16] 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 20$^{\text{th}}$ century. These negotiations produced the World 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), functioning as a carrot that has goaded developing countries such as China, which otherwise would likely balk at intellectual property agreements, into strengthening their IP laws (Farah and Cima, 2010, 100-101).

TRIPS promotes the basic principles of international trade liberalization known as "national

[15] In particular, the global TRIPS regime follows the particular French conception of "droit d'auter," an inherent natural right of authors. This particular strand is even alien to *American* copyright law, which, since joining the Berne Union in 1988, has been forced to incorporate European notions of intellectual property that are inconsistent with the economic and jurisprudential rationales for US copyright, namely, recognizing "moral rights." Khan (2005, 222-223) 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.

[16] In 1967 the executive apparatus of the Berne Convention (along with the patent-equivalent 1893 Paris Convention for the Protection of Industrial Property) transitioned into the newly established World Intellectual Property Organization (WIPO, 1967a). WIPO became a special agency within the United Nations in 1974, broadening its mandate to also promoting "creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate economic, social and cultural development" (WIPO, 1974).

treatment," (World Trade Organization, 1994, Article 3), and "most favored nation" provisions (Article 5). In effect, these provisions requires equal treatment of foreigners and national copyright-holders within and across WTO member countries. For substantive provisions relating to copyright, TRIPS incorporates articles 1-21 of the Berne Convention (World Trade Organization, 1994, Article 9), which includes all of the substantive provisions summarized above.[17] As nearly every nation is a member of the WTO, it in effect applied the rules of the Berne Convention to all nations, especially non-Berne Union and developing nations.

The official stance of the international community is that agreements such as these, which raise minimum standards of copyright protection worldwide, encourage economic development. The UN and the WIPO maintain that there is evidence of a positive correlation between strengthening IP and subsequent economic growth in developing countries(Yasuda, 2007). Furthermore, disagreements over intellectual property rights across nations can, in effect, function as a non-tariff barrier to international trade, discouraging foreign investment, technology transfer, and other developmental gains from trade.[18] The goals of the internationalization of IP through the WIPO are

> to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations [and] to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development (WIPO, 2008, 3).

An international regime of equally strong mandatory minimum intellectual property rights under TRIPS functions like a Procrustean bed, chopping off innovations that run afoul of IP, and stretching existing indigenous institutions to fit with an exogenous and potentially incompatible western plan.[19] Indeed, Khan (2005, 304) notes that historically, the United States has had strong patent protections but weak copyright protection, while European nations have had weak patent

[17]The only exception is that TRIPS does not implement the "moral rights" of the 1971 text of Berne Convention (section 6bis), that is, "the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation" (Berne Convention, 1979, Section 6bis).

[18]Hence, following the evolution of international trade liberalization in the late 20^{th} century, international reformers have sought to incorporate international intellectual property rights agreements as part and parcel of multilateral trade liberalization negotiations.

[19]In Greek mythology, Procrustes was a roguish blacksmith with an iron bed he had all of his guests to sleep in, "fitting" them forcibly: if they were too short for the bed, he would stretch their limbs; if they were too long for the bed, he would cut them off.

protections but strong copyright protection, yet the international system crafted today forces developing countries to submit to both strong patent and strong copyright policies. TRIPS in particular has been met with fierce criticism, primarily from the costs it imposes on developing third world nations for accessing Western technology (Corbett, 2001; Picciotto, 2003; Lanoszka, 2003; May, 2004; Cullet, 2007).

History shows that one international copyright law is not necessarily a logical conclusion of legal evolution nor a dispassionate creation by policymakers to stimulate economic development or innovation. International copyright should thus not be understood as an exogenous feature of international relations or economic development. It is in fact an endogenous creation of publishing interests to protect their property once the benefits (of preventing competition) outweigh the costs (of preventing them from pirating existing works).

While this paper has focused on a positive analysis of the evolution of international copyright, it is not difficult to draw normative policy conclusions. While providing a globally uniform rule of law and reducing regulatory arbitrage and are laudable goals, economists should be wary of the costs disproportionately imposed across nations. Developing nations particularly suffer from decreased access, and developed nations particularly benefit from stronger protections. The moral opprobrium against acts of piracy also must be thrown into question, considering it was frequently employed, even encouraged, as good national policy.

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A Proof of Equation 1

Publisher 2 is indifferent between choosing the same author (assuming Publisher 1 has chosen A) when:

$$\begin{aligned}
\delta(p'_A - c') &= (1-\delta)(p_B - c) \\
\delta(p'_A - c') &= p_B - c - \delta(p_B - c) \\
\delta(p'_A - c') + \delta(p_B - c) &= p_B - c \\
\delta(p'_A - c' + p_B - c) &= P_B - c \\
\delta &= \frac{p_B - c}{p'_A - c' + p_B - c}
\end{aligned}$$

Symmetrically, if Publisher 1 has chosen B):

$$\delta = \frac{p_A - c}{p'_B - c' + p_A - c}$$