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International Copyright in Historical Context: Who Are the Real Pirates?

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Abstract

Copyright is usually justified with arguments about defending the natural right of authors to control their creations, or claims that limited monopolies spur innovation for the greater good of society. I contrarily assert that the primary intent of copyright has generally been to protect powerful industries in advanced countries and ensure control over emerging markets that rely on the importation of intellectual property.

As global trade expanded in the 19th century, a patchwork quilt of domestic copyright laws and bilateral treaties failed to stem rampant infringement that hurt publishers' export revenues. Re-printers and readers, however, benefited from lower prices. The early United States explicitly limited copyright protection to its citizens. As a result, its publishing industry grew exponentially in the 19th century, largely through cheap reprints of European works. Not until it had itself become a literary power did it finally join the international copyright regime to benefit from its protections. In the 20th century, some developing countries successfully emulated America's earlier approach to development, but the intensification of restrictions in recent IP treaties now limits this strategy through threats of economic retaliation.

This paper takes a whirlwind tour through five centuries of international copyright history, challenging dominant narratives about its purpose, beneficiaries, and impact on the global public good. In an age where laws have become ever more skewed in favor of owners and against users, alternatives such as Open Access are offered that, in the long term, will facilitate a more equitable distribution of knowledge resources.

Introduction

The earliest domestic copyright statute arose in the 18th century in an attempt to temper publisher monopolies, empower authors, and make books more affordable. With the growth of global trade, unauthorized reproduction of copyrighted works throughout the world led to lost export revenues for publishers and authors, but benefited domestic printers and readers via lower costs arising from the absence of contractual obligations to the original copyright owners. As publishing industries grew and authors gained rights to their works, they placed increasing pressure on governments to secure international treaties that would protect their financial interests, leading to the 1886 Berne Convention for the Protection of Literary and Artistic Works. Most of the treaty's original signatories were net exporters of intellectual property, and its benefits were designed to give these countries a comparative advantage over nations that were primarily importers. For this reason the United States, in its early days as a developing country, avoided international copyright protection and explicitly endorsed the infringement of foreign works. Not until it had itself become a literary power did it finally join the

international system so that it too could benefit from strong protections.

Global copyright laws have been further strengthened in recent decades through new international treaties. Copyright maximalism is typically justified using natural law arguments about protecting the inherent rights of authors to control their creations; or utilitarian assertions that limited monopolies spur innovation for the greater good of society. In actuality, strong copyright has always been intended to protect the profits of powerful copyright industries in advanced countries, ensuring quasi-perpetual monopoly control over markets in countries that rely primarily on the importation of intellectual property for economic and social development. This paper explores this reality by examining the history of copyright laws and treaties, as well as the prevalence of book piracy in Europe and North America over time. It then shows how modern developing countries have attempted to rely on similar tactics only to have their options limited by ever more controlling treaties. With possibilities limited by threats of economic sanctions, this paper finally examines alternatives that are still available to countries of the global South as they attempt to even the playing field and

improve their economic, educational, and health situations.

Emergence of Copyright

In Britain, from 1557 until 1695, the Stationers' Company of London, a guild of printers and booksellers, enjoyed a royally privileged perpetual monopoly to distribute all printed materials throughout the kingdom. Only guild members were permitted to publish, and only after registration of the work with a company warden. Unregistered works were deemed illegal and offenders faced criminal prosecution (Khong, 2006). In return for control over the increasingly lucrative book trade, the company was required to censor the press against seditious materials. The government's primary motive for tolerating anticompetitive practices was the suppression of political opposition in a time of religious conflict over royal succession. Unanticipated consequences of this arrangement included high book prices and high unemployment in the printing trades. This combination of factors predictably resulted in rampant illegal reprinting of works, which simultaneously absorbed surplus labor and satisfied public demand for affordable reading material. It also made censorship ineffective, as antiroyalist and antimonopolist tracts abounded (Feather, 2006).

Dissatisfaction with the status quo led Parliament to strip the Stationers' Company of its privileges in 1695, and in 1710 the Statute of Anne became the world's first modern copyright law. It recognized authors as the first owners of the content of their books (United Kingdom, 1710), whereas they previously had no rights other than ownership of the manuscript and the ability to sell it. It also limited the duration of owners' exclusive rights to 14 years from the date of publication, a modest attempt to constrain the power of the London booksellers, increase competition, and discourage price gouging. Similar to the earlier system, however, it acknowledged the need to protect intellectual property from unauthorized appropriation. The statute also continued to require registration as a form of censorship, and forbade the importation of reprints from abroad to protect local industry. Other countries followed suit with domestic copyright legislation over the next two centuries.

International Lawlessness

The publishing industry expanded in the 18th century alongside global trade, but at that time

international law was poorly developed. The Statute of Anne applied to U.K. citizens, but residents of other countries were not subject to British laws and British subjects were not beholden to those of other nations. As demand for reading material expanded with the spread of Enlightenment thinking and public education (Hesse, 2002, p. 32), the reprinting of foreign works became ubiquitous in many countries. Printers kept costs down by avoiding contractual obligations to foreign authors, and readers enjoyed cheaper texts. This piracy was considered an honorable public service because the efficiencies it entrained permitted a level of relative economic advantage over a country's competitors (Drahos & Braithwaite, 2002, p. 32). "Every government has a duty to restrict, where possible, the outflow of its wealth, hence to encourage domestic reproduction of foreign art objects" (Hesse, 2002, p. 35, citing a 1770s German mercantilist).

While reprinters and readers benefited from nonexistent international regulation, publishers of original works and authors lost significant export revenues. These latter two groups had considerable influence: publishers had always had the ear of the government because of their earlier privileges and economic power. Authors emerged as a significant lobby after gaining rights under the Statute of Anne, and with the growth of the Lockean notion that creativity was the product of individual genius rather than the channeling of divinity. In 1763, Diderot famously asserted that "ideas are the most inviolable form of property because they spring directly from the individual mind" (Hesse, 1990, p. 114). Governments were thus under pressure to protect export markets on the one hand, but to allow piracy of imported works to protect domestic industries on the other.

The Need for Consistency

Calls for international regulation increased to fever pitch by the mid-18th century (Hesse, 2002, pp. 32–33). In 1777, the case of *Bach v. Longman* established that foreign authors received protection if they were in the country when their work was first published in the United Kingdom, but courts handed down inconsistent rulings until the 1850s. This was due in large part to statutory confusion, as at one point there were 14 different laws governing copyright in Britain (Seville, 2006). The 1844 International Copyright Act provided some clarity by regulating the importation of foreign works (United Kingdom, 1844), leading to Britain's first bilateral copyright

treaty with Prussia in 1848. In 1851 an Anglo-French treaty was signed, significant because France and Britain were the two largest centers of publishing at that time. In 1852 France went further and unilaterally recognized the property rights of all foreign authors. A flurry of bilateral treaties throughout Europe soon followed, but they all differed in detail so the overall international situation continued to be confusing. Important markets remained aloof, notably the Netherlands, Russia, and the United States (Seville, 2006), and unauthorized reproductions continued to flood Europe from these countries.

After persistent pressure from publishers and authors such as Hugo, Dickens, and Twain, the Berne Convention for the Protection of Literary and Artistic Works emerged in 1886 (WIPO, 2013), finally giving reciprocal rights to all member countries' copyright owners. It continues to form the basis of international copyright law today and now includes 176 members (WIPO, 2018). It is notable that most of the original signatories, including Belgium, Germany, France, Italy, Spain, Switzerland, and the United Kingdom, were major publishing centers and stood to gain the most from the treaty because it safeguarded their exports. In order to fulfill their Berne commitments, countries had to modify their domestic copyright regimes; one of the convention's greatest achievements was to reduce variation between nations.

The United States Opt's Out

As a developing country, the early United States lacked the infrastructural, educational, commercial, or military institutions of European nations. To compete on the world stage it needed substantial growth stimulated by technological and commercial innovation. There were few notable American authors and relatively few printing presses, so there was initially little choice but to depend on the importation of foreign works. In 1820 British authors represented 70% of the American book market, but declined to less than 20% by 1856 (Seville, 2006, p. 156). The U.S. population grew rapidly, overtaking Britain's by 1855, and a strong emphasis on education resulted in a 90% adult literacy rate. There was enormous demand for reading material and the publishing industry grew rapidly: in the 1830s about 100 titles per year were published, but by 1855 the figure had risen to 1,100 (Seville, 2006, p. 147).

A copyright clause was embedded in the Constitution "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, 1789, section 8). It balanced monopoly power against limited duration to encourage creators while ensuring the diffusion of ideas and promoting innovation via the public domain. Details were fleshed out in the Copyright Act of 1790, which generally followed along the same lines as the Statute of Anne in terms of owners' rights, duration, remedies, and parallel importation. However, it differed by explicitly limiting protection to U.S. citizens and residents, as well as by permitting the importation, reprinting, and distribution of works produced abroad (United States, 1790, sec. 5).

Opposing interests in the United States paralleled those seen in Europe. As early as the 1820s, authors such as James Fenimore Cooper and Washington Irving began favoring some form of international regulation (Seville, 2006, p. 156). They enjoyed domestic protection but their books were more expensive than reprints because of the added costs of author contracts for publishers, making it difficult for a distinctly American body of literature to emerge. As American authors gained international acclaim, they also lost potential revenue to overseas infringement. Several reputable publishers also came to support an international agreement. They purchased advance rights from foreign authors to take advantage of sales flowing from being first to market, but often found their investment undercut within mere weeks by pirate publishers in the Midwest who kept costs down by avoiding author contracts and using cheap materials. This was a perfectly legal strategy given that there was no U.S. copyright attached to the work, but a treaty would threaten this approach (Hesse, 2002, p. 41). The printing trades also opposed international copyright, fearing competition from works printed or typeset abroad.

Congress was buffeted by competing lobbies, and it took 70 years before eventual passage of the International Copyright Act of 1891, which finally afforded protection to foreign authors providing that the work was both typeset and manufactured in the United States, and that the author's home country provided reciprocal treatment of American authors (United States, 1891). Thus, compromise was reached between the interests of authors, exporters, domestic printing interests, and protectionists. The country transitioned to supporting maximalist positions once it became a net exporter of literary works and was no longer dependent on the importation of foreign titles to gain advantage. However, it remained outside the Berne Convention until 1989, preferring

instead to negotiate bilateral treaties, using its leverage as an economic powerhouse to gain the upper hand instead of accepting the constraints inherent in multilateral agreements.

From Colonialism to Neocolonialism

Imperial powers foisted their intellectual property regimes on their colonies, and this was further reinforced in the Berne Convention, which permitted countries to sign on behalf of their foreign possessions (WIPO, 2013). In the mid-20th century, as empires dissolved and countries gained independence, two divergent strategies emerged. Generally speaking, the poorest countries of Africa and Asia that had been under French or British control largely retained the IP systems of their former masters, retaining membership in Berne since they lacked native legal expertise to start from scratch or competently negotiate in the international arena (Drahos & Braithwaite, 2002, p. 76). Other nations, including much of Central and South America as well as large countries such as India, took a more independent approach and modified their patent and copyright rules to encourage industrial and educational development. This included weaker protections for foreign rights holders in order to make materials such as textbooks and pharmaceuticals more affordable (Deere, 2009, pp. 39–41). In the 1960s and 1970s, developing countries also attempted to revise the Berne Convention to their advantage by seeking more favorable terms with respect to duration, translation, broadcast rights, and educational use. However, opposition from global publishers convinced copyright exporting countries to block these efforts so as to retain their global market dominance (Drahos & Braithwaite, 2002, p. 77). Failing to obtain satisfaction via negotiation and having little recourse, developing nations reverted to the age-old strategy used over the previous century by the United States of pirating foreign works, ignoring foreign patents, and neglecting to enforce their treaty obligations to punish infringement. Free riding was used to diffuse innovation and gain some advantage.

The Berne Convention has weak enforcement mechanisms, so rapidly developing countries such as China, India, Brazil, and South Korea were able to get away with evading it for some time. However, as the “information economy” expanded in the late 20th century and IP-containing exports such as software and movies took on ever-increasing significance, efforts intensified to maximize and protect the IP rights of transnational corporations. The United

States in particular has taken a three-pronged approach: first, strengthen *multilateral* agreements linking trade benefits to IP protection. Second, negotiate *bilateral* agreements exceeding international norms, promising enhanced market access in exchange for improved enforcement (Deere, 2009, p. 114; U.S. Copyright Office, 2018). Third, threaten *unilateral* sanctions against habitually infringing countries (Drahos & Braithwaite, 2002, p. 73). These efforts are encouraged by trade lobbyists, notably the International Intellectual Property Alliance, a coalition representing over 3,200 companies in the music, film, publishing, and software industries (IIPA, 2017). This group has been particularly influential, providing data and recommendations to the Office of the U.S. Trade Representative, culminating in its annual *Special 301 Report*, a rating of “problem” countries according to their degree of noncompliance (USTR, 2018a). The report is used as a coercive tool to bring countries into line by threatening to erect trade barriers for perceived inadequacies. Tellingly, countries that have consistently protested excessive IP rights in international fora, including Brazil, India, and Argentina, are perennially placed on the priority watch list to weaken their bargaining positions (Deere, 2009, p. 165). This bullying strategy is not limited to developing countries either. In 2018, Canada was demoted to the priority watch list just as the North American Free Trade Agreement (NAFTA) was being renegotiated. In the new treaty, Canada has made significant concessions on IP, including lengthening the duration of copyright and patent protection (USTR, 2018b).

Because of Berne’s weak teeth, IP industries, led by IBM and Pfizer, promulgated a new treaty tying IP to trade. Negotiated primarily by a coterie of a dozen or so developed nations and actively excluding developing countries (Drahos & Braithwaite, 2002), the 1995 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) was a core component of the newly created World Trade Organization which replaced the General Agreement on Tariffs and Trade (GATT). TRIPS expands the scope of works receiving IP protection and ties enforcement to the WTO’s binding dispute resolution mechanism. The 1996 WIPO Internet Treaties further strengthen protections for computer programs, databases, phonograms, and performances (WIPO, 1996). Similar to Berne a century previously, these agreements reinforce the clout of IP-exporting nations and further limit the sovereign powers of individual countries to legislate flexibilities into their IP regimes. The copyright laws of most countries have become

substantially similar, reflecting the hegemonic influence of global corporations over international law.

Finding Alternatives

Despite corporate stranglehold over the international IP system and the diminished power of individual countries to take independent legislative action, options still exist for IP-importing nations to protect and advance their interests. Moving forward, new works can be kept away from the enclosure of strict ownership so they can diffuse and promote the public good.

Limitations and Exceptions: Berne and TRIPS allow certain flexibilities, including fair use for purposes such as education, criticism, and review, and exceptions for libraries and people with disabilities. Rights to reverse engineering of computer programs, translation into local languages, and the use of compulsory licenses are also available. However, most developing countries have not taken full advantage of these possibilities, partly due to “TRIPS-plus” obligations arising from bilateral treaties with exporters such as the United States (e.g., copyright duration of life + 70 instead of TRIPS’ life + 50), and also because of a shortage of expertise in understanding the full scope of available rights (Deere, 2009, p. 92). Nations must strengthen their legal skills in order to leverage these options, and avoid consenting to agreements that are more restrictive than absolutely necessary.

Free and Open Source Software (FOSS): With copyright-protected software, firms such as Microsoft, IBM, and Apple extract significant rents from users, resulting in considerable outflows of licensing fees to industry centers dominated by the United States. Developing countries could use these funds more productively to promote sectoral development and economic growth. FOSS has emerged as a viable alternative to proprietary code, with operating systems such as LINUX offering low-cost competition to Windows, UNIX, and Mac-OS. Not only is it free from licensing fees, FOSS also gives local control over code modification, including translation into local languages that are too obscure for corporate profitability. Countries such as Brazil, Chile, and Ecuador have begun shifting to FOSS, and because government agencies are major IT consumers, they have significant influence on local markets. By creating a hospitable environment for FOSS, governments create demand for local skills, but this must be accompanied by investment in educational opportunities for programmers in order to avoid the

need to import skilled workers from abroad. Rizk and El-Kassas (2010) explore the challenges and opportunities of FOSS in Egypt as it tries to develop a robust domestic IT industry.

Open Access (OA): Monopoly pricing by commercial publishers has led to runaway inflation in sectors dependent on access to knowledge. In rich and poor countries alike, public institutions have found that their constituencies suffer from the high price of scholarly information and textbooks. For example, 120 members of the Association of Research Libraries (ARL) in the United States and Canada spent a combined total of U.S. \$1.17 billion on subscriptions in 2015–2016 (Morris & Roebuck, 2018). Developing countries cannot afford these costs, and this impedes improvements to education, health care, and other critical arenas, thereby keeping them at a growing disadvantage.

Enabled by the low marginal costs of online dissemination, there is a growing trend to publish OA journals, books, and other open educational resources (OER). These are free to read and financed via means other than subscription or purchase, such as government subsidies or support from private foundations and NGOs. Funding bodies must make significant and ongoing commitments to sustainably support these initiatives. As OA infrastructure matures and the corpus of OA knowledge expands the intellectual commons, these initiatives can have a snowball effect on the growth of education and research while diminishing wealth transfers to corporate copyright owners. Although front-end investment in open initiatives is nontrivial, the long-term costs involved will be lower than if the status quo of commercial scholarly publishing is permitted to persist in draining the public purse.

Conclusion

This paper has examined the history of copyright law from its local beginnings in 18th-century Britain to its internationalization and intensification in the present day. Despite usual justifications stated in terms of natural law or utilitarian ideals, its real purpose has always been to strengthen monopoly power and market dominance for copyright owners. Opposing this trend, countries that rely on the importation of copyrighted works have always pressed their own advantage by advocating for weak intellectual property laws, and by the unauthorized reproduction and distribution of works. International treaties and economic coercion by the most powerful IP-exporting

nations have reduced the array of options available to developing countries, but the Internet presents new licensing models such as open source software and open access publishing for keeping creative works beyond corporate control. These innovations

for leveling the playing field have the long-term potential to reduce the input costs of obtaining the knowledge needed to achieve improvements in education, health care, and economic development.

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