Life, Liberty, and the Relentless Pursuit of Ownership: the "Americanization" of Intellectual Property Rights[1]

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"All the riches of English literature are ours. English authorship comes free as the vital air, untaxed, unhindered, even by the necessity of translation, into our country; and the question is, Shall we tax it, and thus interpose a barrier to the circulation of intellectual and moral light? Shall we build up a dam, to obstruct the flow of the rivers of knowledge?...Shall we refuse to gather the share of this harvest, which Providence, and our own position, makes our own?"[2]

Taken from a memorial presented to the Congress on June 13, 1842, by the Philadelphia law-book publishers T. & J.W. Johnson, this opinion illustrates a common attitude among Nineteenth-century U.S. publishers: piracy was simply considered a perfectly valid means to a highly desirable end. The protracted congressional debate regarding possible adhesion to emerging international conventions on intellectual property rights was fueled by heated opinions for or against such a step. Those in favor were concerned that by its failure to protect authorship, the U.S. risked

1. This paper is based on a chapter in my forthcoming book No Trespassing: Authorship, Intellectual Property Rights, and the Boundaries of Globalization (Toronto: University of Toronto Press, 2003).

2. Quoted in Thorvald Solberg, *International Copyright in the Congress of the United States, 1837-1886* (Boston: Press of Rockwell and Churchill, 1886), 10.

becoming "the literary Ishmael of the civilized world,"[3] while those in the opposite camp primarily launched their counterarguments on behalf of a growing publishing industry and the need to ensure democratic accessibility of cheap books to the American audience.[4]

Clearly, the perspective of the U.S. at this time is that of a developing nation, bent on safeguarding its own industry at all cost. If any sort of regulation was to be implemented, prices would go up, publishers and booksellers go bankrupt, and the ongoing process of democratization in the vast country be undone, or so the argument went. Those who launched such a viewpoint often did so in a rebellious tone that comes across indicating a very conscious payback by a former colony on its ex-masters. To T. & J.W. Johnson, English literature represented indeed a common cultural source, one that the previously oppressed now had every right to exploit in order to further their own agenda of independence.

As John Tebbel suggests in his monumental exposé on the history of American publishing, international copyright would most likely have been a hindrance to book publishing in the U.S. had it been enacted before the Civil War.[5] Instead, popular novels were reprinted without rights being bought or authors receiving any compensation; an activity completely above board since U.S. copyright law only protected domestic writers. Interestingly enough, this did not apply to The Provisional Congress of the Confederacy, which in an 1861 act extended copyrights to citizens of any foreign state or power.[6] West & Johnston, one of the South's leading publishing houses at that time, even accused the "Yankee swindlers" of robbing foreign authors of the fruits of their labor, but added that fortunately such disgraceful proceedings were not part of Southern practice or legislation.[7]

3. Report of the Hon. W.E. Simonds, of Conneticut, from the House Committee on Patents, June 10, 1890, in Haven Putnam, *The Question of Copyright: A Summary of the Copyright Laws at Present in Force in the Chief Countries of the World* (New York: G.P. Putnam's Sons, 1891), 121.

4. Senate representative William C. Preston, of South Carolina, put it bluntly: "Great Britain…had two authors to our one, and was, therefore, more interested in the protection of mental labor; while the United States published three or four times as many books, and, therefore, more interested in protecting publishers." William C. Preston quoted in Solberg, *International Copyright*, 4.

5. John Tebbel, *A History of Book Publishing in the United States: Volume II: The Expansion of an Industry 1865-1919* (New York: Bowker, 1975), 641.

6. John Tebbel, *A History of Book Publishing in the United States: Volume I: The Creation of an Industry 1630-1865* (New York: Bowker, 1975), 561.

7. Tebbel, *Creation of an Industry*, 561.

During most of the Twentieth Century, U.S. copyright policy demonstrates a strong protectionist slant that relied on the implementation of several complicated formalities, all of which would effectively bar the U.S. from coming into compliance with international copyright conventions. The most contentious of these was the "manufacturing clause" that remained in place up until the U.S. joined the Berne Convention in 1986, and which called for manufacturing in the U.S. or Canada in order to qualify for copyright. Not being a signatory did not hinder the U.S. from using Canada as a convenient loophole (Canada had joined Berne in 1928) to secure protection under the convention by publishing first editions simultaneously in both countries, what was referred to as the so-called "back door to Berne."[8]

I

Let us now step into the time machine and press the button on warp speed for the 1970s, when access to information and knowledge was to become an increasingly global, increasingly interconnected, and increasingly polarized question. During this decade, many recently decolonized nations viewed intellectual property rights with skepticism, if not downright hostility. Successfully establishing questions relating to North-South inequality primarily on the UN agenda, the one vote, one nation system provided Least Developed Countries with a far more sympathetic venue in which to launch their concerns than the weighted vote in the International Monetary Fund or The World Bank allowed for. In order to comply with existing international intellectual property treaties, developing nations used almost the exact same line of argument as the Philadelphia publishers did a century before them: if they were to have any chance of coming up to speed with the developed world and building the infrastructure of the Information Age, some sort of special provisions were called for. Working to achieve a New International Economic Order (NIEO), developing nations were boosted in their efforts by the apparent success of The Orga-

8. See Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford: Oxford University Press, 2001) 189-196, for a longer discussion on U.S. pre-Berne policies.

nization of the Petroleum Exporting Countries (OPEC), whose commodity leverage during the oil-crisis of the 1970s raised hopes in some quarters and fear in others that power of this kind could spawn equally successful constellations elsewhere.[9] Culminating in the work of the International Commission for the Study of Communication Problems, UNESCO promoted the idea that economy and information were two concepts of equal standing, deeply enmeshed and interdependent. When the commission in 1980 published its findings in the controversial Many Voices, One World: Communication and Society Today and Tomorrow: Towards a New More Just and More Efficient World Information and Communication Order (often referred to as the McBride Report, after Sean MacBride, chairman of the commission) it stressed that the two major programs of NIEO and NWICO (New World Information and Communication Order) had to be considered together and that information as well as more tangible riches should be considered a common heritage in need of equitable distribution, even suggesting that concrete plans of action linking both processes should be implemented within the United Nations system.[10] The U.S. however, reacted strongly to the MacBride report and left the organization in 1984 because of UNESCO's alleged politicization. In the end, a combination of internal and external factors – failure to rally a unified front paired with accelerating transnational flows of an increasingly immaterial and informational, rather than commodity-based nature – made it clear that the NIEO and NWICO would fail, and as we shall see later, the issue of intellectual property rights would instead begin to move into a different arena than that of UNESCO.

I have framed my argument within these two seemingly incommensurable temporal markers for several reasons. One: it illustrates the U.S. propensity to stand "outside" the agenda set by the international community at certain key moments; two: it demonstrates the tremendous histor-

9. Susan K. Sell, *Power and Ideas. North-South Politics of Intellectual Property and Antitrust* (New York: SUNY, 1998), 29-31, 73. Chapter one in Sell's book, "Power and Ideas," 9-40, provides a comprehensive introduction to the North-South dichotomy in matters of intellectual property rights. For another overview of the pros and cons of stronger intellectual property protection on part of the Least Developed Countries, see Carlos Alberto Primo Braga, "The Economics of Intellectual Property Rights and the GATT: A View From the South," *Vanderbilt Journal of Transnational Law* 22 (1989), 243-264.

10. UNESCO, *Many Voices, One World: Communication and Society Today and Tomorrow: Towards a New More Just and More Efficient World Information and Communication Order* (Paris: UNESCO, 1980), 268, at 68.

ical shift in the U.S. position *vis-à-vis* international intellectual property rights, which is the one that recasts the nation from being a developing or importing one, to being a developed and exporting one, and finally, three: it introduces the question to what extent we might describe the current status of intellectual property rights in the global, knowledge-based society as being "Americanized."

II

Intellectual property rights are important because they safeguard what makes the wheels of the information society turn: culture, information, knowledge, or, in other words resources "of the mind." Making these rights into explicit policy is however a fairly new phenomenon in the U.S., and it is precisely the structural sea change of the global economy that made it possible. Interconnected, technology-driven, and above all, knowledge-based, this economy was stimulated by products the U.S. had or could manufacture plenty of in elite universities, research parks, or Hollywood studios, and subsequently, U.S. companies were likely to benefit from the deregulation of global markets and the increase in transnational trade, whether their business was in pharmaceuticals, software, or sitcoms. As a major exporter of intellectual property products – be they patented or copyrighted – two simultaneous market movements further underwrote the drift towards increased emphasis on global protection: at home, domestic markets were in some cases nearing saturation; abroad, foreign markets represented the potential for substantial new revenues, but on the downside many of these provided inadequate intellectual property protection.

As a consequence, U.S. business interests resolutely rallied around the cause of international intellectual property rights, demonstrated in part by the launch of organizations such as The International Intellectual Property Alliance (IIPA) in 1984. IIPA claims that those industries who "create copyrighted materials as their primary product,"[11] continue to be

11. Stephen E. Siwek, "Executive Summary," The International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy – The 2002 Report* (Washington: Economists Incorporated, 2002), 3.

one of the fastest growing segments of the U.S economy, and that the annual growth of these so-called "core copyright industries," has been more than twice that of the economy as a whole.[12] According to IIPA the foreign sales/exports of these corporations – growing from $36 billion in 1991 to $89 billion in 2001[13] – exceed almost all other major sectors in the U.S. economy, including aircrafts, cars, and chemicals.[14] Because this industry represents such a vital segment of the U.S. economy, any potential loss due to unauthorized use – estimated in IIPA's "2002 'Special 301' Recommendations" at $838 billion in 2001 – indicates considerable adverse effects.[15] Another member of IIPA, The Business Software Alliance, put the world piracy rate at 37 percent in 2000, predicted their loss for that year at $11.75 billion,[16] and concluded in a survey together with the Software and Information Industry Association (SIIA) released in 1999, that the U.S. and Canada were the two nations most severely hit by piracy, leading every other world region with 26 percent of the total.[17]

Not until the mid-1980s would a revamped trade policy put an end to the more ad hoc approach favored up until then and secure intellectual property rights the full attention of the U.S. government. The financial importance of copyright in relation to the export industry had created a "copyright super lobby" in Washington, whose concerns fell on the favorable ears of industry-insider-incumbent President Ronald Reagan.[18] His era of liberalization and deregulation could not have provided a better climate in which to fortify the connection between trade and intellectual property, laying the foundation for what appears to be a strong bipartisan consensus in support of intellectual property as the "engine driving U.S. economy into the 21st century."[19]

12. Ibid., 4.

13. Ibid., 24.

14. Ibid., 5.

15. The International Intellectual Property Alliance, "2002 'Special 301' Recommendations," (Washington: IIPA, 2002), 2.

16. Business Software Alliance, *Sixth Annual BSA Global Software Piracy Study*, (Washington: BSA, 2001), 1.

17. Software and Information Industry Association, Press release, "Five Years: $59.2 Billion Lost," (Washington: SIIA, May 24, 2000).

18. For a longer account of these lobby strategies, see Jeremy Tunstall and David Machin, *The Anglo-American Media Connection* (Oxford: Oxford University Press, 1999), esp. 40-52.

19. Bruce Lehman, "The United States and the Global Intellectual Property System: Leadership and Responsibilities," (Washington: International Intellectual Property Institute, June 1, 2001), available at .

One of the most important instruments securing this policy is Section 301 of the Trade and Tariff Act of 1974 giving the President the right to enforce U.S. interests in trade agreements, and allowing industries, trade associations, and individuals to petition the United States Trade Representative (USTR) if they feel that U.S. commerce is somehow jeopardized by unfair practices and piracy. Established in 1962, the USTR is chief trade negotiator for the United States and its representative in major international trade organizations. In a 1984 amendment by Congress, the USTR's authority was extended so that it could initiate cases on its own accord and second, for the first time, failure to adequately protect intellectual property was deemed actionable. Today, the USTR is not only permitted to identify unfair practices, but can now also introduce trade sanctions as retaliatory measures in response to insufficient intellectual property protection. Under "Special 301" and "Super 301" the USTR must annually identify intellectual property priority countries, thirty days after which the agency must self-initiate an investigation, determine if action is warranted, and what sort of action is to be taken.[20] In the 2002 'Special 301' report issued by the USTR, Ukraine is designated Priority Foreign Country for the second year running, with an estimated level of piracy of 80 percent in the category Motion Pictures (down from 99 percent in 2000) and 85 percent in Records and Music (down from 95 percent in 2000); numbers leading to continued U.S. sanctions – valued at $75 million – that were initially imposed on Ukrainian products in January 2002.[21] Together with the so-called Generalized System of Preferences (GSP), which accords preferential duty-free entry into the U.S. market for about 140 designated beneficiary countries and territories, the U.S. enacted between 1984-1988 a powerful set of trade instruments which could act as leverage in order to ensure and enforce the interests of

20. My account of the role of the USTR draws substantially on Sell, *Power and Ideas*, 133-136. See also Bernard M. Hoekman and Michel M. Kostecki, *The Political Economy of the World Trading System: From GATT to WTO* (Oxford: Oxford University Press, 1995), 147. Ronald Bettig claims that the U.S. government has used three forms of leverage to eradicate piracy: bilateral trade leveraging against countries where piracy was rampant; free trade agreements with selected partners inclusive of intellectual property protection; and multilateral efforts including U.S observance of the Berne convention. Ronald V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Boulder: Westview Press, 1996), 198.

21. USTR, *2002 Special 301 Report* (Washington: USTR, 2002), available at http://www.ustr.gov/reports/2002/special301-report.PDF.

the core copyright industries in an increasingly global and interconnected economy.

The principal venue for the implementation of these policies would be a very specific international forum: GATT (General Agreement on Tariffs and Trade). Drawing on the close industry-government liaison, companies such as IBM, General Electric, and Disney worked hard to ensure that intellectual property became an important part of the final GATT round in 1986-1994,[22] a comprehensive tactic Peter Drahos describes as leading up to the global period in intellectual property regulation.[23] As the so-called Uruguay round drew to a close and GATT turned into The World Trade Organization (WTO), anxious voices were heard for the fate of developing nations, arguing that they should do their outmost to ensure that intellectual property rights were not inserted and institutionalized into formalized trade regimes.[24] One concern was the possibility that such steps would only further cement the division between those who were "information rich" and those who were "information poor." The formation of the WTO in 1995 led to the most important agreement in intellectual property rights since the 1886 Berne Convention, namely the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS). The TRIPS agreement, which is Annex 1C of the Final Act, has a unique position within the WTO context because it imposes obligations upon governments to adhere to specific policies.[25] Any nation that is a part of the WTO, and that includes the vast majority of nations, must automatically comply with the standards of TRIPS or face possible trade sanctions or other retaliatory measures. Like no other treaty on intellectual property TRIPS has unequivocally strengthened the connection between trade and intellectual property rights, and it has done so on a

22. See Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* (Washington: Brookings Institution Press, 1998), esp. 67-89, for a longer account of these events.

23. Peter Drahos, "Thinking Strategically About Intellectual Property Rights," *Telecommunications Policy* 21, 3 (1997), 202. Drahos refers to the two previous periods as the territorial and the international.

24. Chakravarthi Raghavan, *Recolonization: GATT, the Uruguay Round & the Third World* (London: Zed Books, 1990), 59.

25. This is different from both GATT and another WTO agreement, the General Agreement on Trade in Services (GATS), consisting instead of agreements *not to* use specific policies. Hoekman and Kostecki, *The Political Economy of the World Trading System*, 144.

truly global scale, making it, according to one critic, "one of the most effective vehicles of Western imperialism in history."[26]

III

In what sense may we then talk of these developments as an expression of "Americanization," rather than merely the logical result of a general and global spread of a market economy that no longer "belongs" to any individual nation-state? During the Uruguay round it became clear that a decisive reconfiguration of the world economy had taken place – from industrial to informational production – and that prosperity in this new co-dependent economy primarily was an issue of access to and participation in global trade flows. Those who for whatever reason did not or could not trade were almost certain to be left behind. While organizations profoundly critical of the present world trade system acknowledge that history makes a mockery of the claim that trade cannot work for the poor, they also conclude that the current system is built on "rigged rules and double standards," both of which favor developed nations.[27] Therefore is it quite possible, as Ruth Gana Okediji claims, that weaknesses of the free trade model are negatively reinforced by weaknesses in the intellectual property model, and that this will hit developing countries especially hard.[28]

Cast in the role as the only remaining superpower post-1989 has meant a privileged position for the U.S. in a number of converging fields. In a simultaneous movement, we witnessed how intellectual property rights became an issue with global implications. I would argue that it is irrefutable that the U.S. very successfully has transplanted essentially domestic policies into global truths, a project with distinct universalizing

26. Marci A. Hamilton, "The TRIPS Agreement: Imperialistic, Outdated, and Overprotective," in *Intellectual Property: Moral, Legal, and International Dilemmas*, ed. Adam D. Moore (Lanham: Rowman & Littlefield, 1997), 243.

27. Oxfam, *Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, (Oxford: Oxfam 2002), available at http://www.maketradefair.org/stylesheet.asp?file=03042002154154

28. Ruth Gana Okediji, "Copyright and Welfare in Global Perspective," *Indiana Journal of Global Legal Studies* 7 (Fall 1999), 134.

dimensions. This feature is particularly obvious within the framework of the WTO and TRIPS, where we see not only a stronger bond between trade and intellectual property rights than we have before, but also have come to accept threat of, or actual trade sanctions, as weapons in cases of non-compliance. The U.S. is not the only nation-state benefiting from this scenario, but it has been a strong advocate for its general applicability and continues to be a dominating force in setting the perimeters of these global norms. In addition, in leaving UNESCO and choosing other combat zones, the U.S. has steered the battle of intellectual property rights away from being waged in the U.N. system and instead squarely placed it within WTO and TRIPS. Both these structural tendencies, I suggest, represent a form of "Americanization" of intellectual property rights and of our understanding of the best way these rights should be managed. However, while in a much less encompassing manner, the same strategy was used by the leading exporter of cultural goods and the leading proponent for international intellectual property rights at the end of the Nineteenth century: France. A history lesson of this kind should lead us to recognize and question structural power wherever we see it, but also remind us that power itself is a profoundly impermanent thing.