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# How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright

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## How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright

John A. Rothchild\*

### *Abstract*

*From the time of the first federal copyright law in 1790 until enactment of the International Copyright Act in 1891, U.S. copyright law did not apply to works by authors who were not citizens or residents of the United States. U.S. publishers took advantage of this lacuna in the law, and the demand among American readers for books by popular British authors, by reprinting the books of these authors without their authorization and without paying a negotiated royalty to them.*

*This Article tells the story of how proponents of extending copyright protections to foreign authors—called international copyright—finally succeeded after more than fifty years of failed efforts. Beginning in the 1830s, the principal opponents of international copyright were U.S. book publishers, who were unwilling to support a change in the law that would require them to pay negotiated copyright royalties to British authors and, even worse from their perspective, would open up the American market to competition from British publishers. U.S. publishers were quite content with the status quo—a system of quasi-copyright called “trade courtesy.” That system came crashing down in the 1870s, when non-establishment publishers who did not benefit from trade courtesy decided to ignore its norms, publishing their own cheap, low-quality editions of books by British authors in competition with the editions published by the establishment publishers. As a result, most U.S. publishers came to support extending copyright to foreign authors as a means of preventing competition from publishers of the cheap editions.*

*Once the publishers withdrew their opposition, another powerful interest group came to the fore: typesetters,*

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\* Associate Professor, Wayne State University Law School. ©2018 John A. Rothchild.

*bookbinders, printers, and other workers in the book-manufacturing industries. These groups opposed international copyright unless it were accompanied by rules assuring that they would not be thrown out of work by a transfer of book manufacturing from the United States to England. In the 1891 Act, the typesetters achieved what they sought: a provision requiring books to be typeset in the United States as a condition of copyright. In this way, U.S. copyright law implemented an element of U.S. trade policy.*

*The manufacturing clause, as this requirement was called, was gradually watered down over the succeeding decades and lingered in the copyright law until 1986. Yet the entanglement of copyright law with trade policy continued, in the World Trade Organization treaty system and elsewhere.*

*As a major exporter of books, software, movies, and other articles embodying copyrighted works, the United States has sought in multiple forums to strengthen the protections those works receive under the laws of other nations, sometimes provoking pushback from countries that are net importers of intellectual property goods. When pursuing these goals in the twenty-first century, U.S. policymakers would do well to bear in mind this country's forgotten history as the greatest copyright pirate nation of the nineteenth century.*

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“The committee believe it is time that the United States should cease to be the Barbary coast of literature, and that the people of the United States should cease to be the buccaneers of books.”<sup>1</sup>

— From an 1888 Senate Report on the bill that in 1891 first extended U.S. copyright protection to works by foreign authors

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1. S. REP. NO. 50-622, at 2 (1888).

## I. Introduction

In recent decades, the United States has been perhaps the leading exponent of strengthened intellectual property rights at the international level.<sup>2</sup> However, this was not always the case. During its first one hundred years, U.S. copyright law failed to offer any protection for works of authorship created by persons who were not citizens or residents of the United States. In the absence of any legal restrictions against doing so, U.S. publishers freely reprinted books by popular British authors and sold them in great quantities to a voracious American reading public, without troubling to obtain the author's permission or pay negotiated royalties.

The story of the United States' coy engagement with the 1886 Berne Convention<sup>3</sup>—the landmark multilateral copyright treaty—which lasted for more than a hundred years until the United States finally acceded to it in 1989, is well known.<sup>4</sup> Less

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2. See Sean M. Flynn et al., *The U.S. Proposal for an Intellectual Property Chapter in the Trans-Pacific Partnership Agreement*, 28 AM. U. INT'L L. REV. 105, 106–07 (2012) (“Over the last quarter century, the United States has aggressively shifted among various international law and policy-making forums to promote a goal of harmonizing the world’s intellectual property laws in its image.”); B. Zorina Khan, *Does Copyright Piracy Pay? The Effects of U.S. International Copyright Laws on the Market for Books, 1790-1920*, at 6 (Nat'l Bureau of Econ. Research, Working Paper No. 10271, 2004) (stating “the United States today is the leader in the movement for stronger enforcement of patents and copyrights”).

3. Berne Convention for the Protection of Literary and Artistic Works, *opened for signature* Sept. 9, 1886, 102 Stat. 2853, 1161 U.N.T.S. 3 (revised on July 24, 1971) (amended on Sept. 28, 1979) [hereinafter Berne Convention].

4. This story, in a nutshell, is as follows. At the time of its founding, and for the following 150 years, the United States was primarily a consumer and not a creator of works of authorship subject to copyright protection. By the middle of the twentieth century, that had changed, as the United States increasingly became a net exporter of materials embodying copyrighted works. Until that time, U.S. authors would not have significantly benefited from entering bilateral reciprocity-based copyright treaties or joining the Berne Convention. However, once exports became an important source of income for U.S. authors, it became sensible, and indeed imperative, for the United States to gain protection for its authors under the copyright laws of the countries that consumed their output. This it did, in 1954 by joining the Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, T.I.A.S. No. 3324, as a stopgap measure, and in 1989, by joining the Berne Convention. See, e.g., PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* 14 (Earthscan Publ'ns Ltd. 2002); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE*

well known, and insufficiently appreciated, is the story of how U.S. copyright law first became applicable to foreign authors through a long struggle among several factions that culminated in an 1891 amendment of the copyright law called the International Copyright Act.<sup>5</sup> The Act included a curious provision that one would not expect to find in a law whose purpose was to protect the rights of authors in their creative output: as a condition to receiving copyright protection, books had to be typeset *in the United States*. This requirement—later expanded to require *all* book-manufacturing operations to be performed in the United States—is known as the “manufacturing clause.”

Inclusion of the manufacturing clause broke a long stalemate between factions that favored and opposed extension of copyright to foreign authors. Through most of the nineteenth century, publishers opposed extending copyright protection to foreign authors on the ground that doing so would greatly increase the price of their books in the United States and American readers’ interest in cheap books required that the status quo be maintained. Rarely did the publishers mention that granting copyright to British authors would harm the publishers’ own interests by forcing them to compete with British publishers in the U.S. market. Those who favored international copyright invoked the interest of American authors in preventing unfair competition from foreign authors, as well as the abstract interest in treating foreign authors justly by granting them the right to control uses of their creative output. For over fifty years the opponents of international copyright were successful in maintaining the status quo.

The principal opposition to international copyright was overcome only with the emergence of a split in the ranks of the publishers between the establishment publishing houses and the upstart publishers of cheap “libraries.” The latter offered unrestrained competition that undermined the system of quasi-copyright known as “trade courtesy,” under which a U.S.

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CELESTIAL JUKEBOX 147 (Stanford Univ. Press rev. ed. 2003); Marshall Leaffer, *International Copyright from an American Perspective*, 43 *ARK. L. REV.* 373, 375–76 (1990).

5. International Copyright Act, ch. 565, 26 Stat. 1106 (1891). This is often referred to as the Chace Act.

publisher would pay an “honorarium” to a British author, and other U.S. publishers would voluntarily refrain from releasing a competing edition. The non-establishment publishers did not benefit from this regime and eventually ignored it, publishing their own editions in competition with those produced by the captains of the publishing industry. The demise of trade courtesy altered the economic interests of the major publishers and, accordingly, their point of view on international copyright.

Once the majority of influential publishers dropped their opposition, the way was cleared for a compromise between the advocates of authors’ rights and the unions representing workers in the book-manufacturing industries, under which foreign authors could receive U.S. copyright protection but only if they complied with the protectionist rules of the manufacturing clause.

Amazingly, the manufacturing clause remained an element of U.S. copyright law for nearly one hundred years. Weakened over the decades by a series of amendments, it lingered on until 1986, just three years before the United States acceded to the Berne Convention. Copyright, a grant of legal rights to authors, was finally detached from trade policy and its concern with protecting domestic workers from foreign competition viewed as unfair or contrary to the national interest.

But the linkage between copyright and trade policy was not actually severed; it was merely shifted to other forums. At about the time when the manufacturing clause was finally excised from the copyright law, copyright policy and trade policy became entwined once again through inclusion of intellectual property provisions in U.S. trade law and in the treaty regime administered by the World Trade Organization. In the treaty negotiations, countries that were net importers of intellectual property opposed linking copyright protections with trade policy, adopting the position that the proponents of pure, authors’-rights-only protection of the works of foreigners had espoused during half of the nineteenth century. Those who insisted that international copyright policy should be treated as an element of international trade policy prevailed once again.

As the United States continues to seek stronger protections for the intellectual property of its citizens under the laws of foreign countries, it is instructive to recall a largely forgotten era

of history when the United States was the world's leading pirate nation.

This Article tells the story of the struggle to extend U.S. copyright protection to foreign authors. Part II describes the first phase of the struggle, from 1837 to 1873, which occurred during the reign of the system of trade courtesy. Part III describes the rise and fall of trade courtesy. Part IV explains how the advocates of international copyright finally succeeded after the authors' rights faction gave in almost entirely to the representatives of workers in the book manufacturing industries who demanded protection from foreign competition as the price of their acquiescence. Part V traces the career of the manufacturing clause from its enactment in 1891 until its elimination in 1986. It then briefly describes the continued linkage between copyright policy and trade policy through devices other than the manufacturing clause.

## II. Early Efforts to Extend U.S. Copyright Protection to Works by Foreign Authors: 1837–1873

### A. The Early Legal Landscape

The exclusion of foreigners from the protection of U.S. copyright law antedated ratification of the U.S. Constitution. The Confederation Congress's 1783 resolution on copyright recommended that the states extend copyright protection to authors or publishers who were "citizens of the United States."<sup>6</sup> Copyright legislation enacted by the states between 1783 and 1786 generally only protected citizens and residents of the United States.<sup>7</sup> This was not for want of interest among

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6. THORVALD SOLBERG, *COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906*, at 11 (Gov't Printing Office 2d ed. rev. 1906).

7. Hamish R. Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM.-VLA J.L. & ARTS 89, 91 (1986). Ten of the twelve states that enacted copyright legislation in the 1780s excluded foreign authors from protection, limiting the protected class to "inhabitants," "residents," "citizens," or "subjects" of the United States. The laws of Maryland and South Carolina included no nationality limitation. South Carolina, curiously, excluded "any book in Greek, Latin, or any other foreign language, printed beyond the seas." SOLBERG, *supra* note 6, at 23. Delaware enacted no legislation. See Harry G. Henn, *The Quest for*



Americans in reading foreign works. Unauthorized copying of foreign books in the colonies began with John Bunyan's *Pilgrim's Progress*, which was first published in England in 1678 and reprinted in the United States in 1681, and became very widespread by the mid-eighteenth century.<sup>8</sup>

The first federal copyright statute, enacted in 1790, continued the exclusion of foreign authors, limiting its protection to authors "being a citizen or citizens of these United States, or resident therein."<sup>9</sup> At this time, the United States was in step with other nations, which likewise denied copyright protection to foreigners. However, over the next sixty years, the countries of Europe adopted international copyright protection while the United States retained its isolationist stance.

Although the idea of international copyright protection was first broached in Europe during the 1815 Congress of Vienna,<sup>10</sup> the first country actually to extend copyright protection to foreigners was Denmark in 1828, conditioned on reciprocity by the author's home country.<sup>11</sup> From 1827 to 1829, Prussia entered into bilateral copyright agreements with other German states.<sup>12</sup> Bilateral agreements between other European countries followed. These agreements were based on the principle of national treatment, under which one country agrees to provide copyright protection to nationals of the other country

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*International Copyright Protection*, 39 CORNELL L.Q. 43, 52 n.46 (1953). The state enactments are set out in SOLBERG, *supra* note 6, at 11–31.

8. See Joel Larus, *The Origin and Development of the 1891 International Copyright Law of the United States* 35 (1960) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

9. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124. In case this was not sufficiently clear, the statute added: "[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States." *Id.* § 5. An 1837 decision, interpreting similar language in the 1831 revision of the Copyright Act, held that "resident" meant one who was a "permanent inhabitant" of a state, not one who was transient and merely intended to become a U.S. citizen. *Carey v. Collier*, 5 F. Cas. 58, 59 (C.C.S.D.N.Y. 1837).

10. See ADAM ZAMOYSKI, *rites of peace: the fall of Napoleon and the Congress of Vienna* 258 (Harper Collins Publishers 2007).

11. See 1 STEPHEN P. LADAS, *The International Protection of Literary and Artistic Property* 22 (1938).

12. *Id.* at 44.

under the same rules it applies to its own nationals.<sup>13</sup>

A major breakthrough occurred in 1852 when France unilaterally declared that it would protect the works of all authors, domestic and foreign alike, with no requirement of reciprocity, resulting in numerous additional bilateral agreements.<sup>14</sup> This action “provide[d] substantial impetus to the adoption of widespread systems of treaties for reciprocal copyright protection.”<sup>15</sup>

By 1868, a congressional report could state that among nearly all European countries “international copyright laws have been established by legislative acts and conventions,” and that the United States is “the only great nation of the civilized world that has failed to secure the benefit of such laws.”<sup>16</sup>

The exclusion of foreign authors from U.S. copyright protection was maintained in the major revisions of the Copyright Act that occurred in 1831<sup>17</sup> and 1870.<sup>18</sup> This exclusion remained a feature of U.S. law until passage of the International Copyright Act in 1891.

## B. Legislative Efforts

Between 1837 and 1872, several bills were introduced in Congress that, if enacted, would have extended the protections of U.S. copyright law to at least some foreign authors. In an effort to blunt the opposition of U.S. publishers, typesetters, and paper manufacturers, several of the bills included a manufacturing clause, conditioning copyright protection on the books’ being manufactured in the United States. Despite this substantial concession to the protectionist instinct, none of the bills was enacted or even proceeded to a floor vote.

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13. Sam Ricketson, *The Birth of the Berne Union*, 11 COLUM.-VLA J.L. & ARTS 9, 14–15 (1986); see also Roberto Garza Barbosa, *Revisiting International Copyright Law*, 8 BARRY L. REV. 43, 44–46 (2007).

14. Ricketson, *supra* note 13, at 14.

15. Henn, *supra* note 7, at 45.

16. H.R. REP. NO. 40-16, at 1 (1868); see also AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* 27 (1960) (“Only Russia, the Ottoman Empire and the United States were outside the fold at mid-century.”).

17. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436.

18. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 202.

In February 1837, a few months before a leading member of England's House of Commons gave a speech in Parliament "lament[ing] the sorry state that authors found themselves in throughout the world,"<sup>19</sup> Senator Henry Clay of Kentucky presented to the U.S. Congress a petition signed by a group of fifty-six British authors, who "earnestly request"<sup>20</sup> enactment of a law that would protect the copyright of British authors. As grounds for their request, the petition recited that the present system (1) harmed British authors financially by depriving them of the profits resulting from their popularity and allowing U.S. booksellers to profit instead; (2) harmed the authors' reputation and infringed their moral rights because, in the absence of legal protection, their works were "liable to be mutilated and altered" at the whim of booksellers and others; (3) harmed American authors because U.S. publishers were unwilling to pay them reasonable royalties when they could acquire British works through "unjust appropriation"; (4) harmed the U.S. reading public, who were deprived of the works of U.S. authors and could not know whether the British works had been altered by the publisher; and (5) was inconsistent with "simple justice," as illustrated by the plight of Walter Scott, who, burdened by debts, was condemned to "destructive [literary] toils" because he received no income from publications of his works in the United States.<sup>21</sup>

The petition had its genesis in the 1836 attempt by a British publisher, Saunders & Otley, to shame the Americans into protecting the works of English authors by setting up an office in New York and publishing authorized editions of those authors' books. The firm announced that it had secured from Lucien Bonaparte, Napoleon's brother, the exclusive right to

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19. See Larus, *supra* note 8, at 27.

20. PETITION OF THOMAS MOORE, AND OTHER AUTHORS OF GREAT BRITAIN, PRAYING CONGRESS TO GRANT TO THEM THE EXCLUSIVE BENEFIT OF THEIR WRITINGS WITHIN THE UNITED STATES, S. DOC. NO. 24-134 (1837).

21. *Id.* In his later years, Scott incurred crushing debt through improvident spending. To preserve his "honour" he entered a repayment plan with his creditors, rather than declaring bankruptcy and discharging his debt at less than 100% repayment. To make the agreed payments to his creditors, he had no alternative but to keep writing at breakneck speed, despite suffering several strokes. The continuing hard labors at his writing desk probably shortened his life. JOHN SUTHERLAND, *THE LIFE OF WALTER SCOTT: A CRITICAL BIOGRAPHY* 292-93, 335-55 (1995).

publish his *Memoirs* in England, France, and the United States. Harper & Brothers responded by announcing that its own, unauthorized edition would shortly be available for sale.<sup>22</sup>

This brazen flouting of the norms of authors' rights by one of the country's leading publishers convinced Saunders & Otley that efforts at moral suasion would be useless with the Americans, impelling the firm to prepare the British authors' petition.<sup>23</sup>

When Clay presented the petition from the British authors to the Senate on February 2, 1837, the remarks of several of his colleagues offered an early indication of the opposition that any bill to extend U.S. copyright to foreigners would face. Senator Preston of South Carolina noted that such a law would benefit American authors, but "publishers had an opposite interest, to seize upon foreign works without price, and republish them," and the publishers "had arrayed themselves against the object of this memorial."<sup>24</sup> Senator Calhoun of South Carolina likewise noted that booksellers would find the petition contrary to their interests. Senator Buchanan of Pennsylvania considered international copyright "a vexed and difficult question," and referenced the interests of the American reading public in cheap books.<sup>25</sup>

Senator Clay championed the cause of international copyright from an early date. He led a Senate select committee that received the British petition, as well as other petitions submitted by several groups of American authors,<sup>26</sup> and issued a report recommending enactment of legislation to extend copyright protection to foreign authors.<sup>27</sup> The report was

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22. Frederick Saunders believed that Harper had obtained proofs of the book by bribing the Saunders & Otley pressmen. CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* 160 (2006).

23. Larus, *supra* note 8, at 58–59.

24. Gales & Seaton's Register of Debates in Congress 670–71 (1837).

25. *Id.* at 671; *see also* Thorvald Solberg, *International Copyright in Congress, 1837-1886*, 11 LIBRARY J. 250, 251–52 (1886) (discussing the debate on the petition).

26. The British authors' petition was soon followed by similar petitions from U.S. authors and others. *See* Larus, *supra* note 8, at 60–61; Solberg, *supra* note 25, at 252 (discussing a petition signed by thirty U.S. authors).

27. RICHARD ROGERS BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 344 (1912).

accompanied by a bill that Clay prepared for this purpose. The Clay Report premised its conclusions largely on moral grounds. It equated misappropriation of literary property with theft of ordinary merchandise:

We should be all 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 daily violation, without the possibility of their invoking the aid of the laws. The committee think that this distinction in the condition of the two descriptions of property is not just; and that it ought to be remedied by some safe and cautious amendment of the law.<sup>28</sup>

The Report also anticipated and addressed an objection to copyright for foreign works that would surface again and again in the ensuing debate—the claim that extending copyright would harm American readers by raising the cost of foreign-authored books. The Report offered two responses to this objection. First, the savings to publishers from not having to rush an edition into print and not having to guard against competition might outweigh the costs of paying licensing fees to the foreign authors. Second, even if the price of foreign-authored books increased, it would amount only to “a few cents,” which the American book-buyer would gladly pay for a clear conscience and a higher quality product.<sup>29</sup>

The Clay Bill was modest in its scope. It would have extended copyright protection only to nationals of the United Kingdom and France, since those countries offered protection to U.S. authors, and it would not apply retroactively to works already published. Furthermore, it contained a provision that would play a key, and ultimately determinative, role in the debate over international copyright: a domestic manufacturing requirement. Protection was premised on the condition that “an edition of the work . . . shall be printed and published in the

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28. S. REP. NO. 24-179, at 1–2 (1837).

29. *Id.* at 2–3.

United States simultaneously with its issue in the foreign country, or within one month after depositing as aforesaid the title thereof in the clerk's office of the district court."<sup>30</sup> The significance of the requirement was that it ensured that U.S. publishers and printers would continue to receive the employment, and the profits, associated with the production of foreign-authored works. Without such a provision, it was entirely possible that British publishers would publish a single edition of a book in England and ship copies to retailers in the United States, rather than produce separate editions for the two markets.

Despite the favorable committee report, the Clay Bill did not reach a final vote.<sup>31</sup> It appears likely that opposition from publishers impeded its forward motion. As noted above, even before the bill was introduced, several senators referred to the countervailing interests of publishers. Another hint comes from a letter that Justice Joseph Story wrote to Harriet Martineau, an English novelist and social theorist, in April 1837 after the adjournment of the Twenty-fourth Congress and failure of the bill. In the letter, Story informs his correspondent that "the body of our booksellers . . . is opposed to [the petition from the British authors]."<sup>32</sup> The opposition of the publishers is understandable. The bill's manufacturing clause was weak: it required publication of an American edition of the book, but (1) did not forbid importation of copies manufactured abroad, (2) did not forbid the use of foreign printing plates in making the American edition, and (3) did not require the American edition to issue from an American publisher. A British publisher could thus evade the manufacturing requirement by bringing its printing plates to the United States, printing an edition of token size, and then supplying the American market with books manufactured in England.

Clay reintroduced the bill in the next (Twenty-fifth)

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30. S. 223, 24th Cong. (1837); see also Patrice A. Lyons, *The Manufacturing Clause Report*, reprinted in 29 J. COPYRIGHT SOC'Y U.S.A. 1, 11 (1981) ("This may be viewed as the first attempt to introduce a manufacturing requirement into the U.S. copyright law.").

31. BOWKER, *supra* note 27, at 346.

32. Letter from Joseph Story to Harriet Martineau (Apr. 7, 1837), in 2 LIFE AND LETTERS OF JOSEPH STORY 275 (William W. Story ed. London, John Chapman 1851), cited in SEVILLE, *supra* note 22, at 161.

Congress, as S. 32,<sup>33</sup> and the bill was referred to the Committee on Patents. The publishers, now alert to the impending danger, rallied their forces. There ensued “a flood of memorials and petitions” opposing the bill,<sup>34</sup> invoking the interests of U.S. publishers and the publishing trades.<sup>35</sup> The committee’s report on S. 32, called the Ruggles Report after its author, Senator John Ruggles of Maine, recommended against the bill.<sup>36</sup> Its analysis was sharply at odds with that of the previous year’s Clay Report, and it took direct issue with the arguments presented in the British authors’ petition of 1837.<sup>37</sup> First, to the Clay Report’s premise that intellectual property is entitled by natural right to the same protection as ordinary property, the Ruggles Report responded:

The right of the author . . . is *property* of a peculiar character, not absolute but special, subject to conditions and limitations. As between nations it 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.<sup>38</sup>

The only justification for copyright protection, the Report continued, is the utilitarian one “that it tends to encourage and reward talent.”<sup>39</sup>

Second, the Report found that granting copyright to foreign authors would harm the U.S. book-manufacturing industry, which “embrac[ed] booksellers, paper makers, printers, bookbinders, type founders, and others.”<sup>40</sup> The proposed legislation would “take employment from our own citizens and transfer it to foreigners, to the great discouragement of

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33. S. 32, 25th Cong. (1837) (unaltered from its previous introduction as S. 223).

34. Solberg, *supra* note 25, at 253.

35. SEVILLE, *supra* note 22, at 161.

36. *See* S. REP. NO. 25-494, at 2 (1838).

37. *See supra* text accompanying notes 20–22.

38. S. REP. NO. 25-494, at 2.

39. *Id.*

40. *Id.* at 3.

American industry.”<sup>41</sup> Books would likely be produced in England and shipped to the United States because “[l]arge editions of books can be printed at much less average cost than small editions,” and labor and capital were both cheaper in England than in the United States.<sup>42</sup>

But what about the protections offered by the proposed manufacturing clause, which provided that at least the first edition of a book had to be published and printed in the United States if it was to be protected by U.S. copyright? The Report found that such a provision “does not remove the objection.”<sup>43</sup> Referring to the attempt by British publisher Saunders & Otley two years earlier to set up operations in New York for the purpose of publishing American editions of books by British authors,<sup>44</sup> the Report maintained that if the bill were enacted British publishers would “monopolize the publication here as well as in England, of all English works for the supply of the American market!”<sup>45</sup>

Third, the Report addressed and rejected the argument that enactment would benefit U.S. authors by allowing their own works to receive copyright protection under English law. Quoting a British reviewer’s rhetorical question, “Who ever reads an American book?,” the Report maintained that there was simply no demand in England for books by American authors, offering the example of John Marshall’s *Life of Washington*, which sold only fifty copies in England in two years.<sup>46</sup>

Fourth, the Report claimed that the bill would increase the price of books, thereby harming the American reading public. The Report included a list of eight “standard works” that were issued by both British and American publishers, comparing the price of the English edition with that of the American. The prices of the former ranged from two to sixteen times those of the latter.<sup>47</sup> The Report explained the mechanism of the price

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41. *Id.*

42. *Id.*

43. *Id.*

44. *See supra* text accompanying note 22.

45. S. REP. NO. 25-494, at 3.

46. *Id.* at 4.

47. For example, the “common edition” of the Bible was said to be priced at \$1.00 in the English edition versus \$.50 in the American, while the



differential: “The difference in prices is partly attributable to the style of publication, and not a little to the general effect of copyright protection to the great mass of new publications in England, in giving to the great and influential publishing houses there a control over both publication and prices.”<sup>48</sup>

The themes raised in these two early reports—the interests of British authors, American authors, U.S. publishers, the U.S. book-manufacturing industry, and the American reading public, as well as the demands of justice—would recur repeatedly as the debate over international copyright proceeded at intervals over the next fifty years.

The Clay Bill was reintroduced in 1838, 1840, and 1842, but never advanced to a final vote.<sup>49</sup> The American public had its attention drawn to the issue in 1842, when Charles Dickens visited the United States on a lecture tour. Dickens spoke strongly in favor of international copyright on moral grounds, arguing that the United States should protect international copyright “*firstly*, because it is justice; *secondly*, because without it you can never have, and keep, a literature of your own.”<sup>50</sup> However, Dickens’s efforts were counterproductive, as Americans found his criticisms offensive,<sup>51</sup> and accused him, one of the most financially successful British authors, of greed.<sup>52</sup>

Additional bills for international copyright were introduced in 1858 and 1860, but went nowhere. In May 1861, during the Civil War, the Confederate government, seeking to curry favor with the British, enacted a law that provided international copyright based on reciprocity, with no domestic manufacturing requirement. The law passed into oblivion along with the government that had promulgated it.<sup>53</sup>

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corresponding prices for “Scott’s Napoleon” were \$37.00 and \$2.25. *Id.*

48. *Id.*

49. BOWKER, *supra* note 27, at 346.

50. SEVILLE, *supra* note 22, at 165.

51. See generally Thomas Hoeren, *Charles Dickens and the International Copyright Law*, 63 J. COPYRIGHT SOC’Y U.S.A. 341 (2016). Other well-known English authors, including Matthew Arnold and Anthony Trollope, made similar efforts. See CLAUDIA STOKES, *WRITERS IN RETROSPECT: THE RISE OF AMERICAN LITERARY HISTORY, 1875-1910*, at 90 (2006).

52. Martin T. Buinicki, *Walt Whitman and the Question of Copyright*, 15 AM. LITERARY HIST. 248, 250 (2003).

53. See 1 JOHN TEBBEL, *A HISTORY OF BOOK PUBLISHING IN THE UNITED*

An article published in *The Atlantic Monthly* in 1867 by James Parton, a British-born American writer, rekindled the hopes of supporters of international copyright. Parton emphasized the benefits that would accrue to American authors if the United States extended copyright protection to works by foreign authors, bringing about reciprocal protection of the works of U.S. authors under foreign copyright law.<sup>54</sup>

In January 1868, a few months after the article appeared, Parton joined with four other distinguished citizens in constituting a committee that would press Congress for an international copyright law.<sup>55</sup> They supported a resolution that had been introduced in the House, which called upon the House Library Committee to “enquire into the subject of international copyright.”<sup>56</sup> The result was a report from the Committee, dated February 21, 1868, that recommended enactment of a law extending copyright protection to foreign authors.<sup>57</sup>

The report enumerated the benefits of such a law. First, the law would entitle U.S. authors to protection under the laws of other countries on the basis of reciprocity: currently, an American author’s work “is taken from him in England by any publisher who chooses to lay hands on it, and on the continent by any man who chooses to translate and issue it without his supervision or consent.”<sup>58</sup> Second, it would promote the development of a higher class of literature by American authors:

At present much of the best talent and learning of the country is discouraged from entering this field of labor by the certainty of being stripped of literary property abroad and by ruinous competition at home with the worst as well as the best English books, which can be taken without

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STATES 561 (1972); Herman Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025, 1041–42 (1956).

54. James Parton, *International Copyright*, 20 ATLANTIC MONTHLY 430, 434, 438–39, 441 (1867).

55. Larus, *supra* note 8, at 100 (listing other members of the committee as clergyman, editor, and author Samuel Irenaeus Prime; publishers Henry Ivison and George P. Putnam; and Egbert Hazard).

56. Quoted in SEVILLE, *supra* note 22, at 196.

57. H.R. REP. NO. 40-16, at 1 (1868).

58. *Id.* at 3.

pay, and be reprinted here with some hope of profit . . . .<sup>59</sup>

Third, it would be in the interests of U.S. publishers and others concerned with book manufacturing, enabling them to prevent rival unauthorized editions by other publishers: “Without changing the price of his book save to reduce it, . . . he could well afford to pay for a protected copyright that would give him the market free from ruinous competition.”<sup>60</sup> Fourth, it would benefit American book-buyers: the costs of paying copyright royalties would be small compared to the gains to publishers from not having to defend against competing editions, so that the public would have better-made books at lower prices; and publishers would no longer find it necessary to publish the lowest class of English books, “many of them either very stupid or utterly worthless.”<sup>61</sup>

The report’s author, Representative John D. Baldwin of Massachusetts, introduced a bill that seemingly offered the publishing industry everything it could wish by way of protection. This bill provided that, to be entitled to copyright, a book not only had to be manufactured in the United States, but also could only be sold by a publisher who was a U.S. citizen<sup>62</sup>—thus countering the fear expressed in the Ruggles Report that British publishers would set up shop in the United States and monopolize the publishing of books by English authors. The bill gained the support of some publishers, including D. Appleton & Company, which represented that the bill “was generally acceptable to the publishing interests.”<sup>63</sup> But there was also opposition. The bill’s progress was stymied as Congress became distracted by impeachment proceedings against President Andrew Johnson.<sup>64</sup>

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59. *Id.* at 4.

60. *Id.*

61. *Id.* at 5.

62. The condition was that “all the editions of [the republication of the work] shall be wholly manufactured in the United States, and be issued for sale by a publisher or publishers who are citizens of the United States.” H.R. 779, 40th Cong. (1868).

63. *Quoted in* Larus, *supra* note 8, at 101–02.

64. Larus, *supra* note 8, at 99–102; Solberg, *supra* note 25, at 262–63.

A few years later several new legislative proposals were unveiled. In 1872, a group of New York publishers led by William H. Appleton of D. Appleton & Company drafted a bill with a highly restrictive manufacturing clause, like that of the 1868 Baldwin Bill, requiring that all of the manufacturing operations occur within the United States and that the publisher be a U.S. citizen.<sup>65</sup> The draft was supported by a group of fifty-one British authors, including Herbert Spencer, John Stuart Mill, and Thomas Carlyle.<sup>66</sup> At the same time, the International Copyright Association (“ICA”), a group of authors and publishers,<sup>67</sup> drafted its own proposal, consisting of what was sometimes called a “clean bill”—that is, one that accorded copyright protection to foreign authors without any requirement of domestic manufacture or any other protectionist element.<sup>68</sup> Efforts by the proponents of the two bills to devise a compromise yielded an amended version of the Appleton draft, which dropped the requirement that all manufacturing operations occur in the United States, thus allowing printing plates to be imported.<sup>69</sup>

Also in 1872, Senator John Sherman and Representative James B. Beck submitted bills taking a rather different approach from the Appleton and ICA proposals. Their proposals would have established a compulsory license regime for foreign-authored works, allowing republication upon payment of a five percent (Senate version)<sup>70</sup> or ten percent (House version)<sup>71</sup>

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65. The draft required that the “foreign author shall enter into a contract with an American publisher, a citizen of the United States, to manufacture the book in all its parts, so that it shall be wholly the product of the mechanical industry of the United States.” Larus, *supra* note 8, at 113–14; *see also* BOWKER, *supra* note 27, at 350.

66. Larus, *supra* note 8, at 114.

67. Putnam had created an organization with this name in 1837, but its activities had soon lapsed. The new organization was a revival of the earlier effort. *See* SEVILLE, *supra* note 22, at 162, 193–94. Its initial meeting is memorialized in INT’L COPYRIGHT ASSOC., MEETING OF AUTHORS AND PUBLISHERS, AT THE ROOMS OF THE NEW YORK HISTORICAL SOCIETY (New York, Int’l Copyright Ass’n 1868).

68. Larus, *supra* note 8, at 117.

69. *Id.* at 120; SEVILLE, *supra* note 22, at 202.

70. S. 688, 42d Cong. (1872).

71. H.R. 1667, 42d Cong. (1872).

royalty to the author.<sup>72</sup> This approach tilted decidedly in favor of U.S. publishers because it deprived the foreign copyright owner of the right to negotiate what he considered a fair licensing fee, or to refuse altogether permission to reprint.

In early 1872, the congressional Joint Committee on the Library, in obedience to a House resolution, held three days of hearings on the question of international copyright. A year later, the Committee released its findings, called the Morrill Report after the Committee's chairman Senator Lot M. Morrill of Maine.<sup>73</sup> The Report expressed doubts about the constitutionality of a law that would extend copyright protection to foreigners, on the ground that the Constitution was designed to promote the interests of citizens of the United States and its framers were not "solicitous for the protection of individual rights of those alien to its jurisdiction."<sup>74</sup> It went on to compare the prices of American and English editions of a lengthy list of titles to demonstrate that the law would increase book prices and therefore harm the American reading public. Additionally, it noted the inevitable harm to the book-manufacturing industry, observed the lack of uniformity of views on the appropriate approach, and concluded that "any project for an international copyright will be found upon mature deliberation to be inexpedient."<sup>75</sup> The Report "was decidedly a damper to the cause, and the movement lapsed for some years."<sup>76</sup>

### C. Treaty Efforts

At the time these legislative proposals were being introduced, there were parallel efforts to establish a treaty between the United States and England that would protect authors from each country within the territory of the other country. An invitation from British Foreign Secretary Lord Palmerston in 1838 to embark on treaty negotiations received an unfavorable response from the U.S. State Department and

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72. Larus, *supra* note 8, at 121–22; SEVILLE, *supra* note 22, at 203.

73. S. REP. NO. 42-409 (1873).

74. *Id.* at 3.

75. *Id.* at 8.

76. BOWKER, *supra* note 27, at 353.

went nowhere.<sup>77</sup> In 1853, a treaty drafted by Senator Charles Sumner and Secretary of State Edward Everett was negotiated with the British and forwarded to the Senate for approval. U.S. publishers opposed the draft because it lacked a manufacturing clause; they demanded a requirement “that the type shall be set up and the book printed and bound in this country.”<sup>78</sup> The publishers maintained that without such a clause the work would be done in England, and “more than one-half of the mechanics and women employed in the type-founderies, printing-offices, paper-mills, book-binderies and the various collateral branches, will be thrown out of employment.”<sup>79</sup> The publishers’ opposition resulted in additional negotiations and the insertion of a requirement that foreign-authored works “shall be stereotyped or printed & published in the United States.”<sup>80</sup>

The publishers, however, were not satisfied. Numerous petitions were lodged with Congress, urging the Senate not to ratify any treaty.<sup>81</sup> They were styled as emanating from “citizens” of various locations,<sup>82</sup> but at least some, and perhaps all, represented the interests of publishers and others involved in book manufacturing.<sup>83</sup> The treaty died in committee.<sup>84</sup>

The British did not give up. In 1869, Edward Thornton, British minister to the United States, proposed that the two countries enter negotiations grounded on a draft treaty that once again did not contain a manufacturing clause. New York publisher D. Appleton & Company responded to an inquiry from

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77. *Id.* at 346; Larus, *supra* note 8, at 71.

78. Letter from U.S. Publishers to Edward Everett, U.S. Secretary of State (Feb. 15, 1853), *quoted in* Charles E. Appleton, *American Efforts After International Copyright*, 21 FORTNIGHTLY REV. 237, 244 (1877). The signatory publishers were D. Appleton & Co., G.P. Putnam & Company, Robert Carter & Bros., Charles Scribner, and Stamford & Swords. *Id.*

79. *Id.*

80. Stereotyping is a method of printing “in which a solid plate of type-metal, cast from a papier-mâché or plaster mould taken from the surface of a forme of type, is used for printing from instead of the forme itself.” OXFORD ENGLISH DICTIONARY (2d ed. 1991).

81. Larus, *supra* note 8, at 92.

82. Solberg, *supra* note 25, at 260.

83. *See* SEVILLE, *supra* note 22, at 184 (referring to petitions submitted by paper manufacturers, booksellers, bookbinders, and printers).

84. Larus, *supra* note 8, at 87–92; TEBBEL, *supra* note 53, at 560.

the State Department with a letter stating in no uncertain terms that the leading publishers would oppose any measure lacking a domestic manufacturing requirement.<sup>85</sup> The letter added that Harper & Brothers was opposed to any sort of international copyright law.<sup>86</sup>

Opposition from publishers also torpedoed an 1870 attempt by the British to revive treaty negotiations on the basis of what was called the Clarendon Draft, which also lacked a manufacturing clause. In a letter to Secretary of State Hamilton Fish, Harper & Brothers opposed the proposal on the ground that it would make books by British authors “as dear in New York as they are in London.”<sup>87</sup>

#### D. The Positions of Authors, Publishers, and the Book Manufacturing Trades

The interest groups that had the greatest impact during this time period were the authors, publishers, and workers in the book manufacturing trades. Generally speaking, authors wanted a “clean bill”—one that extended copyright protection to non-U.S. authors, augmented by a reciprocity rule that would grant protection to an author from a foreign country only if that country granted protection to U.S. authors. The publishers’ views were more mixed: some were opposed to any form of international copyright; some favored it, as long as they were protected from competition from foreign (especially British) publishers; some may have been content even with a clean bill that did not offer protections. Organizations representing workers in the printing trades sometimes supported international copyright, but only if it included protections to ensure that all phases of book manufacturing would remain on American shores.

##### 1. Authors

As early as 1837, prominent American authors had made

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85. Larus, *supra* note 8, at 106–07.

86. *Id.* at 107–08.

87. *Quoted in* SEVILLE, *supra* note 22, at 200.

common cause with their English counterparts in supporting international copyright protection. In that year, a group of thirty U.S. authors submitted a memorial to Congress supporting Senator Clay's proposal for an international copyright law. The memorial emphasized the unfairness of the present system to American authors, who, "by the present law of copyright . . . are unable to contend with" foreign authors.<sup>88</sup> That is, cheap reprints by U.S. publishers of the works of British authors competed with their own books. Because the U.S. reading public generally held British authors in higher esteem than they did American authors, American authors could ill afford the added obstacle of the pricing advantage accruing to books whose publication costs did not include the burden of negotiated royalty costs. The memorial also invoked the foreign authors' right to fair treatment.<sup>89</sup>

The exclusion of British (and other foreign) authors from U.S. copyright protection had another harmful impact on American writers: because U.S. law did not protect the works of foreign authors, the law of other countries did not protect the works of U.S. authors. British publishers accordingly brought out cheap editions of works by the most popular American authors without paying a negotiated royalty. Sometimes the publishers would pay American authors nominal sums for the advance sheets of their books, and sometimes nothing at all.<sup>90</sup>

## 2. Publishers

The publishers were less united in their views. During this time period they staked out several different positions in response to various proposals for international copyright, based upon their perceived interests as well as their intellectual prepossessions. They usually sought to justify their point of view, and to persuade others of the same, by invoking the public's interests—such as the interests of American readers in

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88. S. Doc. No. 24-141, at 1 (1837); *see also* Solberg, *supra* note 25, at 252.

89. S. Doc. No. 24-141, at 1 (referencing "the just and reasonable protection of others, by whose labors and discoveries we profit").

90. *See* Parton, *supra* note 54, at 436; *see also* CLARK, *supra* note 16, at 50–51 (describing British publishers' unauthorized reprinting of works by U.S. authors during first half of nineteenth century).



cheap books and of tradesmen in the publishing industry (printers, typesetters, bookbinders) in continued employment—rather than their own.

a. Henry Carey and His Disciples

One group of publishers premised their opposition to international copyright on a particular set of theories of political economy and literary property. The leading exponent of this position was Henry C. Carey, who had spent twenty years as a partner in the Philadelphia publishing firm, Carey & Lea,<sup>91</sup> founded by his father, before becoming an outspoken proponent of protectionism and opponent of free trade.<sup>92</sup> A group of Philadelphia-based publishers adhered to his opinion on international copyright.<sup>93</sup>

In 1853, Carey expressed his views in a short book titled *Letters on International Copyright*,<sup>94</sup> which was sent to all Senators and proved highly influential in bringing about the demise of the Everett Treaty.<sup>95</sup> Carey's opposition to international copyright was premised on his disapproval of British policies that led to several types of "centralization," as well as some peculiar views on the relative value to society of the discoverers of facts and those who convey those facts to the reading public through literary expression.

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91. SEVILLE, *supra* note 22, at 158. Carey & Lea has been called the first "publisher in the modern sense"—that is, the first whose activities went beyond merely printing books and included sharing the financial risks of publishing and working to develop authors and markets. David Kaser, *Carey & Lea*, in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA 73, 76 (Madeleine B. Stern ed., 1980).

92. His protectionist views were so uncompromising that he became known as the "Ajax of Protection." See Rodney J. Morrison, *Henry C. Carey and American Economic Development*, 76 TRANSACTIONS AM. PHIL. SOC'Y 1, 43 (1986).

93. See Larus, *supra* note 8, at 115–17.

94. H. C. CAREY, *LETTERS ON INTERNATIONAL COPYRIGHT* (Philadelphia, A. Hart 1853). A second edition of the book appeared in 1868, in time to influence the proposals that were floated from 1868 to 1872.

95. See SEVILLE, *supra* note 22, at 183–84; Larus, *supra* note 8, at 91 ("It would be difficult to over-emphasize the importance of Carey's writings in causing the ultimate rejection of the Everett Treaty."); see also *supra* text accompanying notes 78–80 (discussing the Everett Treaty).

Carey maintained that the call for international copyright had its source in “the extreme poverty of many highly popular English writers,”<sup>96</sup> who are unable to make an adequate income from sales of their books in their home country and, by their exclusion from the scope of U.S. copyright law, do not benefit, or benefit only exiguously, from sales of their books in the United States. Carey dismissed this attempt to justify extending U.S. copyright protection to British authors, arguing that the inability of those authors to support themselves on the strength of their domestic sales was the direct result of poor public policies in England. In particular, Carey blamed policies that had resulted in the centralization of money, institutions, and power in London, which led to decreased literary talent and a reduced demand for books in the rest of the country. Due to wealth disparities and high taxes there were few readers who could afford to buy overpriced books, while the institution of circulating libraries allowed readers to borrow rather than buy books.<sup>97</sup>

Carey also berated authors, both British and American, for their complaints about the poor remuneration they received from their literary output. He contended that the real benefactors of society are those who *gather* the facts and ideas contained in the books, its “body,” not those who *express* those facts and ideas, who contribute merely the “clothing of the body.”<sup>98</sup> The great discoverers of facts and ideas—Carey cites Humboldt, Newton, and Franklin, among others—have no property in their contributions, donate them to the world, and frequently live in poverty or are dependent on handouts from the moneyed elite. In the face of this injustice, why should policymakers heed the cries of authors who already enjoy a copyright monopoly lasting “the long period of forty-two years” in their home country?<sup>99</sup> Moreover, British authors were already compensated for sales of their books in the United States, even without copyright protection, since the fame they gained from the large, albeit unauthorized, circulation of their books in the United States resulted in increased sales of those books in

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96. CAREY, *supra* note 94, at 25.

97. *Id.* at 29–41.

98. *Id.* at 9.

99. *Id.* at 9–11, 19, 22, 53, 61.

England.<sup>100</sup>

Carey also invoked the interests of American readers in cheap books, arguing that granting U.S. copyright to British authors would raise the price of their books in the American market. To support this claim, he compared the current prices in the United States of particular books by British authors with the prices that the same books sold for in England, finding the latter prices much higher.<sup>101</sup>

Carey's tract provoked an impassioned rejoinder from Representative Stevenson Archer of Maryland in an 1872 speech he delivered in the House. Archer rebutted, point by point, the various peculiar propositions Carey had advanced: his belittling of the work of authors as contriving merely the "clothing" of the facts and ideas contributed by true men of science; his argument that, because many scientists died poor, authors should not be heard to demand any more compensation than what they currently receive; his claim that British authors should be satisfied to be compensated with the fame they receive from circulation of their books in this country; among others.<sup>102</sup> The speech had no perceptible effect, as illustrated by the resounding rejection of international copyright in the 1873 Morrill Report.

b. Publishers Who Benefited from the Status Quo of Trade Courtesy

A group of large, well-established publishers benefited from the status quo of quasi-copyright known as "trade courtesy" or "courtesy of the trade," and were opposed to any alteration that would require them to negotiate with British authors, in competition with other publishers, for the right to publish their books in the United States.

Trade courtesy was a system of functional copyright that operated without the involvement of the state in either a legislative or enforcement capacity—strictly a creature of private ordering.<sup>103</sup> Its basic operation was very simple. A U.S.

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100. *Id.* at 42–43.

101. *Id.* at 57.

102. CONG. GLOBE, 42d Cong., 2d Sess. 1931 (1872).

103. "Henry Holt thus describes trade courtesy: 'In the first place, it was

publisher would make an arrangement with a British author, or the author's British publisher, under which the U.S. publisher would pay the author an agreed sum of money, and the author in return would provide the publisher with a copy of the book before anyone else on this side of the Atlantic received it.<sup>104</sup> Receipt of this advance copy, called "early sheets" or "advance sheets," allowed the U.S. publisher to typeset and print the book before any of its competitors could. Upon striking such a deal, the U.S. publisher would announce it to the publishing industry generally. Such an announcement would trigger an obligation on the part of other publishers to refrain from issuing a competing edition.<sup>105</sup> Furthermore, once a publisher had published one book by a foreign author under this system, the publisher was deemed to have the rights to publish any subsequent books by that author.<sup>106</sup> The result, from the publisher's perspective, was a close simulation of copyright, in which the publisher gained a monopoly over the supply of the book to the U.S. market.

Some of the publishers who benefited from trade courtesy were opposed to international copyright no matter what conditions were attached to it. The most prominent member of this group was James Harper, co-founder of the Harper & Brothers publishing enterprise, which has been described as "America's foremost pirate of the nineteenth century."<sup>107</sup> In the

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a brief realization of the ideals of philosophical anarchism—self-regulation without law." J. HENRY HARPER, *THE HOUSE OF HARPER* 110 (1912).

104. Advance sheets might also be acquired through the less savory method of theft by agents of the American publisher who had been installed in the shop of a British printer. CLARK, *supra* note 16, at 35.

105. See Ricketson, *supra* note 13, at 13–14 (explaining that under the system of trade courtesy "the major publishing houses observed an unwritten custom whereby each would refrain from publishing editions of foreign works in respect of which another had reached a publishing agreement with the author").

106. EUGENE EXMAN, *THE HOUSE OF HARPER* 7 (1967) (Trade courtesy "had three stipulations: the purchase of advance proofs from an English publisher or author, the right to a new book by an author previously published, and the listing of a forthcoming book in a newspaper advertisement, known as a 'first announcement.');" Parton, *supra* note 54, at 441 (describing other elements of the system).

107. Larus, *supra* note 8, at 58; see also CLARK, *supra* note 16, at 79 (noting that Harper also benefited from the uncompensated use of British publications for his *Harper's Monthly* magazine, which consisted "almost

1872 hearings held by the Joint Committee on the Library,<sup>108</sup> the Harper firm submitted a letter stating its opposition to any extension of copyright to foreign authors. In his 1872 speech to Congress, Representative Archer seemed to be referring to Harper when he noted that “all of our publishers, with one single exception, are in favor of” international copyright.<sup>109</sup> As the English writer Charles Appleton observed, perhaps with some hyperbole, “so far as any influence upon Congress is concerned, the little finger of Mr. Harper is thicker than the loins of all the literary and scientific men in the United States put together.”<sup>110</sup>

Another vocal opponent of any form of international copyright was T. & J.W. Johnson, a Philadelphia publisher of law books whose catalog consisted almost entirely of books by English writers and, therefore, was quite content with the status quo.<sup>111</sup>

Other publishers who benefited from the status quo were willing to consider supporting a version of international copyright that would result in competition between themselves and other U.S. publishers, as long as they did not have to face competition from British publishers. A prominent member of this group was George Palmer Putnam, progenitor of the New York publishing firm that became G.P. Putnam’s Sons. As

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entirely” of this material). In his 1867 article in the *Atlantic Monthly* magazine, which rekindled hopes for an international copyright law, James Parton contended that the Harpers were not opposed to international copyright: “There is an impression in many circles that the Harpers are opposed to it. We are enabled to state, upon the authority of a member of that great house, that this is not now, and never has been, the case.” Parton, *supra* note 54, at 443. This claim is hard to square with the Harpers’ own actions during this period, including the uncompromising opposition of Harper & Brothers to the proposed copyright treaties in 1869 and 1870 and to the 1872 legislative proposal.

108. See *supra* text accompanying note 73.

109. CONG. GLOBE, 42d Cong., 2d Sess. 1935 (1872).

110. Appleton, *supra* note 78, at 239. The author of this piece, Charles Appleton, does not appear to be related to the namesakes of the Appleton publishing company; according to his biographer, he was born in Reading, England, and his father was the Reverend Robert Appleton. JOHN H. APPLETON & A.H. SAYCE, DR. APPLETON: HIS LIFE AND LITERARY RELICS 3 (London, Trübner & Co. 1881). Seville’s statement that Charles was the son of William Appleton, head of the D. Appleton & Co. publishing firm during the second half of the 19th century, see SEVILLE, *supra* note 22, at 207, appears to be mistaken.

111. Solberg, *supra* note 25, at 257.

described above, in 1853 he joined with Appleton and other publishers to oppose the original version of the Everett Treaty for its lack of a manufacturing clause.<sup>112</sup> But in 1868, Putnam, as one of five prominent publishers and authors who assembled to press Congress to again consider enacting an international copyright law,<sup>113</sup> supported the Baldwin Bill, which featured a highly protective manufacturing clause. This provision granted copyright to a foreign author only if the book was manufactured in the United States *and was sold by a publisher who was a citizen of the United States*, thereby preventing British publishers from setting up operations in the United States and competing with U.S. publishers for the right to publish books by British authors.<sup>114</sup>

In opposing international copyright, these publishers, like Carey and his circle, invoked not their own interests but those of the American reading public and workers employed by the book manufacturing industries. The 1853 letter from the Appleton group to Secretary of State Everett justified their insistence on a strong manufacturing clause by referencing the harms that would otherwise befall the book-manufacturing workers.<sup>115</sup> The letter also observed that “[t]he people of this country are accustomed to cheap books,” and granting British publishers a monopoly of the publishing and sale in the United States of British-authored books would make those books “much higher in price.”<sup>116</sup> Harper’s submission to the 1872 hearings invoked “[t]he interests of the people at large” in continued access to cheap editions of books by British authors, and averred that international copyright would increase the cost of books by British authors by a factor of five.<sup>117</sup>

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112. *See supra* text accompanying note 78.

113. *See supra* text accompanying note 55.

114. *See supra* text accompanying note 62.

115. *See supra* text accompanying note 79. An 1869 letter from D. Appleton and Company to Secretary of State Hamilton Fish invoked similar considerations in opposing another British treaty proposal. Letter from D. Appleton & Co. to Hamilton Fish (Nov. 5, 1869), *quoted in* Larus, *supra* note 8, at 106–07.

116. Letter from U.S. Publishers to Edward Everett, *supra* note 78, at 244.

117. Letter from Harper & Bros. to the Joint Committee of Congress upon the Library (1872), *quoted in* Appleton, *supra* note 78, at 251.

Another division among U.S. publishers was that between publishers who were in the habit of publishing books by British authors from stereotype plates that were brought over from England and those who were not. The bill that a group of publishers, led by William H. Appleton, proposed in 1872<sup>118</sup> included a stringent manufacturing clause, requiring that foreign books be “wholly the product of the mechanical industry of the United States.”<sup>119</sup> But another group of publishers objected to this provision on the ground that it prevented the printing of books in the United States from stereotype plates produced in England. Naturally, these publishers were the ones most heavily engaged in that practice.<sup>120</sup>

c. Publishers Who Did Not Benefit from Trade Courtesy

Another group of publishers opposed international copyright unless it were implemented in a manner that redressed what they felt were unfair aspects of the system of trade courtesy. This group included booksellers and publishers located in the interior or western regions of the country, rather than in the major east coast metropolises. They lacked the reputation, financial resources, and geographical position required to obtain the manuscripts of new works by British authors and publish them before their better-established east coast competitors could do so. They argued that U.S. copyright should not be extended to British authors unless accompanied by a system for assuring that the less-established publishers could fairly compete for publication rights against the likes of the Harpers, Putnams, and Appletons. Without such protections, international copyright would serve to perpetuate the commanding position held by the great publishing houses.<sup>121</sup> Given the influence the established publishers wielded in Congress, the conditions that would satisfy these second-tier publishers were not likely to make it through the legislative

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118. See *supra* text accompanying note 65.

119. BOWKER, *supra* note 27, at 350.

120. Larus, *supra* note 8, at 115; BOWKER, *supra* note 27, at 351.

121. Appleton, *supra* note 78, at 239–41.

process.

It seems likely that at least some of the small publishers would have reached the opposite conclusion, supporting international copyright as, if imperfect from their standpoint, at least some advance over the existing system which did not serve their interests in the least. As Parton observed, in advocating for international copyright, “[i]t is only under the reign of law that the rights of the weak have any security.”<sup>122</sup>

d. Publishers Who Supported International Copyright on Moral Grounds

At the other end of the spectrum were publishers who supported international copyright on moral grounds, regardless of negative consequences to their economic interests. It is questionable how many publishers fit this description. According to Charles Appleton, as of 1877 “a small number of publishers” supported “international copyright pure and simple, without restrictions or conditions of any kind”;<sup>123</sup> but this may have been on grounds of expediency rather than morality. Early in the period under discussion George Palmer Putnam may have fit this description. In 1840, Putnam, who was then a partner in the New York publishing firm of Wiley & Putnam, published a small book in the form of a letter addressed to Senator Preston, written by Francis Lieber, a German-American legal theorist and political philosopher. The book, titled *On International Copyright*, made an impassioned plea for international copyright on moral grounds.<sup>124</sup> Lieber argued for the natural rights of an author in his literary productions, offering an extended analogy between literary and ordinary property.<sup>125</sup> His theme throughout is that of justice, and he insists that if the demands of justice come into conflict with those of expediency, it is the

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122. Parton, *supra* note 54, at 441.

123. Appleton, *supra* note 78, at 237.

124. The book was published by Wiley & Putman, the publishing firm that Putnam established with John Wiley in 1840. BOWKER, *supra* note 27, at 346; GEORGE HAVEN PUTNAM, A MEMOIR OF GEORGE PALMER PUTNAM 40 (1903).

125. FRANCIS LIEBER, ON INTERNATIONAL COPYRIGHT, IN A LETTER TO THE HON. WILLIAM C. PRESTON *passim* (New York & London, Wiley & Putnam 1840).



latter that must yield. Thus, he maintains, even if it is the case that the absence of international copyright is financially advantageous to U.S. publishers and readers, “justice stands above utility.”<sup>126</sup> In a rhetorical flourish, he asks: “Have we as men, and especially as christians, a right to deny the plainest justice to foreigners, solely because we may do it with impunity, and, perhaps, imagine, that some advantage accrues to our nation from it?”<sup>127</sup>

Putnam’s willingness to bring out this book suggests that, as an idealistic youth—he was 26 at the time—who had just embarked on a career in publishing, he embraced international copyright on moral grounds. However, as noted above,<sup>128</sup> in 1853, as a publisher with something to lose, he opposed the Everett Treaty because, lacking a manufacturing clause, it would have harmed his business interests. The Baldwin Bill, which he supported in 1868, included a strong manufacturing clause and, therefore, did not threaten his business with competition from British publishers.

### 3. Book Manufacturing Trades

During this period, members of the industries that produced the physical books—printers, typographers, paper manufacturers, bookbinders, and others—sometimes opposed and sometimes supported proposals for international copyright protection. However, they all undeniably wanted protection from foreign competition.

An 1838 memorial from “A Number of Citizens of Philadelphia” directed attention to the harms that the Clay Bill, then under consideration, would visit upon those employed in the industries of “paper making, paper dealing, printing, bookbinding, stereotyping, bookselling, newspaper and periodical publishing, and collateral branches.”<sup>129</sup> Passage of the bill, the memorial averred, would “deprive of their accustomed

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126. *Id.* at 54–55.

127. *Id.* at 52.

128. *See supra* text accompanying note 78.

129. S. Doc. No. 25-102, at 1 (1838).

daily occupations thousands of men, women, and children.”<sup>130</sup> A brief 1838 memorial from the Columbia Typographical Society opined that enactment of the Clay Bill “will prove the immediate destruction of the book-printing business of the United States,” and urged that “it is the duty of every Government . . . to protect the interests of its *own* people, when they come in *competition* with *foreigners*.”<sup>131</sup>

An 1838 memorial from The New York Typographical Society offered a more quantitative argument to the same effect.<sup>132</sup> It compared the costs of printing 1,000 and 2,000 copies of a book, including costs for composition, presswork, and paper, demonstrating that a British publisher could print an additional 1,000 copies for the American market for less, including payment of import duties, than it would cost an American publisher to publish an edition of 1,000—the savings resulting from the fact that the cost of composition, representing a large proportion of the total cost, was fixed regardless of the size of the edition. Therefore, extending U.S. copyright to British authors inevitably would result in the American market being supplied by books manufactured in England, depriving workers in the U.S. book manufacturing industries of employment.

An 1843 memorial to Congress, in which publishers made common cause with representatives of the book manufacturing industries, expressed support for international copyright. The memorial declared that the *absence* of international copyright was “injurious . . . to that very extensive branch of American industry which comprehends the whole mechanical department of book-making.”<sup>133</sup> It recommended enactment of an international copyright law that included a domestic manufacturing clause,<sup>134</sup> as well as a provision excluding

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130. *Id.*

131. S. DOC. NO. 25-190, at 1 (1838). The Columbia Typographical Society (of what is now Washington, D.C.), and similar groups organized in New York, Boston, and Philadelphia in this period, were formed to advance the interests of workers in the printing trades, including by establishing minimum wage scales. These societies were the predecessors of modern unions. See GEORGE A. TRACY, HISTORY OF THE TYPOGRAPHICAL UNION 270 (1913).

132. S. DOC. NO. 25-296, at 1–2 (1838).

133. H.R. DOC. NO. 28-10, at 1 (1843).

134. The domestic manufacturing stipulation was that “the book be printed in the United States within a certain time (to be settled by law) after

transfer of copyright to non-U.S. publishers.<sup>135</sup> Its ninety-seven signatories included publishers, booksellers, printers, and bookbinders.

Likewise, in 1852, a group of authors headlined by Washington Irving and James Fenimore Cooper, together with “publishers, book-sellers, printers, editors, and paper dealers,” petitioned for a law that would grant copyright to British authors on a reciprocal basis.<sup>136</sup>

### III. Interlude: The Rise and Fall of the System of Trade Courtesy

Throughout the nineteenth century the American reading public exhibited an avid interest in books by British authors, generating an incentive for U.S. publishers to bring out editions by those authors. But the absence of a U.S. copyright on foreign works created a dilemma for the publishers: how could they prevent rival American publishers from issuing competing editions of the same book, siphoning away purchasers, cutting into their profits, and perhaps even turning the publication into a money-losing proposition?

As noted above, the system that the publishers devised to overcome this problem was called “trade courtesy” or “courtesy of the trade.”<sup>137</sup>

#### A. The System of Trade Courtesy

##### 1. Evolution of the System

The first step toward establishing the system of trade courtesy came about as U.S. publishers sought to obtain copies of newly published books by popular British authors before competing publishers could do so. The publisher who acquired

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its publication in a foreign country.” *Id.*

135. This would be effectuated through a proviso “that the copyright for this country shall be transferable from the author to American resident publishers only.” *Id.*

136. CONG. GLOBE, 32d Cong., 1st Sess. 1832 (1852).

137. See *supra* Section II(D)(2)(b).

such an early copy would rush an edition into print and place it on sale long before copies from the authorized British edition could reach U.S. shores.<sup>138</sup>

In the early decades of the nineteenth century, the courtesies of trade courtesy were not yet widely observed.<sup>139</sup> In the early 1820s Carey & Lea, a well-established Philadelphia publisher, arranged for its London agent to ship Sir Walter Scott's novels to it as soon as they were published. However, other publishers did not recognize Carey & Lea's priority and brought out competing editions. Carey & Lea then switched tactics, paying Scott's publisher to send it advance sheets as soon as they came off the presses and before the book actually appeared, so as to gain more of a lead on its competitors.<sup>140</sup> In the absence of forbearance by competing publishers, all a publisher could acquire was a first-mover advantage, which fell far short of the functional equivalent of copyright.

Likewise, in 1835, Harper & Brothers made an agreement with Edward Bulwer-Lytton "to pay him £50 per volume for advance sheets of his highly popular novels."<sup>141</sup> A Boston publisher, Marsh, Capen & Lyon, tried to induce Bulwer-Lytton to defect to it, and probably would have succeeded had Bulwer-Lytton not balked in the mistaken belief that Congress was

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138. Unauthorized editions could be produced very speedily indeed. "In 1823 Carey & Lea of Philadelphia received advance copies of cantos eleven and thirteen of Byron's *Don Juan*. It was immediately given out to thirty-five or forty compositors, and within thirty-six hours an American edition was on sale." Earl L. Bradsher, *Book Publishers and Publishing*, in 18 THE CAMBRIDGE HISTORY OF ENGLISH AND AMERICAN LITERATURE ch. XXIX, § 15 (W.P. Trent et al. eds., 1907–21).

139. According to one writer, there was an earlier phase in the early 1800s during which trade courtesy had been observed. But the great popularity of Scott's *Waverly* in 1814 set off a scramble among American publishers to release competing versions, and trade courtesy ceased for a while to be respected. Kaser, *supra* note 91, at 74. It is difficult to identify a definite starting date for trade courtesy. See Stan J. Liebowitz, *Paradise Lost or Fantasy Island? Voluntary Payments by American Publishers to Authors Not Protected by Copyright*, 59 J.L. & ECON. 549, 555 (2016) (concluding "[i]t appears to have begun in a small way in the third and fourth decades of the 19th century and then became a more standard feature by the middle of the century").

140. SEVILLE, *supra* note 22, at 157.

141. *Id.* at 159.

about to enact an international copyright law.<sup>142</sup> The next year, Marsh, Capen & Lyon arranged for Captain Frederick Marryat, a popular English author, to send it the manuscript of his novel *Mr. Midshipman Easy* as soon as it was available, in return for royalties on the U.S. edition of the book. Now it was Marsh, Capen & Lyon's turn to suffer unwanted competition, as trade courtesy was not observed and the Philadelphia publisher Carey & Hart came out with a competing reprint.<sup>143</sup>

The practice of recognizing and respecting the rights of the publisher who first staked his claim to a work by a British author "gradually evolved,"<sup>144</sup> eventually reaching a point where "it was safe to pay for an early copy, or advance proofs, of a foreign book, in order to reprint it before anyone else could."<sup>145</sup> Under the norms of trade courtesy, other publishers would forbear from publishing competing editions of such a work.<sup>146</sup>

## 2. Elements of Trade Courtesy

Integral to the system of trade courtesy was a publisher's announcement that it had arranged with a particular author to publish that author's book. The rules governing these announcements were fairly intricate. For example, there was

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142. *Id.*

143. *Id.* at 159 n.36. Marsh, Capen & Lyon attempted to secure a U.S. copyright on its edition, on the basis that its editor had corrected errors in the British edition. Carey & Hart simply ignored this attempt, and no infringement lawsuit was filed. Larus, *supra* note 8, at 51–52.

144. HENRY HOLT, GARRULITIES OF AN OCTOGENARIAN EDITOR 97 (1923) (idiosyncratic spelling in original). Holt advocated for reforming the English language by the adoption of simplified spelling, and occasionally practiced what he preached. *Id.* at 411–12.

145. *Id.* at 97; *see also* Parton, *supra* note 54, at 441 ("If a publisher is the first to announce his intention to publish a foreign work, that announcement gives him an exclusive right to publish it."); S. REP. NO. 49-1188, at 9 (1886) ("For a long time anterior to about 1875 it was the rule for all American publishers to respect the contracts which any of them made with foreign authors, and not to print a rival edition of any book printed under such contract.").

146. This aspect of trade courtesy was prefigured in the days of ancient Rome. When a Roman book dealer received a manuscript from an author for duplication, his rights to the book were recognized by other book dealers. Max M. Kampelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 406, 406 (1947).

the possibility of a pre-announcement:

Even when no arrangement had been made for a forthcoming English book, the *modus operandi* under the courtesy of the trade was to announce it as early as possible as “in press” if the book seemed promising to a publisher. Under this provision the first announcement stood good as against another publisher’s subsequent announcement, it being assumed in every case that payment would be made for *advance* sheets. If a publisher had the advance sheets in his possession, such right or claim overrode a simple announcement.<sup>147</sup>

It does not take much imagination to perceive that the institution of pre-announcement lent itself to abuse by less-than-scrupulous publishers: “Some houses ‘announce’ everything that is announced on the other side of the Atlantic, so as to have the first choice.”<sup>148</sup>

The unwritten rules of trade courtesy gave a publisher a right of first refusal for a new book by an author whom the publisher had previously published. “An offer received by a publisher from an author already identified with another house was by courtesy first submitted to the house which had already published the author’s works, and publishers abstained from entering into competition for books which were recognized as the special province of another house.”<sup>149</sup> A March 12, 1872 letter from Harper & Brothers to the New York publishing firm Sheldon & Co. politely sought adherence to this rule:

It is well known to you that complete editions of Mr. Reade’s novels are published by two houses in

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147. HARPER, *supra* note 103, at 111. The author of this book, J. Henry Harper (1850-1938), a grandson of Fletcher Harper (1806-77), one of the four original Harper brothers, is not an objective witness to the events, and his book’s tone is hagiographic. His characterizations must be taken with a grain of salt.

148. Parton, *supra* note 54, at 441.

149. HARPER, *supra* note 103, at 111; Parton, *supra* note 54, at 441.

this country, by ourselves and Messrs. J. R. Osgood & Co. Had we received a similar offer from an author whose works we do not uniformly publish, but which are reprinted complete by another house, we would have promptly apprised the other house to give it an opportunity of accepting or rejecting the offer . . . . This is our construction of Trade Courtesy. We ask simply for ourselves what we always promptly and cheerfully accord to others.<sup>150</sup>

The effect of this rule was to restrain competition among publishers, thereby holding down the sums they paid to the authors; an author who had accepted an honorarium from a U.S. publisher on account of one work could not expect competing bids from other publishers for his subsequent works.

Advance sheets might be secured for an American publisher through the services of an agent located in England. For example, from 1847 to 1886, Harper & Brothers employed as its agent Sampson Low, who headed the London publishing firm Sampson Low & Co. “He conducted business in [Harper’s] interest with English authors and publishers, negotiating for advance sheets of English books and publishing English editions of American books.”<sup>151</sup>

The size and form of payment to British authors varied. Most often, the author received a flat sum irrespective of sales. For famous authors, the sums could be substantial: £1,250 to Charles Dickens for *Great Expectations*; £480 to William Makepeace Thackeray for *The Virginians*; £700 to Anthony Trollope for *Sir Harry Hotspur*; up to £750 to Wilkie Collins for each of several novels; £1,000 to Charles Reade for *A Woman Hater*; £650 to Thomas Macaulay for his *History of England*;

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150. HARPER, *supra* note 103, at 336–37; see also David S. Edelstein, *Henry Holt and Company*, in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA, *supra* note 91, at 157, 164 (“[I]n February 1873, . . . Holt asked Harper to desist from publishing Hardy’s *A Pair of Blue Eyes* because Holt was then publishing his *Under the Greenwood Tree* and felt he should have the opportunity, if he so chose, to publish the former. Harper agreed.”).

151. HARPER, *supra* note 103, at 131.

£1,000 to Macaulay for his *Life and Letters*.<sup>152</sup> Dickens received \$2,000 for *Little Dorrit*.<sup>153</sup> Thackeray accepted \$1,000 for his *Lectures on the Humorous Writers of the Last Century*.<sup>154</sup> George Eliot received £1,200 for *Middlemarch* and £1,700 for *Daniel Deronda*.<sup>155</sup>

Sometimes, the U.S. publishers paid British authors a royalty instead, such as was typically received by American authors.<sup>156</sup> Royalty rates were normally about ten percent.<sup>157</sup>

The best-known British authors received significant sums under this system.<sup>158</sup> Indeed, “English authors sometimes received more from the sale of their books by American publishers, where they had no copyright, than from their royalties in [England].”<sup>159</sup> There is some evidence that the payments to English authors were at the same rate that U.S. publishers paid to American authors: according to Herbert Spencer, “arrangements initiated about 1860 gave to English authors who published with Messrs. Appleton profits comparable to, if not identical with, those of American

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152. *Id.* at 114; see also Cass Canfield, *An Introductory Review of Harper Highlights, in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA*, *supra* note 91, at 147, 148 (“For the privilege of obtaining advance sheets Harper & Brothers paid Dickens sums ranging from £250 to £1,250.”).

153. HARPER, *supra* note 103, at 115–16.

154. *Id.* at 125.

155. *Id.* at 334, 388.

156. SEVILLE, *supra* note 22, at 157 n.28.

157. *Id.* (“occasionally a royalty (normally around 10 per cent) was agreed”); BOWKER, *supra* note 27, at 364 (“the leading American publishers voluntarily made payments to foreign authors, in many cases the same ten per cent paid to American authors”); Edelstein, *supra* note 150, at 164 (“leading publishers did pay the usual 10 percent to popular English novelists”).

158. See BOWKER, *supra* note 27, at 364 (referencing “one case of ‘outright’ purchase of ‘advance sheets’” for \$5000); Ricketson, *supra* note 13, at 14 (“authors such as Dickens and Trollope received large sums in respect of the American sales of their works”); see also S. DOC. NO. 25-102, at 2–3 (1838) (“British authors of high repute have been, and are still paid liberally for their works”).

159. Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* 167, 172 (1934); see also *id.* at 188 (explaining that Herbert Spencer’s “receipts from sales in America (where he had no copyright to keep up prices) were apparently greater than from those in England”); Edelstein, *supra* note 150, at 161 (noting that Hippolyte Tain received from Holt “royalties four times his return from the British edition” for his *History of English Literature*).



authors.”<sup>160</sup> One recent reexamination of the evidence concludes, to the contrary, that, under trade courtesy, British authors received only about one-third as much as American authors did.<sup>161</sup>

During the heyday of trade courtesy, the rights of a U.S. publisher that had followed the prescribed procedures were generally recognized and honored by the mainstream publishers.<sup>162</sup> According to J. Henry Harper, his firm “felt as safe from the interference of American publishers as if we had the copyright of these books—provided, of course, we published them at reasonable prices.”<sup>163</sup> Yet Harper cites instances in which the norms were not observed. In 1857, his firm sent an indignant letter to the *New York Tribune*, protesting the newspaper’s reprinting of a story by Thackeray that had been published in *Harper’s Magazine*, having been “printed from early sheets, received from the author in advance of publication in England; for which [*Harper’s* paid] Mr. Thackeray the sum of Two Thousand Dollars.”<sup>164</sup> Harper expostulates:

With the full knowledge of this arrangement, the proprietors of the *New York Tribune*, who have been leading advocates of an International Copyright Law, and profess the warmest regard for the interests of British authors in this country, have begun to copy this Story into their paper. The same parties, under the same circumstances, reprinted upon us Mr. Dickens’s *Little Dorrit*, for

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160. HERBERT SPENCER, VARIOUS FRAGMENTS 237 (1907) (letter to *The Times* (of London) published Sept. 21, 1895), *quoted in* Plant, *supra* note 159, at 173–74 n.5.

161. Liebowitz, *supra* note 139, at 564.

162. See HARPER, *supra* note 103, at 110 (“The system was but a makeshift, but it usually answered its purpose, and its principles were respected by all first-class publishing houses.”); S. REP. NO. 49-1188, at 9 (1886) (during the period prior to the rise of cheap libraries in 1875, the observance of trade courtesy was “quite the rule”).

163. HARPER, *supra* note 103, at 446. The proviso is intriguing in its suggestion of an additional norm of courtesy copyright: that a publisher’s claim to exclusive publication rights as to a particular work might not be recognized if it abused the privilege by charging unreasonable prices.

164. *Id.* at 115.

which we paid the author Two Thousand Dollars.<sup>165</sup>

Because it was a voluntary system, adherence to courtesy copyright could be policed only by the participating publishers. According to J. Henry Harper, disputes were usually resolved amicably. He gives this example of a situation in which two publishers both believe they have a legitimate claim to a particular book:

Occasionally, through inadvertence or misunderstanding, two publishers might have the same work in hand and partly manufactured before realizing the fact; but in such cases a friendly adjustment would generally be reached, either by one house reimbursing the other for its outlay and taking the book, or, the dispute would be determined by arbitration, the contention being commonly left to a fellow-publisher for arbitrament. The houses controlled by trade courtesy invariably endeavored to meet all cases of trade friction on the highest plane of equity.<sup>166</sup>

In view of Harper's tendency to speak as an apologist for the system of trade courtesy, one may be suspicious about his claims about the infrequency of violations of the norms and the amicability of their resolution.

When a "friendly adjustment" or "arbitrament" proved impossible, a perceived violation of the norms of trade courtesy might lead to retaliation.<sup>167</sup> This usually consisted of coming out with a competing edition offered at a lower price than the

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165. *Id.*

166. *Id.* at 111.

167. *Id.* ("Publishers sometimes differed as to their claim to a certain book, which at times resulted in acrimonious controversy and even retaliation."); see also Robert Spoo, *Courtesy Paratexts: Informal Publishing Norms and the Copyright Vacuum in Nineteenth-Century America*, 69 STAN. L. REV. 637, 659–65 (2017) (discussing the varieties of retaliation, arranged on a spectrum, running from a "gentlemanly rebuke" to "printing on" the violator).

offending publisher's.<sup>168</sup> The retaliating publisher might even sell his edition at a loss to assure that the violator would not profit from his violation of the norms.<sup>169</sup>

An example of retaliation occurred in 1861 in connection with a tussle over publication rights to Anthony Trollope's new novel *North America*. Harper & Brothers had published some of Trollope's previous novels on financial terms arranged with Trollope's London publisher. Despite an offer from Harper to match whatever any other publisher offered him for rights to *North America*, Trollope made a deal with competing publisher Lippincott. Harper, considering itself aggrieved by this violation of the norms, "got hold of a copy and rushed out a cheap and shoddy edition" before Lippincott did, "ruining the American market for Trollope."<sup>170</sup>

A dispute over publication rights under trade courtesy might be resolved through a settlement rather than retaliation. J. Henry Harper relates that his firm settled a particular dispute relating to two Wilkie Collins novels with the following offer to the rival publisher:

Gentlemen,—We will give you one hundred dollars for the plates of your 12mo. edition of *The Dead Secret* and *Basil*—which is about fifty per cent. above the price of type-metal. We should melt them, as we have made entirely new plates for our uniform edition of Mr. Collins's novels.<sup>171</sup>

In another sort of settlement, Harper "bought up the rival edition and ultimately destroyed the copies."<sup>172</sup>

Another method used by an honorarium-paying publisher to

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168. HARPER, *supra* note 103, at 111–12.

169. Plant, *supra* note 159, at 173.

170. SEVILLE, *supra* note 22, at 195. J. Henry Harper describes several other examples of retaliation by the Harper firm in the 1860s and early 1870s. See HARPER, *supra* note 103, at 245–46 ("we had to meet the competition of a pirated edition by issuing the work at twenty-five cents in paper covers"); *id.* at 393 ("the book was printed on us and offered in inferior style at \$2.50, whereupon we brought out a legible small-pica edition, the two volumes bound in one, at \$1.75").

171. HARPER, *supra* note 103, at 347–48.

172. *Id.* at 245.

discourage other publishers from bringing out their own editions in violation of trade courtesy was to price the book at a reasonable level—high enough so the publisher could make a profit, but not so high as to tempt other publishers to grab a piece of the action in disregard of the norms.<sup>173</sup>

A publisher might find it necessary to remind an author of the norm that the publisher of one work by an author had first right of refusal to publish subsequent works by that author. In 1835, after agreeing to pay Edward Bulwer-Lytton £50 per novel for advance sheets, Harpers “made it clear that if Bulwer-Lytton later sought better terms from another publisher, that they would reprint in competition,” explaining “that they needed to protect their previous investment by keeping their edition of his works complete.”<sup>174</sup>

That violations of trade courtesy did not rise above a level that U.S. publishers considered tolerable is suggested by an 1875 letter from Joseph W. Harper<sup>175</sup> to Charles Appleton, of London, in which Harper expressed the view that international copyright was unnecessary. “I could concede . . . that there are occasional violations of ‘Trade Courtesy’ which are very annoying and exasperating. But your proposed remedy I fear would be worse than the disease.”<sup>176</sup> However, characterizations of the level of compliance are not entirely consistent. Side-by-side with the notion of only “occasional violations” is the image of publishers securing, by their payment for advance sheets, only a few days’ lead time over competing publishers, suggesting the absence of any forbearance whatsoever. Thus, an 1838 submission to Congress notes that “large sums were paid to Sir Walter Scott, or his agent, for early copies of his novels, and this in the face of competition which produced rival editions in twenty-four hours.”<sup>177</sup>

According to J. Henry Harper, publication of British works

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173. Plant, *supra* note 159, at 173 (describing this strategy as “perhaps the most important check on the rival publisher”); HARPER, *supra* note 103, at 446.

174. SEVILLE, *supra* note 22, at 159.

175. Not to be confused with his namesake father, Joseph Wesley Harper (1801-70), one of the four original Harper brothers.

176. HARPER, *supra* note 103, at 383.

177. S. DOC. NO. 25-102, at 2-3 (1838).

under the trade courtesy system was not always profitable to the U.S. publisher. As an example, demonstrating that “foreign purchases not infrequently proved unprofitable,” Harper offered a letter that the firm sent to a British author belonging to its stable explaining why the firm would be unable to publish her newest book:

We thank you for your favor of the 8th instant, offering us the early sheets of your new novel (probably *Christian’s Mistake*) on the same terms as *Mistress and Maid*—and we regret that in consequence of the disturbed state of our country, the constantly advancing price of labor and material, and the high rate of exchange, we are unable to avail ourselves of it. Owing to these facts, the publication of *Mistress and Maid* in book form, reckoning the sheets of it to have cost us twenty-five hundred dollars, was a loss to us of nearly fifteen hundred dollars. Under present circumstances, we do not see how the publication of your works in this country, if secured by any considerable payments for priority, can be profitable to publishers.<sup>178</sup>

According to Francis Lieber, the system as it existed in 1840 benefitted only a few publishers. Those publishers, he stated, “indeed may make large profits, but an overwhelming majority of our publishers do not share in it.”<sup>179</sup>

Publishers participating in trade courtesy conceptualized the system as one in which they purchased rights, just as if copyright were in effect and they were actually paying the author for a license or assignment of copyright. Thus, an 1871 letter from Harper & Brothers to one “W.E. Tunis, of Detroit, who controlled the book and periodical business on the Canadian railroads” (and who served as Harper’s agent) states: “We bought Wilkie Collins’s story for use in the WEEKLY . . .

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178. HARPER, *supra* note 103, at 227 (quoting a letter to Dinah Maria Mulock dated Aug. 23, 1864).

179. LIEBER, *supra* note 125, at 55.

*Middlemarch*, by George Eliot, belongs to us alike for Canada and the U.S.—the right for both countries having been purchased by us.”<sup>180</sup> J. Henry Harper went so far as to refer to trade courtesy as “the laws binding publishers.”<sup>181</sup>

Consistent with that conceptualization, a British author who did not observe the niceties of trade courtesy was viewed by publishers as in the wrong. In 1872, English author E.H. Palmer complained, in a letter published in the London *Athenaeum*, about Harper & Brothers’ having published an unauthorized reprint of his book *The Desert of the Exodus*. The firm sent off an acerbic reply to Palmer’s letter: “Our transactions with foreign authors, whose works we reprint, are based either on the purchase of advance sheets in season to admit of simultaneous publication in this country, or on some pecuniary acknowledgment as a matter of courtesy.”<sup>182</sup> Palmer abjectly responded:

[M]y letter was written in ignorance of certain usages of the American publishing trade. These, it seems, give, by courtesy, to one who has paid for *early sheets* a *quasi* copyright in America, but do not extend such courtesy to *English printed works which have been imported into that country*, as was the case with my book. Such being the case, I readily acknowledge my error, and regret that I should have impugned the integrity and good faith of Messrs. Harper in the matter. Had *early sheets* been offered, it is probable that I should have had no cause for complaint.<sup>183</sup>

Publishers other than the established, well-known houses viewed the situation rather differently. They saw the system of

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180. HARPER, *supra* note 103, at 344–45.

181. *Id.* at 446. Looking back in 1894, after passage of an international copyright law, Harper observed: “It is not fair to call the time previous to the copyright agreement ‘piratical days.’ There was then an understanding between reputable publishers here and abroad that amounted to a copyright law.” *Advantage to Authors*, N.Y. TIMES, Dec. 9, 1894, at 12.

182. HARPER, *supra* note 103, at 354.

183. *Id.* at 354–55.

trade courtesy as one designed to further the interests of, and maintain the monopoly held by, the established publishers. As George Munro, publisher of the first of the cheap libraries, put it in 1884:

The cheap libraries have broken down the Chinese or rather the American wall of trade courtesy and privilege. For whose benefit was that erected? For the foreign authors? Not at all, but for a monopoly of publishers in this country. They dictated terms, and precious low ones too, to the authors, on the basis of non-interference among themselves.<sup>184</sup>

Not all English authors were pleased with the payments they received from U.S. publishers. In 1886, Harper & Brothers sent the English dramatist W.S. Gilbert (one half of Gilbert & Sullivan), unbidden, a draft for £10, explaining that it was “in acknowledgment for reprinting ‘Original Comic Operas’ in our Franklin-square Library.”<sup>185</sup> Gilbert’s sarcastic reply, published in the *London Times*, reads:

Gentlemen,—You have been good enough to forward me a donation of £10. Notwithstanding the fact that for many years I have been pillaged, right and left, by such of your countrymen as are engaged in publishing and theatrical ventures, I am not yet reduced to such a state of absolute penury as would justify me in taking advantage of the charitable impulse which prompted your gift. But the Victoria Hospital for Children stands sorely in needs of funds, and I have therefore taken the liberty of handing your cheque to the secretary of that institution.<sup>186</sup>

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184. CHARLES A. MADISON, *BOOK PUBLISHING IN AMERICA* 53 (1966).

185. W.S. Gilbert, Letter to the Editor, *LONDON TIMES*, Feb. 2, 1886, reprinted in *ST. JAMES’S GAZETTE*, Feb. 2, 1886, at 13.

186. *Id.*

Gilbert was roundly excoriated in the New York press for what was viewed as an intemperate reply.<sup>187</sup> An opinion piece in the *London Times* came to Harper's defense. While deploring the absence of an international copyright law in the United States, which it described as "a profound grievance to English authors," the writer assured his audience that Gilbert did not represent "an average specimen of the courtesy of English men of letters" and "disown[ed] any sympathy with [Gilbert's] ebullition of temper."<sup>188</sup> The piece explained: "when an eminent firm, known all over the world for its liberal dealing with authors, attempts, in however small a way, to recognize the unfair position of British authors it seems a little hard that they should be snarled at."<sup>189</sup> This legalistic approach is striking in its complete disregard of the author's moral rights. If he had wanted to take the high road, could Harper not have sought from Gilbert permission to reprint in return for a negotiated "honorarium," rather than printing first and sending a small sum as an exercise of noblesse oblige?

Discussions of the system of trade courtesy reveal indications of a sort of class division in the ranks of U.S. publishers—those which were long-established, had a reputation for quality, and published the best-known authors, versus the upstarts, whose ethical standards were regularly denigrated by publishers belonging to the former category. Responding to the notion that before U.S. copyright protected foreign authors "certain works by well-known English authors . . . were appropriated by American publishers without any pecuniary compensation," J. Henry Harper explained that "leading American publishers were in the habit of paying English authors or their representatives liberally for advance sheets, in view of the fact that unauthorized editions of the same

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187. *The New York Times* described Gilbert's letter as "a surly note." *The Retort Courteous: Harper & Brothers Reply to W.S. Gilbert's Surly Letter*, N.Y. TIMES, Mar. 11, 1886, at 4.

188. *Mr. W.S. Gilbert's Letter: An Adverse Opinion of It from His Own Country*, N.Y. TIMES, Feb. 16, 1886, at 4.

189. *Id.* Another opinion piece, reprinted from the *London Truth*, expressed the hope "that the Americans will not judge us by Mr. Gilbert's foolish and intemperate letter to Messrs. Harper, one of the most honorable of the publishing firms in the United States." *Gilbert's Heaven-Born Genius*, N.Y. TIMES, Feb. 22, 1886, at 4.



work were apt to be promptly put on the market by irresponsible publishers, for which the English author received no return.”<sup>190</sup> This cast the “leading American publishers” as benevolent supporters of literature while the “irresponsible publishers” were just out to make a buck.

#### B. The Rise of the Cheap Libraries and the Demise of Trade Courtesy

In the 1870s, the system of trade courtesy began to unravel as upstart publishers simply ignored it and published their editions irrespective of whether some other U.S. publisher had paid an “honorarium” to the British author and announced its claim to the right to publish the works of that author.

The challenge to trade courtesy came from publishers that brought out what were called “cheap libraries.” These were series of books, grouped together under an imprint name, brought out by a U.S. publisher and sold for very low prices. A publisher’s “library” might include hundreds or thousands of titles. Most of the authors were British, and none of them received any payment from the publisher. Many of the books were ones to which a mainstream publisher had previously staked a claim under the norms of trade courtesy.

The first of the cheap libraries was the *Lakeside Library*, started in 1874 by Chicago publisher Donnelley, Lloyd and Company.<sup>191</sup> As Henry Holt colorfully put it: “[S]ometime about 1875 ‘the Assyrian came down like a wolf on the fold,’ in the shape of a man in Chicago who started a *Lakeside Library* of cheap pamphlets like the weekly papers, in which he printed, as

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190. HARPER, *supra* note 103, at 113; *see also id.* at 446 (“the law of trade courtesy was scrupulously observed (except in cases of retaliation) by leading American publishers”); *id.* at 110 (“its principles were respected by all first-class publishing houses”); CARROLL D. WRIGHT, A REPORT ON THE EFFECT OF THE INTERNATIONAL COPYRIGHT LAW IN THE UNITED STATES, S. DOC. NO. 56-87, at 68 (1901) (“All reputable publishers made arrangements with English publishers or authors and paid them whatever the market here would afford.”) (statement of reputable publisher Lea Brothers & Co.).

191. Lydia Cushman Schurman, *The Librarian of Congress Argues Against Cheap Novels Getting Low Postal Rates*, in PIONEERS, PASSIONATE LADIES, AND PRIVATE EYES: DIME NOVELS, SERIES BOOKS, AND PAPERBACKS 59, 62 (Larry E. Sullivan & Lydia Cushman Schurman, eds. 1996).

soon as it appeared, every popular novel not protected by copyright.”<sup>192</sup> Within five years after its inception, this series had grown to 270 titles, “mostly trash but also the works of some of the best foreign writers.”<sup>193</sup> The success of the *Lakeside Library* encouraged other publishers to bring out their own cheap libraries. George Munro published the *Seaside Library* from 1877 to 1890; Harper & Brothers the *Franklin Square Library* from 1878 to 1893; John Lovell published *Lovell’s Library* from 1882 to 1889; and Norman Munro issued *Munro’s Library* from 1883 to 1888.<sup>194</sup> “By 1877, 14 such ‘libraries’ were in existence, with the *Seaside Library* the most successful.”<sup>195</sup>

The cheap libraries initially published high quality English books, but when these ran out they started publishing material of markedly lower quality.<sup>196</sup> The preponderance of material published in the libraries was from foreign authors. For example, fewer than seventy-five of the 2,000 issues of the *Seaside Library* included American authors; *Franklin Square Library* included 599 foreign and 20 American books; the *Lovell Library* had 913 foreign and 228 American books.<sup>197</sup> This may have had something to do with audience taste, but was largely due to the fact that books by U.S. authors might well be protected by copyright while those by foreign authors were not. The libraries did reprint books by American authors once the copyright had expired. “The original editions of Emerson’s *Essays*, for example, had slow sales, but when the copyright ran out and reprint publishers such as Altemus produced them, the sales were so large that the *Essays* became best-sellers.”<sup>198</sup> Some

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192. HOLT, *supra* note 144, at 98 (idiosyncratic spelling in original). The quotation is from Lord Byron’s 1815 poem “The Destruction of Sennacherib.”

193. MADISON, *supra* note 184, at 53.

194. Schurman, *supra* note 191, at 61.

195. MADISON, *supra* note 184, at 53; *see also* SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 52–53 (2001).

196. S. REP. NO. 50-622, at 9 (1888) (“Finally they have exhausted the list, and now we get third and fourth-rate British gas-light fiction.”); *see also* BRANDER MATTHEWS, CHEAP BOOKS AND GOOD BOOKS 5 (1888) (the cheap libraries published many inferior English novels, which were not worthy of being reprinted).

197. Schurman, *supra* note 191, at 66.

198. Lawrence Parke Murphy, *W. L. Allison and Company*, in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA, *supra* note 91, at

85–95 percent of the works published in the libraries consisted of fiction.<sup>199</sup>

The libraries were initially printed in the format of a small tabloid newspaper.<sup>200</sup> A reviewer noted that the reader might feel comfortable disposing of an issue after reading it, or that one might “bind up a selection from this [Franklin Square] Library for one’s shelves.”<sup>201</sup> The newspaper-like format was designed to take advantage of the second-class postage rate for periodicals, which in 1885 was halved to one cent a pound compared with eight cents for books.<sup>202</sup> To qualify for the second-class rate, the libraries had to be issued regularly at least four times per year, dated, consecutively numbered, and have a list of subscribers.<sup>203</sup> Opponents of the special postage treatment complained that it further stacked the deck against American literature: the cheap libraries published mostly foreign works, so, in addition to not paying any royalties, the publishers enjoyed a subsidized postage rate.<sup>204</sup> In 1888, Representative Loud of California introduced a bill in the House that would exclude the cheap libraries from second-class mail.<sup>205</sup> The bill failed; but in 1901, the Postmaster General determined administratively that the libraries did not qualify for second-class mail.<sup>206</sup>

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9, 14. This was at a time in history, very unlike the present, in which the expiration of copyright was not an uncommon event. Emerson’s first series of *Essays*, published in 1841, would have received no more than forty-two years of federal copyright protection, and thus would be in the public domain by 1883. If current copyright rules had then been in effect, the *Essays* would have remained under copyright until 1952, seventy years after Emerson’s death.

199. Schurman, *supra* note 191, at 66.

200. *Id.* at 61.

201. *Harper’s Cheap Libraries*, 10 LITERARY WORLD 275 (1879).

202. Schurman, *supra* note 191, at 60, 63.

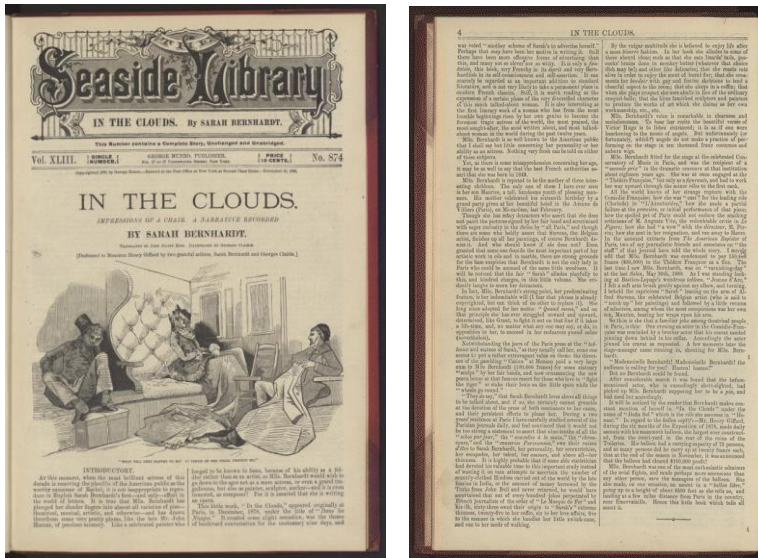
203. *Id.* at 62.

204. *Id.* at 66–68; *see also* S. REP. NO. 49-1188, at 123 (1886) (testimony of Ainsworth R. Spofford, Librarian of Congress) (“Thus, the best books are charged with high postage that trashy novels may be transported almost free in the mails . . .”).

205. Schurman, *supra* note 191, at 60.

206. *Id.* at 67–68.

Later on, the libraries were published as paperback books.<sup>207</sup> The quality of the materials and workmanship were kept low to minimize costs. “The type was small and unlead. Some of the volumes did not even have covers.”<sup>208</sup> The paper was of poor quality.<sup>209</sup> As the Librarian of Congress summarized the cheap libraries: “A group of publishing houses in the United States . . . vied with each other in the business of appropriating English and Continental trash, and printed this under villainous covers, in type ugly enough to risk a serious increase of ophthalmia among American readers.”<sup>210</sup>



The cheap libraries were called “cheap” for a reason. “Depending on their size, libraries usually cost ten or twenty cents . . . . At this time, male workers averaged a dollar a day, women earned a quarter, and an ordinary paper novel usually cost from fifty to seventy-five cents.”<sup>211</sup> Titles in the *Lakeside*

207. *Id.* at 63.

208. MADISON, *supra* note 184, at 53–54.

209. BOWKER, *supra* note 27, at 364–65.

210. GEO. HAVEN PUTNAM, THE QUESTION OF COPYRIGHT 170 (New York & London, G.P. Putnam’s Sons 2d ed. 1896).

211. Schurman, *supra* note 191, at 62; *see also* S. REP. NO. 50-622, at 22 (1888) (the libraries cost fifteen or twenty cents).

*Library* sold for ten to fifty cents, clothbound.<sup>212</sup>

The publishers of the cheap libraries did not consider themselves under any legal or moral obligation to conform to the system of trade courtesy. “According to their thinking, if a small number of New York, Boston, and Philadelphia publishers could re-issue the works of foreign authors without authorization and at a profit to themselves, they, too, should have the same right.”<sup>213</sup> Their output of cheap reprints came just as the postbellum increase in railway travel created a demand for reading material that could be purchased at train stations and aboard the trains.<sup>214</sup>

Still indignant some 35 years later, J. Henry Harper reported:

[T]he Lakeside Library, in violation of the laws binding publishers, began to reprint on us not only novels but books of travel for which liberal pecuniary acknowledgment had been made to the authors. The Lakeside enterprise was followed by the Seaside, and both affairs were nourished by the American News Company, without whose encouragement they would have been short-lived. The issues of these so-called “libraries,” meanly printed, from small type, and on inferior paper, were retailed at ten or twenty cents, and doubtless yielded a profit to their publishers. No book likely to be popular was safe for a day from these people aided and abetted by the News Companies.<sup>215</sup>

Starting in 1877, Harper & Brothers tried to stamp out the cheap libraries by creating a cheap library of its own, which it called the *Franklin Square Library*, after the location of its headquarters in Lower Manhattan.<sup>216</sup> The titles in this library

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212. Anna Lou Ashby, *Donnelley, Loyd & Co., in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA*, *supra* note 91, at 115, 116.

213. Larus, *supra* note 8, at 132.

214. *Id.* at 133.

215. HARPER, *supra* note 103, at 446. At the time, the American News Company was the country’s largest distributor of periodicals.

216. *Id.* at 10.

consisted of those as to which Harper considered itself to have the rights according to trade courtesy, and volumes were priced at ten cents.<sup>217</sup> As J. Henry Harper explained:

Our idea, therefore, in starting the Franklin Square Library was to stop the profit at least on some of [the Seaside Library's] issues. We determined that they should not share our profits, because we intended that there should be no profit for a division. We began to print on ourselves. We published a cheap edition of Black's *Macleod of Dare* at ten cents retail. To be sure, the Seaside followed us at the same price, but we imagine there was no profit to them in the transaction.<sup>218</sup>

In 1879, a reviewer wrote that the *Franklin Square Library* consisted mostly of fiction, "but fiction always of the better sort, and sometimes of the very highest class."<sup>219</sup>

Mainstream publishers were not united in their views of the proper response to the cheap libraries. In an 1879 letter to Harper & Brothers, New York publisher A.D.F. Randolph complained about Harper's publication of the *Franklin Square Library*:

The public has got into its head the idea that books are too dear, and every \$2.50 book put into a fifteen-cent pamphlet strengthens that idea amazingly. Then, too, the consumption of books is, after all, very limited, and a reader can for \$1.00 get enough to last him for a month. . . . [M]y chief regret is to be found in the fact that your adoption of the Library has dignified the whole business—given it a respectability it would not otherwise have obtained.<sup>220</sup>

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217. MADISON, *supra* note 184, at 54.

218. HARPER, *supra* note 103, at 447.

219. *Harper's Cheap Libraries*, *supra* note 201, at 275.

220. HARPER, *supra* note 103, at 445.

Publication of the cheap libraries pressured the mainstream publishers to cut their prices. For example, in the 1870s and 1880s Henry Holt and Company published a popular series of novels called the *Leisure Hour Series*, priced at \$1.00 or \$1.25. To compete with the ten-cent cheap editions, starting in 1883, Holt published a number of his titles in a *Leisure Moment Series* at twenty to thirty-five cents each.<sup>221</sup> Similarly, Harper & Brothers “greatly reduced the price of their popular Library of Select Novels.”<sup>222</sup>

The phenomenal success of the cheap libraries fundamentally altered the attitude of mainstream publishers towards international copyright.<sup>223</sup> The gentlemanly norms of trade courtesy had passed from the scene, a relic of an earlier time.

### C. The End of the Cheap Libraries

Within ten years after their inception, the cheap libraries were suffering from cutthroat competition and overproduction, with the result that few of them were able to make a profit. “By 1883 the overproduction of paperbacks caused such a glut that the American News Company, to cite one instance, returned to Seaside Library 1,200,000 copies it could not sell. Later Munro disposed of 3,000,000 of his unsalable reprints for \$30,000 to soap companies which gave a free copy with each bar of soap.”<sup>224</sup> In 1890, John Lovell, publisher of one of the cheap libraries, perhaps envying Rockefeller’s Standard Oil Trust, sought to create a “trust” composed of the publishers of the cheap libraries, enticing them with the promise “that such a book trust would end the destructive and self-defeating price war that existed among paper-covered reprint companies.”<sup>225</sup> Lovell enjoyed some initial success, creating the largest publishing operation in

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221. Edelstein, *supra* note 150, at 162–64.

222. MADISON, *supra* note 184, at 54.

223. CLARK, *supra* note 16, at 99 (describing the conversion of Isaac K. Funk, of Funk & Wagnall’s).

224. MADISON, *supra* note 184, at 54.

225. Michael B. Goodman, *United States Book Company*, in PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA, *supra* note 91, at 307, 308.

the country. But his trust went bust in 1893, facing competition from at least eight cheap reprinters who did not join his enterprise and from mainstream publishers who lowered the prices of their books.<sup>226</sup>

#### IV. Endgame: The Triumph of International Copyright

As noted above, after the 1873 Morrill Report failed to recommend any of the several legislative proposals that had been placed before the Library Committee there was a lull in the efforts to achieve international copyright under U.S. law. But the demise of trade courtesy with the rise of the cheap libraries created a new set of facts on the ground, and caused some of the key players to reconsider their positions.<sup>227</sup>

##### A. The Harper Draft

The most significant of these was the Harper firm. In 1878, Joseph W. Harper, the son and namesake of one of the four original Harper brothers, sent a letter to Secretary of State William M. Evarts proposing the appointment of a binational commission—consisting of authors, publishers, and publicists—that would work to develop a treaty between the United States and England aimed at protecting the authors of each country under the copyright laws of the other.<sup>228</sup> This represented a complete reversal of the position the firm had taken a few years earlier when it had sternly opposed the proposed Thornton and Clarendon treaties and rejected the very idea of protection for foreign-authored works under U.S. copyright law.<sup>229</sup>

Harper's letter included a draft treaty that Harper & Brothers was willing to support, which became known as the "Harper Draft." The key terms of the Harper Draft from the standpoint of U.S. publishers were: (1) a book by a British

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226. MADISON, *supra* note 184, at 56.

227. *Id.* at 58 ("The emergence of the piratical reprinters changed the minds of most publishers who had previously opposed a copyright law.")

228. Larus, *supra* note 8, at 136; MADISON, *supra* note 184, at 58; SEVILLE, *supra* note 22, at 208.

229. *See supra* text accompanying notes 86–87.



author had to be manufactured and published in the United States within three months of its original publication; (2) the publisher had to be a U.S. citizen; and (3) the stereotype plates need not be manufactured in the United States, but could be imported from England.<sup>230</sup> The Draft thus closely resembled the revised Appleton Draft of 1872.<sup>231</sup> Harper's letter explained that publishers were quite willing to pay British authors for the right to publish their works; "American publishers simply wished to be assured that they should have the privilege of printing and publishing the books of British authors."<sup>232</sup> In other words, Harper & Brothers was willing to support international copyright only if its terms did not threaten the firm with competition in the U.S. market from British publishers.

It is easy to see why Harper & Brothers would promote such a proposal at this time. A treaty granting U.S. copyright protection to British authors would eliminate competition from the publishers of the cheap libraries, which would thenceforward have to obtain publication rights from British authors or be subject to copyright infringement actions. It would crystallize in law the central promise of trade courtesy: that the publisher of a book by an English author would be assured that there would be no competition from other publishers releasing rival editions. There were, of course, some entries on the cost side of the equation. Harper & Brothers (and other U.S. publishers) would no longer be able unilaterally to dictate the financial terms of a publication agreement with a British author, but would have to negotiate those terms, possibly in competition with other U.S. publishers. In the absence of an agreement, Harper & Brothers would not be guaranteed the right to publish the subsequent works of an author whose earlier work it had published. The firm must have considered these costs minor in relation to the benefits. Harper's new-found appreciation for international copyright clearly reflected his perceived self-interest.<sup>233</sup>

The Harper Draft was the focus of discussion on both sides

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230. BOWKER, *supra* note 27, at 354.

231. *See supra* text accompanying note 69.

232. *Quoted in* BOWKER, *supra* note 27, at 354.

233. *See* Larus, *supra* note 8, at 135 ("The self-interest of the Harpers rather than any newly discovered high moral principles pushed them towards the position which other publishers had taken over the previous years.").

of the Atlantic in 1880 and 1881. It was supported by most U.S. publishers and authors, and the State Department entered negotiations with the British government, which had proposed an alternative draft. There were objections from the International Literary Association—an authors' group formed in 1878—and British publishers, which opposed the manufacturing requirement and three-month publication time limit. The British government, too, called for an expansion of the publication time limit to at least six months.<sup>234</sup>

However, the strongest opposition came from a newly salient interest group: the typographical unions. Demand for typographers in the United States had begun to slacken, as new technology allowed multiple copies of a stereotyped plate to be manufactured much more cheaply.<sup>235</sup> At the same time, American publishers began to have their plates made in Europe, where the costs were lower. This took additional work away from U.S. typesetters. The typesetters were joined in their opposition by the Philadelphia publishers, who remained true to the principles of Henry C. Carey (who had died in 1879) and opposed any version of international copyright that threatened their economic interests. In late 1880 Philadelphia publishers and workers in the typographical trades formed a committee to evaluate the Harper Draft, and the committee publicly released a report of its findings. The report's outlook was parochial in the extreme. It noted that while the Harper Draft protected other segments of the bookmaking trades via the manufacturing clause, the provision allowing importation of stereotype plates threw workers employed in that phase of the manufacturing process—compositors, engravers, electrotypers, stereotypers, and type-founders—under the bus.<sup>236</sup> The report also recited the objections Carey had raised in his *Letters on International Copyright* against implementing international copyright via a treaty rather than legislation.<sup>237</sup>

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234. BOWKER, *supra* note 27, at 355–56; EXMAN, *supra* note 106, at 51.

235. Under the prior practice, the same book would be set in type anew for each publisher that came out with a competing edition of a foreign-authored book, resulting in additional work for typesetters. LARUS, *supra* note 8, at 140–41.

236. *International Copyright: Action of the Book Trade Association of Philadelphia*, 18 PUBLISHERS' WKLY. 547, 547 (1880).

237. *Id.* at 548–49; *see also* CAREY, *supra* note 94, at 5 (objecting to the

These forces of opposition—objections from the British side to the manufacturing clause and the short (three-month) window for registering a work in the United States, and the growing influence of the Philadelphia publishers and typographical workers—as well as President Garfield’s death in 1881, which resulted in a change in the personnel of the State Department, scuttled the effort.<sup>238</sup>

#### B. Clean Bills Without a Chance

The next major step<sup>239</sup> on the path to international copyright was the introduction of a bill by Representative William Dorsheimer of New York. As originally introduced, this was what was called a “clean bill” or an “author’s bill”: it did not contain any provisions aimed at protecting the employment of workers in the bookmaking trades. The only requirement was one of reciprocity with the home country of the foreign author.<sup>240</sup> The original bill deviated from a pure author’s bill in that it limited the term of copyright of foreign authors to the earlier of twenty-five years or life of the author, as opposed to forty-two years for U.S. authors. At the urging of the American Copyright League,<sup>241</sup> the House Judiciary Committee amended the bill to provide foreign authors the same term of copyright as applied to U.S. authors.<sup>242</sup>

The views of the publishers were split, but generally favorable to the bill. Shortly after the bill was introduced, *The Publishers’ Weekly* surveyed U.S. publishers for their views on international copyright legislation. Fifty-five publishers

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proposed Everett Treaty on the ground that it represents “an attempt to substitute the action of the Executive for that of the Legislature”).

238. BOWKER, *supra* note 27, at 355–56; Larus, *supra* note 8, at 141–51.

239. Other bills were introduced in 1882 and 1883, but went nowhere. Solberg, *supra* note 25, at 268–69.

240. H.R. 2418, 48th Cong. (1884).

241. The American Copyright League was an organization formed in 1883 at the instance of George P. Lathrop, a poet and novelist, to promote the extension of U.S. copyright law to foreign authors. See George Parsons Lathrop, *The American Copyright League, Its Origin and Early Days*, 33 PUBLISHERS’ WKLY. 59, 59 (1888); see also SEVILLE, *supra* note 22, at 217–18.

242. BOWKER, *supra* note 27, at 356–57; Solberg, *supra* note 25, at 269–70.

responded, representing “probably nine tenths of the book-production of this country.”<sup>243</sup> Of these, fifty-two expressed support for “international copyright” in the abstract, with only three opposed. Forty-eight publishers who supported international copyright expressed a view on whether inclusion of a domestic manufacturing requirement was “essential.” Of these, fourteen called for including a manufacturing requirement, while twenty-eight thought it unnecessary.<sup>244</sup> Thus, publishers favored international copyright without a manufacturing requirement by a two-to-one margin.

But there were substantial differences in the breakdown of publishers’ opinions based on their geographical location. Majorities of the New York (twenty-three to six) and Boston (seven to two) publishers were opposed to requiring a manufacturing clause, while nearly all of the responding Philadelphia publishers (seven to one) demanded such a provision.<sup>245</sup> In this respect, the Philadelphia publishers were following their long tradition of opposition to international copyright. One of the leading Philadelphia publishers of the era was Henry C. Lea. At the time that the Dorsheimer Bill was introduced, Lea had recently retired from nearly forty years with the publishing firm that was formerly called Carey & Lea.<sup>246</sup> He was the nephew of Henry C. Carey, the arch-opponent of international copyright and author of *Letters on International Copyright*.<sup>247</sup> Lea inherited his uncle’s protectionist leanings. In an open letter addressed to Representative Samuel J. Randall,

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243. *The Publishers on International Copyright*, 25 PUBLISHERS’ WKLY. 378, 378 (1884).

244. *Id.*

245. *Id.* The *Weekly’s* summary of the survey results seems internally inconsistent. It states that twenty-eight publishers oppose a manufacturing clause while fourteen favor it, totaling forty-two; yet the tally of the reported results from three cities has thirty-one opposed and fifteen in favor, totaling forty-six; and responses of four publishers from other cities make a total of fifty. *Id.* In addition, while the *Weekly’s* summary states that Philadelphia publishers were seven to one in calling for a domestic manufacturing provision, my own review of the responses puts the score at six to two. The discrepancies are curious but do not alter the general picture resulting from the survey.

246. This firm’s early experience with paying for advance sheets of books about to be published in England is discussed *supra* text accompanying note 140.

247. *See supra* text accompanying note 94.

Lea objected to the Dorsheimer Bill, calling attention to the harsh effects it would have on “the tens of thousands of men and women whose livelihood depends upon the prosperity of the trades of paper-making, printing, and book-binding, and their related industries,”<sup>248</sup> as well as the impact on American readers of the inevitable increase in book prices. Stating his support in principle for the institution of international copyright, Lea proposed as an improvement over the Dorsheimer Bill “a measure which would preserve the manufacture of books in this country in forms and styles suited to the wants and pockets of our multitudinous reading class.”<sup>249</sup>

While a strong majority of the New York publishers who responded to the survey saw no need for a manufacturing clause, Harper & Brothers was a striking exception. Rather than responding to the survey questions with yes or no answers, as most but not all of the other publishers did, Harper & Brothers sent a recent issue of its *Harper's Weekly* magazine, which included an editorial discussing the Dorsheimer Bill. The editorial stated the firm's support for the Dorsheimer Bill “with suitable amendments,”<sup>250</sup> and then discussed the proposed treaty known as the Harper Draft.<sup>251</sup> It noted that, in 1881, the British government had agreed in principle to the inclusion of a domestic manufacturing requirement—clearly intimating that Harper would support the bill only if it were amended to include a manufacturing requirement. In a letter to Henry C. Lea commenting on the Dorsheimer Bill, Harper expressed explicitly his objection to the absence of a manufacturing clause.<sup>252</sup>

Several members of Congress who spoke against the bill referred to its impact on the bookmaking trades. As Bowker summarized, “[t]here was considerable opposition on the part of those who insisted upon the re-manufacture of foreign books in this country.”<sup>253</sup> Representative Deuster of Wisconsin declared that if the bill passed “all the publishers of reprints in the United

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248. Samuel J. Randall, *H.C. Lea's Open Letter*, 25 PUBLISHERS' WKLY. 238, 239 (1884).

249. *Id.* at 240.

250. *The Publishers on International Copyright*, *supra* note 243, at 382.

251. *See supra* text accompanying note 230.

252. HARPER, *supra* note 103, at 431–32 (letter dated Mar. 13, 1884).

253. *See BOWKER*, *supra* note 27, at 357.

States, the printers, paper manufacturers, type and stereotype founders, bookbinders, and many thousands of workmen employed in the production of reprinted works, would lose their occupations and their daily bread.”<sup>254</sup> He also decried the higher book prices that he insisted would result.<sup>255</sup> Representative Chace of Rhode Island stated his opposition to the bill in its current form, invoking the interests of “printers, publishers, and a variety of people whose livelihood depends on the industries which authors provide by the creation of their brains.”<sup>256</sup> Representative Kelley of Pennsylvania was concerned about the bill’s effect on the interests “of our papermakers, of our printers in all the various branches, of the great number of the best workmen and best designers in the world, admittedly so by all the world, who make the illustrations of our books, and also the interests of every department of book-binding, &c.”<sup>257</sup> The Dorsheimer Bill did not progress to a vote.

The following year saw the introduction of another “clean bill,” by Senator J.R. Hawley of Connecticut.<sup>258</sup> The bill had been drafted by the American Copyright League.<sup>259</sup> *The Publishers’ Weekly* editorialized in favor of the bill, but thought it “exceedingly improbable” that a bill without a manufacturing clause could be enacted, given “the persistent opposition already developed.”<sup>260</sup> Here, the split between two segments of the book-publishing industry—those who manufacture the books, on the one hand, and those who create the printing plates, on the other—is clearly on display. This organ of the publishing industry<sup>261</sup> championed a manufacturing clause limited to the presswork alone and excluding the platemaking: it

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254. 15 CONG. REC. 1201 (1884).

255. *Id.*

256. *Id.* at 1202.

257. *Id.*

258. S. 2498, 48th Cong. (1885). This bill was as clean as they come. Beyond requiring reciprocity, it simply struck out two phrases in the existing copyright law that limited protection to citizens and residents of the United States.

259. SEVILLE, *supra* note 22, at 221; Solberg, *supra* note 25, at 271.

260. *The Hawley Copyright Bill*, 27 PUBLISHERS’ WKLY. 49, 49 (1885).

261. *The Publishers’ Weekly* was founded in 1872 by a group of publishers. *About Us*, PUBLISHERS WKLY., <https://www.publishersweekly.com/pw/corp/aboutus.html> (last visited Sept. 3, 2018).

characterized as “extreme” the view “that type-setting and engraving should be a part of the manufacturing required.”<sup>262</sup> After all, it explained, “the type-setting is not a great portion of the total cost, while the presswork has to be done each sheet for itself whether in England or America.”<sup>263</sup> “[E]ven in Philadelphia,” long the hotbed of opposition to international copyright, “these extreme views are held, not by publishers and the book trade, but by the printers, type-founders, etc.”<sup>264</sup>

Several prominent New York publishers expressed admiration for the Hawley Bill, despite, or even because of, the absence of a domestic manufacturing requirement. Thus, Charles Scribner said: “I favor the bill because it is simple and honest. It is not encumbered with manufacturing clauses.”<sup>265</sup> Henry Holt and George H. Putnam expressed similar views.<sup>266</sup> However, Harper & Brothers retained its yen for a manufacturing clause: a member of the firm said that the bill was “in some ways, the best that had been presented for international copyright,” though he doubted whether “any bill could be passed which did not provide for the printing of the book in this country.”<sup>267</sup>

Thus, by the time the Dorsheimer and Hawley Bills were under consideration, the publishers had largely abandoned their opposition to an international copyright bill that lacked a domestic manufacturing requirement. Some publishers had always favored a clean, non-protectionist extension of copyright

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262. *The Hawley Copyright Bill*, *supra* note 260, at 49.

263. *Id.*

264. *Id.*; see also *The Campaign for International Copyright*, 28 PUBLISHERS' WKLY. 16, 16 (1885) (opposition to the Dorsheimer and Hawley Bills “came rather from the trades employed by publishers than from publishers themselves”).

265. *Views of Some New York Publishers*, 27 PUBLISHERS' WKLY. 52, 52 (1885).

266. *Id.*

267. *Id.* Curiously, George Parson Lathrop, speaking at a meeting of the American Copyright League, offered an assessment that differed from the *Publishers' Weekly* survey of the previous year, asserting that a majority of publishers “took the ground they would oppose every bill . . . unless it incorporated a clause providing for printing books in this country,” and that some demanded a complete domestic manufacturing requirement. *The American Copyright League*, 28 PUBLISHERS' WKLY. 668, 668–69 (1885) (reporting on the first annual meeting of the American Copyright League).

to non-citizens, on grounds of justice alone,<sup>268</sup> or because they did not benefit from the system of trade courtesy.<sup>269</sup> Others altered their position in response to the downfall of trade courtesy; while they might have preferred a law that included a manufacturing clause, they considered that any sort of international copyright law would be better than the status quo, under which the publishers of the cheap libraries made it impossible to issue books by British authors at a profit. There were exceptions: a third of the publishers that *Publishers' Weekly* surveyed in 1884 said that a domestic manufacturing provision was “essential,” and Harper & Brothers continued to mention the need for such a provision with every expression of its support for international copyright in principle.

Yet the publishers' support, or at least acquiescence, was not enough to allow passage of a clean international copyright law. Several members of the House opposed the bill due to its presumed impact on the book manufacturing industry. That opposition was stoked principally by the unions representing workers in the typographical trades.

### C. Halfway There: The Chace Bill

On January 21, 1886, while the Hawley Bill languished, Senator Jonathan Chace of Rhode Island introduced a bill that included key elements of protection for the domestic book manufacturing industries. The bill required deposit of “two copies of the best American edition” and prohibited importation of copies, thus requiring that the entire American market be supplied by books manufactured in this country.<sup>270</sup> The Senate

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268. G.P. Putnam's Sons stated in response to the *Publishers' Weekly* survey: “The record of our house from 1838 to the present time has been one of consistent advocacy of the widest obtainable measure of international copyright, on the ground of essential justice to American and foreign authors, of the development of American literature, and of the best interests of American publishers.” *The Publishers on International Copyright*, *supra* note 243, at 383.

269. *See supra* text accompanying note 179.

270. S. 1178, 49th Cong. (1886). According to *The Publishers' Weekly*, the bill was drafted by Henry C. Lea. *The Chace Bill*, 23 PUBLISHERS' WKLY. 56 (1888). According to James Welsh, president of the Philadelphia Typographical Union, the bill was drafted by the union. S. REP. NO. 49-1188,



Committee on Patents held four days of hearings on the bill, and on the re-introduced Hawley Bill,<sup>271</sup> commencing January 28.<sup>272</sup> In the course of these hearings, “the power and influence of the book-publishing trade unions for the first time . . . clearly emerged as one of the decisive forces determining the fate” of any measure to establish international copyright.<sup>273</sup> In an effort to emphasize the unions’ clout, James Welsh, president of the Philadelphia Typographical Union, testified that the membership of the typographical unions totaled 24,000 or 25,000, and intimated that there was broad support for the union’s position from the four to five million members of the Knights of Labor.<sup>274</sup> He conveyed the unions’ strong support for the Chace Bill,<sup>275</sup> and their “universal disapproval” of the Hawley Bill.<sup>276</sup> To illustrate the breadth of the unions’ support for a protectionist bill, he included in the record resolutions from two dozen unions representing workers in the bookmaking industries, located in the Northeast states and as far west as Michigan and Missouri, stating their opposition to the Hawley Bill.<sup>277</sup> Robert Johnson later observed that all involved had recognized at the time “that no Copyright Bill could be passed against the opposition of the labor unions.”<sup>278</sup>

Several participants in the hearing pointed out that the domestic manufacturing requirement—calling for deposit with the Librarian of Congress of “two copies of the best American edition”—did not clearly require manufacture in the United States.<sup>279</sup> Senator Chace agreed, and on May 21, 1886,

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at 44 (1886).

271. The Hawley Bill had died at the end of the Forty-eighth Congress and was introduced in the Forty-ninth Congress as S. 191.

272. Solberg, *supra* note 25, at 273.

273. Larus, *supra* note 8, at 164.

274. S. REP. NO. 49-1188, at 51 (1886). The latter claim seems to be a gross exaggeration. Membership in the Knights of Labor peaked at under one million in 1886, and then swiftly declined. See MATTHEW HILD, GREENBACKERS, KNIGHTS OF LABOR, AND POPULISTS 125 (2007) (“The Knights’ self-reported membership fell dramatically from 729,677 in mid-1886 to 220,607 just three years later.”).

275. S. REP. NO. 49-1188, at 44 (1886).

276. *Id.* at 51.

277. *Id.* at 45–50.

278. ROBERT UNDERWOOD JOHNSON, REMEMBERED YESTERDAYS 246 (1923).

279. S. REP. NO. 49-1188, at 55–56, 63, 102 (1886).

introduced an amended version of the bill with a clearer statement of the requirement: “two copies of the best edition of the same printed in the United States.”<sup>280</sup> The Committee on Patents reported favorably on the amended bill. However, the Forty-ninth Congress ended with no vote having been taken on the bill.

The American Copyright League retained its opposition to the Chace Bill because of its prohibition on importing foreign-manufactured copies; this would harm the libraries, preventing them from acquiring for their collections foreign editions that might differ from the U.S.-published edition.<sup>281</sup> In attempting to persuade the League’s secretary, Robert Johnson, to moderate his position, Boston publisher Dana Estes explained that it was impossible to defeat the trade unions: “One representative of the trade union would be listened to with more deference than all the Lowells, Stedmans, and other authors whom you can bring together.”<sup>282</sup> In a subsequent letter to Johnson, Estes added: “There is practically no opposition to any copyright measure from the publishers of the country . . . the opposition comes wholly from Trade Unions.”<sup>283</sup>

A battle between rival factions of the American Copyright League resulted in the installation of new leadership who were willing to accept compromises to bring about an international copyright bill.<sup>284</sup> This led to the formation of two organizations of publishers who supported international copyright—the American Publishers Copyright League and the International Copyright Association—which joined forces with the American Copyright League to promote the desired legislative outcome.<sup>285</sup> This confederation operated through a sort of executive committee, consisting of both publishers and authors.

On December 12, 1887, a week after the start of the Fiftieth

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280. S. 2496, 49th Cong., at 2 (1886).

281. Larus, *supra* note 8, at 166–68.

282. *Quoted in* Larus, *supra* note 8, at 168. Note the echo of a similar assessment of Harper, just ten years earlier: “so far as any influence upon Congress is concerned, the little finger of Mr. Harper is thicker than the loins of all the literary and scientific men in the United States put together.” Appleton, *supra* note 78, at 239; *see supra* text accompanying note 110.

283. *Quoted in* Larus, *supra* note 8, at 169.

284. *Id.* at 169–70.

285. *Id.* at 170–71.

Congress, Senator Chace re-introduced his bill.<sup>286</sup> Shortly thereafter, the confederation's executive committee proposed an amendment designed to head off an attack from the authors'-rights faction: a relaxation of the non-importation provision. The typographical unions objected to the proposed modification. They also found the manufacturing clause inadequate, believing that the existing language, which required that the books for deposit with the Librarian of Congress be "printed in the United States," did not clearly exclude the importation of printing plates.<sup>287</sup> The result was a compromise that tilted sharply in the direction of the unions: importation was limited to no more than two foreign-manufactured copies at a time, and only with the written, witnessed consent of the copyright owner, while the manufacturing clause was strengthened by requiring that the book "shall be printed from type set within the limits of the United States."<sup>288</sup> On March 19, 1888, Chace introduced an amended version of the bill that implemented these two changes.<sup>289</sup> In a report published on the same date, the Committee on Patents reported favorably on the Chace Bill, recommending that it be enacted as amended.<sup>290</sup> On May 9, 1888, the Senate voted in favor of the Chace Bill, as so amended.<sup>291</sup>

The focus then shifted to the House, where Representative W.C.P. Breckinridge of Kentucky had introduced a counterpart of the approved Chace Bill on March 19, 1888.<sup>292</sup> A month later,

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286. S. 554, 50th Cong. (1887). This bill was identical to S. 2496, 49th Cong. (1886), which had failed to come up for a vote in the Forty-ninth Congress.

287. The union representatives made this point in hearings held on March 9, 1888. See S. REP. NO. 50-622, at 18 (1888) (Statement of George Chance, representative of the Philadelphia Typographical Union, No. 2) ("Unfortunately in the former bill the word 'printed' was not sufficient. Under it the publishers claimed the right to introduce plates."); *id.* at 16 (Statement of Sherman Cummin, representative of the New York Typographical Union, No. 6) ("[W]e insist that the type should be wholly set within this country . . .").

288. *Id.* at 3.

289. S. 554, 50th Cong. (1887) (reintroduced as amended Mar. 19, 1888).

290. S. REP. NO. 50-622, at 2 (1888).

291. 19 CONG. REC. 3882 (1888). The vote was thirty-four to ten in favor of passage, with thirty-two senators absent.

292. H.R. 8715, 50th Cong. (1888).

the House Committee on the Judiciary reported favorably on the bill.<sup>293</sup> The brief report noted that the publishers and the bookmaking trades supported the bill. Indicating that the issue was still of concern in certain quarters, the report went on to address the question of the impact of international copyright on the price of books in the American market. Without much justification, it offered this soothing conclusion: “It is certain that the best books written by men and women all over the world will, under international copyright, be sold in the United States for less than they are sold now; and . . . that all other books will be sold for as low a price as they are now.”<sup>294</sup> However, as the Fiftieth Congress drew to a close on March 4, 1889, the House, preoccupied with debate on a tariff bill,<sup>295</sup> had failed to act on the copyright bill. International copyright would have to wait.

#### D. International Copyright Becomes Law

Early in the Fifty-first Congress, Representative Adams of Illinois introduced an international copyright bill that featured the two key elements of the previous session’s compromise bills: (1) a requirement that at least two copies of the books (those required to be deposited with the Librarian of Congress) “shall be printed from type set within the limits of the United States,” and (2) a limitation on importing foreign-made books to two copies at a time, “for use and not for sale,” and with the written consent of the copyright owner “signed in the presence of two witnesses.”<sup>296</sup> During debate on the bill on May 1, 1890, Representative Adams argued that enacting the bill would be a great boon for the bookmaking trades because British authors would publish their books in the United States—which offered by far the larger market with a population of seventy million compared with thirty-seven million in England—and supply both the U.S. and the British markets from this production.<sup>297</sup> He also said that the bill would not increase the price of books by British authors, explaining the practice in England of

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293. H.R. REP. NO. 50-1875 (1888).

294. *Id.* at 2.

295. See CLARK, *supra* note 16, at 155–56.

296. H.R. 6941, 51st Cong. § 3 (1890).

297. 21 CONG. REC. 4107 (1890).

initially publishing expensive, three-volume editions for the circulating libraries and then coming out with cheap editions for purchase by the general public.<sup>298</sup> Bill opponent A.J. Hopkins of Illinois argued exactly the opposite: the bill would harm the U.S. bookmaking trades because it would provoke retaliatory legislation in England that would exclude the importation of American-manufactured books and would “more than quadruple the price” of books.<sup>299</sup>

Several members objected to the non-importation provision, observing that, under its strictures, a person who purchased a book while visiting England could not bring the volume into the United States on his return, but would be required “to dump [it] into New York Harbor.”<sup>300</sup> Representative Payson offered two amendments. The first, a reciprocity provision, was not very consequential. But the second dramatically altered the plan of the bill by removing the prohibition against importation of foreign-manufactured copies of books; without such a provision, a U.S. publisher could not prevent competition from cheap editions produced by a British publisher and would have a diminished incentive to publish books by British authors, defeating the whole purpose of international copyright. The amendment passed. There immediately followed a vote on the bill as amended, and the bill was defeated by a vote of 99 in favor and 126 opposed, with 103 not voting.<sup>301</sup>

The proponents of international copyright quickly regrouped. On May 16, 1890, Representative William Simonds of Connecticut introduced a bill that was identical to the original, pre-amendment Adams Bill, except that it included a reciprocity clause.<sup>302</sup> After a minor amendment, the bill<sup>303</sup> was brought back for debate in the House. The members expressed views on both sides of the question, but the debate was

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298. *Id.*

299. *Id.* at 4136–39. Representative Payson contributed a lengthy demonstration that international copyright would increase the price of books by British authors. *Id.* at 4145–50.

300. *Id.* at 4151 (Representative Lind); 4142 (Representative Anderson).

301. *Id.* at 4155.

302. H.R. 10254, 51st Cong. (1890).

303. H.R. 10881, 51st Cong. (1890).

restrained in comparison with what greeted the Adams Bill.<sup>304</sup> When the debate ended, the bill passed with 139 in favor, 95 opposed, and 96 not voting.<sup>305</sup>

Thus, in the Fifty-first Congress, the House-approved bill included (1) a strong domestic manufacturing clause, bolstered by (2) a prohibition against importing foreign-manufactured copies, which prohibition was (3) limited by an exception allowing importation of two copies at a time, for personal use, with the written, witnessed consent of the copyright owner.

The action then returned to the Senate. Time was a limiting factor because the second session of the Fifty-first Congress ran only four months: from December 1, 1890 to March 3, 1891. Robert Johnson, who as secretary of the American Copyright League played a critical role in developing the strategy for achieving enactment of the law, successfully lobbied to have the Senate take up international copyright as its second major order of business in the session.<sup>306</sup>

Sitting as a committee of the whole, the Senate began consideration of the Simonds Bill, as enacted in the House. Because the Simonds Bill was very similar to the Chace Bill that the Senate had approved in May 1888, but for addition of a reciprocity provision, one might have expected smooth sailing in the Senate. But that was not to be, as another industrial interest seeking protection from foreign competition raised its head. Senator William Frye of Maine had been approached by constituents who operated a lithographic business in his state and wished to enjoy the same protection from foreign competition that the bill had extended to typographers, printers, and other members of the book-manufacturing trades.<sup>307</sup> Declaring that he believed himself duty-bound to honor his

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304. 21 CONG. REC. 55–59 (1890).

305. *Id.* at 60. The voting was highly partisan, with Republicans supporting the bill ninety-six to twenty-five and Democrats opposing it seventy to forty-three. PUTNAM, *supra* note 210, at 157–59.

306. JOHNSON, *supra* note 278, at 245–46.

307. According to Johnson, the National Lithographers' Association had been invited to participate, along with the other trade unions, in strategy sessions at the time of the Chace Bill, but had declined, and it was for that reason its members' interests were not represented in the development of the domestic manufacturing requirement. *Id.* at 246–47.

constituents' request,<sup>308</sup> on February 9, 1891 he offered an amendment that broadened the domestic manufacturing requirement to include not only books, but also any "map, chart, dramatic or musical composition, engraving, cut, print, photograph, chromo, or lithograph."<sup>309</sup> The amendment was approved by a vote of twenty-seven to twenty-four, with thirty-seven absent.<sup>310</sup> Senator John Sherman of Ohio then offered an amendment designed to eviscerate the bill by deleting the prohibition against importing foreign-manufactured books. This amendment too was approved, twenty-five to twenty-four, with thirty-nine senators absent.<sup>311</sup> Strangely, however, on the very next day, February 14th, when the Senate was asked to concur in these two amendments, it declined to do so, voting twenty-nine in favor, thirty-one opposed, with twenty-eight absent.<sup>312</sup>

However, a few days later the Senate reversed itself yet again. On February 17th, the Senate resumed its consideration of the Simonds Bill. Senator Power of Montana offered an amendment that was equivalent to the Sherman amendment, removing the prohibition against importing foreign-manufactured copies.<sup>313</sup> The Power amendment was approved the next day, with thirty-six in favor, twenty-four opposed, and twenty-eight absent.<sup>314</sup>

The Senate then moved on to an amendment to protect the lithographers, offered by Senator Frye. With the rejection of the Frye amendment on February 14th, the lithographers were in a weak position and willing to make a deal. In negotiations with

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308. Senator Frye explained that he favored the existing bill, but: "I have always entertained the notion that any constituent of mine had a right to have presented to the Senate any petition respectful in its form, any bill, or any amendment to any pending bill, and that I, as a Senator, had no right to refuse a constituent in these directions." 22 CONG. REC. 2379 (1891).

309. *Id.*

310. *Id.* at 2392.

311. *Id.* at 2618.

312. *Id.* at 2673. Putnam supposes that the turnaround as to the Sherman Amendment came about once "its actual purport had been made clear by outside criticism." PUTNAM, *supra* note 210, at 145. Given the close votes and the large and varying numbers of senators not voting, the result seems equally explicable on grounds of the vagaries of attendance and voting in the Senate.

313. 22 CONG. REC. 2795 (1891).

314. *Id.* at 2837.

Robert Johnson, they agreed to a narrower domestic manufacturing provision, limited to lithographs, chromos, and photographs.<sup>315</sup> As Senator Frye explained when he offered this amendment: “[T]he friends of the copyright bill, who have been present here and whom I have occasionally seen, came to me with a proposition that instead of submitting my amendment I should submit one limiting the exclusion to lithographs, chromos, and photographs.”<sup>316</sup> So he did, and the Senate approved by a vote of forty-one to twenty-four, with twenty-three senators absent.<sup>317</sup> The Senate proceeded to approve the bill as amended, thirty-six to fourteen, with thirty-eight absent.<sup>318</sup>

Thus, the Senate bill as approved featured (1) the same domestic manufacturing requirement as in the House (Simonds) bill, but (2) no prohibition against importing foreign-manufactured copies. Unlike the Simonds Bill, it (3) extended the domestic manufacturing requirement beyond books, to include lithographs, chromos, and photographs.

Because the bills passed by the House and Senate were not identical, a conference committee was appointed to attempt to arrive at a mutually acceptable version.<sup>319</sup> As of March 2, 1891, with one day remaining in the Fifty-first Congress, the conference committee was deadlocked: the House members would not agree to the Senate’s deletion of the prohibition on importation, and the Senators would not agree to its restoration. The groups supporting the measure sprang into action, focusing on one member of the conference committee, Senator Frank Hiscock of New York. A representative of the printers’ unions sent telegrams to union locals throughout the state, as well as to New York City newspapers. As a result, Senator Hiscock received a flood of telegrams from the unions demanding that he cease obstructing passage of the bill.<sup>320</sup> He was also called out by name in a *New York Times* editorial the next day, on March 3rd.<sup>321</sup> This onslaught apparently altered Senator Hiscock’s

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315. JOHNSON, *supra* note 278, at 248–49.

316. 22 CONG. REC. 2840 (1891).

317. *Id.*

318. *Id.* at 2849.

319. Larus, *supra* note 8, at 210.

320. JOHNSON, *supra* note 278, at 253–54.

321. *The Copyright Bill*, N.Y. TIMES, Mar. 3, 1891, at 4 (“It appears that



point of view and allowed the conference committee to agree on a compromise: the non-importation clause of the Simonds Bill was restored, but with a more generous carve-out, allowing importation of two copies for personal use as of right, without requiring the signed, witnessed consent of the copyright owner.<sup>322</sup>

During the early morning hours of March 4th,<sup>323</sup> both the House and the Senate<sup>324</sup> approved the compromise bill, and President Harrison signed it at 10:45 that morning, safely in advance of the closing of the congressional session at noon!<sup>325</sup>

## E. Who Won? Who Lost?

### 1. The Printing Trades

The international copyright law<sup>326</sup> largely fulfilled the protectionist ambitions of the trade unions that helped to enact it. A book, whether by a U.S. or a foreign author, could be copyrighted only with the deposit of two copies “printed from type set within the limits of the United States.”<sup>327</sup> This

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the obstacle . . . is the curious obstinacy of Senator Hiscock . . . in insisting upon Senator Sherman’s amendment.”). The next day, the *Times* acknowledged that it had unfairly maligned Senator Hiscock. *Copyright*, N.Y. TIMES, Mar. 4, 1891, at 4 (“It appears that an injustice was done to the position of Senator Hiscock . . .”).

322. Larus, *supra* note 8, at 213–14. Senator Hiscock himself explained that he changed his view once he recognized the great interest of the printers in retaining in America the work of book manufacturing. 22 CONG. REC. 3884–85.

323. Though March 3 was nominally the last day of the legislative session, the session in fact ended at 12:00 noon on March 4. See 22 CONG. REC. 3919 (Mar. 3, 1891) (Vice President’s announcement of adjournment of the 51st Congress at noon on March 4). March 4 was deemed to belong to the March 3 “legislative day.” CLARK, *supra* note 16, at 181.

324. The vote in the Senate, like the previous vote in the House, was sharply divided along partisan lines: Republicans voted twenty-six to six in favor, while Democrats went thirteen to one against the bill. PUTNAM, *supra* note 210, at 160–61.

325. JOHNSON, *supra* note 278, at 259. Johnson relates in amusing detail some additional twists and turns in the career of the international copyright bill during the night of March 3–4, 1891. *Id.* at 256–59.

326. International Copyright Act, ch. 565, 26 Stat. 1106 (1891).

327. *Id.* § 3, 26 Stat. at 1107.

guaranteed that the job of typesetting would be performed by U.S. workers, even if the printing plates were used to print only two copies. If the publisher wished to sell copies of the book in the United States, it would have to print virtually all such copies in the United States, resulting in work for American printers, papermakers, and binders. This results from the slightly-watered-down non-importation clause, which prohibited, during the term of copyright, the importation of foreign-manufactured copies except for “not more than two copies . . . at any one time,” “for use and not for sale.”<sup>328</sup>

The lithographers received most of the protection they sought. They were protected with respect to any “photograph, chromo, or lithograph”: the deposit copies had to be “printed from . . . negatives, or drawings on stone made within the limits of the United States.”<sup>329</sup> This protected the jobs of lithographers, because any publisher of lithographs would have to hire U.S. workers to produce the deposit copies. The ban on importation applied to these products too, without even the exception for two copies for personal use, so the U.S. market had to be supplied solely through the labors of American printers.<sup>330</sup> The manufacturing and non-importation rules, however, did not extend to graphical works produced by non-lithographic methods, such as engravings. Artists using that medium were therefore able to obtain U.S. copyright without the need to hire U.S. workers to engrave the plates.

Yet matters were not so simple. The domestic manufacturing requirement did not apply to books as to which U.S. copyright was not sought. Therefore, an English author or publisher who wanted to sell books in the United States had two options: (1) he could have the type set in the United States and

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328. *Id.* § 3, 26 Stat. at 1108. The law included another set of exceptions to the non-importation clause, consisting of categories of books and other printed materials that were exempt from duties under the Tariff Act. *Id.* at 1107–08 (incorporating by reference Tariff Act of 1890, ch. 1244, 26 Stat. 567, 604, § 2, ¶¶ 512–516 (1890)).

329. International Copyright Act § 3, 26 Stat. at 1107.

330. The provision as to photographs would seem to prevent copyrighting any photograph taken outside the United States. The explanation for this odd provision is that the printers of cigar-box labels “desired to have the free use of the photographs of pretty Viennese women!” JOHNSON, *supra* note 278, at 249.

supply the market from books manufactured in the United States, thereby obtaining the benefit of U.S. copyright; or (2) he could print books, on either side of the Atlantic, from plates made in England for the English edition, then sell the books in the United States (importing them if they were printed overseas), forgoing the benefits of U.S. copyright.

For books that were expected to sell in large quantity in the U.S. market, publishers would find the first option preferable. Although paying to have the type set in the United States added substantially to the cost of publication, that cost was more than offset by the freedom from competition that the U.S. copyright ensured.

However, for by far the greater number of works, which could not be assured of large sales in the United States, it was to the publisher's advantage to choose the second option. The British publisher could sell in America the same books it produced for the English market, or an American publisher could purchase duplicate plates from the British publisher and use those plates to print an American edition. In either case, the cost of publishing the books would be lower because of the savings from not having to set the type a second time; in the case of what was expected to be a small edition, with fewer units over which to amortize the fixed costs of composition, the publication costs per book could be dramatically lower. It is true that if a publisher followed this route there was no U.S. copyright and piratical publishers could bring out competing editions at will, as occurred in the bad old days after the demise of trade courtesy. But for books that appealed to only a small audience, there was little profit expected and, therefore, little incentive to do so.

As Boston publisher L.C. Page & Co. explained in 1901:

English publishers, except in the case of very well-known and very popular authors, prefer not to copyright their books in America, since by copyrighting them in America the publisher who might purchase the American rights, although by the copyright he would be absolutely and adequately protected, would, on the other hand, be forced to undergo the expense of making an

entirely new plant [i.e., printing plates] for the book.<sup>331</sup>

The manufacturing clause, the publisher concluded, “instead of forcing foreign books to be manufactured in this country, merely forces foreign books to get along without the copyright protection.”<sup>332</sup> This phenomenon persisted in 1948, as “over 14,000 books were published in England and yet only 139 books written in the English language in England and in all other foreign countries were registered in the United States Copyright Office.”<sup>333</sup>

The international copyright law had another effect that was the opposite of what the typesetters hoped for. During the race-to-the-bottom years after the implosion of trade courtesy, typesetters were showered with work from the publishers of the cheap editions. Popular British books attracted multiple competing unauthorized publishers, and each of these hired American workers to set the type for his own edition. But once these best-selling books began obtaining a U.S. copyright, only a single, authorized edition needed to be set in type. Interviews with members of the International Typographical Union in 1901 yielded this assessment:

[T]he effect of the law is to confine the labor of production of each copyrighted work to the employees of the single establishment to whom the monopoly of publication is secured under the law, whereas, were it not for the law, the works of many foreign authors would be published by several different establishments, thus giving employment to a largely increased number of operatives.<sup>334</sup>

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331. WRIGHT, *supra* note 190, at 17.

332. *Id.* at 19.

333. S. REP. NO. 81-375, at 2 (1949).

334. WRIGHT, *supra* note 190, at 9.

## 2. The American Reading Public

Putnam, writing in 1894, offered a nuanced assessment of the impact of the Act on book prices. Because the dirt-cheap, low-quality editions were no longer available (for new books; the Act did not have retroactive effect), the prices of these increased considerably; Putnam says that the cheap books were now priced at forty or fifty cents, instead of fifteen or twenty-five cents as previously. But the books were of higher quality, featuring more-readable type, fewer typographical errors, and better paper. Some American readers would have found the price/quality tradeoff desirable; others, not. As to books other than cheap fiction, Putnam found there had been “a steady tendency to lower prices.”<sup>335</sup> This is because the American publishers of books for the U.S. market priced them at levels designed to maximize their profits—perforce at much lower prices than the British publishers set for their initial sales to the circulating libraries.<sup>336</sup> This assessment corresponds with the predictions of the proponents of international copyright that book prices would be set by market forces.<sup>337</sup>

In a 1901 report produced at the command of a Senate resolution, the Commissioner of Labor was unable to locate any hard data on the impact of the Act on book prices.<sup>338</sup> Responses from seventy publishers and other firms involved in book publishing yielded a range of views on this effect. Most of them believed that the law had caused increases in the prices of certain types of books.<sup>339</sup>

Bibliophiles and scholars who wanted to obtain an edition of a copyrighted book that was manufactured abroad had their options limited. They could no longer purchase these through

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335. PUTNAM, *supra* note 210, at 168.

336. *Id.* at 167–69.

337. *See, e.g.*, S. REP. NO. 49-1188, at 63 (1886) (“It is reasonable to expect that the English book in America will fetch an American price, and that the American book in England will fetch an English price.”); *The Cheap Book Delusion*, N.Y. EVENING POST, Mar. 1, 1884, *reprinted in* 25 PUBLISHERS’ WKLY. 297 (1884) (“The reason that the English editions of some books are dear is undoubtedly because experience has taught the publisher that some readers in England prefer well-bound and printed, and therefore expensive, books.”).

338. WRIGHT, *supra* note 190, at 8.

339. *Id.* at 10–88.

normal commercial channels, because importation for resale was prohibited. Instead, they had to avail themselves of the exception allowing importation of one or two copies for personal use. But to do so, they would have to order the book from a supplier abroad, typically in England, which involved additional costs and inconvenience, or else purchase them on a visit to England. Senator Sherman found the personal-use exception a wholly insufficient limitation on the importation ban that he sought to remove from the bill, observing “that no one except a very rich man could afford to import any books whatever.”<sup>340</sup>

### 3. American Authors

The Act included a reciprocity provision: U.S. copyright was available only to those foreign authors whose country “permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens.”<sup>341</sup> Ten years after the Act went into effect, some thirteen foreign countries had met this requirement by entering bilateral treaties, with Great Britain (along with Belgium, France, and Switzerland) doing so as of the July 1, 1891 effective date.<sup>342</sup>

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340. 22 CONG. REC. 3883 (1891).

341. International Copyright Act, ch. 565, § 13, 26 Stat. 1106, 1110 (1891). The reciprocity provision also made copyright available to a national of a country that “is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement.” *Id.* However, the U.S. State Department determined that this provision did not extend U.S. copyright to nationals of every Berne Convention country because the manufacturing clause prevented the United States from joining Berne. Kampelman, *supra* note 146, at 417.

342. WRIGHT, *supra* note 190, at 99. The ability of an author who was not a British subject to obtain copyright under United Kingdom law was a matter of some controversy in the British courts in the mid-1800s. In 1854 the House of Lords decided in *Jefferys v. Boosey*, (1854) 4 H.L.C. 815, that a foreign author could obtain a UK copyright only if he resided in the UK at the time of publication. An 1868 decision by the House of Lords clarified the meaning of residency, holding that a temporary sojourn was sufficient. See Catherine Seville, *Authors as Copyright Campaigners: Mark Twain’s Legacy*, 55 J. COPYRIGHT SOC’Y U.S.A. 283, 295–98 (2008). Mark Twain explained his system: “To-day the American author can go to Canada, spend three days there, and come home with an English and Canadian copyright which is as strong as if it had been built out of railroad iron.” Mark Twain, *American Authors and British Pirates*, 5 NEW PRINCETON REV. 47, 47 (1888).

From a vantage point two-and-a-half years after the Act went into effect, Putman reported tentatively that revenues to American authors from publication of their works in England had increased, though not as much as some authors may have hoped.<sup>343</sup>

American authors also benefited by the elimination of unfair competition from British authors, who, if they complied with the requirements for gaining U.S. copyright protection, could no longer be published in the United States without payment of royalties and exclusion of competition from other publishers. In 1894, in response to a question from a reporter as to whether the international copyright law had harmed American authors, Harper indicated that the price of books by British authors had increased as a result of the law, making the American author better off: “The works of British authors are now sold at the same price as his own. He is not subjected to competition with the stolen cheap editions.”<sup>344</sup>

On the other hand, American authors were subject for the first time to a domestic manufacturing requirement: the new law’s manufacturing clause was applicable to all authors, not just foreigners. Therefore, the Act prevented U.S. authors from publishing with a British publisher if they wished to have the benefit of a U.S. copyright. By the mid-twentieth century, the Register of Copyrights could enumerate the harms this caused some categories of U.S. authors.<sup>345</sup>

#### 4. British Authors

British authors now had the ability to exercise control over the publication of their works in the United States. The requirements for U.S. copyright included deposit of two copies of the book “not later than the day of the publication thereof in this

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343. PUTNAM, *supra* note 210, at 163–64.

344. *Advantage to Authors*, *supra* note 181, at 12; *see also* PUTNAM, *supra* note 210, at 164–65 (“American publishers are now in a position to give to American fiction a larger measure of favorable attention than was possible when such volumes had to compete with English stories that had not been paid for . . .”).

345. *See infra* text accompanying note 372.

or any foreign country.”<sup>346</sup> This meant that if the book was published in England, it could receive U.S. copyright only if it were published in the United States at the same time or earlier. For authors with established reputations and predictable sales, the simultaneous-publication requirement imposed no hardship, since an American publisher would be happy to satisfy that requirement; however, an author of lesser renown might find it difficult to secure an American publisher until the book had proven its popularity in England. According to one observer writing in 1953, “the manufacturing clause has served to deny American copyright to all but the best-known foreign authors writing in English.”<sup>347</sup>

### 5. American Publishers

The publishers were rescued from ruinous competition among themselves in the publication of books by British authors, which had driven prices down below sustainable levels. For the establishment printers—the Harpers, Appletons, Putnams, and the like—this was not a return to the halcyon days of trade courtesy when they were able to publish British authors at their pleasure, paying them such honorariums as lay within their benevolence, and had no fear of competition from other publishers. Now they had to pay a negotiated royalty to the monopoly supplier of any particular manuscript that qualified for U.S. copyright. Yet this was but a small price to pay for the benefits of the manufacturing clause, which protected them from competition by British publishers in obtaining those manuscripts, and the copyright monopoly itself, which recreated trade courtesy in a form that was enforceable by law. The second-tier publishers, too, may have seen an improvement in their fortunes, depending on whether they were able to get their

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346. International Copyright Act, ch. 565, § 3, 26 Stat. 1106, 1107 (1891).

347. Comment, *International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law*, 62 YALE L.J. 1065, 1069 (1953); cf. PUTNAM, *supra* note 210, at 140 (“The assertion has been made that the provision for simultaneous publication was inserted by the publishers with the malicious purpose of preventing the less known British authors, who might not be in a position to make advance arrangements for their American editions, from securing under the act any American copyright.”).



hands on desirable British manuscripts that had been out of their reach under the reign of trade courtesy.

The manufacturing clause as enacted, however, did not in terms protect U.S. publishers. As a condition of copyright, it required the type from which the deposit copies are printed to be set in the United States, and forbade importation for resale. However, unlike the manufacturing clauses in several proposals that failed to become law,<sup>348</sup> it did not require the books to issue from a publisher who is a U.S. citizen. This would allow a British publisher to set up operations in the United States and publish books by British authors, as Saunders & Otley had tried to do in 1836<sup>349</sup>—preserving the typesetting and other book-manufacturing jobs for U.S. workers, but shutting out the U.S. publishers.

## V. The Afterlife of the Manufacturing Clause

Some version of the manufacturing clause was to remain a part of U.S. copyright law until 1986. During the ninety-five years of its existence, the clause was amended multiple times.

### A. Ad Interim Copyright

The first modification of the domestic manufacturing requirement occurred in 1904. The Louisiana Purchase Exposition was planned to be held in St. Louis in that year. Some foreign exhibitors expressed an unwillingness to bring foreign-published books to the Exposition, fearing that, because they were unprotected by U.S. copyright, anyone who acquired a book could reproduce and sell copies of it with impunity. To eliminate this barrier, Congress amended the copyright law to

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348. See, e.g., Baldwin Bill, H.R. 779, 40th Cong. (1868) (stating all the U.S. editions “shall be wholly manufactured in the United States, and be issued for sale by a publisher or publishers who are citizens of the United States”); the Appleton draft bill, see *supra* note 65 (stating the “foreign author shall enter into a contract with an American publisher, a citizen of the United States, to manufacture the book in all its parts”); the Harper Draft, see BOWKER, *supra* note 27, at 354 (stating the publisher must be a citizen of the United States).

349. See *supra* text accompanying note 22.

provide for “ad interim” copyright. Under this provision, a foreign exhibitor was granted a two-year copyright on any books brought into the country for the purpose of exhibiting them at the Exposition. This could be converted into a full-term copyright if, during the interim period, the author produced a U.S. edition, printed from type set within the United States.<sup>350</sup> In 1905, a one-year ad interim copyright was extended to books published abroad in a foreign language.<sup>351</sup> This modification of the manufacturing requirement eased the burden on some foreign authors and publishers who sought a U.S. copyright.

#### B. Expansion and Contraction in the 1909 Act

In 1909, the Copyright Act underwent a thoroughgoing revision, and several changes were made to the manufacturing clause. In one respect, the requirement was made stiffer: not only must the book be printed from type set within the United States, but the other manufacturing operations must also occur domestically.<sup>352</sup> This was a simple expansion of protection against foreign competition to other groups of workers in the book-manufacturing trades. As a House report on the bill explained:

It was felt by your committee that if there was reason, as we think there was, for the requirement that the book should be printed from type set in this country, there was just as much reason for a requirement that the book should be printed and bound in this country . . . . That protection to the men engaged in the work of setting type, making plates, printing and binding books is given by this section . . . .<sup>353</sup>

On the other hand, the manufacturing requirement was

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350. Act of Jan. 7, 1904, ch. 2, 33 Stat. 4.

351. Act of Mar. 3, 1905, ch. 1432, 33 Stat. 1000.

352. Act of Mar. 4, 1909, ch. 320, § 15, 35 Stat. 1075, 1078 (“[T]he printing of the text and binding of the said book shall be performed within the limits of the United States.”).

353. H.R. REP. NO. 60-2222, at 12 (1909).

narrowed in that it no longer applied to books “of foreign origin in a language . . . other than English.”<sup>354</sup> In addition, ad interim copyright protection was extended to books published abroad in English, though the term was sharply limited to only thirty days.<sup>355</sup> Responding to complaints that foreigners were obtaining copyright on books that had not actually been printed from type set within the United States,<sup>356</sup> a provision was added requiring the person claiming copyright to include an affidavit declaring that the book was typeset, printed, and bound in the United States.<sup>357</sup>

#### C. Relaxation of Non-Importation Provision and Expansion of Ad Interim Copyright

Because few English-language books by foreign authors were being registered for U.S. copyright,<sup>358</sup> in 1949, Congress modified the registration and non-importation provisions to reduce the obstacles. The new language extended the time for registration to six months after foreign publication, extended ad interim protection to five years, and allowed the import of up to 1,500 foreign-manufactured copies.<sup>359</sup> These provisions were designed to allow the foreign publisher to test the reception of a book in the U.S. market before committing to typeset and manufacture a new edition in this country. The bill was supported not only by the publishers, but also by unions representing the printing trades,<sup>360</sup> evidently on the theory that the loss of the work of printing 1,500 copies would be more than offset in the gains resulting from more books by non-U.S. authors being published in the United States.

#### D. Efforts to Join the Berne Convention

A multilateral treaty establishing reciprocal copyright

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354. Act of Mar. 4, 1909, § 15, 35 Stat. at 1078.

355. *Id.* § 21, 35 Stat. at 1080.

356. H.R. REP. NO. 60-2222, at 12.

357. Act of Mar. 4, 1909, § 16, 35 Stat. at 1079.

358. *See supra* text accompanying note 333.

359. Act of June 3, 1949, Pub. L. No. 81-84, 63 Stat. 153.

360. S. REP. NO. 81-375, at 2 (1949).

protections for non-nationals, called the Berne Convention,<sup>361</sup> was adopted in 1886. The United States did not participate in drafting the Convention and did not join it once adopted; this was at a time when the United States had not yet included any protection of foreign authors in its domestic copyright laws. But subsequently, and continuing for nearly a hundred years, various interests pushed for the United States to join the Berne Convention. The United States had become a net exporter of copyrighted works, and it was important for U.S. authors to obtain copyright under the laws of other countries.<sup>362</sup> U.S. publishers had been accomplishing this by availing themselves of what was called the “back door” to Berne: simultaneous publication in the United States and a Berne country, such as Canada, brought U.S. authors the benefit of the Convention even while the United States failed to reciprocate with respect to authors from Berne countries.<sup>363</sup> Nevertheless, there was a reasonable apprehension that Berne countries, which bristled at the unfairness of this situation, might at any time shut this door, as the Convention allowed them to do.<sup>364</sup>

A major obstacle to U.S. adherence to the Berne Convention was the manufacturing clause. Beginning with its 1908 revision, the treaty prohibited the imposition of any “formality” as a condition of copyright. The domestic manufacturing requirement was such a formality.<sup>365</sup> Bills designed to enable U.S. adherence to Berne were introduced in Congress starting in 1922, and continuing through the 1930s and as late as 1941,<sup>366</sup> but none was enacted during this period.

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361. See Berne Convention, *supra* note 3.

362. Barbara A. Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1059 (1968).

363. David Nimmer, *Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States*, 55 LAW & CONTEMP. PROBS. 211, 215 (1992).

364. Lyons, *supra* note 30, at 29.

365. Ringer, *supra* note 362, at 1057.

366. *Id.* at 1058; Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 548 (1967); see also Comment, *supra* note 347, at 1080.

## E. The Universal Copyright Convention

After World War II, the United States participated in the development of a new multilateral treaty under the auspices of UNESCO. The treaty, called the Universal Copyright Convention (“UCC”),<sup>367</sup> would enable U.S. authors to obtain copyright protection in other countries while allowing the United States to retain its domestic manufacturing requirement.<sup>368</sup> The critical provision of the UCC said that a contracting state could not impose a domestic manufacturing requirement on a foreign national with respect to a work first published outside the territory of that state, as long as the work was published with the standard copyright notice: ©, the name of the author, and the year of publication.<sup>369</sup> There was no prohibition, however, against retaining the manufacturing requirement with respect to works by a contracting state’s own citizens, or works first published in the territory of that contracting state.<sup>370</sup> The amendment to the Copyright Act implementing the UCC did just that, removing the manufacturing requirement only if the work is by a foreign author from a country that is party to the UCC or was first published in such a country.<sup>371</sup>

The UCC conveyed benefits to U.S. authors by allowing them to obtain copyright in multiple foreign countries without the need to depend on the back door to Berne. Because it limited the scope of the manufacturing clause, it was contrary to the interests of workers in the printing trades.

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367. Universal Copyright Convention, Sept. 6, 1952, 6 U.S.T. 2732, T.I.A.S. No. 3324.

368. The UCC imposed less stringent requirements than the Berne Convention: it required equal treatment of foreigners (called “national treatment”), but did not require many substantive minimum protections or the elimination of formalities as a condition of copyright. Herman Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 199, 201 (1953). The Berne Convention had prohibited formalities as a condition of copyright as of its 1908 revision. Ralph Oman, *The United States and the Berne Union: An Extended Courtship*, 3 J.L. & TECH. 71, 73 (1988).

369. Universal Copyright Convention, art. III, ¶ 1.

370. *Id.* art. III, ¶ 2.

371. Act of Aug. 31, 1954, Pub. L. No. 83-743, 68 Stat. 1030, 1031 (codified at 17 U.S.C. § 9(c)) (repealed).

## F. The 1976 Act

In his 1961 report prepared as part of the lengthy process to overhaul the 1909 Copyright Act, which culminated in the Copyright Act of 1976, the Register of Copyrights recommended elimination of the manufacturing clause. As justification for this position, the report described the harmful and unfair effects of the domestic manufacturing requirement upon certain U.S. authors; it will be recalled that, as a result of the United States' joining the UCC, foreign authors—at least those residing in UCC contracting states—were no longer subject to the manufacturing clause. Although in the normal course of things most U.S. authors would have their books published by a U.S. publisher and manufactured in the United States, there were exceptions, such as “[w]here a foreign publisher is the only one offering to publish the work” or “[w]here the market for the work is so small . . . that printing must be procured wherever the cost is lowest.”<sup>372</sup> Denial of copyright under such circumstances seemed “unjust.”<sup>373</sup> And what of the interests of workers in the printing trades? In the Register’s view, “[i]t is hard to see the basis in logic or principle for denying copyright protection to authors as a means of protecting printers against foreign competition.”<sup>374</sup>

The 1976 Act mostly adopted the recommendation of the Register, but stopped short of an immediate elimination of the manufacturing clause. The domestic manufacturing requirement was reduced in its severity: (1) the requirement was completely eliminated with respect to authors who are not U.S. citizens, and even as to U.S. citizens who were domiciled abroad;<sup>375</sup> (2) manufacturing was now permitted in Canada as well as the United States;<sup>376</sup> (3) the number of foreign-manufactured copies that could be imported was raised from 1,500 to 2,000;<sup>377</sup> and (4) violation of the manufacturing

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372. REPORT OF THE REGISTER OF COPYRIGHTS ON THE GEN. REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG. 122 (House Comm. Print 1961).

373. *Id.*

374. *Id.*

375. 17 U.S.C. § 601(b) (repealed).

376. § 601(a) (repealed).

377. § 601(b)(2) (repealed).

requirement did not void copyright in the work, but only provided the infringer with a complete defense against liability under certain circumstances.<sup>378</sup>

#### G. The End of the Manufacturing Clause

Most importantly, however, the 1976 Act included a death warrant: the manufacturing clause was to expire on June 30, 1982.<sup>379</sup> In addition to all of the other objections, Congress was motivated to terminate the clause because its retention might place the United States in violation of its obligations under the General Agreement on Tariffs and Trade (“GATT”).<sup>380</sup> The clause got a reprieve, however, as Congress, responding to cries from the printing industry that opening it up to foreign competition would result in the loss of 170,000 to 367,000 jobs in the U.S. economy,<sup>381</sup> extended its life for another four years.<sup>382</sup> The warnings about the legal validity of the manufacturing clause proved correct: in 1984, upon a complaint brought by the European Communities, a panel determined that the manufacturing clause violated the GATT, and the report was adopted by the full GATT membership.<sup>383</sup> After a reign of precisely ninety-five years, the manufacturing clause finally expired on June 30, 1986.

The elimination of the manufacturing clause cleared away one major obstacle to U.S. adherence to the Berne Convention.<sup>384</sup>

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378. § 601(d) (repealed).

379. § 601(a) (repealed).

380. Annette V. Tucker, Note, *The Validity of the Manufacturing Clause of the United States Copyright Code as Challenged by Trade Partners and Copyright Owners*, 18 VAND. J. TRANSNAT'L L. 577, 595–96 (1985).

381. H.R. REP. NO. 97-575, pt. 2, at 2 (1982). Dissenting members of the Committee on Ways and Means argued that the clause violated the GATT. *Id.* at 7.

382. An Act to Amend the Manufacturing Clause of the Copyright Law, Pub. L. No. 97-215, 96 Stat. 178 (1982). President Reagan vetoed the law, referencing the objections of our trade partners to the manufacturing clause and his administration's commitment to free trade. H.R. DOC. NO. 97-208 (1982). Congress overrode the veto. *See* Tucker, *supra* note 380, at 601–04.

383. Report of the Panel, *The United States Manufacturing Clause*, L/5609 - 31S/74 (May 15/16, 1984), [https://www.wto.org/english/tratop\\_e/dispu\\_e/gatt\\_e/83copyrt.pdf](https://www.wto.org/english/tratop_e/dispu_e/gatt_e/83copyrt.pdf).

384. In congressional debate on the Berne Convention Implementation

The United States acceded to the Berne Convention in 1988, and it was implemented in U.S. law by the Berne Convention Implementation Act, effective March 1, 1989.<sup>385</sup> U.S. Copyright law in its application to the works of foreign authors thus finally emerged as a freestanding law of authors' rights, free from any linkage with trade policy. Or did it?

#### H. Copyright Law Cannot Escape Linkage with International Trade Policy

As it turned out, the gravitational pull of trade policy was too powerful, and copyright law never did reach escape velocity. I will briefly mention two manifestations of this attraction.

First, in 1988 Congress enacted what is known as the "Special 301" provision as part of the Omnibus Trade and Competitiveness Act.<sup>386</sup> Special 301 requires the U.S. Trade Representative ("USTR") to produce an annual report identifying those foreign countries that are insufficiently protective of the intellectual property of U.S. rightsholders. The requirement is premised on a congressional finding that "the absence of adequate and effective protection of United States intellectual property rights . . . seriously impede[s] the ability of the United States persons that rely on protection of intellectual property rights to export and operate overseas."<sup>387</sup> This explicitly treats intellectual property as a product whose export should be regulated as an element of trade policy. Inclusion of a country on the USTR's list "is designed to increase leverage for U.S. trade negotiators seeking to promote international trade liberalization."<sup>388</sup>

Second, intellectual property was one of the key topics addressed in the Uruguay Round of negotiations under the

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Act, Senator Hatch observed that "U.S. law is now more compatible with Berne [since the] manufacturing clause has expired." 134 CONG. REC. 28,306 (1988).

385. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

386. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1303, 102 Stat. 1107 (codified at 19 U.S.C. § 2242).

387. 19 U.S.C. § 2242 note (2012).

388. Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259, 263 (1989).



auspices of the GATT, which ran from 1986 until 1994, and resulted in development of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>389</sup> The TRIPS Agreement, whose very title expresses its linkage of intellectual property (including copyright) protection with international trade policy, is one of the three foundational multilateral treaties of the World Trade Organization (“WTO”).<sup>390</sup> “The TRIPS agreement represents the incorporation of intellectual property into the legal field of international trade . . . .”<sup>391</sup> By virtue of TRIPS, a WTO member country may lodge a trade dispute against another member country on the grounds that the latter does not adequately protect the intellectual property rights of nationals of the former. If the charged country is found to have violated its obligations under TRIPS, the remedy may in some cases consist of allowing the prevailing country to retaliate against the charged country by imposing trade sanctions that would otherwise violate the GATT or GATS.<sup>392</sup> Violation of copyright is thus treated no differently from the imposition of forbidden tariffs on an international transaction in goods or services.

When the idea of incorporating intellectual property protection into the international trade treaty system was first broached in the Uruguay Round,<sup>393</sup> the response of developing

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389. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

390. *Overview: A Navigational Guide*, WORLD TRADE ORG., [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm) (last visited Jan. 23, 2019) (describing the WTO system as founded on the General Agreement on Tariffs and Trade, for goods, the General Agreement on Trade in Services, for services, and TRIPS).

391. Barbosa, *supra* note 13, at 62.

392. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994); David J. Townsend, *Stretching the Dispute Settlement Understanding: U.S. – Cotton’s Relaxed Interpretation of Cross-Retaliation in the World Trade Organization*, 9 RICH. J. GLOBAL L. & BUS. 135, 137–39 (2010).

393. Inclusion of intellectual property protection in the world trade treaty system was instigated by the U.S. intellectual property industries. Robert W. Kastenmeier & David Beier, *International Trade and Intellectual Property: Promise, Risks, and Reality*, 22 VAND. J. TRANSNAT’L L. 285, 286–87 (1989). The United States was the leader of these efforts on the global stage. Peter Drahos,

countries was highly negative:

Developing countries, led by Brazil and India, immediately opposed discussing intellectual property issues at GATT and maintained that those discussions were to be held at [the World Intellectual Property Organization]. . . . Government officials and opinion leaders in developing countries thought that . . . book and software [piracy] promoted local learning and technology transfer.<sup>394</sup>

Thus, in the 1980s, developing countries opposed extending copyright and other intellectual property rights to foreigners by invoking one of the arguments that opponents of international copyright in the United States wielded throughout much of the nineteenth century.

## VI. Conclusion

The story of the manufacturing clause is a tale in which the characters are the clashing interest groups of authors, publishers, readers, and workers in the bookmaking trades, in both the United States and England, and the themes are arguments about literary property, justice, trade policy, competition, and monopoly. The first movement for international copyright, which culminated in the 1891 enactment of the first law extending U.S. copyright protection to persons who were not U.S. citizens or residents, saw the triumph of the printing tradesmen, who succeeded in holding up a broadened protection of literary property until it included protection against foreign competition that would more properly form part of a tariff bill. The result was an enactment that, in comparison with a simple extension of U.S. copyright to foreigners, harmed some categories of U.S. authors (by requiring their books to be manufactured in the United States, even if it

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*Thinking Strategically About Intellectual Property Rights*, 21 TELECOMM. POL'Y 201, 202 (1997).

<sup>394</sup>. Barbosa, *supra* note 13, at 64.

could be done more cheaply elsewhere, or else forgo U.S. copyright protection), and harmed British authors who lacked a track record of robust sales (by requiring a British publisher to commit to a U.S. edition before it was known whether there was a market for it).

Whether the manufacturing clause actually benefited the printing tradesmen is less clear. Due to the onerous manufacturing requirements, few books by English authors followed the procedures required to obtain U.S. copyright; they either forwent the U.S. market or supplied it with copies from the British edition without the protection of copyright. U.S. authors had to have their books manufactured in the United States, but a large proportion of them already did so regardless of the law. Single editions of books by popular English authors, rather than the multiple competing editions that flourished in the era of the cheap libraries, meant less work for typesetters, not more.

The clause had a mixed impact on the American reading public: some books by British authors were better produced, but cost more. Yet the impact on price stemmed more from the strictly literary-property element of the law—enabling the author to preclude the publication of multiple competing editions in order to maximize his economic returns—than from the protectionist element.

The established American publishers failed to get what they had insisted upon from the days of Henry Clay through the era of the cheap libraries, namely protection from competition by British publishers, inasmuch as a clause requiring the publisher to be a U.S. citizen was not included in the 1891 Act. Such a clause, however, was no longer of any use to U.S. publishers once the system of trade courtesy broke down. At that point, the *bête noire* of the establishment U.S. publishers was not the British publishers, but the U.S. publishers of the cheap libraries who disdained the norms of trade courtesy.

The manufacturing clause would have been some consolation to the Henry Carey school of Philadelphia publishers, but the extension of copyright to foreigners in any form was contrary to their philosophy. By 1891, however, their voices were no longer heard, signifying perhaps that they had accepted the inevitable.

Those who supported international copyright on grounds of simple justice received half a loaf, or maybe something less. The stain of a national reputation as “the buccaneers of books”<sup>395</sup> was erased, but it was replaced by an extreme of protectionism that had no proper place in the empyreal realm of arts and letters.

The second movement for international copyright, consisting of the United States’ long march toward joining the international copyright treaty regime that had been in place since the 1886 creation of the Berne Convention, was characterized by the erosion and eventual removal of the trade policy elements that had been engrafted on the Copyright Act in 1891. Ironically, the first to be freed from the manufacturing clause were non-U.S. authors; the UCC only barred the imposition of formality requirements on foreign nationals, not on a contracting state’s own citizens. Thus, for thirty-two of the ninety-five years that the manufacturing clause held sway, it impinged only on U.S. authors. What a change from the regime in effect from 1790 to 1891, when U.S. copyright law recognized no rights of non-U.S. authors. The progressive weakening of the manufacturing clause made big holes in the protection from foreign competition that the printing trades unions had fought for with such tenacity during the first struggle for international copyright.

The end of the manufacturing clause did not mean the end of the linkage between copyright policy and trade policy; it just meant that the linkage was shifted from the copyright law to the trade and tariff laws, and to the WTO treaty system. An appreciation of the history of how copyright became entwined with trade policy should inform current efforts by the United States to bring about stronger protections of the rights of U.S. authors under the laws of other nations.

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395. S. REP. NO. 50-622, at 2 (1888).