

**How TRIPs Got Legs:
Copyright, Trade Policy, and the Role of Government
in 19th-Century American Economic Thought**

Stephen Meardon[♦]

INTRODUCTION

The cause of free trade was advanced successfully in Britain to achieve the repeal of the Corn Laws in 1846, the removal of other tariffs in Gladstone's budget of 1853, and the Cobden-Chevalier treaty of 1860. It was advanced much less successfully in postbellum America, where protection reigned until 1913. The cause is advanced today in the Doha-round negotiations of the World Trade Organization and, in the Western Hemisphere, in the proposed Free Trade Area of the Americas and several subregional and bilateral preferential trade agreements. Or is it not?

The WTO and FTAA negotiations have stalled repeatedly – most recently at the failed Cancún WTO talks of September 2003 – because of the vastly different agendas of developing and developed countries. Developing countries press for the dismantling of rich countries' anti-dumping laws and of their protection of agriculture and cotton goods. Developed countries, particularly the United States, press for not only for access to poor countries' markets, but also for their acceptance of stricter definitions and greater enforcement of intellectual property rights. The chapter concerning TRIPs (Trade-Related aspects of Intellectual Property rights) was included in the WTO agreement at the conclusion of the Uruguay Round of the GATT; since that time the United States has been seeking tougher provisions. While the U.S. relented in Cancún (Bhagwati 2004, p. 57), it did so while simultaneously pursuing regional and bilateral agreements that are more forceful.

Intellectual property provokes the ire of globalization's critics: it entails monopoly rents that accrue to producers of pharmaceuticals, some agricultural goods, and entertainment and media products, most of which producers reside in rich countries. Proponents view the rents as

[♦] Dept. of Economics, Bowdoin College, Brunswick, ME 04011. E-mail to smearдон@bowdoin.edu. This is a May 2004 revision of a paper prepared for the 2004 *HOPE* conference on "The Economic Role of Government in the History of Economic Thought," April 23-25, Durham, North Carolina.

the just returns to innovation and as a necessary incentive for progress. Critics see the rents as evidence of “corporate-led globalization” and “profit over people.”

The criticisms have spurred a reassessment of the appropriateness of intellectual property chapters in trade agreements. *Why* is intellectual property trade-related? In any case, *should* it be? The reassessment has been undertaken by advocates as well as skeptics of globalization. It has followed various lines of argument and employed different methods, some rooted in contemporary theory, some in politics, some in history. Jagdish Bhagwati, one of globalization’s chief advocates, writes that “intellectual property protection is a matter of collecting royalties, and including them in a trade institution such as the WTO seriously distorted what that organization should accomplish” (Bhagwati 2004, p. 57). Ha-Joon Chang, a skeptic, considers international agreements for the enforcement of intellectual property rights to be among the methods by which rich countries (which promoted their own development in the nineteenth century precisely by *pirating* the intellectual property of foreigners) are now “kicking away the ladder” from poor countries (Chang 2002). TRIPs, therefore, “needs a serious overhaul, if not an outright abolition” (Chang 2001, p. 303). B. Zorina Khan analyzes historical data from the U.S. book trade to determine whether the country’s refusal through most of the nineteenth century to enter into an international copyright agreement produced net welfare benefits or costs for Americans. Ultimately her conclusion is similar to Chang’s in substance, if not in tone: “strong measures by the state to counter piracy may lead to social overinvestment in property rights enforcement.” Specifically, “the U.S. experience during the nineteenth century suggests that appropriate intellectual property institutions are not independent of the level of economic and social development” (Khan 2004, p. 30).

Notwithstanding the use by Chang, Khan, and others of historical argument to criticize the marriage of trade and intellectual property rights, the *intellectual history* of that marriage has been given scant attention. The intellectual connections between trade and one particular form of intellectual property – copyright – is especially worthy of historical scrutiny. Khan (2004, p. 5) notes that copyright has not generated nearly as much scholarly interest as patents. Yet the question of international copyright in the nineteenth-century United States was controversial and sustained through generations, while the question of international patent recognition was

neither.¹ Inasmuch as copyright does receive scholarly attention, historical *arguments* for legislation tend to be neglected in favor of basic historical facts of the contents of legislation or historical data manifesting the economic effects of legislation. Chang, for example, surveys some of the principal ideas in nineteenth-century America supporting trade restrictions, but where his subject turns to copyright his historical observations are limited to broad-brush characterizations of policies: “even the most advanced countries were still routinely violating the [intellectual property rights] of other countries’ citizens well into the twentieth century. ... Even the USA, already a strong advocate of patentee rights, did not acknowledge foreigners’ copyrights until 1891” (2002, p. 57). The observation is true. It is even important. But it does not convey the ideas that maintained the nineteenth-century copyright status quo nor those that resisted and ultimately toppled it, nor does contribute to an understanding of how any of them related to protection or free trade.

Khan (2004, p. 9) offers at least a sketch of the opposing sides of the controversy: she writes that international copyright was kept at bay in the United States until 1891 due to the efforts of “publishers, printers, and representatives of the Democratic Party.” But the sketch requires some revision and much elaboration. Although it is true that the votes for the Platt-Simonds Copyright Act of March, 1891 were made mostly by Republicans, and the votes against mostly by Democrats, there was much voting across party lines. More to the point, and notwithstanding the roll calls, the arguments that kept international copyright at bay for most of the half-century leading up to the vote were formulated mainly by *Republicans* – specifically, Republicans (and, prior to 1854 and less consistently, Whigs) of a common protectionist stamp. On the other hand, the arguments in favor of international copyright were devised by the minority of Republicans of *Jacksonian-Democrat* lineage (and, in the last twenty years, of Liberal Republican and Mugwump affinities).²

¹ In 1837 Henry Clay, who engineered the first concerted legislative push towards international copyright, stated in his Senate Select Committee report on the subject that “[a]lready the principle has been adopted, in the patent laws, of extending their benefits to foreign inventions or improvements. It is but carrying out the same principle to extend the benefits of our copyright laws to foreign authors” (Clay [1837] 1896, p. 35; Barnes 1974, pp. 61-74). At the very beginning of the half-century wrangle over international copyright, the corresponding dispute over patents had already been settled.

² Khan’s sketch of political alignments is consistent with the chapter-length account of Meredith L. McGill, who writes that “In Congress, active support of international copyright tended to be Whig, northern, and avowedly protectionist,” in contrast to the “largely Democratic opposition” (McGill 2003, pp. 84-85). The previously-mentioned advocacy of international copyright by Henry Clay, a staunch protectionist Whig, would appear to seal the case. I contend instead that Clay’s advocacy highlights the fundamental ambiguity of international copyright as

Why, one might ask, do the arguments and the identities of their exponents matter at all? Why *shouldn't* one attend just to the details of legislation and their economic consequences? My premise is that the political and doctrinal allegiances of authors of arguments on both sides of the international copyright controversy matter because they reflect how, in the nineteenth century, intellectual property was “trade-related.” Those who were at the vanguard of the movement for international copyright were also the leading advocates of free trade – and their ambivalence about the Republican Party after the Civil War was due above all to that party’s adherence to protectionist principles. Likewise, the principal articulators of the case against international copyright were also the foremost advocates of protection – and they were at home in the Republican Party mainly for that reason.

a matter of free trade or protection, but does not overturn the rule of thumb that I advance concerning the political and ideological alignments of the exponents of both sides of the debate. What is more, I disagree with McGill’s characterization of those alignments. Unfortunately one cannot settle the matter simply by tallying votes, in part because until 1890-1891 the several treaties and bills to establish international copyright did not come to a vote: they were tabled or died in committee. But even a glance at the final roll calls for the Platt-Simonds Act in 1890-1891 is not sufficient to discern the political and ideological commitments of those in favor and those opposed. In the House, the vote was 139 in favor, of whom 96 were Republicans and 43 Democrats, and 95 opposed, of whom 25 were Republicans and 70 Democrats. In the Senate, 27 were finally in favor, of whom 26 were Republicans and 1 was a Democrat, and 19 opposed, of whom 6 were Republicans and 13 Democrats (Putnam 1891, pp. 407-412). Notably, however, the votes secured, in addition to international copyright, the Act’s “manufacturing provisions.” The particular provisions of Platt-Simonds not only made U.S. copyright for a foreign author contingent upon the book being typeset and printed in the United States, but also prohibited commercial importation of books securing U.S. copyright that were not also typeset and printed in the United States. Those who opposed the bill were therefore voting against the equivalent of a prohibitory tariff on the importation of all foreign books with U.S. copyright. The record shows that the opposition’s leaders, at the very least, voted against the bill *for that reason*. George H. Putnam (1891, p. 395) named Senators John Sherman, John Warwick Daniel, and John Henninger Reagan among the leaders of the opposition. One must take care to note exactly what they opposed, and what they favored. Sherman sponsored, and Daniel and Reagan backed vigorously, an amendment to preserve international copyright while scrapping the non-importation manufacturing provision – thus establishing the intellectual property rights of foreign authors without hindering international trade in books. As Senator Reagan explained, “While I recognize that a legitimate copyright law would increase the cost of literature, I so strongly believe that authors ought to have the benefit for a limited period of their own works that I would support a legitimate international copyright law. This bill provides for that, and then it provides (I used the phrase ‘protective tariff,’ and I will repeat it) a protective tariff for publishers and printers. ... I do not feel prepared to join that” (*Cong. Record*, 51st Cong., 2nd sess., p. 2607; see also statements by Senator Sherman on pp. 2385-2386 and Senator Daniel on pp. 2608, 2610). Sherman, a Republican of Ohio, Daniel, a Democrat from Virginia, and Reagan, a Democrat of Texas, fit well the profile I have delineated of Liberal Republican / Mugwump / Jacksonian-Democrat advocates of free trade and international copyright. On the other side, Platt-Simonds’ supporters fit, if less neatly and somewhat paradoxically, the converse profile of Whig / Republican protectionists and opponents of international copyright. Although 96 House Republicans voted originally to pass the bill, only 22 voted to concur with the aforementioned Senate amendment that scrapped the non-importation provision. The tallies indicate that a large majority of Republicans who supported international copyright did so because it was bundled with a substantial increase in protection, and declined to do so otherwise. (The Senate amendment was dropped in conference.) In the final analysis, even the 1890-1891 debate, as lopsided as it turned out to be with Republicans in favor of Platt-Simonds and Democrats opposed, is consistent with the general rule that opponents of international copyright *per se* were protection-minded Republicans, while advocates were free-trade Republicans and Jacksonian Democrats.

My purpose is to lay bare the intellectual connections between free trade and international copyright, on one side of the debate, and protection and opposition to international copyright on the other. The connections, I will argue, were the different roles of government favored by the two sides' doctrines. Free-trade doctrine maintained that the principal role of government was to protect the natural right of individuals to appropriate the fruits of their own labor. The salient protective doctrine affirmed an active role of government in fostering certain industries, ensuring industrial diversification, and promoting actively productivity growth. The champions of each side of the tariff controversy believed that their favored role of government necessitated their chosen position on international copyright.

To show why, I will recall the arguments and advocacy of two such champions. Each was the single most respected figure on his side of the tariff debate, and each was deeply involved in the question of international copyright. Each, moreover, was directly interested in the publishing industry.

The first, William Cullen Bryant (1794-1878), was, with Emerson and Longfellow, one of the most revered men of letters in mid-nineteenth century America. His reputation owed much to his poetry, but it was due also to his work as editor and publisher for a half century of the New York *Evening Post* and to his leadership of many political causes, including that of the American Free Trade League (of which he was the first President). The second, Henry C. Carey (1793-1879), is well known to historians of economic thought as America's leading protectionist thinker. He was also, until he retired in 1838 to devote himself to political economy, partner in the publishing firm founded by his father and maintained as Carey & Lea (later Carey, Lea & Blanchard) of Philadelphia (Kaser 1957, p. 62).

In the remainder of the essay I will review the contributions of Bryant and Carey to the nineteenth-century U.S. debate over international copyright debate. I will try to show why, in the mind of each, international copyright was "trade-related." Finally, I will discuss the relevance of history to the present. Economic history may suggest, as Chang has argued and Khan implied, that the present-day link between tighter international copyright agreements and trade liberalization may not be in the best interest of poor countries. But that is not the thrust of this essay. Intellectual history suggests a different conclusion. The consequence of the "trade-relatedness" of international copyright in nineteenth-century America should put rich countries on guard as well.

WILLIAM CULLEN BRYANT

William Cullen Bryant was already a widely-read and acclaimed free trader at the age of thirteen. His father, Dr. Peter Bryant, served for several years in the Massachusetts legislature, so the family's house was abuzz with political discussion. Dr. Bryant was also a lover of poetry who cultivated young Cullen's aptitude for versification. The boy's aptitudes for politics and poetry coalesced in 1807, when, with Britain and France embroiled in war and each country pressing a naval blockade of the other's American commerce, Congress passed and President Jefferson signed the Embargo Act. The Act was intended to compel the combatants to end their dispute, or at least those of their practices that caused the most collateral damage to the United States. But it provoked fierce antipathy in the commercial centers of New York and New England. Cullen inveighed against the Act in a satirical poem, originally of 244 lines, which impressed his father so much that he sought out a publisher for it in early 1808. Published as "The Embargo; or, Sketches of the Times, A Satire; by a Youth of Thirteen," the work was sufficiently popular in Boston to warrant a second edition with an additional 175 lines (Brown 1971, pp. 24-27).

Mandeville aside, opportunities to cite free-trade poetry are infrequent. Bryant's is worth citing less for the sublimity of the genre than for its containing the kernel of the idea motivating his leadership of the free-trade cause for most of the following seventy years. After his opening lines Bryant implored the Muse of Satire to lend him poetic strength to aid the cause:

Satiric Muse, shall injured Commerce weep
Her ravish'd rights, and will thy thunders sleep;
Dart thy keen glances, knit thy threat'ning brows,
call fire from heaven to blast thy country's foes.
Oh, let a youth thine inspiration learn –
Oh give him "words that breathe and thoughts that burn"!

Neither at this moment nor afterwards were Bryant's arguments against commercial barriers original. His importance to economic thought was to be as an influential advocate and opinion-maker, not a theorist. His arguments warrant examination nonetheless because his influence was great. Bryant's defense in "The Embargo" of unimpeded international trade includes traces (in the second cited line above) of the natural rights tradition. It also includes, more distinctly, the related conviction that government restrictions of trade bear unintended

consequences – of poverty, namely, and even starvation. “Th’ Embargo rages, like a sweeping wind, / Fear lowers before, and famine stalks behind,” he wrote. He continued,

In vain Mechanics ply their curious art,
And bootless mourn the interdicted mart;
While our sage *Ruler’s* diplomatic skill,
Subjects our councils to his sovereign will;
His grand “*restrictive energies*” employs,
And wisely regulating trade – destroys.³

As he matured Bryant continued writing, but he did not expect to do so as a vocation. Through most of his third decade and into his early thirties he tried his hand at the law in Plainfield and Great Barrington, Massachusetts, while making occasional literary contributions to such publications as the *United States Literary Gazette* and the *North American Review*. In Great Barrington his association with the Sedgwicks, a prominent family in Massachusetts politics and society, provided companionship, conversation, and connections. With one of their number Bryant studied political economy, taking up Smith, Say, Thornton, and Ricardo (Godwin 1883, v. 1, pp. 184-185). With two others, who had moved to New York to practice law, Bryant was introduced into the intellectual and social circles of the city (Brown 1971, pp. 112-113, 135).

Weary of the law and enticed by the prospect of making a living in letters in New York, Bryant quit his practice and moved to the city in 1825. In mid-1826 the founding editor of the *New York Evening Post* was injured and required a temporary replacement. Bryant, by then a recognized critic and poet, was hired to the position. He proved to be an adept manager and an able and eloquent editorial writer. His particular passion was the question of the tariff, which he considered “legal robbery” (Brown 1971, pp. 150, 159). When the editor died in 1829, Bryant took over fully his position, and over time acquired controlling ownership of the business (*ibid.*, p. 173).

In the early years of Bryant’s editorship Henry Clay was the leading voice of the “American system” of protection. Clay, therefore, was the paper’s principal foe, and Andrew Jackson its champion, even several years after the two contested the Presidency in 1832. In an editorial of March 31, 1834, Bryant made clear the reasons for the paper’s stance. Clay, he wrote,

³ From Bryant ([1808] 1947, pp. 281-282).

is the parent and champion of the tariff and internal improvements; of a system directly opposed to the interests and prosperity of every merchant in the United States, and devised for the purpose of organizing an extensive scheme through which the different portions of the United States might be bought up in detail. By assuming the power of dissipating the public revenue in local improvements, by which one portion of the community would be benefited at the expense of many others, Congress acquired the means of influencing and controlling the politics of every State in the Union, and of establishing a rigid, invincible consolidated government. By assuming the power of protecting any class or portion of the industry of this country, by bounties in the shape of high duties on foreign importations, they placed the labor and industry of the people entirely at their own disposal, and usurped the prerogative of dispensing all the blessings of Providence at pleasure. They could at any time decide what class of industry should be enriched, and what class impoverished; whether commerce should flourish or decay; whether the manufacturer of cotton, wool, or iron should become a king, while the common laborer sank into a pauper. Out of this system grew those great manufacturing establishments which have monopolized almost all the pursuits of simple mechanics, and converted them from independent men presiding over their own homes, masters of their own shops, and proprietors of their own earnings, into the pale, sickly, and half-starved slaves of companies and corporations. (Bryant 1834, in Bryant II 1994, p. 20)

Bryant believed the protective tariff to be class legislation favoring the few at the expense of many. It was also, as he had expressed in verse long before, ruinous to industry. Eight years later he restated the point in an editorial titled “How to Destroy a Commercial Town,” written in response to Clay’s tariff of 1842, which raised the average duty by roughly fifty percent.⁴ “There are several methods of bringing ruin upon a city which owes its prosperity to its flourishing commerce with foreign nations,” Bryant warned. One method is to obstruct its harbors. A second, practiced during the late Embargo, is to forbid by law the passage of vessels to and from the port. Or one could follow Clay, establishing “a law laying, upon merchandize imported from abroad, duties so enormously high that they cannot be paid, amounting to a prohibition of foreign commerce” (Bryant 1842, in Bryant II 1994, p. 176).

To Bryant, the unfairness of protection and the likelihood that it would “bring ruin” upon a populace were reasons enough to renounce the policy. But one could say more. It was unfair and ruinous because it was contrary to the legitimate role of government. At its core, government’s role was to secure “free labor” – in all the term’s senses. Specifically, a government functioning in its legitimate role would ensure: (1) that individuals could sell their

⁴ Import duties were 36.9% of the value of dutiable imports in 1844, up from 25.8% in 1842; and 30.5% of the value of all imports in 1844, up from 19% in 1842. Source: U.S. Census Bureau, Historical Statistics of the United States, series 212 and 211.

labor for whatever wages an unencumbered market would allow; (2) that they could keep for themselves all of their wage-earnings that were not required to finance a small and stripped-down government; and (3) that with those earnings they could purchase goods for the best price an unencumbered market would offer. Free labor therefore demanded, to the minds of Bryant and his readers, a consistent stand on three of the most controversial issues of the day. For individuals to be able to sell their labor freely demanded anti-slavery. For individuals to be as free as possible from taxation demanded not only a minimalist government, but, more to the point, a government averse to the financing of internal improvements (*contra* Henry Clay) and the resulting spoils of patronage. And for individuals to be able to trade their wages for goods at the best price they could get demanded free trade. When Bryant pressed for “commercial emancipation” from “the practice of confining trade by the invisible, but potent chains of law” (Bryant 1843, in Bryant II 1994, p. 187), therefore, his language was not *just* metaphorical. He considered restrictions on international trade to be a violation of the principle of free labor – and, in the same manner as slavery, a contravention of the legitimate role of government.

Bradley Bateman (2004, p. 14) acknowledges the importance of the free labor ideal to salient conceptions of the role of government, but identifies the ideal far too much with “republicanism,” especially in the years prior to the Civil War. To the editor and most readers of the *Evening Post*, free labor was the basic principle of *democratic* government – democratic, that is, with a large *or* small “d” before the founding of the Republican party in 1854, and with a small “d” even afterwards. In an editorial of 1853, for example, Bryant wrote,

In the first place we shall abide by the democratic party, because it is our party, because it is the party with whose principles, as laid down by Jefferson and as expounded by many enlightened men both of his time and ours, we fully agree. We recognize the great basis of the democratic party, simplicity in government – as little government, as little patronage, as little expenditure as the structure of civil polity can subsist with, and a strict construction of the constitution. (Bryant 1853, in Bryant II 1994, p. 270)

Shortly afterwards, in 1855, despite the Democratic party’s willingness to accommodate slavery and the consequent defection of numerous northern Democrats (including Bryant himself) to the Republican party, Bryant insisted that “true democracy” would not yield. He maintained that, under the circumstances, the defections served the cause more effectively than would party loyalty. After all, “living principles are better worth fighting for than dead heroes” after all (Bryant 1855, in Bryant II 1994, p. 288).

Bryant on International Copyright

The same principles demanded an additional policy. The United States already had a copyright law: an act of 1790 granted to U.S. citizens, residents, and their heirs a fourteen-year copyright to new books, maps, and charts – and offered those still living after the first fourteen years the right to renew for another fourteen. An act of 1831 extended copyright to twenty-eight years for citizens, residents, and heirs, with the possibility of renewal for an additional fourteen (Clark [1960] 1973, pp. 24-25). But there was no U.S. copyright at all for citizens and residents of foreign countries, and that, Bryant believed, was unjust.

In that belief Henry Clay and Cullen Bryant were, for once, in agreement. The efforts to secure international copyright began in 1836, when a partner in a London publishing firm moved to New York in an effort to issue a simultaneous American edition, under copyright, of a British work. The effort failed, the work was pirated, and the firm's New York branch was ruined. But the partner had influential supporters, including Bryant and Clay (Clark [1960] 1973, pp. 41-42). The American International Copyright Association was established by George P. Putnam in 1837, with Bryant prominent among its members. The Association presented numerous petitions to Congress, and a bill was drawn up with Clay's sponsorship that would accomplish the Association's ends. Senate Bill No. 223, titled "An Act to amend the several acts respecting copyright," was concise and simple:

Be it enacted, etc., That the provisions of the act to amend the several acts respecting copyrights, which was passed on the third day of February, eighteen hundred and thirty-one, shall be extended to, and the benefits thereof may be enjoyed by, any subject or resident of the United Kingdom of Great Britain and Ireland, or of France, in the same manner as if they were citizens or residents of the United States, upon depositing a printed copy of the title of the book, or other work for which a copyright is desired, in the clerk's office of the district court of any district in the United States, and complying with the other requirements of the said act: *Provided*, That this act shall not apply to any of the works enumerated in the aforesaid act, which shall have been etched or engraved, or printed and published, prior to the passage of this act: *And provided, also*, that, unless an edition of the work for which it is intended to secure the copyright shall be printed and published in the 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, the benefits of copyright hereby allowed shall not be enjoyed as to such work. (Clay [1837] 1896, pp. 38-39)

The cause of international copyright was a natural one for Bryant to pick up. His first editorial on the subject, on September 27, 1836, was titled “Copyright and Patent Right are Natural Rights.” Bryant asserted that if international recognition of patents were granted (as it had been), then international copyright should be granted for the same reason. But as his title indicates, the argument involved more than that:

In all ages and all nations of the world, the rights of an individual to the creations of his own labour or skill have always been considered sacred. ... On the same basis rests an author’s right of property in the book which he draws from the resources of his mind, and prepares with labour both of the hand and the head. On the same basis, also, rests the right of the inventor to the productions of his own ingenuity. These are natural rights, not rights created by law; not rights growing out of kingly grants, or the preponderance of might over justice. (Bryant 1836, in Bryant II 1994, p. 58)

The consistency, to Bryant’s mind, of international copyright with the other applications of the free labor ideal hardly requires comment. What is worth remarking is how constant remained Bryant’s support for the measure through all the years of debate over it. Senate Bill 223 was laid on the table, and no other bill made any further progress until Congress’s ultimate acceptance of international copyright in 1891 – by which time Bryant and the other original proponents were long dead. From 1836 until the end of his life in 1878, however, Bryant made several more attempts. More editorials followed. Bryant organized the American Copyright Club in 1842, and he remained in the forefront of the movement through an unratified copyright treaty with Britain in 1853, several unsuccessful bills, and numerous memorials presented to Congress.⁵

HENRY C. CAREY

Throughout most of the nineteenth century, opposition to international copyright and advocacy of protection was not built upon disavowal of the “natural law” tradition that underlay pro-copyright and free trade. Instead, protectionists and copyright opponents turned the very same rhetorical tables used by Bryant and his allies against them. The master of the art, and by far the most influential of Bryant’s adversaries, was Henry C. Carey.

⁵ E.g., “Memorials of John Jay and of William C. Bryant and Others in Favor of an International Copyright Law,” House Misc. Doc. No. 76, 30th Cong., 1st Session, April 29, 1848.

Early in his career and until his fifth decade, Henry Carey, like his father Matthew, was a Philadelphia publisher. Henry and a brother-in-law bought out Matthew Carey's interest upon his retirement in 1822; in that year M. Carey & Sons became the house of Carey & Lea. Thanks to Carey's industriousness the firm "ruled the Philadelphia booktrade" and sustained the city's rivalry with New York as center of the nation's publishing industry (Kaser 1957, p. 63; Lehmann-Haupt 1951, p. 120). Carey & Lea published a variety of books: the copyrighted works of American authors, like James Fenimore Cooper's *The Last of the Mohicans*, for which Carey paid Cooper \$5,000 in 1826; and reprints without copyright of foreign books, including the tremendously popular works of Sir Walter Scott (Kaser 1957, pp. 79, 95).

Most of the 930 books published by the firm from 1822 until Carey's retirement in 1838 were reprints (Kaser 1957, pp. 72, 115) – but that fact does not explain his opposition to international copyright. The reprint trade was sometimes lucrative, but it was always risky. The "courtesy of the trade" called for publishers to refrain from reprinting a foreign work once another publisher had made a newspaper announcement of intention to print it – but such courtesy was unenforceable by law and violated by habit (McGill 2003, p. 105). The business was a frenetic one in which publishers jockeyed for the first copies of British books to cross the ocean, and then raced without rest to typeset the works, print sufficient copies, and get them to the shops of Philadelphia, New York, Boston, and other northern towns. Mere hours could make the difference between spectacular success and utter failure, and "small fortunes could be made or lost in a single day" (Kaser 1957, p. 149). One strategy for success was to position agents wherever necessary along the route from London to the local bookshop, via the U.S. publishing house, to ensure a speedy transfer of the first available copies and rapid distribution of the reprints. Another was to invest in faster printing equipment or hire other printers. Yet another was to buy an advance copy from the British publisher, or to buy it directly from the author. If that and all else failed, one could just steal the advance copy. American publishers, not least Carey & Lea, used all of these methods (Kaser 1957, pp. 25, 95, 103). The firm was generally successful in its efforts, but it also suffered several losses, and suffered as well from a fierce battle of encroachment from upstart Harpers' (Kaser 1957, pp. 150-152). Carey's was not the kind of firm to prefer the slower pace of business that would have been obtained by an international copyright law – but absent his indomitable competitiveness, it is not obvious that the firm could not (or should not) have preferred it. One could argue, as advocates of

international copyright often did, that copyright of foreign works would stimulate demand for American substitutes – which, presumably, Carey & Lea would have supplied in greater numbers. If demand for American substitutes were indeed stimulated, Carey would have yet another reason to support international copyright: he was an unapologetic anglophobe who deplored Americans’ slavish imitation of, and preference for, British works. “We are bound up in the chains of intellectual slavery,” he scolded, “to a people far inferior to ourselves” (Carey 1853, p. 231). Finally, legislative initiatives for international copyright, beginning with Henry Clay’s bill of 1837, were routinely bundled with “manufacturing provisions” that, at a minimum, made copyright of foreign works contingent upon having them reprinted and published in the United States within a few months of their publication abroad (Barnes 1974, p. 63; Clark [1960] 1973, p. 44). More stringent provisions could have included, as they later did in the Chace Bill of 1886 and Platt-Simonds of 1891, an outright prohibition of commercial imports of copyrighted books. If Carey’s position on international copyright were determined by his former interests, one might have expected him to voice opposition if stringent manufacturing provisions were absent, and at least tepid support so long as they were included – as did Henry C. Lea, Carey’s namesake and scion of his former business partner (Clark [1960] 1973, pp. 136-143). But he made no such hedge.

To understand Carey’s opposition to international copyright requires more than recognition of his financial stake in the reprint trade early in his career. It requires inspection of his argument. At the root of his argument was a vision of the role of government that differed markedly from that of his intellectual opponents. Carey expounded that role most clearly in his rationale for tariff protection, which he advocated tirelessly and passionately from a few years after his retirement until the end of his life.

Carey on tariff protection and the role of government

The first work that Carey published, immediately after his retirement in 1838, was *Principles of Political Economy*. The *Principles* contains Carey’s main theoretical contribution, upon which he founded all the work in his remaining four decades: a detailed refutation of Ricardo’s theory of land rent. But in 1838 the theory did not yet lead him to protection. That happened in 1847, when, distressed by the Walker tariff reduction, Carey wrote in three months *The Past, the Present and the Future* ([1847] 1872; Elder [1880] 1883, p. 26). It was a justification of

protection built upon a self-contained system of historical and economic laws; it benefited from a young nation's experience of having watched the laws unfold in the compressed time of generations instead of centuries or millennia. Carey's system implied a harmony of interests between labor and capital that would exist but for "the interference of the laws of man with those of the Deity" ([1847] 1872, p. 311). In later books, *Principles of Social Science* (Carey [1858] 1883, vol. I, p. iii) and *The Unity of Law; as Exhibited in the Relations of Physical, Social, Mental, and Moral Science* (1872, p. ix), he claimed priority for the ideas articulated by Frederic Basitat, whose *opposition* to protection was founded similarly on a system of economic harmonies. To Carey, though, the protective tariff was not necessarily an interference with the laws of the Deity. In some places and times, and certainly in the United States, it was necessary to preserve their natural harmony.

The crux of his argument was to show that what was "natural," particularly in the settlement of land and the concentration of population, was not what political economists had theretofore believed. Here is where Carey took issue with Ricardo. Ricardo had proposed that the most fertile lands were settled first, and that as the population grew, less fertile lands came under cultivation while more rent accrued to the better lands' owners. "Mr. Ricardo's system is one of discords," Carey argued: if people married and multiplied, rents were raised and wages depressed; if the rights of property were respected, undeserved rewards accrued to the few and misery to the many. "His book," he pronounced, "is the true manual of the demagogue, who seeks power by means of agrarianism, war, and plunder" ([1847] 1872, pp. 74-75). But Ricardo's system was not only worrisome, it was wrong: "Mr. Ricardo's proposition is diametrically opposed to all the facts presented by the history of the United States: of England: and of the World" (p. 56). The proof was in the way that land settlement and population growth had proceeded naturally in the past, and the way it still proceeded. Ricardo, he claimed, was too far removed from the process to discern it (p. 24).

To read Carey one must think of pyramids. The pyramid is the abstract form of a mountain, Carey's point of reference for showing how settlement proceeds through time. It is also the abstract form of the proper relationships among families, communities, and nations.

Human settlement in any region, Carey explained, does not begin on the most fertile lands, as Ricardo had assumed, but on the lands that are easiest to clear with a minimum of technology. The first settlers of Massachusetts settled at rocky Plymouth and eked out a living

as best they could; in New York settlers first chose land high above the Hudson River instead of the fertile land at its bank ([1847] 1872, pp. 25-26). The more fertile is the land, the denser are its forests and swamps and the harder they are to clear. A community of early settlers who are sparsely concentrated and produce little surplus food are hardly able to tame wild forests and swamps with their scant time and primitive techniques. Nor do they have the luxury to study new techniques. Therefore they choose sites that are midway or near the top of a mountain or hill, not in the river valley below.

Few people can concentrate on unfertile land, but as those few make halting improvements in their techniques of clearance and cultivation, they can at once move down the mountain to the superior land and support a greater population. With a greater population, a smaller proportion of it is needed for cultivation – so many more minds can be employed in devising better techniques ([1847] 1872, p. 25). In addition techniques improve not only because more minds are devoted to their improvement, but because the minds are made more productive by their collaboration. Better techniques of clearance and cultivation allow the community to move on to still better soil, and even to improve the inferior soils – which permits more population growth, and so on. Rent increases with population growth, but not as Ricardo imagined. More rent is paid for the newly cultivated land, not the old: it is the reward to its cultivators of its greater fertility, made possible by the community's accumulated improvements in techniques (p. 62).

Further improvements make the community still more concentrated and wealthy. Its citizens move back up the side of the mountain from which they descended, cultivating with improved techniques the land they once abandoned and diversifying their occupations and trade with one another. As they grow wealthier they begin to profit from intercourse with other communities – primarily those nearby, and gradually and to a lesser extent those more distant. Each mountainside community now resembles spatially a pyramid, at the base of which the most land is cultivated most intensively. As each becomes more *concentrated* in terms of population, intensiveness of cultivation, and diversification of activities, so too does the group of them.

If, now, we take a bird's-eye view of these various communities, we shall see in each an infinite number of little pyramids, with heights proportioned to their breadth and depth. With the extension of the breadth of cultivation we have seen it rising in its height until it has advanced far up the steep hill-side; and on all sides we see it rising higher as it sinks deeper into the fertile soils of the valley below. ... With the establishment of intercourse

among these little communities, the tendency to union, so well begun in each, is seen to spread. Each grows in wealth and population, and intercourse becomes more frequent; and next we find them all combining for the making of roads, or canals, the founding of colleges, and other works calculated to promote the common good. The union becomes more complete: ... General laws now embrace the whole of the various societies constituting this pyramid, which now surmounts the whole. (Carey [1847] 1872, p. 286)

In the last sentence the pyramid of the mountainside community transfigures into a pyramid of social organization. The rationale of protection lies in both. At the base of the social pyramid are each community's many family units. Each family, organizationally, is a pyramid in itself – and each, crucially, is inward-looking. Husbands, wives and children are more concerned with the welfare of their family than they are with that of the larger organizational pyramids comprising it ([1847] 1872, pp. 287-289). Nevertheless, to build local roads, schools, libraries and churches, families will combine to form a community, which is similarly concerned principally with the welfare of its constituents. Communities, too, in order to build highways and canals, will combine to form a state; states will form nations; and, presumably, nations will form alliances. But the natural tendency of each organizational unit is to look primarily inward (downward from its apex, as it were); and the natural order of authority cedes successively less of it to successively larger units. Each unit derives advantages from, but does not concern itself disproportionately with, the larger union of which it is a member. *Concentration* – of productive power, in geographical space – Carey favored. *Centralization* – of authority, in organizational space – he condemned (pp. 289-290).

To Carey, any inversion of the relations within and among the pyramids would be an interference in the natural order and would erode the wealth of the whole. Exactly such an inversion, he argued, would result in the United States without tariff protection. Europe's demand for produce, combined with the abundance of land in the United States, already encouraged people to disperse too widely. Too many Americans cultivated poor soils and traded their produce with distant buyers when they should have concentrated on rich soils, diversified their activities within smaller geographic areas, and traded with their neighbors. To illustrate he pointed to the rich meadows of Pennsylvania, between the manufacturing centers of Pittsburgh and Philadelphia, which remained covered wastefully with timber while pioneers migrated west to cultivate dry prairies ([1847] 1872, p. 298). It might appear that the pioneers moved *en masse* because manufactures were acquired cheapest by interregional and international specialization

and trade. But the appearance is deceptive, Carey held, and the relation unnatural. “In a natural state of things, the people of the United States can manufacture more cheaply than any nation of the world. ... All that is wanted is that the shoemaker with his lapstone shall be *permitted* to take his place by the side of the hides and the food, as he would long since have done but for the existence of a disturbing force of prodigious power” (p. 470). If people are concentrated and their activities diversified they will have more of both manufactures and produce, shoes and food. Their concentration ensures that they will have the techniques and the impetus to cultivate the most fertile soil; its fertility will feed a diverse manufacturing community that develops the techniques. If unnatural commercial opportunities encourage them to settle differently, they will have less of both.

Hence the need for tariff protection. “Concentration, even to its present extent, cannot be maintained without protection ... we must arrest the progress of depopulation and promote concentration upon rich soils, and that can be done only by increased protection” ([1847] 1872, p. 469). And to those who would complain about the negation of “free trade,” Carey responded that far from negating it, protection enabled it. By *permitting* the farmer to stand side by side with the shoemaker (*italics* Carey’s), protection sustains the natural geographic, commercial and social order, without which “every attempt at the establishment of freedom of trade must be a failure” (p. 470).

Protection was perhaps the most important function that a government would serve in Carey’s system while filling its appropriate role, but there were several others. Among them: constructing turnpikes and even footpaths; building aqueducts; coining money; establishing standards of measurement; surveying land; studying and giving public notice of the weather; keeping records of births, marriages, and deaths; levying property taxes to provide public schools; regulating the city’s suppliers of gas; caring for the blind, deaf, and dumb; draining marshes; establishing a postal service; and disseminating new technologies of agriculture (Carey [1858] 1883, vol. III, pp. 410-414). How were all these functions related? Given the “identity of physical and social laws” ([1858] 1883, vol. I, p. vi), it was possible to state the unifying principle in physical terms – and to do so not just metaphorically. The appropriate relation of the state to the populace was identical to the relation of the head to the body:

In all these cases, the political head does exactly that which, as we have seen, has been provided to be done by the physical one – co-ordinating the movements of the various

members of the society in such manner as to remove the obstacles which stand in the way of association, and prevent that diversification of the employments of society which is required for adding value to land and labor, and giving freedom to man. The more perfect that co-ordination, whether in the physical or social body, the more complete must be the development of all the parts, and the more harmonious that action of the whole. (Carey [1858] 1883, vol. III, p. 414)

In brief, the legitimate role of government – in trade policy, and likewise in other policies – was to ensure *concentration* without *centralization*, and to ensure consequently the diversification of industry, thus enabling “people of all ages and sexes to combine their efforts for increasing the productiveness of labor” ([1858] 1883, vol. III, p. 441). Carey anticipated the objection that such a role would appear limitless, and answered it:

Are there, then, no proper limits to the sphere of action of those who guide and direct the commerce of the State? There are – *their whole duty being found in the removal of the obstacles to perfect combination*. Going beyond that point, government leaves its proper sphere – doing then mischief in place of good. ([1858] 1883, vol. III, p. 441, italics Carey's)

Peter Boettke and Steve Horowitz (2004, pp. 10-15) ascribe to Friedrich List a conception of the role of government nearly identical to Carey's. The correspondence is no coincidence: List and Carey were near-contemporaries, were fellow Pennsylvanians during List's periods of residence in the U.S. from 1825-1830 and 1831-1832, and were both influenced by Carey's father (O'Connor 1944, pp. 29-36). Based on a “stages” philosophy of history, the conception held that the advancement of society from one stage to the next required active government policies to foster industrialization. The role of the economist that emerges in consequence of such a perceived role of government, as Boettke and Horowitz put it, is that of “savior”: the economist designs, articulates, and even advocates policies to foster economic development. Carey played precisely that role, as accounts of his life and work acknowledge.⁶ Rarely acknowledged and less understood is how Carey viewed the government's role to be circumscribed, and how he continued to fill the role of economist as savior while articulating the limits rather than the expanse of appropriate government policy.⁷ One area of policy beyond the appropriate reach of government was international copyright.

⁶ E.g. Rodney J. Morrison (1986, pp. 36, 81-83).

⁷ Again see Morrison (1986, p. 37), who concedes the difficulty of demarcating the sphere of government in Carey's system.

Carey on international copyright

Increasing the productiveness of labor, Carey believed, required tariff protection. To be precise it required the dissemination of knowledge, and tariff protection was an indirect means of fomenting the dissemination. But even as protection served its function, bad policies in other areas could inhibit knowledge transfer. International copyright was one such policy.

Peter Temin (2000, pp. 110-111, 116-119), quoting a British visitor to New England factories in the mid-nineteenth century, recalls the astonishment with which such visitors viewed the quality of industrial machinery in what was primarily an agricultural nation. The United States was advancing upon and even surpassing Britain technologically. The American System of Manufactures, comprising interchangeable parts that were manufactured by gauged, replaceable machine tools, figures importantly in Temin's explanation of America's technological advancement. So too does stable government, clear laws, a cleverly designed protective tariff, a general commitment to public education, and the incentive to innovate provided by patents. His explanation might be distilled to this: the incentive in nineteenth-century America to create and apply new ideas, and the facility of disseminating them (with emphasis placed, perhaps, on the former).

Carey would have disputed none of the items in Temin's list. In fact, Carey inquired similarly into the causes of America's technological progress nearly a century and a half before Temin – even quoting an amazed British visitor to highlight the extent of the country's advancement. But the quotation Carey chose packed still greater punch. Always endeavoring to turn his opponents own words against them, Carey quoted the great free-trade luminary of the era, Richard Cobden. Cobden described an America “where the people are more educated than they are here” in Britain; he also described the anxiety of another Manchester manufacturer that ““if we are to hold our own, if we are not to fall back in the rear of the race of nations we must educate our people to put them upon a level with the more educated artisans of the United States”” (Carey [1853] 1868, p. 84).

To Cobden, his manufacturer friend, and their American acolytes, Carey responded, “let them next ask themselves what have been the causes of this vast change in the relative positions of the two countries” (Carey [1853] 1868, p. 84). Like Temin, Carey avowed the importance of

incentives to create and apply ideas and the ease of disseminating them – but he reversed the emphases, concentrating on the latter. “Will not the answer be,” he asked, “common schools, cheap school-books, cheap newspapers, and cheap literature?”

Although Carey would not have disputed any of the items in Temin’s list, he would have added to it at least one more. American technological progress, Carey believed, was due in no small part to the particular form of U.S. copyright law. The law afforded copyright to U.S. residents but denied it to foreigners, thereby cheapening ideas in printed form and ensuring greater access to them.

The manifest reason for Carey’s opposition to international copyright was expediency. Carey estimated the additional cost, under international copyright, of the books read throughout the country would be seven million dollars per year, just for starters. But consistency demanded that Carey’s objection to international copyright should not be founded on expediency alone. It had to be founded on natural law; it had to be built upon the same fundamental principles that underlay his advocacy of protection. In 1837 Henry Clay had defended international copyright on principle, reporting that “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” (Clay [1837] 1896, p. 34). Carey had conversely to demolish it on principle. He would have to demonstrate that the rights of property, and the system of “physical and social laws” more generally, did *not* justly require international copyright, but rather its absence. Expediency without principle would not do, he admitted (Carey [1853] 1868, p. 21).

Carey justified his position by arguing that the rights of the property owners and the rights of authors, equated by Clay, were in truth not equal at all. Ideas could never be legitimately considered individual property: individuals made only marginal and incremental improvements to prior authors’ ideas, which ideas were the common property of all.

The question is often asked: Why should a man not have the same claim to the perpetual enjoyment of his book that his neighbor has in regard to the house he has built? The answer is, that the rights of the parties are entirely different. The man who builds a house quarries the stone and makes the bricks of which it is composed, or he pays another for doing it for him. When finished, his house is all, materials and workmanship, his own. The man who makes a book uses the common property of mankind, and all he furnishes is the workmanship. Society permits him to use its property, but it is on condition that,

after a certain time, the whole shall become part of the common stock. (Carey [1853] 1868, pp. 32-33)

Because intellectual property is legitimately owned by the entire community, the “copyright” of an individual to his written work, Carey averred, is a misnomer. He did not deny that the community may find it expedient to guarantee the author, in order to give him added incentive to produce his work, a temporary monopoly in the reproduction of it. But the monopoly should not be construed as a right; it is a privilege. “The day has passed, in this country,” Carey wrote, “for the recognition of either perpetuity or universality of literary *rights*.” He insisted, instead,

that literary *privileges* exist in virtue of grants from the people who own the materials out of which books are made; that those privileges have been perhaps already too far extended; that there exists not even a shadow of reason for any further extension; and that to grant what now is asked would be a positive wrong to the many millions of consumers, as well as an obstacle to be now placed in the road towards civilization. (Carey [1853] 1868, p. 13, italics his)

But Carey did not only deny that international copyright was prescribed by the system of physical and social laws. He asserted that the *absence* of international copyright was *required* by the system. A question nags: given his concern about impediments to the dissemination of knowledge, why did Carey inveigh against international copyright with such vehemence but utter hardly a word against domestic copyright? Put differently: why are impediments to the transfer of *foreign* knowledge so particularly pernicious that they warrant discrimination against foreign authors and publishers? Absent an answer, his agitation over international copyright would appear overwrought, and perhaps just a veil for special interests.

Carey did have an answer, and it lay in his distinction between the (beneficent) *concentration* of productive resources in geographic space and the (baneful) *centralization* of authority in organizational space once more entered his argument. “Centralization,” he held, “tends towards taxing the people for building up great institutions at a distance from those who pay the taxes” (Carey [1853] 1868, p. 58). The “taxes” supporting the institution of the literary marketplace were paid in the form of monopoly rents to copyright holders. To Carey, international copyright, which would subject the citizens of America and Britain to copyright laws that encompassed them all, was a perfect example of centralization: monopoly rents would be paid disproportionately by Americans in a literary marketplace dominated by the British.

Decentralization, conversely, would entail each country regulating its literary institutions independently: “English authors are already secured in a monopoly for forty-two years among a body of people so large that a contribution of a shilling a head would enable each and all of them to live in luxury; and if British policy prevents their countrymen from paying them, it is to the British Parliament they should look for redress, and not to our Executive” (Carey [1853] 1868, pp. 57-58).

Centralization, moreover, was attended by its doppelgänger, deconcentration – as decentralization was attended by concentration, and all of its concomitant benefits. Specifically, “[t]he rapid advance that has been made in literature and science,” Carey maintained, “is the result of the *perfect protection* afforded by decentralization” ([1868] 1883, p. 85, italics his). Thus was the absence of international copyright, and the resulting discrimination against foreign authors, requisite to the role of government. The particular exclusion of foreign literary and scientific works from domestic copyright – like the particular exclusion of foreign goods from domestic markets – promoted the combination of efforts and sharing of knowledge, thereby fostering technological progress and growth of the productivity of labor. The analogy is not perfect: Carey neither anticipated nor hoped that discrimination against foreign authors would keep out foreign ideas in the manner that tariff protection would keep out foreign goods. Rather the opposite. What matters is that for the intended ends of both policies, national discrimination was vital, not merely collateral.

Having advanced his ideas, Carey was in a position to answer the concerns of those of his allies who, like Clay, might be led erroneously to believe that the bedrock principles of protection demanded an international copyright agreement. Concerning the Anglo-American International Copyright Treaty of 1853, which provided for national treatment in each country of copyright holders from the other country, Carey wrote:⁸

[The treaty’s] confirmation is, as I understand, urged on some senators on the ground that consistency requires it. Being in favor of protection elsewhere, they are told that it would be inconsistent to refuse it here. In reply to this, it might fairly be retorted that nearly all the supporters of international copyright are advocates of the system called, in England, Free Trade; and that it is quite inconsistent in them to advocate protection here. To do this would however be as unnecessary as it would be unphilosophical. Both are perfectly consistent. Protection to the farmer and planter in their efforts to draw the artisan to their

⁸ The treaty is found in Senate Confidential Ex. Doc. No. 6, 32nd Cong., 2nd sess., Feb. 24, 1853, and is the culminating subject of Barnes (1974, chs. XI-XII).

side, looks to carrying out the doctrine of decentralization by the annihilation of the monopoly of manufactures established in Britain; and our present copyright system looks to the decentralization of literature by offering to all who shall come and live among us the same perfect protection that we give to our own authors. What is called free trade looks to the maintenance of the foreign monopoly for supplying us with cloth and iron; and international copyright looks to continuing the monopoly which Britain has so long enjoyed of furnishing us with books; and both tend towards centralization. (Carey [1853] 1868, p. 85)

Carey's opposition was pivotal in sinking the treaty (Barnes 1974, pp. 252-261). In an attempt to quell the opposition that Carey stirred up, the American negotiator proposed a manufacturing provision requiring republication in each country of works copyrighted in the other.⁹ But it proved to be either too little or too late. (Whether too little or too late for the U.S. Senate is unclear due to delays in trans-Atlantic communications. To Carey, certainly, the provision was too little.)

In at least one fundamental respect, Carey and Bryant agreed. International copyright was trade-related – and whether one was a free-trader and international copyright supporter or a protectionist and opponent, one's positions were, as Carey affirmed, “perfectly consistent.” The difference was that Carey's position on the tariff enjoyed the sympathies of the majority in Congress and was the established policy of the United States. For over half a century preceding 1891, through dropped or deferred legislation ranging from the Clay Bill of 1837 to the Anglo-American Treaty of 1853 and the Chace Bill of 1886 (among others), the interests of readers and printers, wedded to prevailing protectionist sympathies by the ideas of Carey and his allies, kept international copyright at bay.

CONCLUSION

The recent surge of concern over TRIPs has produced ripples of interest in the history of intellectual property institutions and their consequences to the development of emerging economies. Economists have asked whether the premise that intellectual property is trade-related, and the consequent incorporation of intellectual property chapters into bilateral, regional, and multilateral / non-preferential trade agreements, works to the benefit or detriment of developing countries. By investigating the evolution of intellectual property rights and their

⁹ The proposed amendment is found in Senate Confidential Ex. Doc. No. 6, 33rd Cong., 2nd sess., Jan. 24, 1854.

economic consequences in the now-developed countries, economic historians have attempted to provide answers.

The historical interest has not extended, however, to the *intellectual history* of the trade-relatedness of intellectual property rights. My purpose has been to show how, in the United States, one form of intellectual property was perceived to be trade-related a century and a half before TRIPs. The debate over international copyright, sustained from the mid-1830s to 1891, ran parallel to the tariff controversy, which preceded and outlasted it.

I have argued that advocacy of free trade generally implied support for international copyright, while advocacy of protection implied opposition to international copyright. There were numerous exceptions to the rule – yet many of the apparent ones could more accurately be said, upon closer scrutiny, to confirm it. Democrats opposed the Platt-Simonds Copyright Act of March, 1891, for instance, and protectionist Republicans supported it. But the arguments employed on both sides demonstrate that opponents voted against the Act, despite their advocacy of international copyright, because they perceived one of its manufacturing provisions to be a highly protectionist measure; while supporters voted for the Act exactly because they shared that perception, and declined to vote for it at all if the provision was removed.

The connections between the free trade and pro-international copyright positions on one hand, and protection and anti-international copyright on the other, are manifest in the arguments of William Cullen Bryant and Henry C. Carey. Both men were prolific thinkers, authors, publishers, and advocates, and each was in the vanguard of his chosen side in both debates. Each pair of positions was cemented by the role of government in the advocate's system of thought. To Bryant, free trade and international copyright were policies consistent with a government whose role was to secure free labor. To Carey, protection and opposition to international copyright were policies consistent with a government whose role was to promote the diversification of industry and advancement of the productivity of labor.

What is the relevance of all this to the present? While the economic history of TRIPs may be of use in prescribing beneficial intellectual property institutions for developing countries, the intellectual history of TRIPs more likely to be useful for different ends. The ideas proffered by the likes of Bryant and Carey influenced the course of policy at once by giving voice to political and economic interests and influencing popular perceptions of those interests. Intellectual history thus offers a means of considering the political and ultimately the economic

consequences of economic rhetoric – in the nineteenth century, and perhaps by analogy today. The questions that I would like to pose are, What may be the political and ultimately the economic consequences in *developed* countries of TRIPs? What is to be gained or lost by pressing vigorously for the inclusion of more rigorous intellectual property provisions in multilateral, regional, and bilateral trade forums, as the United States has sought to do from the GATT and WTO to the NAFTA, the U.S.-Chile Free Trade Agreement, the Central America-U.S. Free Trade Agreement, and the proposed Free Trade Agreement of the Americas? History reminds that the intellectual bundling of free trade and intellectual property has been done before. What might be its repercussions?

Free traders failed repeatedly for sixty years after the end of the Civil War to reduce the average tariff to its immediate pre-war level. They failed despite a making a case that, by comparison to the one made for free trade today, was compelling. Specifically, when applied to the tariff controversy, free labor principles effected an anti-monopoly argument for trade. Free trade, its advocates argued, would eliminate the special privileges granted to producers in specific industries, most notably cotton goods, iron, and steel. It would promote competition, lower prices, and raise consumers' real incomes.

In the quotation just preceding this Conclusion, Carey attempted to turn the tables on the free traders: he argued that free trade promoted monopoly, and protection mitigated it. His conviction was sincere – but that particular part of his argument was unpersuasive, and relatively few of his followers bothered to repeat it. He was much more persuasive, however, in arguing that *international copyright* promoted monopoly.

In the face of the latter argument the free trade and international copyright proponents were put on the defensive: “This is a very erroneous view of the matter,” Bryant retorted:

A copy-right law instead of being a monopoly, is the very reverse. A monopoly is a legislative grant, to an individual or association, of exclusive or peculiar privileges or immunities denied to the rest of the community. A copyright law, on the other hand, confers no new privilege or immunity, but absolutely takes away a portion of an author's right of property in a work of his own creation, and renders no equivalent, except the mere guarding the remainder with some special provisions. (Bryant 1836, in Bryant II 1994, p. 57)

Here Bryant's argument is the less persuasive one. One wonders whether the tireless advocacy of international copyright by free traders like Bryant – who framed the cause as one

inextricably related to free trade – hindered the advancement of their principal cause. The long-awaited sweeping tariff reductions were deferred until 1913. Might the wait have been shorter if the anti-monopoly credentials of the free trade advocates had not been called into question?

References

- Barnes, James J. 1974. *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement, 1815-1854*. Columbus: Ohio State University Press.
- Bateman, Bradley W. 2004. "Bringing in the State?: The Life and Times of Laissez-Faire in the 19th Century United States." *Paper for the 2004 HOPE Annual Conference*: Durham, NC.
- Bhagwati, Jagdish. 2004. "Free Trade After Cancún." *Foreign Affairs* 83 (1): pp. 52-63.
- Boettke, Peter and Steve Horowitz. 2004. "The Role of the State in Economic Development: Formalism, Institutions and the Economist as Savior." *Paper for the 2004 HOPE Annual Conference*: Durham, NC.
- Brown, Charles H. 1971. *William Cullen Bryant*. New York: Charles Scribner's Sons.
- Bryant II, William Cullen ed. 1994. *Power for Sanity: Selected Editorials of William Cullen Bryant, 1829-1861*. New York: Fordham University Press.
- Bryant, William Cullen. [1808] 1947. The Embargo. In *The Poems of William Cullen Bryant*, ed. by Louis Untermeyer. New York: The Limited Editions Club.
- Carey, Henry Charles. 1853. "Note from Henry C. Carey." *Putnam's Monthly Magazine of American Literature, Science, and Art* 2 (8): pp. 229-231.
- Carey, Henry Charles. 1872. *The Unity of Law; as Exhibited in the Relations of Physical, Social, Mental, and Moral Science*. Philadelphia: Henry Carey Baird.
- Carey, Henry Charles. [1847] 1872. *The Past, the Present, and the Future*. Philadelphia: Henry Carey Baird.
- Carey, Henry Charles. [1853] 1868. Letters on International Copyright. In *Miscellaneous Works of Henry C. Carey*, ed. by William Elder. Philadelphia: Henry Carey Baird & Co., 1883.
- Carey, Henry Charles. [1858] 1883. *Principles of Social Science*. Philadelphia: J. B. Lippincott & Co.
- Carey, Henry Charles. [1868] 1883. Letters on International Copyright. In *Miscellaneous Works of Henry C. Carey*, vol. 1, ed. by William Elder. Philadelphia: Henry Carey Baird & Co.
- Chang, Ha-Joon. 2001. "Intellectual Property Rights and Economic Development: Historical Lessons and Emerging Issues." *Journal of Human Development* 2 (2).

- Chang, Ha-Joon. 2002. *Kicking Away the Ladder: Development Policy in Historical Perspective*. London: Anthem Press.
- Clark, Aubert J. [1960] 1973. *The Movement for International Copyright in Nineteenth Century America*. Westport, CT: Greenwood Press.
- Clay, Henry. [1837] 1896. Henry Clay's Report In Favor of International Copyright. In *The Question of Copyright*, ed. by George H. Putnam. New York: G. P. Putnam's Sons.
- Elder, William. [1880] 1883. A Memoir of Henry C. Carey. In *Miscellaneous Works of Henry C. Carey*, vol. 1, ed. by William Elder. Philadelphia: Henry Carey Baird & Co.
- Godwin, Parke. 1883. *A Biography of William Cullen Bryant, With Extracts From His Private Correspondence*. New York: D. Appleton & Company.
- Kaser, David. 1957. *Messrs. Carey & Lea of Philadelphia: A Study in the History of the Booktrade*. Philadelphia: University of Pennsylvania Press.
- Khan, B. Zorina. 2004. *Does Copyright Piracy Pay? The Effects of U. S. International Copyright Laws on the Market for Books, 1790-1920*. Cambridge, MA: National Bureau of Economic Research.
- Lehmann-Haupt, Hellmut. 1951. *The Book in America: A History of the Making and Selling of Books in the United States*. New York: R. R. Bowker Company.
- McGill, Meredith L. 2003. *American Literature and the Culture of Reprinting, 1834-1853*. Philadelphia: University of Pennsylvania Press.
- Morrison, Rodney J. 1986. "Henry C. Carey and American Economic Development." *Transactions of the American Philosophical Society* 76 (3): pp. 1-91.
- O'Connor, Michael Joseph Lalor. 1944. *Origins of Academic Economics in the United States*. New York: Columbia University Press.
- Putnam, George H. 1891. *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.
- Temin, Peter. 2000. The Industrialization of New England, 1830-1880. In *Engines of Enterprise: an Economic History of New England*, ed. by Peter Temin. Cambridge, MA: Harvard University Press.