

## IP Justice: History of US Piracy

Throughout the development of today's wealthy nations, countries have offered different types of Intellectual Property (IP) protection to maximize their own development. The United States has a long history as a pirate nation, not protecting foreign authors when it suited its own developmental self-interest.<sup>1</sup> Only recently has the US pushed for strong international IP protection in an effort to maximize its information and entertainment exports.

In the US, Congress enacted the first copyright statute in 1790<sup>2</sup> but limited copyright protection to “a citizen or citizens of these United States or resident therein.”<sup>3</sup> The Act explicitly allowed pirating of foreign published works, stating:

[N]othing 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.<sup>4</sup>

During the late eighteenth and early nineteenth centuries many countries chose not to protect foreign works.<sup>5</sup> The piracy of foreign works was commonplace in Europe where some countries “openly countenanced piracy as contributing to their educational and social needs as

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<sup>1</sup> See Henry G. Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43, 52 (1953) stating: “The United States had been among the most parochial of nations so far as copyright protection for published works is concerned. For over a hundred years, this nation not only denied copyright protection to published works by foreign authors . . . but appeared to encourage the piracy of such works.”

<sup>2</sup> Act of May 31, 1790, ch 15, 1 Stat. 124.

<sup>3</sup> *Id.* § 1.

<sup>4</sup> *Id.* § 5.

<sup>5</sup> See Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 339 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=460740](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=460740).

reducing the prices of books for their citizens.”<sup>6</sup> During this period, countries could only secure copyright protection abroad by entering into bilateral treaties based on reciprocity.<sup>7</sup>

The US support of its own developmental interests came at the expense of foreign authors. The 1790 Act’s lack of copyright protection to foreign authors was particularly damaging to English authors; between 1800 and 1860 nearly half of the US bestsellers were pirated English novels.<sup>8</sup>

Despite harm to English authors, the US was unwilling to change its position, largely because of the interests of American publishers.<sup>9</sup> In 1842, Charles Dickens traveled to the US to advocate the importance of protecting foreign authors who were being harmed by the US copyright policy<sup>10</sup> and the British Prime minister unsuccessfully sought to induce the US to sign a copyright treaty<sup>11</sup>

In 1852, France initiated progress towards multilateral copyright protection by extending unilateral copyright protection to works from any country of origin.<sup>12</sup> The French Decree opened a dialogue on protection of foreign works which culminated with the adoption of the Berne Convention by twelve countries in 1887.

While the Berne Convention for the Protection of Literary and Artistic Works took force in 1887 the United States refused to join for the next century. In 1886, the US Secretary of State

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<sup>6</sup> EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 231 (2000).

<sup>7</sup> See Barbara A. Ringer, *The Role of the United States in International Copyright – Past, Present and Future*, 56 GEO. L.J. 1050, 1053 (1968) [hereinafter Ringer, *The Role of the United States*] (defining reciprocity as “I’ll protect your works, but only to the extent you protect my works”).

<sup>8</sup> See Yu, *The Copyright Divide* at 341 (2003) *supra* note 5.

<sup>9</sup> See Ringer, *The Role of the United States* at 1055, *supra* note 7 (stating “legislation to extend U.S. copyright protection to foreign authors attracted strong opposition, principally by American printing and publishing interests who believed that their livelihood depended upon cheap reprints of English books”)

<sup>10</sup> See Yu, *The Copyright Divide* at 341, *supra* note 5.

<sup>11</sup> See SIVA VIADHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 51 (2001)

<sup>12</sup> Decree of March 28, 1852.

wrote that it was impractical to attend the Convention at that time but noted that the US may ascend to the Convention in the future “should it become expedient and practicable to do so.”<sup>13</sup> While Berne changed the norm for international IP from reciprocity to national treatment,<sup>14</sup> the United States continued to ignore such norms.

It wasn't until American authorship emerged and attracted readers in England and other European countries that the US considered amending its stance on protection of foreign authors.<sup>15</sup> Since US copyright policy prevented American authors from receiving protection abroad<sup>16</sup> while creating competition against cheap imports at home,<sup>17</sup> American authors petitioned Congress for a change.

The US Congress responded by enacting the International Copyright Act of 1891, commonly called the Chase Act.<sup>18</sup> Under the Chase Act, foreign authors could secure a copyright by registering the work before publication and depositing two copies of the work on or before the date of publication anywhere. The act included an important manufacturing clause, which required the deposit of two copies “printed from type set within the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom.”<sup>19</sup>

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<sup>13</sup> Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 95 (1926).

<sup>14</sup> See Ringer, *The Role of the United States* at 1053, *supra* note 7 (defining national treatment as “I’ll protect your works to the same extent I protect my own works if you promise to do the same”)

<sup>15</sup> EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 231(2000) (noting the emergence of prominent authors such as James Fenimore Cooper, Ralph Waldo Emerson, Nathaniel Hawthorne, Washington Irving, Henry Wadsworth Longfellow, Herman Melville, Edgar Allen Poe, Harriet Beecher Stowe, Henry David Thoreau and Walt Whitman).

<sup>16</sup> See *id.* at 231.

<sup>17</sup> See Yu, *The Copyright Divide* at 343, *supra* note 5.

<sup>18</sup> Ch 565, 26 Stat. 1106 [hereinafter Chase Act].

<sup>19</sup> Chase Act § 3.

While the Chase Act finally granted foreign authors protection, the manufacturing clause effectively denied rights to foreign publishers<sup>20</sup> and even copyright protection to foreign authors was considered illusory due to the rigid formality requirements.<sup>21</sup> Congress made major revisions to the Chase act in 1909 and 1976, but didn't completely remove the manufacturing clause until 1986.<sup>22</sup>

Even though the US refused to join Berne, US authors were still getting protection under Berne through the provision known as the “backdoor to Berne.” By simultaneously publishing a work in a Berne member country and the United States, the work was entitled to protection throughout the Berne Union. The practice was “extremely widespread” for US works.<sup>23</sup>

“[F]ollowing the First World War, the increasing use of American works in other countries brought with it a demand that the United States adhere to the Berne Convention.”<sup>24</sup> The US ultimately joined the Berne Convention in 1988 and is now one of the largest advocates of strong international IP protection. Since the original Convention, when many members were still developing nations, the minimum protection requirements have substantially expanded,<sup>25</sup> currently requiring protection for a minimum of the life of the author plus fifty years.<sup>26</sup>

When the US used to primarily export cars, steel, and aluminum, other countries IP laws were of no concern.<sup>27</sup> Now the US supports strong IP protection because without protection of

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<sup>20</sup> See Yu, *The Copyright Divide* at 348, *supra* note 5.

<sup>21</sup> See Ringer, *The Role of the United States* at 1057, *supra* note 7.

<sup>22</sup> 17 U.S.C. § 601 (2004).

<sup>23</sup> See Ringer, *The Role of the United States* at 1059, *supra* note 7.

<sup>24</sup> See *id.* at 1058.

<sup>25</sup> See *id.* at 1054 stating: “Any country that now wants to join the Berne Union must obligate itself to grant a very high level of copyright protection.”

<sup>26</sup> Berne Convention for the Protection of Literary and Artistic Works, June 26, 1948 (Brussels) art. 7(1).

<sup>27</sup> See Thomas J. McCarthy, *Intellectual Property – America’s Overlooked Export*, 20 U. DAYTON L. REV. 809, 809 (1995).

technical and entertainment information, the US will have little to sell to the rest of the world.<sup>28</sup>

The United States holds an astounding seventy-five percent of the international market for prepackaged software and sixty percent of software related services market.<sup>29</sup>

The United States' own path to development illustrates that different levels of IP protection that respect a countries own developmental needs are acceptable and optimal in allowing others to develop. Unfortunately, now the US tries to prevent poorer countries from achieving the same path of development by forcing them to adopt maximalist IP rights at the expense of the public interest. But history should not be forgotten and less developed countries should be allowed to pursue their own judgment in setting IP policy, just as the US always has.

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<sup>28</sup> See McCarthy, *America's Overlooked Export* at 812 stating "Foreign sales in the copyright industry-publishing, computer programs, film making and the like--are larger than those of paper, plastics, rubber, lumber, pharmaceuticals, textiles and telephone equipment combined").

<sup>29</sup> See *id.* at 811.