



THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars
January 13, 2016
Vol. 11, No. 3

The Logic of International Intellectual Property Protection

by

Randolph J. May * and Seth L. Cooper **

Securing protection of American intellectual property (IP) rights internationally is an economic imperative. It is also a constitutional duty. In today's information economy, copyrights and patent rights provide critical financial investment incentives for research and development of new products and services. And IP constitutes a potent source of economic value and prosperity. According to an official U.S. Department of Commerce report, IP-intensive industries in America generated an estimated \$5 trillion in revenues in 2010 alone, providing over 27 million jobs. Since then, those figures almost certainly have grown. Another report estimated that the copyright industries alone contributed \$1.1 trillion in value added to the U.S. economy and employed nearly 5.5 million workers in the U.S. in 2014.

As IP becomes increasingly vital to our nation's wealth and prosperity, the need to ensure its protection on a global basis increases correspondingly. The American economy suffers staggering losses each year to international IP theft. According to the IP Theft Commission (2013), these losses likely exceed \$300 billion annually. IP theft is an injustice to the IP owners, diminishes economic prosperity, and undermines job opportunities. Indeed, this is a reason why it is so important to conclude international trade agreements, such as the recently-negotiated Trans-Pacific Partnership, that contain meaningful intellectual property protections.

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

The Constitution expressly makes protection of intellectual property rights an imperative of the federal government. The Intellectual Property Clause contained in Article I, Section 8, provides that Congress has 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.” The IP Clause is premised on the understanding that copyrights and patent rights are property rights grounded in the intellectual and physical labors of authors and inventors.

There is strong constitutional foundation for international protection of Americans’ copyrights and patent rights. The IP Clause permits protection of foreign intellectual property under federal law – or at the very least, permits it as a means of securing American IP rights abroad. Federal legal recognition of foreign IP constitutes fair play. As a matter of common sense and experience, doing justice and providing comparable treatment to rights of foreigners facilitates foreign cooperation to protect American IP rights. Treaty-making with foreign nations constitutes another critical constitutional mechanism for securing international protections for Americans’ IP rights.

The Copyright and Patent Acts of 1790, adopted by the First Congress and signed by President George Washington, constituted crucial first steps in fulfillment of the IP Clause’s mandate. But those landmark laws only provided domestic copyright and patent right protection to American authors and inventors. In most instances, early 19th century theft of American intellectual property was entirely permissible under the laws of foreign nations. For its part, America offered no copyright or patent right protections for foreigners. Nor did America offer IP protections for imported creations and discoveries already protected under foreign laws. American publishers openly engaged in literary piracy by reprinting cheap, royalty-free American editions of foreign works by Sir Walter Scott and Charles Dickens. A foreign reprint “courtesy of the trade” custom emerged among a small handful of prominent northeastern American publishers. By this custom, publishers typically agreed with one another concerning which firm would pirate a particular work, effectively monopolizing the American reprint market. And American tradesmen imported foreign inventions and, without license, profited by their use in manufacturing or other business activities. Without protections, creative works by American authors were left prey to foreign literary piracy, too. Publishers in Great Britain and other nations reprinted American works without obtaining consent or paying royalties to American authors, such as Washington Irving and James Fenimore Cooper.

Foreign piracy of American literary works rendered a serious injustice to authors. It also inflicted incalculable financial losses. This significantly harmed the ability of aspiring authors and inventors in America to earn a living through their creativity and innovation. Absence of international IP protections undermined the incentive of aspiring authors to engage in the extensive mental and physical labors and to make resource investments necessary to pursue new literary achievements.

American inventions were also an open target for unauthorized technology transfers to manufacturing and commercial interests in Britain and other nations. However, within only a few decades after the Founding, rapidly industrializing America recognized the expediency, if not the justice, of respecting the intellectual property rights of foreign inventors and inventions. So, in most cases, the Patent Acts of 1836 and 1839 permitted foreign nationals to obtain patent

protections in America. These laws similarly permitted American patents for foreign discoveries regardless of whether they had previously been patented in other nations. Federal patent protection for foreign nationals and citizens alike was carried over into the Consolidated Patent Act of 1870. Thus, laws passed by Congress in the 1830s supplied the basic groundwork for all future federal patent laws respecting international patent protection, as well as the basis for America signing patent treaties with foreign nations.

By contrast, securing international copyright protections in America involved several decades of advocacy by American authors, artists, lawyers, and statesmen. Consideration of the primary arguments driving the American international copyright movement is therefore instructive to understanding the logic of intellectual property in the American constitutional order. The case for international IP protection – including both copyrights and patent rights – is rooted in justice to the author or inventor who labors to produce a creative work or invention. The product is the intellectual property of the author or inventor. And as the owner of that property, the author or inventor is thereby entitled to exclusive control over the reproduction of that property and to reap the financial rewards arising from the production and use of copies. Government is responsible for securing individual private property rights, including IP rights. One of government's foremost duties is to protect its own citizens' property rights. Nonetheless, foreign citizens' property rights are entitled to respect as well, except where compelling circumstances counsel otherwise. As both a principled and practical matter, by respecting the property rights of citizens of foreign nations on equal or at least similar terms with its own, a government may best secure foreign protection for its own citizens' property rights. Thus, international IP protection is based on the justice of rewarding the labor of authors and inventors, whether foreign or domestic, and bolstered by a beneficent expediency in more fully securing IP rights from other nations on a reciprocal basis.

The movement for international copyright protection did trigger America's only organized and influential opposition movement to expanding intellectual property rights protections in the 19th century. Even so, the opposition movement was principally concerned with *international* aspects of intellectual property protection. Also, the opposition movement was primarily directed toward practical considerations, *not* against the natural law theory of literary or industrial property rights. According to the natural law perspective, constitutional protection of intellectual property rights is substantially grounded in abstract notions of doing justice not only to individual authors and inventors but to foreign countries as well. To a large degree, the 19th century movement against international copyright was fueled by the American publishing industry's protectionist concerns. A small handful of major Northeast American publishing houses established their own "courtesy of the trade" custom, thereby effectively monopolizing the reprint market. In times past and present, IP rights have been misguidedly attacked as government-conferred monopolies rather than respected as property rights. Yet, throughout the 19th century it was the protectionist – indeed, monopolistic – major American publishing houses that opposed expanding IP rights protections.

Throughout the 19th century, the movement for international copyright presented a compelling logical case for the exclusive rights of authors to control the reproduction of their literary property and reap the financial rewards and for the need to secure those rights from infringement abroad. Early leaders of the American copyright movement in legal and political arenas included

authors and writers such as Washington Irving, James Fenimore Cooper, and William Cullen Bryant. Lawyers and statesmen were also part of the early international copyright movement.

Henry Clay was the most widely known American statesman to actively support the cause of international copyright in the late 1830s and early 1840s. Between 1837 and 1842, Clay filed five international copyright bills in the Senate. After gaining appointment as Chairman to a Select Committee to consider the subject, Clay presented the first Congressional committee report favoring international copyright. It declared: “That authors and inventors have, according the practice among civilized nations, a property in the respective products of their genius is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence.”

Francis Lieber, deemed by many to be America’s first academic political scientist, published the century’s most respected academic defense of international copyright protection. Lieber’s pamphlet, *On International Copyright* (1840), emphasized that copyright is a form of property created by a person’s labor which government is entrusted to protect:

Both personal and intellectual activity appear clearest in a literary production; and if any product of individual activity has any claim whatever to an individual title of property, it is a literary composition; if there exists any species of property not made by government, but existing by its own spontaneous right, and which requires only to be acknowledged by way of protection on the part of government, it is literary property.

In 1848, New York lawyer John Jay II wrote a petition that one historian has called “the most elaborate and carefully argued defense of international copyright to reach the halls of Congress before the Civil War.” Wrote Jay, “the passage of an international copyright law, by which foreign authors shall be allowed their copyright here, and American authors assisted to their copyright abroad, would not only be an act of national justice, but of national policy.” Jay’s petition identified nearly 600 American books that had been reprinted in Great Britain, evidencing the extent of foreign piracy and lost rewards due to American authors.

The post-Civil War international copyright movement in America built upon the central arguments of its forbears. The American Publishers’ Copyright League and other organizations sprung up in support. Authors and creative artists, including Henry Wadsworth Longfellow and Samuel Clemens, also lent support. The primary justification for international copyright urged by supporters was the claim, as a matter of natural right, of authors to the fruits of their labors. As Longfellow put it in his 1886 Senate hearing testimony:

One could live a great deal cheaper, undoubtedly, if he could supply himself from other people’s labor or cost. But at the same time—well, it was not called honest when I was young, and that is all I can say... and if I were asked what book is better than a cheap book, I should answer that there is one book better than a cheap book, and that is a book honestly come by.

Finally, the International Copyright Act of 1891 established the principle of reciprocity, whereby American authors and creative artists could obtain copyright protections from foreign nations similar to those already enjoyed at home. The 1891 Act laid the groundwork for future international cooperation by the United States to secure copyrights, including American signing of copyright treaties with foreign nations and trade agreements.

Today, the United States is a signatory to numerous treaties with foreign nations that incorporate international protection of IP. The recently concluded Trans-Pacific Partnership Agreement (TPP), which will now come before the Senate for ratification, is but one example. Precise answers as to how American IP rights may best be secured internationally through laws passed by Congress or by treaties signed with foreign nations inevitably involve practical judgments that take specific facts and circumstances into account. But all such judgments begin with recognition of the IP Clause's imperative to secure the IP rights of American citizens and the principled and practical reasons for treating the IP rights of foreign nationals justly.

In sum, by providing protections for the IP rights of foreign nationals on terms equal or similar to the way that the United States protects its own citizens' IP rights at home, our government acts in a principled and practical way to secure our citizens' intellectual property rights abroad. International IP protection thus fulfills the Constitution's promise to secure the rights of American authors and inventors. Making good on that promise through the negotiation and ratification of international trade agreements and otherwise is all the more vital in light of the crucial role played by intellectual property in today's information economy.

Copyright and Patent Rights in Late 18th Century America

At the Philadelphia Convention of 1787, the Constitution's framers proposed to make nationwide protection of intellectual property rights a part of the fundamental law of the land. The Article I, Section 8, Intellectual Property Clause empowers Congress "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." As demonstrated in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (2015), the underlying premise of the IP Clause is that copyrights and patent rights are property rights of authors and inventors. The authors and inventors are entitled to ownership based on the intellectual and physical labors expended in producing their creative works and inventions. This is the natural rights perspective that, as we show in our book, was the Founders' principal rationale for including the IP Clause in the Constitution.

Soon after the Constitution was ratified and went into effect, the First Congress adopted the Copyright and Patent Acts of 1790. President George Washington signed both acts into law. By its terms, the Copyright Act of 1790 provided domestic copyright protection only to "the author and authors of any map, chart, book or books already printed within these United States, being a citizen or citizens thereof, or resident within the same, his or their executors, administrators or assigns." It prohibited copyrighted works "printed, reprinted, published, or imported from any foreign Kingdom or State." And the 1790 Act made clear that it did not "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.”

The Patent Act of 1790 did not expressly limit its application to inventions made by citizens or residents of the United States. However, the 1790 Act proved administratively burdensome and short-lived. Few patents were granted under it. The Second Congress passed the Patent Act of 1793. The 1793 Act was adopted with the encouragement and drafting assistance of Secretary of State Thomas Jefferson. It provided a patent application review process that was less administratively burdensome and extended protections not merely to novel inventions but also to improvements to existing inventions. But the 1793 Act expressly limited all patent rights to citizens of the United States.

Interestingly, some of the copyright and patent right laws passed in the newly independent states in the 1780s did contain reciprocity clauses. Under those provisions, the home state would recognize the intellectual property rights of residents of other states where such other states offered similar protections. These early state laws were important precursors of the Copyright and Patent Acts of 1790. And although they offered a model by which Congress could have given reciprocity to the literary works and inventions of foreign authors and inventors where those foreign countries offered Americans similar protections, the early Congresses declined to do so.

The Second Congress also disregarded Alexander Hamilton’s call for express duties on imported books as a means of aiding the American printing industry. In his *Report on Manufactures* (1791), Hamilton wrote:

The great number of presses disseminated throughout the Union seem to afford an assurance that there is no need of being indebted to foreign countries for the printing of the books which are used in the United States. A duty of ten percent, instead of five, which is now charged upon the article, would have a tendency to aid the business internally.

Historian and intellectual biographer Forrest McDonald referred to Hamilton’s *Report on Manufactures* as “his third great state paper.” (Hamilton’s *First* and *Second Report on Public Credit* (1790) are regarded as his other two great state papers). McDonald explained that Hamilton “believed the country could achieve prosperity and safety only if it broadened its economic base to include manufacturing as well as agriculture and commerce.” Among the means Hamilton’s *Report* recommended for promoting manufactures in the new nation was: “*The encouragement of new inventions and discoveries at home, and of the introduction into the United States of such as may have been made in other countries; particularly, those which relate to machinery.*” Hamilton proposed making financial rewards available to overcome the threat of foreign restrictions and punishments on such technology transfers. Implicitly referring to the Copyright and Patent Acts of 1790, Hamilton continued:

[S]o far w respects “authors and inventors,” provision has been made by law. But it is desirable, in regard to improvements, and secrets of extraordinary value, to be able to extend the same benefit to introducers, as well as authors and inventors; a

policy which has been practised with advantage in other countries. Here, however, as in some other cases, there is cause to regret, that the competency of the authority of the National Government to the good which might be done, is not without a question.

The Second Congress and its immediate successors similarly declined to take up Hamilton's idea for extending domestic copyright and patent right protections to importers of foreign works and inventions.

Contemporary writers sometimes draw attention to Hamilton's early proposal as officially encouraging industrial espionage. Or they point to Hamilton's role in starting the Society for Establishing Useful Manufactures, a state-chartered business corporation, to draw on foreign workers and technical knowledge to advance American enterprise. Mention is sometimes made of George Washington having apparently been receptive to American plans along these same lines. And indeed some Americans may have enticed foreign skilled workers with special knowledge of foreign inventions to emigrate to the U.S. or to otherwise obtain foreign trade secrets and profit by their use in manufacturing and commercial enterprises. But it is misguided to make any such occurrences the basis for claiming the Founding Fathers had disrespect for IP rights. And it is equally misguided to make such occurrences the basis for reducing patent rights protections.

First and foremost, Hamilton's proposal was not calculated to deny patent rights as such. Coinciding with Hamilton's overall interest in securing America's geopolitical and economic independence, his *Report* proposal called for providing domestic patent rights protections to imported inventions. Domestic patent rights were to be inducements for persons to undertake the difficulties of importing foreign inventions. At the same time, it is worth noting that Hamilton's proposal was made openly in his *Report*, and other nations remained free to pursue a similar course with respect to American inventions. Active pursuit of trade secrets belonging to Americans and other foreign nationals by manufacturers and commercial interests in rival nations was by no means a new phenomenon when Hamilton presented his *Report*. It must also be remembered that the United States was not far removed from the Revolutionary War (1775-1783) and that America would again face Great Britain in the War of 1812. Indeed, peacetime relations between the nations ranged from uneasy to tense up until the Treaty of Washington (1871). And just as obvious, Hamilton's proposal never became official federal official policy. Rather, with the adoption of reforms within a relatively brief period, federal policy closed the door to such official inducements to import inventions or trade secrets. For as will be seen, over the next few decades Congress would take up the issue of foreign imported inventions and make them eligible for patent rights protections.

Patent Rights in Early 19th Century America

Under the early patent laws passed by Congress, American inventions were an open target for unauthorized technology transfers to manufacturing and commercial interests in Britain and other nations. However, within only a few decades, industrializing America recognized the expediency, if not the justice, of respecting the intellectual property rights of foreign inventors and inventions.

The Patent Act of 1800 did extend to aliens who had resided in the United States for two years at the time of their petition for a patent, so long as the applicant made an oath or affirmation that “to the best of their knowledge or belief, such invention, art, or discovery had not been known or used, either in this or any foreign country.” Also, the Patent Act of July 13, 1832, extended to every alien, who at the time of petition was resident of the United States and declared his or her intent to become a citizen, without regard to length of time of having resided in America. Under the 1832 Act, failure to become an American citizen at the earliest time possible voided the patent. In addition, the Patent Act of 1842 provided that any citizen or alien who resided one year in the United States and proved upon oath an intent to become a citizen could obtain a design patent. These laws yielded no real benefit to foreigners who wished to reap the rewards of their intellectual labors in both America and in foreign nations. But they do show an early American recognition of the value of foreign inventions and receptivity to according them domestic patent rights protections.

The Patent Act of 1836 took an important step in securing patent rights to inventions by foreign nationals. The 1836 Act provided that an inventor would not be deprived of patent rights by reason of having previously taken out a foreign patent if such foreign patent was published within six months of date of filing of a patent application in the United States. Also, the fact that the invention had been known or used in a foreign country without receiving a foreign patent did not void a patent. The Patent Act of 1839 went a step further, providing: “[N]o person shall be debarred from receiving a patent for any invention or discovery ... by reason of the same having been patented in a foreign country more than six months prior to his application.”

Federal patent protection for foreign nationals and American citizens alike was carried over into the Consolidated Patent Act of 1870 and also into the “Revised Statutes” of 1874. As the 1874 revised statutes provided:

Any person, whether a citizen or an alien, may obtain patent protection for a term of seventeen years, who has invented or discovered any new and useful art, machine, manufacture, or compositions of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention and discovery thereof, and not in public use or on sale for more than two years prior to his application unless the same is proved to have been abandoned.

Thus the Patent Acts passed by Congress in the late 1830s and early 1840s supplied the basic groundwork for all future federal patent laws respecting international patent protection, as well as American signing of patent treaties with foreign nations.

Copyrights in Early 19th Century America

The first major revision of federal copyright laws – the Copyright Act of 1831 – did not confer copyright protection for foreign authors or make any provision facilitating protection of copyrights by American creators abroad. The 1831 Act’s primary importance was in its

extension of copyright protection terms of years from 14 years to 28 and its inclusion of musical compositions, designs, prints, etchings, and engravings within the scope of copyrightable works. But the 1831 Act retained the 1790 Act's domestic focus by limiting its application to "a citizen or citizens of the United States, or resident therein, ... and the executors, administrators, or legal assigns of such person or persons."

Subsequent 19th century copyright legislation similarly widened the scope of copyrightable works or reformed administrative processes for registering works and obtaining remedies for infringements through the courts. But those reforms maintained federal copyright law's applicability only to domestic protection of the rights of American creators. Securing international copyright protections in America involved several decades of advocacy by American authors, artists, lawyers, and statesmen.

The Logical Case for International IP Rights Protections

Historian Aubert J. Clark observed "the arguments for and against international copyright remained generally the same throughout the century." Not only that, to a significant extent the force of logic behind those arguments for international copyright during the 19th century also applied to international protection of patent rights.

Thus, it is worth briefly restating the case for international IP protection in the abstract. The case for international IP protection – including both copyrights and patent rights – is rooted in justice to the author or inventor who labors to produce a creative work or invention. The product is the intellectual property of the author or inventor. And as the owner of that property, the author thereby is entitled to exclusive control over the reproduction of that property and to reap the financial rewards arising from the production of copies.

Government is responsible for securing individual private property rights, including IP rights. A government's foremost duty is to protect its own citizens' property rights. And though lacking U.S. citizenship, a foreign citizen's property rights nonetheless are entitled to respect except where compelling circumstances counsel otherwise. As both a principled and practical matter, by respecting the property rights of citizens of foreign nations on equal or at least similar terms with its own, a government may best secure foreign protection for its own citizens' property rights. Thus, international IP protection is based on justice to authors and inventors, whether foreign or domestic, and bolstered by expediency in more fully securing their rights through reciprocal recognition.

The Constitution and the Textual Case for International IP Rights Protections

The Constitution expressly makes protection of IP rights an imperative of the federal government. The Article I, Section 8, Clause 8 Intellectual Property Clause provides that Congress has 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." The IP Clause is premised on the understanding that copyrights and patent rights are property rights and that authors and inventors have title to ownership based on their intellectual and physical labors in producing their creative works and inventions.

The text of the clause refers to “Writings,” “Discoveries,” and “Authors” and “Inventors” without express identification of citizenship. Nowhere does the text of the IP Clause limit its application strictly to domestic protection of the IP rights of American citizens. Although the IP Clause does not express geographic restrictions, the Supreme Court concluded in *Brown v. Duchesne* (1856) that “the power thus granted is domestic in its character, and necessarily confined within the limits of the United States.” There the Court ruled that use of a “patentee’s right of property and exclusive use” occurring “outside the jurisdiction of the United States is not an infringement of his rights.” The conclusion reached in *Duchesne*, based on long-standing canons of constitutional construction, was reaffirmed by the Supreme Court in *Microsoft v. AT&T* (2007).

In addition, the IP Clause permits protection of IP rights for foreign nationals under federal law – or at the very least, permits it as a means of securing American IP. After all, the Article I, Section 8, Clause 18 Necessary and Proper Clause gives Congress power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers,” one of which is the power to secure copyrights and patent rights. In *United States v. Duell* (1899), the Supreme Court recognized the conjunctive operation of those two constitutional clauses. Explained the Court in *Duell*, from Congress’s powers under the IP Clause along with its powers “to make all laws which shall be necessary and proper for carrying that expressed power into execution, it follows that Congress may provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that object.” Federal legal recognition of foreigners’ IP is consistent with justice and also facilitates foreign cooperation to protect American rights through IP-specific treaties or the IP provisions of international trade agreements. Treaty-making with foreign nations, pursuant to Article II, Section 2, Clause 2, can also work in tandem with the IP Clause. The treaty-making power thus constitutes another critical and commonly used constitutional mechanism for securing international protections for Americans’ IP rights.

All this said, securing international copyright protections for American authors, consistent with the IP Clause, involved several decades of advocacy by American authors, artists, lawyers, and statesmen. Their advocacy drew upon the underlying logic of intellectual property in the American constitutional order. Their efforts and arguments are thereby worth recalling as America suffers significant IP theft from abroad and attempts to address the piracy problem.

Henry Clay: Champion of International Copyright

Henry Clay was one of the most famous Americans of his day, with a career in national politics that spanned six decades. As Speaker of the House, Clay molded the position into a source and symbol of political power. In the Senate he championed his so-called “American System” of import tariffs and federal funding of internal improvements. Clay earned the superlative “The Great Compromiser” for his contribution to the Missouri Compromise of 1820 and the Compromise of 1850. Clay’s multiple, unsuccessful attempts to gain election to the presidency also kept him closely associated with the major political events of the first half of the 19th century.

As historian Daniel Walker Howe has written, “American writers lobbied for an international copyright law to save them from this unfair competition, and found a champion in Henry Clay.” Clay was the most prominent statesman advocating for international copyright protections during the 19th century. To this task, Clay brought not only his skills as a consummate politician, but his strong background with regard to property rights principles, international relations, and legal administration.

Although known first and foremost as a politician and statesman, Clay was an accomplished property lawyer. His legal education began with an apprenticeship to Virginia Chancellor George Wythe, a signer of the Declaration of Independence, and a delegate at both the Philadelphia Convention of 1787 and Virginia Ratifying Convention in 1788. Although at times Clay downplayed his legal education and study habits, historian Maurice Baxter concludes Clay’s legal education was far better than most lawyers of his day. Clay the lawyer does not appear to have had an active practice in patent right or copyright infringement cases. Yet he was a knowledgeable property law attorney who specialized in complex land title cases. Clay argued numerous cases before the U.S. Supreme Court, including *Green v. Biddle* (1823), which involved land subject to conflicting grants of title by the states of Virginia and Kentucky.

Clay also possessed a strong background in international relations. He was a negotiator of the Treaty of Ghent (1814), which officially secured the peace with Great Britain following the War of 1812. And as Secretary of State in the administration of John Quincy Adams (1825-1829), Clay was entrusted with advancing the nation’s interests in international affairs. During Clay’s time of service in the John Quincy Adams administration, the Patent Office was under the purview of the State Department. Thus, as Secretary of State, Clay’s responsibilities also included administration of the federal patent system. His signature routinely appeared on the patent certificates awarded to inventors. Indeed, patent applications and awards increased significantly during Clay’s time heading the State Department.

And as a member of the 21st Congress, Senator Clay supported the Copyright Act of 1831. This was the first major revision of federal copyright law since 1790. The 1831 Act extended copyright protection terms for authors and expanded the scope of recognized copyrightable works under federal law.

In February 1837, Clay presented to the Senate a pair of petitions signed respectively by British authors and American authors. Both petitions called on Congress to pass a law providing international protections for literary property. The Senate promptly appointed a Select Committee to look into the matter of international copyright. Clay was appointed as the Select Committee’s Chairman, and Senators William C. Preston, James Buchanan, Daniel Webster, Thomas Ewing, and John Ruggles were named as members. On February 16, 1837, Clay presented the Select Committee’s Report. The report based its recommendation on the need to do justice to the owners of property rights in literary works. It declared:

That authors and inventors have, according the practice among civilized nations, a property in the respective products of their genius is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence....It being established that literary property is

entitled to protection ought to be afforded wherever the property is situated... We would be shocked if the law tolerated the least invasion of the rights of property in the case of merchandise, whilst those which justly belong to the works of authors are exposed to violation without the possibility of invoking the aid of the laws.

Accompanying its report, the Select Committee prepared a bill that would secure literary property rights regardless of an author's nationality. The bill proposed to extend the Copyright Act of 1831's protections to unpublished works by authors from Great Britain, Ireland, and France. The bill also included a "manufacturing clause" that required all copyrightable works by foreign authors from those nations be printed and published in the United States. The clause was intended to placate opposition from American publishers who otherwise would not welcome competition from copyright-protected imported literary works.

Clay's bill had first and second readings and passed the Senate by unanimous consent. However, the bill failed to advance in the House of Representatives during the short session in which it was introduced. Undeterred, Clay reintroduced the bill later in that same year on December 13, 1837. And during the next few years, Clay introduced his copyright bill another three times: December 17, 1838; January 6, 1840; and January 6 or 7, 1842.

Although Clay's efforts came up short during his own day, the association of his name with the cause of international copyright helped propel the movement forward. In discussing Clay's efforts in early 1837, Aubert J. Clark wrote:

The report and the proposed bill stimulated widespread discussion. The proponents of the bill were chiefly a small group of writers, foreign publishers, intellectuals and men interested in international justice. Some advocated the law in the interests of native American literature; some had suffered personally from piracy or the system under which it operated; some pleaded the cause of an abstract right on philosophical grounds... Out of this attempt to secure passage of the Clay bill came the first of many organizations to promote the cause of international copyright.

Francis Lieber: The Property and Labor Basis for International Copyright

Francis Lieber is widely considered America's first political scientist. Educated in his native Prussia, Lieber immigrated to the United States in 1827. He served as professor of history and political economy at South Carolina College for two decades and later joined Columbia College in New York City as professor of history and political science. Lieber was a prolific researcher and writer. His *Essays on Property and Labor* (1841), for instance, was widely acclaimed in his day for its robust examination and defense of private property rights. Lieber was also editor of the *Encyclopedia Americana* (1829-32). In editing America's first encyclopedia, Lieber solicited entry articles by accomplished thinkers such as Justice Joseph Story, and he also contributed several of his own entries. (Biographer Frank Freidel questions Lieber's own respect for the copyrights of foreign authors relied on for the *Encyclopedia Americana*.) Lieber's publications were as frequent and diverse as his numerous interests and causes, including penal reform, social

statistics, the census, philology, the laws of war, international arbitration of disputes, and, of course, international copyright.

In his *Manual of Political Ethics* (1838-39), Lieber proposed protection of international copyrights. Lieber endorsed copyright protection “throughout the lifetime of a man and his heirs or perhaps even for a century.” Therein Lieber regarded literary piracy as politically unethical: “It strikes every one now-a-days, as very barbarous, that in former times, commodities belonging to any foreign nation were considered as a good prize... Yet, we allow robbing in the shape of reprint, to the manifest injury of the author.”

In March 1840, Lieber penned a lengthy essay on the theory of literary property. Lieber’s essay was written in the form of a letter to his friend and his former college President, Senator Robert Preston of South Carolina. The essay may have been prompted by a June 1839 letter Lieber received from Henry Clay about the obstacles to international copyright posted by the American publisher’s lobby. Indeed, in 1839, Lieber encouraged Clay to continue his fight for the cause of international copyright.

From his own pocket, Lieber paid for the publication of *On International Copyright* (1840) in pamphlet form. In it, Lieber emphasized that copyright is a form of property created by a person’s labor which government is entrusted to protect:

Both personal and intellectual activity appear clearest in a literary production; and if any product of individual activity has any claim whatever to an individual title of property, it is a literary composition; if there exists any species of property not made by government, but existing by its own spontaneous right, and which requires only to be acknowledged by way of protection on the part of government, it is literary property; if there is any property which does not trench upon the rights of others, and exists without any sacrifice of theirs; in brief, if there is any property peculiarly innocent and inoffensive in its character it is literary property.

Indeed, Lieber’s pamphlet vigorously defended “the nature of literary property in general” from “radically erroneous notions” about the subject. He pointed to the fact that literary property received significant pecuniary value due to the rise of printing technology, and thus acquired such value at a later period of human history than other forms of property. The late date in history at which authors acquired such value in comparison with other forms of property, and the correspondingly late recognition of copyright by laws or judicial rulings, misled some people to believe that that literary property was instead a grant of government privilege. Yet, he unequivocally regarded the claim that “property is the creature of government” to be “erroneous.”

Lieber conceded government can legitimately “regulate the transfer of property, prune certain species of it, and influence it in various ways” since “men must and ought to live in society” and that “it is our imperative duty to reconcile to other demands.” But in reconciling these demands with the unique value in producing copies, he argued that literary property “requires more specific protection of government, the farther society advances, and the cheaper, in consequence, the means of multiplying becomes.” Lieber maintained that justice should be considered for its

own sake. And justice to foreign authors should be preferred to expediencies such as cheap books or retention of manufacturing jobs. Still, he concluded: “The denial of an international copyright law operates with equal injustice, perhaps greater, toward our own authors, and decidedly to our greater national disadvantage.”

According to Freidel, Lieber’s pamphlet “came too late to affect the Senate, which in July 1840, ordered Clay’s bill laid on the table.” Nonetheless, “[f]rom New Orleans to Boston to Berlin, the pamphlet created comment and helped revive waning interest in international copyright.” Among the endorsers was Henry Wheaton, Supreme Court reporter, foreign diplomat, historian, and distinguished author of *Elements of International Law* (1836), America’s first treatise on that subject. A prolific and learned scholar in his own right, Wheaton had endured his own works being the subject of international literary piracy.

Freidel offers one further insight into Lieber’s legacy in supporting international copyright:

Throughout his lifetime, Lieber sustained his interest, and toward its close presented the same arguments he had used in 1840 before a new group of men, the members of the newly formed International Copyright Association. This was in 1868, and some of these men after a drawn-out struggle were to see passage of the long-desired measure, the Chace Act of 1891.

The Early Movement Against International Copyright

Examination of the arguments commonly offered by both sides of the debate over international copyright is instructive to understanding the logic of intellectual property in the American constitutional order. The movement for international copyright protection triggered America’s only organized and influential opposition movement to expanding intellectual property rights protections in the 19th century. Yet a close analysis reveals that the resistance to an international copyright agreement was not a withering attack on the institution of intellectual property itself. Objections leveled against an American international copyright law were based primarily upon practical considerations. The premise that literary property is grounded in the labors of authors and deserving of protection was scarcely called into question. Rather, it was the practical application of that premise on the international level that was so contested.

According to historian Aubert J. Clark, opponents of international copyright mostly avoided discussing the natural law theory of literary property rights that was prevalent in late 18th and early 19th century America. Rather than attack the philosophy or abstract justice of international copyright, the opposition movement was primarily directed toward practical circumstances. To a large degree, the 19th century movement against international copyright was fueled by the American publishing industry’s protectionist concerns. According to Daniel Walker Howe:

The first half of the nineteenth century witnessed publishing flourish as an industry while creative writers struggled to establish an economically viable profession in the United States. Unfortunately the interests of publishers and writers collided in the area of copyright law. The Constitution authorized copyright laws, and Congress enacted one in 1790, protecting American but not

foreign authors. This law effected a massive transfer of intellectual property from British to American publishers, but it proved a very mixed benefit to American authors. In the absence of international copyright, American publishers preferred to reprint free the works of established British writers like Thackeray, Scott, Dickens, and the Bronte sisters, rather than take a chance on American writers to whom they would have to pay royalties.

Advocates of international copyright often complained that a small handful of American major publishing houses monopolized the reprint market. As Henry Clay wrote in an 1839 letter to Francis Lieber:

The difficulties which have been encountered, and will continue to be encountered, in the passage of a liberal Copyright law proceed from the trade, especially the large book printers in large Cities. It is very active and brings forward highly exaggerated statements both of the extent of Capital employed and the ruin that would be inflicted by the proposed provision for Foreign authors. These statements exercise great influence on members of Congress, many of whom will not enquire into the truth of them.

As a result of the publishing industry's easy success in blocking international copyright legislation, "Lieber was so irritated that he sneered at one of the leading protectionist houses, Harper and Brothers, as 'hangers-on' of the nation."

American publishers and their allies contended that copyright protection for foreign literary works would increase the costs of doing business on account of royalty payments to authors, threatening business prospects and industry-related jobs. In times past and present, IP rights have been misguidedly attacked as government-conferred monopolies rather than being respected as property rights. Yet, throughout the 19th century it was the protectionist – indeed, monopolistic – major American publishing houses that opposed expanding IP rights protections.

The 19th century movement against international copyright also contended that the benefits of such an agreement would overwhelmingly flow to Great Britain. British authors, it was claimed, were more in demand by American audiences. Some opponents of international copyright insisted that there were too few high-demand or high-quality American literary works to justify international cooperation. Another claim repeated throughout the 19th century was that increased book costs due to royalty payments to foreign authors would deprive Americans of cheap books.

The Ruggles Report Against International Copyright

All told, between the years 1837 and 1868, Congressional committees issued two reports on the subject of international copyright. Whereas Henry Clay's Select Committee issued a report favoring international protection in 1836, an unfavorable report was issued by the Senate Patent Committee in June 1838. The Patent Committee's Report was often known as the "Ruggles Report," for Sen. John Ruggles of Maine, who served as Chairman of the Committee. Although Ruggles reported Clay's June 1838 bill out of Committee without amendment, his Committee's report was highly critical of it.

Regarding the Ruggles Report, James Barnes observed: “The arguments against international copyright bear a striking resemblance to P.H. Nicklin’s *Remarks on Literary Property*. The preface of this work was dated 17 March 1838 and its publication was clearly designed to influence the Committee’s deliberations.” As Barnes pointed out, “Nicklin enjoyed a long-established relationship” with “leading reprinter of English works, the firm of Carey & Lea of Philadelphia.” Among the arguments against international copyright presented by both the Ruggles Report and Nicklin:

- The British authors’ petition presented by Clay in 1837 was foreign meddling;
- International copyright would result in higher retail prices for books and shorter print editions;
- International copyright law would harm the American publishing trade, which was the locus of \$30 to \$50 million in capital investment and which employed 200,000;
- A lack of reciprocity would result from an international copyright law because American domestic copyright terms could extend up to 42 years whereas terms in Great Britain lasted 28 years;
- Many more English authors would benefit from international copyright because American authors rarely ever obtained favorable publishing terms in Great Britain; and
- International copyright protection would not prevent cheap foreign reprints from flooding the market due to an 1833 reduction in tariffs on imported books.

The Ruggles Report was unimpressed by the manufacturing clause in Clay’s bill that required the first edition of foreign literary works to be printed in America.

The points against international copyright just observed will be addressed further in the next section. For now, among the Ruggles Report’s own arguments offered against international copyright, two deserve consideration. First, the Ruggles Report argued:

[A]s between nations, [copyright] has never been regarded as property standing on the footing of wares or merchandise, nor as a proper subject for national protection against foreign spoliation. It has been left to such regulation as every government has thought proper to make for itself, with no right of complaint or interference by any other government.

This was a point that Francis Lieber countered in his pamphlet *On International Copyright*. In Lieber’s view:

The international copyright law in this respect stands upon the same ground upon which powers used to make particular treaties with piratical states, according to which the flags of the contracting powers and their property were mutually respected. Property ought to have been acknowledged without it; but since it was not, it was better to make a treaty and pass a law; yet this law grants no particular boon; it only grants what in justice ought never to have been denied. There are many things which unjustly have been denied for centuries, because he who denied had the power to do it; and it becomes necessary to establish the rightful state of things by positive law, yet that does not on that account necessarily grant a favor.

Second, the Ruggles Report argued:

American ingenuity in the arts and practical sciences, would derive at least as much benefit from international patent laws, as that of foreigners. Not so with authorship and book-making. The difference is too obvious to admit of controversy.

On its face, it is difficult to ascertain if the Ruggles Report's assertion is based on contemporary circumstances or supposed principle. Regardless, the difference between international protections for patent rights and copyrights are not too obvious.

The Ruggles Report identifies no principled reason for favoring international patent right protections over copyright protections. It is highly unlikely any principled reason of the kind existed. The theoretical view of patent rights and copyrights that prevailed at the time of the American Founding and still predominated in the 19th century regarded both as private property rights, grounded in a person's own labor, belonging exclusively to the laborer and deserving of protection under law. The IP Clause's reference to Congress securing "Authors and Inventors exclusive Rights to their respective Writings and Discoveries" supplies strong textual support, if not confirmation, of the parity between the two types of intellectual property. The principled similarities between copyrights and patent rights for purposes of law and public policy also clearly outweigh any differences in James Madison's brief introduction to the IP Clause in *The Federalist* No. 43:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right of useful inventions seems with equal reason to belong to the inventors. The public good coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of these cases, and most of them have anticipated the decision on this point, by laws passed at the instance of Congress.

As Barnes summarized the reception and impact of the Ruggles Report: "The negative report of a Senate Committee was bound to color people's attitudes for years to come and due to the economic hardships of the time it overshadowed the positive one of Clay's Select Committee." A pair of financial panics during the 1830s resulted not only in bank failures, but also in

manufacturing and other commercial failures. Production in many fields of businesses was drastically reduced, and widespread job losses resulted. As recounted by Daniel Walker Howe, “The Panic of 1837 merged with that of 1839 into a prolonged period of hard times that, in severity and duration, was exceeded only by the great depression that began ninety years later, in 1929.” Certainly, the financial panics consumed much attention from Congress and the Van Buren Administration, taking time away from other issues, such as international copyright protection. Not unreasonably, those dire economic conditions rendered American publishing protectionist arguments even more difficult to overcome.

John Jay’s Case for International Copyright and Response to the Ruggles Report

Following the ill fate of Henry Clay’s fifth international copyright bill in 1842, occasional petitions continued to be filed in Congress in support of international copyright. The most significant was presented to the U.S. House of Representatives in March 1848 by John Jay II and William Cullen Bryant.

Jay was a New York lawyer from a well-known American family. His grandfather and namesake was John Jay, foreign diplomat, first Chief Justice of the United States, New York Governor, and co-author of the *Federalist Papers*. Jay’s father, William Jay, was a New York judge for nearly a quarter century. During the administration of President Ulysses S. Grant, Jay II was foreign minister to Austria-Hungary, and he later served as President of New York’s Civil Service Commission.

Jay’s interest in international copyright was sparked in the course of his service as agent for his friend, A. Cleveland Coxe. In 1846, author and publisher Coxe sought to reprint *Blackwood’s Magazine* in America on terms agreeable to its British publisher. To that end, Jay assisted Coxe in an elaborate effort to subdue an American pirated edition of *Blackwood’s Magazine*. Jay arranged for American copyright registration of one of Coxe’s articles before submitting it to *Blackwood’s Magazine* for publication. Jay and Coxe later arranged a compromise with American reprinter Leonard Scott, whereby Scott paid royalties to *Blackwood’s* and both Jay and Coxe agreed not to pursue copyright infringement claims. Jay later served as an intermediary with other British periodicals.

Jay proceeded to take up the cause of international copyright on a large scale. In January 1848 Jay visited Washington, D.C., and gauged the opinions of members of Congress, including Henry Clay. With Speaker of the House Robert C. Winthrop, Jay arranged for a Select Committee to receive a forthcoming petition with signatures requesting amendment of copyright law. While in Washington, Jay set about collecting prior petitions to Congress, as well as Committee reports, statements, and other documents. Jay then drummed up renewed support for international copyright legislation among newspaper editors, authors, and publishers. In March 1848 Jay and Bryant submitted their petition to Congress, and it was promptly introduced in the House of Representatives.

A House Select Committee was appointed to consider Jay’s petition. Jay soon wrote letters to influential acquaintances, including Francis Lieber, urging them to petition the Select Committee. Lieber was among those who petitioned the Select Committee at Jay’s behest.

According to Barnes, “[c]learly this was the most elaborate and carefully argued defense of international copyright to reach the halls of Congress before the Civil War.” Central to Jay’s petition was America’s moral duty to respect the rights of foreign authors and to promote the rights of American authors overseas. Wrote Jay: “[T]he passage of an international copyright law, by which foreign authors shall be allowed their copyright here, and American authors assisted to their copyright abroad, would not only be an act of national justice, but of national policy.”

Jay’s petition also responded point-by-point to a half-dozen arguments leveled against international copyright by the Ruggles Report:

- “1st objection—*That it would transfer the manufacture of books for the American market from this country to England.*”

Response: “All that is asked is protection for the rights of authors; and that protection may be given both at home and abroad by an international copyright, coupled with the conditions, as regards foreign books, that ‘the *type, ink, and paper shall be made, and the printing and binding done, in AMERICAN WORKSHOPS.*”

- “2^d objection—*That the inevitable effect of an international copyright would be to enhance the price of books to American readers, and consequently, to circumscribe their sale.*”

Response: Publishers “will receive an equivalent in the security it affords against interference” and can stereotype it without disturbance. Publishers will have a corresponding benefit in security against interference. Old objection by persons little understanding acknowledged principles of the trade. “The price paid for foreign copyrights would be regulated not by the author’s own estimate of his genius, but by the popularity of his works, and, as in the case of all commodities, the demand would regulate the supply.”

- “3^d objection—*The want of reciprocity from an alleged scarcity of American books in England.*”

Response: The Petition annexed a list of nearly 600 books that have been reprinted in England, including Richard Henry Dana Jr’s *Two Years Before the Mast*, William H. Prescott’s *History of the Conquest of Mexico*, Joseph Story’s *Commentaries on the Conflicts of Law*, James Kent’s *Treatise on Commercial and Maritime Law*, Francis Lieber’s *Manual of Political Ethics*, Noah Webster’s *American Dictionary of the English Language*, Henry Wheaton’s *Elements of International Law*. Also reprinted in England were poems by Washington Alston, Ralph Waldo Emerson, Henry Wadsworth Longfellow, and William Cullen Bryant, as well as and numerous fiction and non-fiction works by Washington Irving, James Fenimore Cooper, and others.

- “4th objection—*That it would prevent the adaptation of English books to American prejudices.*”

Response: “Although we may have ‘the power,’ under the present state of things, to mutilate and deface the unprotected works of foreign writers, yet, if authors do possess that property in their productions attributed to them by the committee who framed the present act of Congress, and recognized, in the words of Lord Mansfield, by ‘the universal consent of ages,’ then we have no right to do so”; “The ‘adaptation’ of American books by British publishers has been again and again denounced as unfair, unreasonable, and in every view unjustifiable”

- “5th objection—*That an international copyright law would be unjust, as it would have a retrospective operation, and impair the obligation of existing contracts.*”

Response: “This object will be avoided by a bill applicable only to books which may be published after its passage.”

- “6th objection—*That American copyright is more valuable than that of Great Britain in respect to time and the tax on authors.*”

Response: Since Chairman Henry Clay’s Select Senate Committee’s June 1838 Report, Great Britain extended copyright term to 42 years with further term of seven years to the author and his assigns. Great Britain reduced to one the number of printed copies foreign authors were required to deposit to register copyrights, whereas the law of the United States in 1846 required copies to be deposited to the Smithsonian Institute and the Library of Congress.

Jay’s petition thus “used contemporary economics to argue that an expanded market such as the United States would provide publishers with larger sales and consequent reductions in unit price.” It reiterated that the American trade in reprinting British literary works “is to a great extent monopolized by a few large houses whose wealth and power enabled them to crush competition, and this monopoly if profitable to the few is injurious to the many.”

Calling attention to European convention on international copyrights, Jay’s petition observed they were “based upon the same principle of reciprocity which was incorporated into the copyright law of several of the United States before the adoption of the constitution.” Some state copyright and patent right laws passed in the newly independent states in the 1780s contained provisions for recognition of the intellectual property rights of other states where neighbor states provided similar protections. Connecticut’s Copyright Statute (1783), for instance, declared: “That this Act shall not extend, or be construed to extend in Favour, or for the Benefit of any Author or Persons residing in, or Inhabitants of any other of the United States, until the State or States, in which such Person or Persons reside or dwell shall have passed similar laws in Favor of the Authors of new Publications, and Heirs and Assigns.”

In urging the House Select Committee to act on his petition, Jay explained that American readers were being sold outdated and obsolete reprints on scientific and professional literary works. While traveling in Great Britain, geologist Charles Lyell related to Jay how American publishers

ignored major revisions to his early publications because they did not want to undertake the expense of manufacturing new stereotype plates.

To Jay's disappointment, the House Select Committee took no action on the petition. Jay "realized that a mere handful of devoted advocates were no match for indifference of Congress and the implied opposition of powerful interest groups." Occasional petitions were sent to Congress thereafter, including an 1852 petition presented to the Senate by Charles Sumner, signed by James Fenimore Cooper, Herman Melville, William Cullen Bryant, George P. Putnam, Washington Irving, and John Jay II. Several more petitions were sent to Congress in the years that followed. But many opposing petitions continued to be presented and the stalemate continued. During the pre-Civil War era, then-Pennsylvania Senator (and later President) James Buchanan presented a handful of petitions to the Senate, opposing an international copyright law or treaty. Philadelphia was home to major American publishers, and Buchanan was one of the most consistent opponents of international copyright during that era.

Although acting Secretary of State Edward Everett conducted negotiations with Great Britain on an international copyright treaty during the Fillmore administration, and President Millard Fillmore mentioned the proposed treaty in his annual message to Congress in 1853, the Senate failed to ratify. Nor did the proposed treaty fare better in the Senate following President Franklin Pierce's annual message to Congress mentioning the proposed treaty in 1854. And it was of little surprise that James Buchanan declined to take up the matter of international copyright while serving as President in the years immediately preceding the Civil War.

Congressional preoccupation with other pressing policy issues also made passing an international copyright law more difficult. Oregon boundary disputes, the Mexican War, and the growing controversy over slavery all took up significant time and attention of Congress. And while consensus bills for domestic copyright and patent rights continued to be passed up until the time of the Civil War, international copyright proved to be one controversial issue too many for Congress.

The Post-Civil War Movement for International Copyright

The post-Civil War international copyright movement in America built upon both the central arguments and the legacy of its forbears. Within a few years of the War's end, international copyright bills were periodically filed and re-filed. The American Publishers' Copyright League and other organizations sprung up to support international copyright. Authors and creative artists, including Henry Wadsworth Longfellow and Samuel Clemens, supported the continuing movement. Opposition voices primarily emphasizing protectionist and expediency concerns also persisted. The opposing outlook was exemplified by a March 1889 article against international copyright by George S. Boutwell, legal treatise author and former Secretary of Treasury in the Grant Administration.

Just as before, the primary justifications for international copyright were the moral claims of authors to the fruits of their labors and America's obligations to do justice to foreign authors. For example, an early 1868 report by a Joint Committee of Congress appointed to consider the subject declared:

We were fully prepared that it is not only expedient, but in a high degree important to the United States to establish such international copyright laws as will protect the rights of American authors in foreign countries, and give similar protection to foreign authors in this country. It would be an act of justice and honor, in which we should find that justice is the wisest policy for nations, and brings the richest rewards.

Similarly, as Francis Lieber put in an April 1868 speech before the International Copyright Association in New York: “We, whose boast it is to honor and protect human rights with eager jealousy, should we, of all leading nations, disregard the right of property, because the owner is a foreigner?” And as Longfellow put it in Senate hearing testimony in 1886:

One could live a great deal cheaper, undoubtedly, if he could supply himself from other people’s labor or cost. But at the same time—well, it was not called honest when I was young, and that is all I can say... and if I were asked what book is better than a cheap book, I should answer that there is one book better than a cheap book, and that is a book honestly come by.

Samuel Clemens testified at that same hearing that he hoped “a day would come when, in the eyes of the law, literary property will be as sacred as whiskey, or any of the necessities of life.”

Advocacy efforts of the American Copyright League also included soliciting endorsements by American writers. The abolitionist and civil rights leader Frederick Douglass was one writer solicited by the League, being the author of three successful autobiographies, including *Narrative of the Life of Frederick Douglass, an American Slave* (1845), as well as an 1853 novella, “The Heroic Slave.” In 1886, *The Century* magazine published Douglass’s views on the matter:

I have given very little thought to the subject of an International Copyright and can offer nothing especially important as to the form and feature such a law should embody; but I can very readily assent to the justice of the principle upon which such a law is desired and demanded. Whatever by mind or by muscle, by thought or by labor, a man may have produced, whether it shall be useful or ornamental, instructive or amusing, whether book, plow, or picture, the said producer has in it a right of property superior to that of any other person at home or abroad. If any arrangement can be devised which will secure this superior and fundamental right to authors, without imposing unreasonable restrictions upon the spread of knowledge and without operating unequally and unfairly towards the authors and artists of the respective countries concerned, I am for such an International Copyright.

International copyright often received mentions in presidential annual messages to Congress. Presidents Chester Arthur, Grover Cleveland, and Benjamin Harrison all welcomed the prospect of America finally recognizing international copyright protections. Diplomatic discussions and negotiations concerning an international

copyright treaty also took place between Great Britain and the United States. Perhaps the most promising proposed international copyright treaty with Great Britain, negotiated in part by American Foreign Minister and James Russell Lowell, was sidelined by the assassination of President James A. Garfield in 1881.

The International Copyright Act of 1891

Although long wanting of success, repeated advocacy efforts on behalf of American authors and creative artists gradually increased public attention and Congressional interest. Senator Jonathan Chace of Rhode Island sponsored international copyright legislation that passed the Senate in 1887, while an identical bill was favorably reported out of Committee in the House. While 1887 marked another near miss for international copyright, Congressional attention to the topic intensified from that point on.

In June 1890 the House Committee on Patents issued the Simonds Report. Named after Representative Walter E. Simonds, a Civil War veteran and future Patent Office Commissioner, the Simonds Report was “the most comprehensive and forceful report which Congress had yet received on the topic of international copyright,” with its compilation of prior hearings and reports. The Simonds Report concluded that “an author has a natural exclusive right to his intellectual productions” but that “present procedure represses authorship by putting the products of the labor of American authors into untrammelled competition with the products of English labor, for which nothing is paid,” and “deprives American authors of the advantages of the British market.

Accompanying the Simonds Report was a bill similar to what Senator Chace’s introduced in 1887. Rep. Simonds’ bill passed the House. And Senator Orville Platt of Connecticut took a leading role in advancing the bill through the Senate. Despite opposition from Senator John Sherman of Ohio and others, the bill made it through the Senate and two conference committees before being passed on the last day and at nearly the last hour of the 51st Congress. President Benjamin Harrison previously endorsed international copyright legislation. His *First Annual Message* (1889) to the 51st Congress declared: “The subject of an international copyright has been frequently commended to the attention of Congress by my predecessors. The enactment of such law would be eminently wise and just.” Harrison renewed his recommendation for an international copyright law in his *Second Annual Message* (1890). Upon passage, he immediately signed the so-called “Chace Bill” or “Simonds-Platt” bill into law.

The 1891 Act did not did not constitute an entirely new statute, but made a series of amendments to the existing general copyright law. Removal of references to “residents” and “citizens” of the United States yielded a broader legal definition of copyright. For example:

The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing,

completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others; and authors or their assigns shall have exclusive right to dramatize and translate any of their works for which copyright shall have been obtained under the laws of the United States.

The 1891 Act established the principle of reciprocity, whereby American authors and creative artists could obtain copyright protections from foreign nations similar to those already enjoyed at home. Also of significance, the 1891 Act laid the groundwork for future international cooperation by the United States to secure copyrights, including American signing of copyright treaties with foreign nations.

Conclusion

Today, the United States is a signatory to numerous treaties with foreign nations concerning international protection of IP. Precise answers as to how American IP rights may best be secured internationally through laws passed by Congress or by treaties signed with foreign nations inevitably involve practical judgments that take specific facts and circumstances into account. For instance, a given foreign nation's history in respecting property rights, and specifically other countries' IP rights, must be considered when the United States engages that nation regarding international IP protections. But all such judgments begin with recognition of the IP Clause's imperative to secure the IP rights of Americans and the principled and practical reasons for treating the IP rights of foreign nationals justly.

Over the course of several decades, the international copyright movement presented a compelling logical case for doing justice to the rights of foreign authors and thereby promoting greater protections abroad for American authors. The core of the international copyright movement's message were the moral claims of authors to the fruits of their labors and the importance of fair play between nations in protecting those rights.

By providing protections for the IP rights of foreign nationals on terms equal or similar to how the United States protects its own citizens' IP rights at home, our government acts in a principled and practical way to secure our citizens IP rights abroad. International intellectual property protection thus fulfills the Constitution's promise to securing the rights of American authors and inventors. Making good on that promise is all the more vital in light of the crucial role and economic value possessed by IP in today's information economy.

* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

** Seth L. Cooper is a Senior Fellow of the Free State Foundation.

Sources

Alexander Hamilton, *Report on Manufactures* (1791).

George S. Boutwell, “Common-Sense and Copyrights,” *The North American Review*, Vol. 148, No. 388 (March 1889).

Brown v. Duchesne (1856).

John Jay, *et. al.*, “Memorials of John Jay and of William C. Bryant and Others in Favor of An International copyright law” (1848).

Francis J. Lieber, *On International Copyright* (1840).

Francis J. Lieber, *Manual of Political Ethics* (1838-1839).

Francis J. Lieber, *Essays on Property and Labor* (1841).

Francis J. Lieber, “Speech of Francis Lieber,” *Meeting of Authors and Publishers at the Rooms of the New York Historical Society* (April 9, 1868).

James Madison, *Federalist No. 43* (1788).

Microsoft v. AT&T (2007).

P.H. Nicklin’s *Remarks on Literary Property* (1838).

Frederick Douglass, “Open Letters: International Copyright: Plain Speech from American Authors” *The Century*, Vol. 21 (1886), reprinted in American Copyright League, *What American Authors Think About International Copyright* (1888).

United States v. Duell (1899).

* * * * *

James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854* (OH St. Univ. Press, 1974).

Maurice G. Baxter, *Henry Clay The Lawyer* (Univ. Press of KY, 2000).

Aubert J. Clark, “The Movement for International Copyright in Nineteenth Century America” (Dissertation) (Catholic Univ. of America Press, 1960).

Frank Freidel, *Francis Lieber, Nineteenth-Century Liberal* (LA St. Univ. Press, 1947).

Frank Freidel, “Lieber’s Contribution to the International Copyright Movement,” *The Huntington Library Quarterly*, VIII (1945), 200.

Stan J. Liebowitz, “[Paradise Lost? The Payment of British Authors in 19th Century America’s Copyright Wilderness](#)” (Nov. 20, 2015).

Commission on the Theft of American Intellectual Property, “[The IP Commission Report](#)” (May 22, 2013).

Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (Oxford Univ. Press, 2007).

Forrest McDonald, *Alexander Hamilton: A Biography* (W.W. Norton & Co., 1979).

U.S. Department of Commerce, “[Intellectual Property and the U.S. Economy: Industries in Focus](#)” (March, 2012).

Christopher F. Wilson, *The Labor of Words: Literary Professionalism in the Progressive Era* (1985).