Exposing the Processes of Empire in the International Protection of Intellectual Property

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Abstract

The foundational international documents of international intellectual property protection – the Berne Convention for the Protection of Literary and Artistic Works and the Paris Convention for the Protection of Industrial Property – were created within the economic, sociologic and political milieu of Nineteenth Century Neo-Imperialism. Neo-imperialism is only one narrative that helps explain the dissonant policy choices reflected in these documents concerning the scope of protection afforded patents and copyrights. It is a powerful one, nonetheless, because it places the empowerment of various actors in the debates over conflicting choices between protection and free access against the more complex, and yet more realistic, milieu in which protectionist choices were ultimately

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made. Such analysis demonstrates that the standards memorialized in the Berne and Paris Conventions did not represent an *inevitable* protectionist choice. Yet the narrative of imperialism, with its four major dynamic processes, had an undoubted impact, providing not only the philosophical analogues for emerging international standards, but also the institutional and regulatory webs necessary to place economic and political power in the hands of the actors and institutional governance structures that ultimately solidified generally protectionist policy choices. These imperialistic "processes of Empire" may not fully explain the choices made, but they, nonetheless, shed a useful, new light on the normative values represented by the Berne and Paris Conventions. More importantly, they provide a strong warning about the role of economics and political expediency in the creation of domestic and international intellectual property standards. The roots of Empire run deep in the present intellectual property system. If the increasing protection of intellectual property in the 21st Century is a vestige of Neo-Imperialist protectionist policies, so too, is the treatment of the public domain as an "unmarked' territory with no prior claimants or pre-existing boundaries. By exploring the continuing impact of the process of Empire on today's international standards, we can hopefully avoid imposing our own unhelpful "civilizing" messages of the future.

Introduction

As a former attorney advisor for the US Patent and Trademark Office actively involved in the negotiation of various bilateral and multilateral intellectual property treaties,[2] I have always been interested in the process by which international standards are established. When it comes to international normative documents, as with all other legal instruments,

[2]The views expressed in this Chapter are my own and do not reflect the views of the U.S. Government or any of its agencies or personnel.

text is not the full story. Neither is the reinterpretation of events by third parties or the rhetorical shorthand into which such re-interpretations often morph. Textual analysis, including the historical and philosophical development of the norms represented by a particular treaty provision, along with its negotiating history, may help illuminate the nature of the competing choices, but it does not adequately explain why one normative standard was selected over another. In the Twentieth Century the role of lobbyists and other private economic actors in the normative selection processes for TRIPS has been well analyzed. Such lobbyists and economic actors (or at least their Nineteenth Century equivalents) were also engaged in the negotiation of the original versions of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the Paris Convention for the Protection of Industrial Property (Paris Convention). But this simple explanation does not answer the critical question of why the strong anti-patent and anti-copyright movements of the Nineteenth Century had only a slight impact on the ultimately protectionist tendencies of these treaties.

Among all the international instruments that have governed intellectual property protection standards, the Berne and Paris Conventions stand virtually alone in their continuing impact on present-day protection debates. Both represent the first major plurilateral agreements in their respective fields of protection – copyright for the Berne Convention, and patents for the Paris Convention. Their substantive obligations are incorporated into TRIPS, virtually *in toto.* More significantly, both appear to represent policy choices that place protectionism over access. In short, they represent the beginning of a trend toward increasing intellectual property rights that has not yet subsided.

To discern the processes which resulted in, or more appropriately empowered, the choices among the divergent policies of protection and access that resulted in this trend toward increased protectionism, this Chapter takes the results of combined contextual and sociological analyses and examines them against the historical-political processes of Nineteenth Century Neo-Imperialism, as explicated by the evolving field of Empire Studies. The impact of imperialism on international law is not a new field of study. But the focus of such studies has been on the subject of either the impact of the colonizer's laws and practices on the colonized (Benton 2002, Schmidhauser 1992) or on the international rules regulating colonization in its various permutations. (Kautsky 1961, Anghie 739) This Chapter instead analyzes imperialism as its own narrative in order to examine the extent to which this narrative affected domestic and international policy choices for the *colonial* powers in connection with intellectual property rights. While such policy choices undoubtedly impacted colonized lands, they were themselves impacted by the processes and policies which arose in response to colonization as part of the narrative of imperialism. Thus, although the narrative of imperialism is viewed largely from the point of view of the colonizer, the processes which form the major strains of this narrative reflect, to varying degrees, the interactions between colonial powers and their colonies. (Hardt & Negroni 2000, 127-132)

Crafting a narrative of imperialism necessarily requires a definition of what qualifies as "imperialism." A message written by George Bernard Shaw on behalf of the Fabian Society may best demonstrate the complexity of this task. Shaw wrote: "The forthcoming General Election will turn, we are told, mainly on the popularity of Imperialism. If this be so, it is important that voters should make up their minds what imperialism means." (Shaw

1900) For purposes of this Chapter, I have defined it as the policy and processes by which Empire was achieved and maintained during the latter decades of the 19th Century, mostly by the Western countries, although Asian countries, such as Japan and China, also represented significant Empires during this period. (Kagan 2003)

Domestic dissonant policy choices, or more specifically the empowerment of certain actors over others in policy debates, may be explained in part by the economic and sociological upheavals of the middle decades of the Nineteenth Century and the creation of institutional systems where the regulatory modeling of certain actors answered perceived economic imperatives. John Braithwaite's and Peter Drahos' foundational study *Global Business Regulation*, while focused primarily on globalization during the post World War II era, underscores that the outcome of any particular political battle over conflicting normative standards is the result of a multiplicity of factors, including the critical role of modeling and the subsequent adoption of certain models as the dominant acceptable narrative of regulation. (Braithwaite & Drahos 2000)

More directly related to the topic of this Chapter, Markus Lang convincingly demonstrates in his paper *The Anti-Patent Movement Revisited: Institutional Change and Cognitive Frames in the Nineteenth Century* that part of the reason for the failure of the German anti-patent movement was the empowerment of industrial lobbyists. This empowerment resulted from the economic upheavals caused by the European financial crisis of 1873 (and the subsequent depression), and the lobbyists' ability to provide regulatory frameworks that coincided with values that supported institution-building efforts to combat such upheavals. (Lang 2010) Yet *domestic* processes do not fully explain the *international* choices made with regard to the Berne and Paris Conventions. To the

contrary, many provisions actually represented a critical advance over existing domestic normative structures. These advances can be explained, at least in part, through other processes of empowerment beyond, or in addition to, those that influenced domestic policy choices.

The processes of Empire reflected in the Neo-Imperialism of the Nineteenth Century forms a useful lens through which to examine the policy choices reflected in the normative standards of the Berne and Paris Conventions because it illuminates the role Neo-Imperialism played by providing, not only the philosophical analogues for emerging international standards, but also the institutional and regulatory webs necessary to place economic and political power in the hands of actors and institutional governance structures that helped solidify generally protectionist policy choices. While the processes of Empire do not fully explain the choices made, they shed new light on the normative choices represented by the Berne and Paris Conventions and warn of the role economics and political expediency can play in resolving today's dissonant policy debates.

I. Dissonant Choices and Multinational Institution Building

Behind traditional legal analysis of the philosophical and normative frameworks of international treaty provisions lie deeper sociological investigations about the factors that result in a particular choice among dissonant normative standards. Legal standards, even those contained in multinational agreements such as TRIPS, are inevitably the result of choices made within political processes and institutional governance structures within which such choices are effectuated. In studying the history of Nineteenth Century international intellectual property standards memorialized in the Berne and Paris Conventions, it becomes clear that the standards contained in those instruments did not

represent any inevitable protectionist choice on behalf of the negotiating parties. To the contrary, combining traditional legal contextual analysis with socio-political theories of modeling, dissonant harmonization and valuation studies demonstrate that many standards contained in the Berne and Paris Conventions represented choices among conflicting policies that were *not* consistently protectionist in nature.

While some form of empowerment in the form of Nineteenth Century "bargain linkage" equivalents to that which occurred during the negotiation of TRIPS, described by Michael Ryan in his work *Knowledge Diplomacy*, might have occurred, there is little historical evidence to demonstrate any such concurrence of interests between those that were most actively involved in the Paris Convention and its impact on innovation protection, and those involved with the Berne Convention, and its more precisely focused trade protection for copyrighted works. (Ryan 1998) The two treaties were not negotiated as part of a whole or even along obvious parallel tracks. There is some confluence in the interrelationship between the Romantic Creator and the Heroic Inventor (described more fully later in this Chapter) in supporting those seeking greater protection for copyright and patent, respectively. (Pettitt 2004) But such domestic confluence does not appear to result in any apparent perception that the two treaties were inevitably linked to one another.

Similarly, the structural modalities of power explicated in Susan Sell's *Private Power, Public Law* help explain the political empowerment of private actors, including multinational corporations, in the later decades of the Twentieth Century. (Sell 2003) Such private actors arguably lacked the same level of power during the Neo-Imperialism of the Nineteenth Century, when the sovereign was *perceived* to be all powerful. Yet *perception* was not always *reality*. In describing the processes that led to the "globalization of

intellectual property rights" in the latter decades of the Twentieth Century, Sell recognizes the interconnected nature between actor empowerment and institutional modeling:

> When private actors need the state to promote their interests, they must present their interests in a way that appeals to policymakers in furthering the goals of the state. This is especially true in multilateral negotiations in which nation-states, not private actors, have standing. In this case, the IP lobby was particularly effective in translating their private interests into a matter of public interest. Conscious that the U.S. government was increasingly worried about its burgeoning trade deficit and its ability to compete internationally, the IP lobby astutely packaged its demands as a solution to America's trade woes.

(Sell 2003, 99) Such "packaging" by certain private economic actors during the Nineteenth Century similarly explains the general victory of protectionist approaches to the equally forceful choice of free access put forth by other actors. But while Neo-Imperialism helped shape certain protectionist choices, it also moderated to some extent at least the perceived power of private actors in the face of an over-arching theory of political sovereign power. Nineteenth Century Neo-Imperialism also created relatively new institutional structures that enabled the selection of policy choices that were at variance with domestic ones.

This Chapter is not designed as a review of colonialism or Empire during the Nineteenth Century. To the contrary, it utilizes major cultural, political, and economic dynamics of Neo-Imperialism as the normative and institutional backdrop against which dissonant theories of protection were valued and empowerment choices made. The discussion of Neo-Imperialism is necessarily short and focuses on the four dynamic processes of Empire that most directly impacted the normative standards memorialized in the Berne and Paris Conventions. (Long 2010). The impact of other processes, and other intellectual property rights beyond copyrights and patents, awaits further study.

II. The Pre-Empire "Patchwork" of International Intellectual Property Protection

Domestic intellectual property protection during the early decades of the 19th Century has been described as a "patchwork." (May & Sell 2006) Some countries, such as France under its 1852 revision, extended copyright protection to foreign authors regardless of the protection offered by other countries. (French 1852) Others, including the United States, provided no protection for foreign authors. (U.S. 1831) Still others, such as Canada, protected works that were first published in their territory regardless of the nationality of the author. (Seville 2006)

Patent protection was equally inconsistent. The Netherlands abandoned an earlier patent protection scheme under the theory that any such protection was "an obstacle to the growth of industry." (May & Sell 2006, 112) Without such protection, the Dutch could produce goods of equal quality at lower cost. The Swiss similarly eschewed patent protection during the early decades of the Nineteenth Century. By contrast, the United States granted patents to *inventors* while Great Britain granted patents to British citizens who either invented new technology or *imported* foreign technology. This latter development was designed to maintain Britain's perceived technological advantage from its Industrial Revolution. (May & Sell 2006)

In today's parlance, describing legal protection as a "patchwork" generally leads to efforts to replace the patchwork with some form of unified protection. Such efforts were clearly undertaken in the 19th Century in connection with intellectual property rights. But a "patchwork" also indicates that different actors were successful in achieving precedence in different countries. Dissonant valuation was possible at the beginning of the Nineteenth Century; it was less possible at its end. Some of the factors behind this change were the

four major processes of Neo-Imperialism described in this Chapter that ultimately empowered those seeking more protectionist value choices.

III. Empire Nineteenth Century Style: Territory, Civilization and Power

At the heart of the concept of Empire, at least during the critical time period of the Nineteenth Century, is the exercise of control over other peoples or countries. Such control could be formal (via annexations, protectorates or military occupations) or informal (via economic control, cultural domination or threat of intervention). (Fry 1994) Earlier periods of Empire building focused largely on the territorial demands of colonization. (Kagan 2003) Territory and the rights of sovereigns to control activities within their "spheres of influence" remained a key factor in the Neo-Imperialism of the Nineteenth Century. Yet behind the race for territorial domination lay other goals of economic need and cultural expansionism that did not necessarily require direct political power over a particular region. These additional goals formed four major processes of power and policy that cut across the international boundaries of Nineteenth Century Neo-Imperialism. (Long 2010). They undeniably shaped the debates over the scope of protection afforded intellectual property rights. Yet despite the leveling effect of these processes, individual goals could still result in divergent policy choices among a range of empowered values.

A. The Hunt for "Raw Materials"

The period of Nineteenth Century imperialism was marked by growing industrial and commercial development fueled by expanding international trade between colonizers and their "colonies." (Hobsbawm 1987) The actual economic value of an Empire has been hotly debated. Regardless of whether or not Empire was ultimately profitable, during the Nineteenth Century, it is significant that at least one of its primary purposes was to bolster

the economic goals of the foreign dominators, regardless of the wants, desires or needs of the indigenous peoples living within the territorial borders of the "colonies." In connection with international intellectual property rights, this process is most directly reflected in the failure to accord protection to foreign technologies or indigenous works despite the growing use of the culture and stories of the Other in Western literature and advertising. (Long 2010) To the extent such works had commercial or innovative value, they were dedicated to the public needs of the colonizing country.

B. Seeking Markets for the End Products of Technology

In addition to serving as a source for raw materials, the colonies of the Nineteenth Century were used as foreign markets for the home country's finished goods. The creation of such foreign markets was not merely an incidental effect of increased commercial development. It was an express policy goal of Neo-Imperialism and reflective of one of its most dynamic processes in altering value choices and the empowerment of private actors. (Hobsbawm 1987)

The use of colonies as a source for export trade with the home country was prevalent in earlier waves of imperialism, most specifically the British and French treatment of their colonies in the New World. What changed the nature of imperialism in the Nineteenth Century, and impacted the selection of dissonant value choices in diverse fields, including intellectual property rights, however, was the blending of market necessity with a perceived moral imperative based largely on Western exceptionalism. This exceptionalism was reflected in the increasing number of technology expos hosted during the latter decades of the Nineteenth Century that paraded the results of technological progress as the inevitable public benefit of exceptionalism. These expos demonstrated the primary role of large

corporate actors, including emerging international businesses, in providing such progress. The new dominance of these large corporations served to empower them in the contested policy choices of protection and access and helped tip the balance in favor of protection. (Coulter 1991)

C. The "Civilizing" Message of Empire

What Niall Ferguson refers to as the "self consciously modernizing project" of the Victorian Era – to bring "Civilization" to the rest of the World, was, at least in public opinion and rhetoric, equally as important as the economic aims of Neo-Imperialism. (Ferguson 2004, xxvii) This civilizing message included the clear view that "progress" and the ameliorating effects of "civilization" were best secured by technological progress in lieu of traditionalism, and a choice of Western "values" over "backwards cultures." This message largely served to bolster actors seeking heightened protection to secure such "progress." (Long 2010)

D. Marking Unilateral Borders

The Neo-Imperialism of the Nineteenth Century was marked by a division of territory in the "uncivilized world" with little or no regard to historic or even ethnographic boundaries. This unilateral determination of what standards should impact developing countries is most clearly demonstrated by the ability granted colonial powers to bind their colonies to the policy choices made in the Berne and Paris Conventions, even though such colonies were not generally consulted about such adoptions, and in fact had made policy choices directly at variance with these new international standards. The binding by Great Britain of its colonies to the Berne Convention, for example, created a direct conflict with Canadian publication practices. These practices had created a vibrant domestic market in

US-authored works through a combination of residency and first publication rights. Giving up those practices in favor of British publishing interests remained a point of contention to the point where Canada denounced the Convention in 1889. (Seville 2006)

IV. Intellectual Property Regimes of the Nineteenth Century: Property, Sovereignty and "Civilization" Confirmed

Conflicting concerns among domestic actors regarding the impact of "free trade," access to knowledge and protection of worker interests over those of private multinational actors were not wholly resolved in the march to uniformity that the Berne and Paris Conventions represented. The leveling processes of Empire are undoubtedly reflected in the variety of advances over prior patchwork protection for intellectual property reflected in these Conventions. In critical areas regarding national treatment for foreign authors and inventors, these foundational Conventions replaced domestic variations with clear proscriptions against discriminatory treatment. Such prohibitions were enforced by the sovereign power of the dominant colonial powers. Yet such "advances" did not completely yield to the equally powerful narratives of sovereign authority over domestic laws. To the contrary, sovereign power to control registration and enforcement determinations allowed some dissonant policy choices to survive.

A. Advancing "Technological Progress" under the Paris Convention by Sovereign Persuasion.

The Paris Convention, signed in 1883, established the first multinational regime governing patents. On its face, it does ***not*** appear as a foundational normative instrument encapsulating the Neo-Imperialist message of inevitable progress through technology. The Paris Convention was only signed by 11 countries -- Belgium, Brazil, France, Guatemala,

Italy, the Netherlands, Portugal, El Salvador, Serbia, Spain and Switzerland. Yet the countries that signed the agreement did so with the power to bind their colonies even though such colonies played virtually no role in the negotiations. While Tunisia was one of the signatories to the Berne Convention and at the time was a protectorate of France, it is doubtful that it had an independent role in the negotiation of the Convention because its interests were represented by the same individual that represented France. (Ricketson & Ginsburg 2006) Yet a proposal to clarify that the Paris Convention would be automatically extended to the colonies ultimately was *not* included in the body of the Convention. Although the general practice of the Union formed under the Convention was to treat its provisions as automatically extended to "dependent" colonies, not every colony qualified for such treatment. To the contrary "dependent" colonies were those to whom the laws of the colonizing countries extended. (Paris 83, Art. 9) Autonomous colonies, by contrast, could become Members of the Union, but only by application for membership. (Paris 83, Art. 9) This relatively enlightened process is in direct contrast to the more unilateral approach of the Berne Convention, signed three years later.

Under Article 19, the Berne Convention expressly gave countries the right to accede "at any time for their Colonies or foreign possessions." (Berne 86, Art. 19) The critical role of trade in foreign works that formed such a fundamental aspect of the international negotiations regarding the Berne Convention, and in particular the contrary views that certain developing countries such as Canada held with regard to the legality of such trade, makes the imposition of unilateral choice one of the most troubling aspects of the impact of the processes of Empire on intellectual property harmonization. Where trade mattered, the colonizers' enforced their choices over other dissonant values. Thus, Canada's

domestic choice to protect foreign authors through residency requirements was overridden by Great Britain's desire to secure broader protection for British authors.

When the Paris Convention is compared to its sister agreement, the Berne Convention, it is clear that countries were less willing to create a detailed protection regime for inventions on an international basis. To the contrary, efforts in the early decades of the Nineteenth Century to craft domestic patent legislation were largely derailed by strong anti-patent movements in Germany and Britain. As Maureen Coulter demonstrates in her detailed analysis of the anti-patent movement in Victorian England, both pro- and anti-patent narratives varied as actors modified proposed regulatory models to fit perceived economic needs. (Coulter 1991) In its early stages, patent protection was actually conceived as helpful to the working man since "[i]nvention was regarded as the 'legitimate occupation' of the working man." (Coulter 1991, 55) Subsequent narratives emphasized the goal of rewarding inventive genius and the need to enable British companies to exploit fully their technological advances. (Coulter 1991, Pettitt 2004, Machlup & Penrose 1950) Anti-patent narratives not only disputed these views, using the rhetoric of Empire, they couched their challenge in terms of the adverse effect of patents on British industrial growth:

> The abolitionists contended that patents for inventions obstructed the free flow of information, restricted adoption of new technology and slowed the pace of industrialization… [J.E. Thorold] Rogers [an occasional Professor of Political Economy at Oxford]…emphasized the obstructive potential of patents, likening the patentee to a squatter on the public domain, "squatting upon materials and powers which are the property, not of individuals, but of the human race." … Most abolitionists were willing to concede that such artificial incentives [as patent protection] might have been necessary in pre-Industrial Britain…they argued that patents had served their purpose and now could be safely disposed of.

(Coulter 1991, 88-89) Thus, dissonant choices were voiced in the equally desirable goals of free trade and industrial growth. The ultimate empowerment of the protectionist narrative as the primary policy choice was driven in part by increasing multinational pressure to protect technology, particularly in connection with the increasing number of technology expos. For example, the Austro-Hungarian Empire adopted a temporary protection for foreign inventors to secure participation by US and German inventors in their 1873 World Exposition. (Seville 2006, 118 – 119) It was also driven by decreasing international support for "free trade" as the preferred economic policy of Neo-Imperialism. (Coulter 1991, Machlup & Penrose 1950)

While the British anti-patent movement arose in response to the adoption of statutory patent protection, and therefore served the role of a dissonant policy choice from established law, in Germany the anti-patent movement *was* the majority view. In fact, in 1863 several trade associations and chambers of commerce in Germany condemned patents of invention as "injurious to common welfare." (Machlup 1958, 4) Pro-patent proponents began in the minority as they sought to establish a patent regime during the Nineteenth Century. Interestingly, they turned British abolitionist arguments on their head. In the absence of patent protection, Germany had developed its domestic industries by imitating others people's goods. In a memorandum in support of patent protection, Wiener Siemens argued that imitative German products had gained a poor reputation in the global market, leading to lost exports. To regain market share it needed to develop, not only quality products based on foreign inventions, but also completely new products based on German innovation. Socialist concerns also played a role in supporting patent protection as supporters relied on the potential patents offered workers to escape from poverty, thereby

having a moderating social impact. (Machlup 1958) The anti-patent movement in Germany failed to sustain its position in the face of economic events, including the 1873 financial crisis that made free trade appear to be a failed policy. (Machlup 1958, Lang 2010, 19)

At the heart of these dissonant choices was a clear conflict between the perceived advantage of patent protection held by private actors, including emerging large multinational technology companies, and the need for workers, businesses and others to have free access to new technologies to continue to prosper. As the shifting histories of the anti-patent movements suggest, the balances between private protection, industrial growth, social welfare and free trade varied through-out the Nineteenth Century. Given the inconsistent views of the benefits of patent protection, it is not surprising that the Paris Convention did not establish a comprehensive definition of patents or even a detailed explication of the scope of rights granted patent holders. In deference to conflicting domestic views regarding the desirability of patent protection per se, the Convention affirms the power of sovereigns over the scope of protection afforded patents within their territories. Even the national treatment obligation contained in Article 2 of the Convention was strictly limited by the obligation of inventors to comply with any "formalities and conditions" the country in which protection was sought imposed, including critically, registration and examination obligations. (Paris 83, Art. 2) These domestic obligations could be extremely problematic. For example, British definitions regarding novelty and utility were often applied inconsistently, displaying a general anti-patent bias that continued to view patents as Crown privileges to be narrowly construed to avoid abuse.

(Khan 2005, 30 – 37) The Paris Convention allowed countries to retain these variable obligations. (Paris Art. 5)

The territorial right of sovereigns to control domestic patent laws – and thereby maintain some level of potential anti-protection sentiment - was strongly embedded in the recognition of the right of countries to obligate patent holders to practice their invention within the grant country in order to maintain patent rights. Article 5 expressly provided that patents remain under any working obligation ["l'obligation d'exploiter son brevet "] that may exist in the country where protection was sought. (Paris 83, Art. 5) The obligation to "work" or practice the patented invention within the country allowed sovereigns to impose compulsory licenses, and ultimately to revoke the patent grant if the patent owner failed to work the invention within a particular period of time. (Wegner 2006, Khan 2005) With their focus on industrial development, many countries, including France, the United Kingdom and Germany already had working obligations entrenched within their domestic regimes prior to the Paris Convention. (Khan 2005)

There is a strong relationship between local working requirements and the economic development of the granting country. As Bodenhausen acknowledges in discussing the working obligation embodied in Article 5 of the Paris Convention: "Normally, working a patent will be understood to mean working it industrially, namely, by manufacture of the patented product or industrial application of a patented process. Thus, importation or sale of the patented article, or of the article manufactured by a patented process, will not normally be regarded as 'working' the patent." (Bodenhausen 1969, 71) A local working requirement assured domestic access to foreign technologies beyond that obtainable from the mere disclosure contained in the patent grant. Germany effectively used such working

obligations to strengthen domestic chemical industries, securing access to foreign technology while simultaneously seeking patent protection for its own innovations in countries where no such working obligations were imposed. (Choate 2005, May & Sell 2006, 127)

As the technology fairs through-out the period demonstrate, technological progress was seen as one of the most significant benefits of "civilization." It was also largely within the hands of large companies such as Siemens Co., The Edison Electric Company, and Farbenfabriken vorm. Friedr. Bayer & Co. "Myth-making inventors" such as Thomas Edison and Werner Siemens led the public embrace of protection in their respective countries. (May & Sell 2006, 116) They also helped fuel an evolving change from private "heroic" inventorship to corporate development that would become the main engine of Twentieth Century technological progress. Despite the arguable power that such private actors exercised at the international level, policy choices contrary to, or at least in partial dissonance with, protectionist standards, nonetheless, remained viable.

B. The Civilizing Benefits of Technological Progress and the Heroic Creator

The clearest civilizing message of the Berne and Paris Conventions was the romantic view of innovation as a heroic venture that deserved legal protection. Such views were not necessarily based on property values per se, but were given increasing prominence internationally as the narrative choice for empowering protectionist values.

It is paradigmatic that copyright values represented by the Berne Convention placed the European romantic view of authorship at the center of its protection regime.[3] The creation of local copyright laws recognizing that authors held rights over their works

[3] Interestingly, despite placing the author as the holder of exclusive rights in a copyrightable work, the Berne Convention did not define authorship.

undoubtedly predated the Romantic Movement. The Statute of Anne was enacted in 1710. (United Kingdom 1710) The Romantic Movement, by contrast, has generally been dated from the latter decades of the 18th Century. Yet court decisions that affirmed the rights of authors over publishers occurred in the midst of this period and placed a strong emphasis on individual creativity. (Deazley 2006). By the time the Berne Convention was negotiated, Romanticism, and its situation of the author at the center of creativity, had already flourished.

Claire Pettitt describes the critical role the narrative of the Heroic Inventor similarly played in early efforts to reform the British patent system. In debates over revisions to Britain's copyright and patent laws during the 1830s inventors were variously treated as mere mechanical laborers and geniuses who stood at the same high level of creativity as authors:

> For those arguing against extending … patent protection it was, indeed, a common line to emphasize that the … inventor was a technician not a creator *ab initio*. In this platonist view, every invention was waiting to be discovered … Yet the inventor was also seen, like the writer, as in possession of an unaccountable power of creativity … The tensions between the two views is clear – between the inventor as genius in the Kantian sense, whose productions are inimitable, and the inventor as a common laborer. (Pettit 2004, 78)

Ultimately, the patent system "conferred upon the inventor a status separate from, and superior to that of the artisan or mechanic; the status of an original thinker, a man who could make a living with his mind rather than his hands." (Coulter 1991, 62) The ennoblement of the Heroic Inventor did not automatically lead to the same evocation of property-based exclusive rights to protect such genius as occurred for authors under copyright. To the contrary, while there are strong currents in the domestic patent reform movements of the early Nineteenth Century to reward inventive genius, there is a

concurrent concern that such protection might impede further scientific development. While to some extent the civilizing message of the Heroic Inventor empowered pro-protectionist choices, such empowerment was relatively slight. Unlike the Berne Convention, the Paris Convention contained no seizure obligations for infringing goods. It allowed differing standards of innovation and allowed significant limitations in the form of domestic registration and working obligations.

Ultimately the civilizing message of Romantic authorship and Heroic inventorship empowered the dissonant choice of protection over access. But even this civilizing message was mediated by a jaundiced eye of the impact international trade could have on an individual country's progress. Private rights remained subject to the power of the sovereign and its domestic policies.

V. The Continuing Role of Neo-Imperialist Narratives in Modern IP Standards

Neo-imperialism is only one narrative that helps explain the policy choices reflected in the Berne and Paris Conventions, but it is a powerful one because it places the empowerment of various actors against the more complex and yet more realistic political, social and economic milieu against which such choices were made. Just as the impact of "Empire" continues to be felt in the Twenty-first Century as new nations emerge and the territorial justifications for continued domination by one group of peoples over another create ongoing tensions and frequent violence, the processes of Empire continue to influence domestic and international intellectual property debates. Disputes over the nature of the right granted authors and inventors trigger the same political and economic concerns as the "protection" debates that surrounded the recognition of a multinational author's right in the Berne Convention. Working obligations for patents similarly replicate sovereignty

issues of the Nineteenth Century and the concern over access to other countries' technological progress. Indeed, some of the socialist norms of early worker demands that informed the dissonant policy debates of the Nineteenth Century are arguably reflected in subsequent international treaties that expressly recognize a "fair use" style compulsory license for patents. The clearest example of this may be Article 30 of TRIPS which provides: "Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties." (TRIPS, Art.30)

International norms regarding the scope granted a particular intellectual property right are created in a maelstrom of political expediency, social norming, economic expectations, and cultural imperatives. Yet social norm and political process theories do not entirely explain the critical alteration in the treatment of derivative and adapted works during the middle decades of the Nineteenth Century. In the early Nineteenth Century, theatrical adaptations were considered sufficiently original to withstand challenges by angry authors. (Guida 2000, Hartvigsen 2008) Yet by the end of the Century the doctrine of "re-origination" gave way to stronger rights for authors to prevent such unauthorized adaptations. (Beard 2004) Undoubtedly the growing insistence on the "property" value represented by authors' rights, combined with the economic value of such adaptations in domestic and foreign markets, form at least part of the explanation for this shift in attitude. The equation of sovereignty with territory (property) that became a critical part of the narrative of Neo-Imperialism strengthened the claim for greater "sovereignty" over an author's property. Yet concerns over trade, which also formed a critical portion of this

narrative, placed limits on such property in the form of, *inter alia*, limited protection terms and a recognized public domain. (French 1793) The dissonant values at the heart of the protectionist debates of the Nineteenth Century remain contested today. Problematically, the narrative of imperialism, and its empowering of certain actors and policies, also remain as a central, if sometimes hidden, factor in these debates.

Conclusion

The roots of Empire run deep in the present intellectual property system. Some of those roots may continue to serve a useful purpose in securing a vibrant public domain by offering protection to those who create the new works of innovation and creativity that will ultimately nourish this domain. Yet as we craft new boundaries of protection and exclusion in the face of the demands of the global, digital market of the Twenty-first Century, we must be certain that we do not repeat past mistakes. If the increasing protection of intellectual property is a vestige of Neo-Imperialist protectionist policies, so too is the treatment of the public domain as an "unmarked" territory with no prior claimants or pre-existing boundaries. Similar to the earlier treatment of the "unmarked" regions of Asia and Africa during the Nineteenth Century, today's "civilizing voice" seeks to demarcate the public domain where unprotected works by excluded Others (such as the holders of indigenous creativity) remain. By exploring the continuing impact of the process of Empire on today's international standards, we can hopefully avoid imposing our own unhelpful "civilizing" messages on the future.

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