**Michael B. McNally**
**University of Western Ontario, London, ON**

# The Influence of Washington's Farewell Address on the American Intellectual Property Debate in the Late 19th Century

**Abstract:** A content analysis of the *Congressional Record* and U.S. diplomatic correspondences relating to the negotiation of the Paris and Berne Conventions in the late 19th century reveals that American officials advanced business interests in accordance with Washington's Farewell Address ahead of the constitutional mandate to promote the arts and sciences.
**Résumé:**

## 1. Introduction

The American debate on intellectual property always begins with reference to the Constitution. However, ad examination of American policy towards intellectual property at the end of the 19th century shows that Congress was more interested in promoting American industry, rather than the progress of science and arts. In fact another early, revered, American document held much greater sway on Congress during the late 1800s - Washington's Farewell Address. The United States position with regard to the international intellectual property agreements was far more consistent with Washington's pragmatic and nationalist Farewell Address, than the inspiring and utilitarian passage from the Constitution. The U.S., an emerging industrial power, was an active proponent of an international patent agreement, which ultimately resulted in the Paris Convention for the Protection of Industrial Property (Paris Convention). The American approach to recognition of foreign copyright was far more complex. Rather than adhere to major international copyright agreement, the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), America took its own path. An international copyright bill was passed under strong demands from both the U.S. public and successive Presidents, but rather than bring America into the Berne Convention legislators enacted specific formalities designed to protect the U.S. publishing industry. A critical examination of the events of the late 19th century shows that national interest always dominated American policy towards the international protection of intellectual property.

## 2. The U.S. Constitution and Intellectual Property

The U.S. Constitution contains only one clause relating to intellectual property, but its importance cannot be underestimated. Article I, section 8, clause 8, clearly states that Congress is empowered, "To promote the progress of science and the useful arts, by securing for a limited times to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Constitution, art. I, sec. 8, cl. 8). It must be noted that the Constitution contains no stipulation on the nationality of the author or inventor. Furthermore, the passage clearly reflects utilitarian reasoning suggesting that there is a general benefit to society in encouraging intellectual pursuits, which justifies granting authors and inventors limited monopolies. Congress quickly acted on the power

provided to it in article I, section 8 of the Constitution. A patent act was passed by Congress on April 10, 1790, during the 1st Congress 2nd Session (An act: To promote the progress of the useful arts 1790). Copyright legislation followed shortly thereafter on May 31, 1790 (An act: For the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times herein mentioned 1790). The Constitution is preeminent document in American law. Not only does it provide the legal basis for intellectual property rights, but it is also an inspiring and optimistic passage stressing the benefits gained when those who pursue intellectual labour are rewarded through limited monopolies.

**3. Washington's Farewell Address**

While the U.S. Constitution is the single most important document for American legislators, the Farewell Address from 1796 of the first President, George Washington, is another revered testament. Although the document does not address copyright or patents in any way, it does contain numerous recommendations as to how the U.S. should conduct its foreign policy. Washington's Farewell Address serves as a warning of the dangers of international encumbrances (Washington 1796, 23). He notes that in expanding America's commercial interests legislators should be weary of becoming entangled in political alliances (26). He specifically warns against grant favours to other nations stating, "even our commercial policy should hold an equal and impartial hand: neither seeking nor granting exclusive favours or preferences," (29) yet he continues, "… diffusing and diversifying by gentle means the streams of commerce but forcing nothing; establishing with powers so disposed - in order to give trade a stable course, to define the rights of our merchants, and to enable to government to support them" (ibid.). Although Washington cautions the nation against foreign treaties that favour certain nations over others, his address notes that such action is warranted when it advances the rights of American industry. An analysis of the American approach to international treaties regarding intellectual property in the late 19th century reveals that U.S. legislators consciously worked to secure commercial interests first paying little attention to the Constitution's passage empowering them to promote the sciences and arts.

**4. Scholarship on Washington's Farewell Address**

Given that Washington was the republic's first President his Farewell Address to the nation has been the subject of an immense amount of scholarship, but none of this scholarship has analyzed the role it played in the international intellectual property debate in the late 1800s. Early in the 19th century the influence of Washington's Farewell Address on American foreign policy was noted in de Tocqueville's *Democracy in America* (Tocqueville 1848, 227). In 1825 James Madison argued that the Washington's final words were as important as the Declaration of Independence and *The Federalist Papers* (Spalding and Garrity 1996, 144). Until the conclusion of the Civil War much of the interest in Washington's Farewell Address centered on his warnings concerning political parties and national unity (Furstenberg 2006, 12; Spalding and Garrity 1996, 51). Washington's Farewell Address has been examined in many different manners in recent scholarship. While the address has historically been cited as a call for American isolationism, new research posits that Washington's position is far more nuanced (Ellis 2005, 235), although the suggestion that it is the source of American isolationism is still recurrent (Phelps 2006; Calabresi 2006). Scholars have reemphasized that the Farewell

Address is as much an admonishment of geographical and political factionalism within the United States as a warning against foreign entanglements (Ellis 2005, 236; Furstenberg 2006, 9). The address has been viewed as an argument opposed to the militarization of the nation (Johnson 2004, 44). The philosophy contained within Washington's parting words have been contrasted with the Monroe Doctrine as a framework for analyzing American foreign policies during the 19th century, but without reference to the international intellectual property debate (Jones 1969: 50-51). After the Civil War the Farewell Address formed the "cornerstone of U.S. foreign policy well into the twentieth century" (Spalding and Garrity 1996, 151). Washington's parting message has remained a critical, early document of Americana despite the realization that much of the final draft was written by Washington's close advisor, Alexander Hamilton (Rossiter 1964, 117). Washington's Farewell Address is one of the most important and influential documents from the founding of the United States, yet there is a distinct lack of scholarship on how Washington's words influenced the international intellectual property debate in America in the late 1800s. Numerous scholars instead turn their attention to Thomas Jefferson and his apparent influence on intellectual property.

## 5. The Influence of Thomas Jefferson on the 19th Century Intellectual Property Debate

Despite the importance of Washington's Farewell Address to American foreign policy, the document does not specifically provide any guidance on intellectual property. This gap has led many scholars including Lawrence Lessig, Yochai Benkler and James Boyle (among others) to turn to the writings of Thomas Jefferson (Lessig 2001, 94; Benkler 2001, 60; Boyle 2003, 51; Mossoff 2007, 964). However, recent scholarship has suggested that Jefferson's influence on intellectual property during the 18th and 19th centuries was minimal. Mossoff notes that Jefferson's writings have influenced American courts since the 1966 Supreme Court decision in *Graham v. John Deere Co.*, but he contends that Jefferson's influence prior to this is a "historical myth" (2007, 955). Though a Founding Father, Jefferson was not at the Constitutional Convention when Art. I., sec. 8, cl. 8 of the Constitution was drafted (Hughes 2006). Hughes has argued that Jefferson's objections to the granting of monopolies, "came late, came from the periphery and were completely ineffectual" (1027). And while Washington's Farewell Address clearly stresses that protecting the interests of merchants abroad should be an aspect of American foreign policy, Jefferson admonished such foreign policy (Tocqueville 1848, 228). Although Jefferson's writings on patents and copyrights resonate currently, his influence in this debate is a modern phenomenon. The U.S. approach to international protection of intellectual property flows from the Washingtonian model of foreign policy and not the Jeffersonian approach.

## 6. America's Early International Agreements

Washington's Farewell Address did not create a complete apprehension against joining in international agreements. The first multilateral agreement to which the U.S. joined was an 1826 agreement regarding the enclosure of a European cemetery in the city of Algiers (Bevans 1976, 1). In 1839 the U.S. signed onto an international agreement ensuring the protection of commercial and shipping regulations in Samoa (3). This is the first multilateral treaty the U.S. signed to advance the interests of its merchants. In the latter half of the 19th century the American government signed on to more substantive

treaties with a number of European nations. In 1864 the U.S. signed the Red Cross Convention (Amelioration of the Condition of the Wounded on the Battlefield) in Geneva. Although US accession was delayed until 1882, this treaty demonstrated that the American's were willing to work with a wide variety of foreign states as the signatories to the Red Cross Convention included: Switzerland, Baden, Belgium, Denmark, Spain France, Hesse, Italy, the Netherlands, Portugal, Prussia, and Wurtemburg (7).

In 1875 the President Grant committed the United States to participation in the General Postal Union, which had been formalized by a treaty signed the previous year (29). The purpose of the treaty was to ensure international postage for citizens of the countries who were members of the Union (29-38). The General Postal Union included every major European power (Germany, Austria-Hungary, Spain, France, Great Britain, Italy, Sweden and Russian, among others) and demonstrated that the U.S. was willing to participate in international agreements that dealt with coordinating the policies between nations. It was in this environment of international cooperation that talks began in the 1870s on multilateral agreements to protect intellectual property.

**7. The United States and the Paris Convention of 1883**

When the U.S. signed the *Paris Convention* on March 20th, 1883, followed by the President's declaration of adherence on March 29th, 1887, it was not only building on an emerging tradition of international agreements, but acting in a manner to secure its national interest (Bevans 1976, 80). While it may appear as though the American's signed the *Paris Convention* because they wanted to help the progress of science, the real motive behind American participation was a desire to improve the conditions for American industry in Europe. The Paris Convention of 1883 can be traced back to discussions in Austria-Hungary in 1872 (Jay 1873, 77). Vienna was to hold a Great Exhibition in 1873, and the subject of patent protection for Americans entered diplomatic discourses in 1872 in preparation for the Vienna Exhibition the following year (Jay 1872a, 48). John Jay, the American ambassador in Vienna, had received some complaints from American manufacturers that noted Austro-Hungarian law provided insufficient protection for American inventors (1872a, 48). While the Americans were interested in securing patent protection for their nationals in Austria-Hungary, Jay notes that American government did not care whether this came in the form of general revisions to the patent laws, which would benefit all foreign inventors, or through a special exception for Americans (1872b, 50). These early correspondences on the subject of international patent protection from 1872 show that the American interest in Austro-Hungarian patent law was driven primarily by the concerns of U.S. industry.

The interests of American manufactures continued to remain an important issue at the nation's European embassies and particularly in Vienna. Correspondences between American officials in Washington and Vienna clearly demonstrate an awareness of both the growing U.S. industrial presence in Europe and the trade implications (Post 1877, 8). In 1878 a conference with nearly 500 delegates met in Paris to discuss the protection of industrial property; however, unlike the discussion in Vienna in which the American's played a leading role, this conference was dominated by French delegates including many French industrialists (Penrose 1951, 48). The outcome the 1878 conference was a drafting committee that examined international patent laws and aimed to draft an international agreement (54-55). An outgrowth of the 1878 conference in Paris was the 1880

International Industrial Property Congress, also held in Paris (Evarts 1880, 378). In a letter from W. M. Evarts at the Department of State to Edward Noyes at the American legation in Paris, Evarts wrote on the conference that, "this country [America] can-not but feel the liveliest interest in any conclusions which may advance and benefit its commerce and manufactures" (378). However, the Department of State also emphasized to its diplomats in France the importance of maintaining national sovereignty (379). The French embassy in Washington assured state department officials that any treaty that would be drafted would be easy implement stating, "it was proper to submit at first to the deliberations of an international conference only drafts of resolutions… easy of application, and whose adoption would not require serious modifications of the laws, which are based, in various countries, on different principles" (Outrey 1880, 383). American officials were attentive to the trade and implementation issues related to international protection of intellectual property, but demonstrate little enthusiasm for promoting the sciences and arts in their own right. The process that began in Vienna in the early 1870s culminated in Paris in 1883 with the signing of the Paris Convention for the Protection of Industrial Property.

On March 20, 1883, the governments of France, Belgium, Brazil, Guatemala, Italy, the Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland formed the Paris Union for the protection of industrial property (WIPO 1983, 216). The broadly worded treaty established international protection for intellectual property under the principle of national treatment found in Article 2 (Paris Convention for the Protection of Industrial Property 1883, art. 2). Although it took the United States until March of 1887 for President Cleveland to formally enter the U.S. into the Paris Convention (Bevans 1976, 80), the American's had succeeded in securing an international agreement to protect their expanding manufacturing industry. [1] While the Paris Convention may appear to have an ideological connection to article 1, section 8, clause 8 of the U.S. Constitution, the diplomatic correspondences from the time period indicate that the motivation of American officials were much more in line with Washington's pragmatic instructions on expanding the nations commercial influence.

## 8. The United States and the *Berne Convention* of 1886

The Paris Convention of 1883 demonstrated that international consensus could be reached on the protection of intellectual property; however, the Paris Convention did not provide protection for all types of intellectual property. Literary and artistic works remained outside the scope of protections in the Paris Convention. An International Literary Association congress in Rome in 1882 laid the groundwork for the 1883 Berne conference, which aimed at reaching a similar agreement to the Paris Convention but for literary and artistic works (WIPO 1986, 83). While the American's had played a central role in developing international protection for industrial property, they chose not to attend the 1884 Berne conference. The American government responded to the conference organizers stating:

> The Government of the United States is in principle disposed to accept the rule that the author of a literary or artistic work… must be protected everywhere as a national. In practice, however, the Government sees great obstacles to accommodating all countries within one and same Convention (WIPO 1986, 83).

However in his address to Congress that year President Chester Arthur provided a different reason for the U.S. not attending Berne. He stated:

> The question of securing to authors, composers, and artists copyright privileges in this country in return for reciprocal rights abroad is one that may justly challenge your attention. It is true that conventions will be necessary for fully accomplishing this result; but until Congress shall by statute fix the extent to which foreign holders of copyright shall be here privileged it has been deemed inadvisable to negotiate such conventions. For this reason the United States were not represented at the recent conference at Berne (Arthur 1884).

Thus we have two contradictory reasons for the lack of American participation. In addressing Congress, President Arthur suggests that conventions will be *necessary* for securing international copyright, but in his note to the Berne conference organizers he expressed doubts as to how a convention can be used to secure international copyright. It is clear from these two statements that the Arthur administration was decidedly less enthused about ensuring intellectual property rights for writers and artists than it was for inventors and manufacturers.

The Berne conference of 1884 resulted in the *Draft Convention Concerning the Creation of a General Union for the Protection of Author's Rights*, and another conference was held in Berne the following year aimed at reaching a final convention. Unlike the 1884 conference, the U.S. did sent a delegate to the 1885 conference - American ambassador to Switzerland, Boyd Winchester (WIPO 1986, 94). During the first four meetings of the conference, Winchester did not contribute to the discussions at all (108-117). In the fifth meeting on September 17, 1885, Winchester broke his silence and gave an explanation as to why the American government had given him a limited mandate. He noted that he had been given a limited mandate by the Cleveland administration[2] because the issue of international copyright was being discussed by the U.S. Congress (126). Despite the limited mandate he stated:

> However, I do not believe that I am overstepping the limits of my powers when I say that the Government of the United States is favourably disposed towards the principle that the author or literary or artistic work, whatever his nationality, and whatever the place reproduction, should be protected everywhere on the same footing as the citizens or subjects of every nation (WIPO 1987, 126).

According to the minutes of the six meetings held in Berne in 1885 Mr. Winchester provided no substantive input (WIPO 1986, 108-117, 126-128).

While the Arthur administration acted duplicitously, the Cleveland administration appears to have been genuinely interested in the discussions at the Berne Conference. In his first State of the Union address Cleveland urged Congress to consider extending copyright protection to foreign authors. Cleveland noted that lack of international copyright protection harmed American writers and artists in Europe (1885, 339). Even in imploring Congress to consider the merits of international copyright, Cleveland's address used the commercial interests of Americans, not the progress of the useful arts, as the basis for his argument.

The work of the two Berne conferences was concluded in 1886 at a final conference in Berne. Unlike the previous conference, Boyd Winchester addressed the

participants during the first meeting; however, he again noted that the United States was not in a position to sign an international agreement on copyright as the issue was being debated in Congress (WIPO 1986, 133). The 1886 Berne conference concluded with the signing of the Berne Convention for the Protection of Literary and Artistic Works on September 9, 1886 (Berne Convention for the Protection of Literary and Artistic Works 1886). Like the Paris Convention the treaty was left purposefully broad so that it could be implemented by the signatories. The principle of national treatment was again contained in Article 2, and the term of protection for foreign authors was to be a minimum of ten years (Berne Convention 1887, art. 2, art. 5(1)). While the U.S. had championed the Paris Convention, it simply observed the Berne process. Although the Constitution empowers Congress to promote the progress of science *and* the useful arts, American legislators only found value in international protection for their manufacturers and inventors. The discussions over the protection of literary and artistic works by foreign authors in Europe did fuel a debate in the United States that eventually led to a limited international copyright act in 1891; however, just as in the American push for international patents, protection of American industry was the leading consideration of Congress.

**9. The International Copyright Debate in the United States 1886-1891**

A strange process occurred from 1886 to 1891 in the United States. While the Cleveland administration clearly wanted the United States to join the Berne Convention, American legislators and the general public were first opposed. But over the five year period there was a dramatic shift in public opinion, and eventually an international copyright act was passed, but this act was not compliant with the Berne Convention of 1886, and instead it was designed to protect the interests of U.S. publishers.

American public opinion can be gleaned from the petitions put forward in Congress. During the 49th Congress 1st Session (December 7, 1885 to August 5, 1886) there were 18 petitions or memorials presented in Congress on the subject of international copyright (*Congressional Record* 49th Cong., 1st sess. 1885-1886, 885-2865; Solberg 1905, 231-238). Only one of these was in favour of international copyright - a petition by the Music Teachers Association made in the Senate on January 27, 1886 (907). Opposition to international copyright came from a variety of unions. Typographical Unions from the cities of Norwich, Connecticut (906); Harrisburg, Pennsylvania (885); Portland, Maine (941, 1042, 1049); Erie, Pennsylvania (1009); Bluff City, Iowa (1684); Chicago, Illinois (1718); Oshkosh, Wisconsin (2607); and Reading, Pennsylvania sent petitions to Congress designed to dissuade legislators from passing any international copyright laws (2367). The Trade and Labour Association of Ohio and Central Labour Union of Pennsylvania also put forward petitions against international copyright (1009, 2644). At the same time as these petitions flooded into Congress, there were several bills put forward to establish international copyright, but unsurprisingly they failed to progress through Congress.

Prior to the 49th Congress 1st Session there had been several attempts to pass an international copyright bill. On December 10, 1883, Patrick Collins of Massachusetts introduced a bill to extend copyright privileges to non citizens (H.R. bill no. 770). The bill was referred to the House Committee on Patents, but no further action was recorded (Solberg 1905, 48). Early in 1884, William Dorsheimer of New York introduced a bill,

H.R. bill no. 2418, to grant copyright to citizens of foreign countries. The bill was amended on February 5 of 1884, and was voted down February 27 (48-49). Two attempts to secure international copyright were also made during the 48th Congress 2nd Session. House Bill no. 7850 was introduced by William English of Indiana. The bill was referred to the House Committee on the Judiciary, but no further action was taken. Senator Joseph Hawley presented an international copyright bill (Senate Bill no. 2498). Hawley's bill was referred to the Senate Committee on the Judiciary, but ultimately ended up getting presented again as Senate Bill no. 191 during the 49th Congress 2nd Session (50).

The 49th Congress 2nd Session began with President Cleveland's second State of the Union Address in early December, 1886. Again he implored Congress to pass an international copyright bill. Cleveland invoked the Constitution stating, "the Constitution gives to the Congress the power 'to promote the progress of science and the useful arts…'" (Cleveland 1886, 505-506). Within two days there was a bill to establish international copyright in the Senate. Hawley's bill was reintroduced to the new congress on December 8, 1885, and it was able to gain some traction. On January 13, 1886, the Senate passed a resolution authorizing the Senate Committee on Patents, to whom the bill had been referred, to take testimony on the subject of international copyright (Solberg 1905, 51). Although the Senate Committee on Patents heard testimony from several prominent Americans in support of the bill including Mark Twain and Librarian of Congress George Haven Putnam, the bill did not become law (55). While Hawley's bill failed, it did not deter Senator Jonathan Chace of Rhode Island from introducing two international copyright bills during the Congressional session. The first Chace bill appeared on January 21, 1886. It was referred to the Senate Committee on Patents, and on May 21 the Committee reported against the bill. The Committee's adverse report led Chace to introduce a new international copyright bill on May 21, 1886. This bill was eventually reintroduced during the 50th Congress 1st Session as Senate Bill 554 (51).

The 50th Congress 1st Session marks a watershed in the international copyright debate in the United States. Within Congress there was a dramatic shift of public opinion as evinced by the petitions put forward in Congress. The first petition to appear before Congress was a Memorial of the Citizens of the United States presented by Senator Hale on December 19, 1887 in favour in international copyright (*Congressional Record* 50th Cong. 1st sess. 1887-1888, 86). A month later a flood of petitions in favour of international copyright from academic institutions deluged Congress. The first was from the President of Haverford College on January 18, 1888 (533). By the end of January nearly 50 petitions had been presented in either the House or the Senate by academic institutions in favour of international copyright (565-1005). 30 more petitions came during the month of February (856-1808). While there were numerous petitions from smaller schools, and some cases of the same school sending a petition to Congressmen in both the House and Senate, a number of the petitions came from prestigious colleges and universities - Princeton (856), John Hopkins University (1174), Rutgers (1039, 1113), and Vanderbilt all put forward petitions in favour of international copyright (1172). Not a single academic institution petitioned Congress against international copyright.

Although Congress was bombarded with petitions in support of international copyright by academic institutions, an even more important event occurred early in the 50th Congress 1st Session that helped lead to the eventual passage of an law recognizing

copyright for foreign authors. On December 12, 1887, Senator Chace presented Senate Bill no. 554, which was a reintroduction of a bill he presented in the previous session (Solberg 1925). This bill was amended on March 19, 1888. and the amended bill ultimately passed the Senate on May 9, 1888 (Solberg 1905, 52). The success of the Chace bill can be attributed to a stipulation in the bill that required American printing of works by foreign authors as a condition for gaining copyright (Solberg 1925). The inclusion of this provision had a dramatic effect on the petitions in Congress. There had been numerous petitions by Typographical Unions against international copyright in the 49th Congress, but this trend was completely reversed in the 50th Congress. Nearly 50 petitions in support of international copyright poured in from Typographical Unions across the country (*Congressional Record* 50th Cong. 1st sess. 1887-1888, 2243-7802). Petitioners included some of the Typographical Unions from major cities including Typographical Union no. 2 from Philadelphia (which sent in petitions to nearly a dozen Congressmen) (2243, 2326, 2678, 4871, 5478), Typographical Union no. 8 in St. Louis and Typographical Unions no. 6 (2784) and 74 in Chicago (3028). Petitions in support of international copyright also reached Congress from the Pressman's Union no. 27 in Buffalo (3609), no. 4 in Philadelphia (ibid., 2824), and no. 1 in Washington D.C (2601). Support for international copyright in the form of petitions to Congress was not limited to only academics and unions in the printing industry. There were also a number of petitions for groups of citizens, including one from 500 citizens of New York (3030). Of the over 180 petitions sent to the 1st Session of the 50th Congress only one protested against international copyright (5994). Given the strong support in favour of Chace's bill, and its domestic printing stipulation, it is unsurprising that Chace bill ultimately was successful in the Senate.

With the Chace bill successfully through the Senate the only major obstacle that remained to the U.S. securing an international copyright act was having a similar bill passed in the House of Representatives. Late in the 51st Congress, 1st session on May 16, 1890, Representative Simonds introduced House Bill no. 10254, which was referred to the House Committee on Patents (Solberg 1905, 52). On June 10, 1890 House Bill no. 10881 was substituted for Simonds' bill tabled in May . House Bill 10881 was passed during the 51st Congress, 2nd Session on December 3 (Solberg 1905, 52), and by March 3, 1891 an international copyright act had been passed in the United States (91). On July, 1891, President Harrison proclaimed the bill law, and for the first time in American history copyrights could be awarded to foreigners (*New York Times* 1891). But the recognition of foreign copyright in the United States was not a measure to advance the useful arts, instead it was a carefully crated piece of legislation that kept the U.S. outside of the Berne Convention, and provided strong protection for domestic publishers.

The influence that Washington's Farewell Address cannot be underestimated. As several scholars have noted after the Civil War the nation's attention turned to the first President's parting words on foreign policy rather than his writings on domestic unity. However, Washington's Farewell Address also took on a special role in the U.S. Senate in the late 1800s. On February 20, 1888 the Senators resolved to have the full text of the Farewell Address read in the Senate to commemorate the first President's birthday (*Congressional Record* 50th Cong. 1st sess. 1887-1888, 1331), and two days later on February 22, 1888, Senator John Ingalls read the revered American document (1397-1400). Though the document had been read once in the Senate during the Civil War (Senate Historical Office, n.d.), this marked the beginning of what would become an

annual tradition in the Senate (Senate Historical Office 2000). Thus Washington's farewell message, including its strong support for advancing the rights of American merchants, was certainly on the minds of U.S. Senators while the Chace bill was being debated.

The success of the Chace Act is directly attributable to its stipulation requiring domestic printing. The requirement for books to be printed in America is the factor that turned the U.S. publishing industry from opponents of international copyright to one of its major proponents. Furthermore, Washington's nationally self-interested comments on advancing the rights of American merchants were certainly known to Senators at the time. While American recognition of international copyright may be viewed as a triumph for the progress of the useful arts, it is an even greater victory for American publishers and the unions in the publishing industry.

**10. The American International Copyright Act**

The international copyright act passed on March 3, 1891, and proclaimed by the President on July 1 of that year was formally titled "An act to amend title sixty, chapter three of the Revised Statues of the United States, relating to copyrights," (Solberg 1905, 91) and was drafted in the spirit of nationalism and pragmatism found in Washington's *Farewell Address*. The law contained two great restrictions. The first was that it only extended the privilege of copyright to citizens of four countries: France, Belgium, Great Britain and Switzerland (*New York Times* 1891). The nationals of several Berne member states (Germany, Italy, Spain, Luxembourg, and Monaco) (WIPO n.d.) were completely excluded from protection. The decision to extent copyright privileges to nationals of such a small group of countries is due to the fact that the American's were only able to secure reciprocal agreements with these four countries (*New York Times* 1891). The limitation of foreign copyright to those countries with which the United States had a reciprocal agreement seems like a minor formality compared to the amendment to section 4956 that was included in the Chace Act. The Act required books to be, "printed from type set within the limits of the United States," (An act: To amend title sixty, chapter three of the Revised Statutes of the United States, relating to copyright 1891, 1107) to qualify for copyright. It was this specific wording that garnered the Chace bill the support of the Pressman's and Typographical Unions as it ensured works by foreign authors would be printed within the United States. Furthermore the Act included a special provision to prevent the circumvention of the manufacturing regulation by the importation of books printed outside the U.S (ibid).

Although there was considerable demand in the U.S. for international copyright, Chace's international copyright act is clearly written in a manner to put American commercial interests first. While the U.S. did move to extend copyright to foreign authors, in doing so they enacted legislation that went against the spirit of Berne. Article 2 of the Berne Convention was founded on the principle of national treatment (Berne Convention 1886, art. 2) - the same principle the American's agreed to in the Paris Convention (Paris Convention 1883, art. 2). Yet the Americans would not acquiesce to national treatment for literary and artistic works, instead demanding domestic printing as well. Within 10 years American publishers began questioning the value of the compelling foreign authors to have their books printed in the United States. Thorvald Solberg, the first Register of Copyrights, noted that as early as 1901 American publishers were

suggesting that the domestic manufacture stipulation was unnecessary. The U.S. publisher Little Brown and Company went so far as to suggest that it was unjust to require that books be printed in America to qualify for copyright (Solberg 1926). American legislators chose to accede to the Paris Convention and adhere to the principle of national treatment for inventors because it served the interests of industry; however, they rejected the same principle that was the foundation of the Berne Convention because of a desire to protect domestic publishers.

## 11. The United States and Berne Since 1891

For the five year period from 1886 to 1891 the American's had the opportunity to enter Berne. From 1891 forward the manufacturing clause in U.S. copyright law was the reason the U.S. could not join Berne. This point was not lost on Solberg and other early proponents of U.S. adherence to Berne (Copyright Office, n.d.). With the Americans outside of the Berne community further complications arose. The revisions to the Berne Convention made in Berlin in 1908 created further problems for American entry - specifically Article 5 forbidding formalities (Solberg 1926). In April 1987 the General Accounting Office (GAO)[3] provided the official explanation as to why the United States chose to join only one of the two 19th century international agreements. The GAO Report to Selected Congressional Subcommittees entitled *International Trade: Strengthening Worldwide Protection of Intellectual Property Rights* stated that the U.S. abstained from joining the 1886 Berne Convention for two reasons. First, it required substantive changes in U.S. law that only occurred with the passage of the1976 Copyright Act, and second, the American copyright system included a number of administrative formalities, including the domestic manufacturing provision, that contravened the terms of the Berne Convention (General Accounting Office 1987, 31). The report is silent on the fact that the nation had a five year window where it could have joined Berne as there were no complicating factors. Ultimately the Americans did join the Berne Convention in 1989 - 103 years after it was originally signed (WIPO n.d.).

Even after joining the Berne Convention the Americans continue to show a clear preference for promoting commerce over the advancement of inventive and creative works. Litman has noted the influence of American lobbyists on copyright law since the beginning of the 20th century (Litman 2001, 38). American pharmaceutical, high-technology and entrainment companies lobbied intensively for the Trade Related Aspects of Intellectual Property (TRIPS) agreement that came out of the Uruguay Round of trade negotiations (Drahos with Braithwaite 2002, 122). Ten years later American industries aggressively pushed for even more expansive intellectual property rights in the negotiation of the WIPO Copyright Treaty (Samuelson 1997). The long American absence from the major international treaty governing copyright does not seem to reflect the sentiment in the Constitution - promoting the useful arts. Instead, America's position with respect to international copyright has been governed by the guiding words contained in Washington's Farewell Address.

## 12. Conclusion

An examination of historical documents and legislation from the late 19th century shows that American policy towards international agreements on intellectual property was always guided by a pragmatic, national self-interest that can be traced to

Washington's Farewell Address. The concerns of American manufacturers were the key reason the nation played such a prominent role in securing the Paris Convention for the Protection if Industrial Property. Conversely, the U.S. stayed out of Berne because it did not suit its national interest, and when an international copyright act was passed it required domestic publication as a way of protecting the American publishing industry even though within ten years many American publishers believed this protection to be unnecessary. The actions of the United States cannot be explained in terms of the optimistic and humanist passage from the Constitution that empowers Congress to promote the sciences and the useful arts. Rather American policy with respect to international agreements on intellectual property owes much more to Washington's pragmatic and nationally focused Farewell Address.

**End-notes**

[1] Specifically, Kronstein and Till portray the entire process from 1872 to 1883 as a triumph for the Americans and the pro-patent movement against the anti-patent movement, which had a strong following in Germany. (Kronstein and Till 1947, 766).

[2] President Cleveland took power in 1885.

[3] In 2004 the General Accounting Office was renamed the Government Accountability Office.

**References**


An act: For the encouragement of learning by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times herein mentioned. 1790. In *Statutes at large of the United States, 1789-1845*, Vol. 1., 124-126. Boston: Little & Brown, 1848.

An act: To amend title sixty, chapter three, of the Revised Statutes of the United States, relating to copyrights. 1891. In *Statutes at large of the United States, December 1889-March 1891*, Vol. 26., 1106-1110. Washington: Government Printing Office, 1891.

An act: To promote the progress of the useful arts.1790. In *Statutes at large of the United States, 1789-1845*, Vol. 1., 109-112. Boston: Little & Brown, 1848.

Arhtur, C. 1884. The message to Congress. *New York Times*. Dec. 2.

Benkler, Y. 2001. Siren songs and Amish children: Autonomy, information, and law. *New York University Law Review*, 76: 23-113.

Berne Convention for the Protection of Literary and Artistic Works (1886). 1886. In *Berne Convention centenary,* 228. Geneva: WIPO, 1986.

Bevans, C. I., comp. 1976. *Treaties and other international agreements of the United States of America 1776-1949*. Vol. 1. *Multilateral 1776-1917*. Washington, DC: Government Printing Office.

Boyle, J. 2003. The second enclosure movement and the construction of the public domain. *Law and Contemporary Problems*, 66: 33-74.

Calabresi, S. G. 2006. The President, the Supreme Court, and the Founding Fathers: A reply to Professor Ackerman. *The University of Chicago Law Review,* 73(1): 469-485.

Cleveland, G. 1885. First annual message. In *A compilation of the messages and papers of the Presidents 1789-1897*, Vol. 8, comp. J. D. Richardson, 324-365, Washington: Government Printing Office, 1898.

Cleveland, G. 1886. Second annual message. In *A compilation of the messages and papers of the Presidents 1789-1897*, Vol. 8, comp. J. D. Richardson, 497-530, Washington: Government Printing Office, 1898.

*Congressional Record*. 49th Cong. 1st Sess., 1885-1886. Ann Arbor: University Microfilms, 1956.

*Congressional Record*. 50th Cong. 1st Sess., 1885-1886. Ann Arbor: University Microfilms, 1956.

Drahos, P. with J. Braithwaite. 2002. *Information feudalism: Who owns the knowledge economy*. London: Earthscan.

Ellis, J. J. 2005. *His excellency*. New York: Knopf.

Evarts, W. M. M. 1880. Mr. Evarts to Mr. Noyes, Washington, Oct. 30, 1880. In *Papers relating to the foreign affairs of the United States - Executive Documents of the House of Representatives for the third session of the forty-sixth Congress, 1880-1881*. Vol. 1, 378-379. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

Furstenberg, Francois. 2006. *In the name of the father*. New York: Penguin.

Hughes, J. 2006. Copyright and incomplete historiographies: Of piracy, propertization and Thomas Jefferson. *Southern California Law Review*, 79: 993-1084.

Jay, J. 1872a. Mr. Jay to Mr. Fish, Vienna, Feb. 29, 1872. In *Papers relating to the foreign affairs of the United States - Executive Documents printed by order of the House of Representatives, 1872-1873*. Vol. 1, 48-49. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

Jay, J. 1872b. Mr. Jay to Mr. Fish, Vienna, Mar. 7, 1872. In *Papers relating to the foreign affairs of the United States - Executive Documents printed by order of the House of Representatives, 1872-1873*. Vol. 1, 49-50. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

Jay, J. 1873. Mr. Jay to Mr. Fish, Vienna, Aug. 15, 1874. In *Papers relating to the foreign affairs of the United States - Executive Documents printed by order of the House of Representatives, 1873-1874*. Vol. 1, 73-77. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

Johnson, C. 2004. *The sorrows of empire*. New York: Metropolitan Books.

Jones, R. E. 1969. Washington's Farewell Address and its applications. In *Washington's Farewell Address: The view from the 20th century,* ed. B. I. Kaufman, 355-403. Chicago: Quadrangle Books.

Kronstein, H. and I. Till. 1947. A reevaluation of the international patent convention. *Law and Contemporary Problems,* 12: 765-781.

Lessig, L. 2001. *The future of ideas*. New York: Random House.

Litman, J. 2001. *Digital copyright*. Amherst, NY: Prometheus.

Mossoff, A. 2007. Who cares what Thomas Jefferson thought about patents: Reevaluating the patent "privilege" in historical context. *Cornell Law Review*, 92: 953-1012.

Outrey, M. 1880. Mr. Outrey to Mr. Evarts, Washington, Jan. 9, 1880. In *Papers relating to the foreign affairs of the United States - Executive Documents of the House of Representatives for the third session of the forty-sixth Congress, 1880-1881*. Vol. 1, 382-383. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

Paris Convention for the Protection of Industrial Property (1883). 1883. In *Paris Convention centenary,* 216. Geneva: WIPO, 1983.

Penrose, E. 1951. *The economics of the international patent system*. Baltimore: John Hopkins Press.

Phelps, P. 2006. …Americans are from Pluto. *Review (Institute of Public Affairs),* 58(3): 35-37.

Post, P. S. 1887. Mr. Post to Mr. Steward, Vienna, Sept. 29, 1877. In *Papers relating to the foreign affairs of the United States - Executive Documents of the House of Representatives for the second session of the forty-fifth Congress, 1877-1878*. App., 8-9. University of Wisconsin Digital Collection. http://digicoll.library.wisc.edu

*New York Times*. 1891. Privileges of copyright. July 2.

Rossiter, C. 1964. *Alexander Hamilton and the Constitution*. New York: Harcourt, Brace & World.

Samuelson, P. 1997. The U.S. digital agenda at WIPO. *Virginia Journal of International Law*, 37: 369-440.

Solberg, T. 1906. *Copyright in Congress 1789-1904*. Washington DC: Government Printing Office.

Solberg, T. 1925. Copyright law reform. *Yale Law Journal,* 35: 48-75.

Solberg, T. 1926. The international copyright union. *Yale Law Journal,* 36: 68-107.

Spalding, M. and P. J. Garrity. 1996. *A sacred union of citizens*. Lanham, MD: Rowman & Littlefield.

Tocqueville, A. 1848. *Democracy in America*. ed. J. P. Mayer, trans. G. Lawrence. New York, NY: HarperPereneial, 1988.

U.S. Constitution, art. I. sec. 8, art. 8.

United States Copyright Office. n.d. *Thorvald Solberg, Register 1897-1930*. http://www.copyright.gov/history/bios/solberg.pdf

United States General Accounting Office (GAO). 1987. *International trade: Strengthening worldwide protection of intellectual property*. http://archive.gao.gov/d2t4/132699.pdf

United States Senate Historical Office. n.d. February 22, 1862, Washington's Farewell Address. http://www.senate.gov/artandhistory/history/minute/Washingtons_Farewell_Address.htm

United States Senate Historical Office. 2000. Introduction. In Washington's Farewell Address - Sept. 19 1796, 106th Cong. 2nd Sess. www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf

Washington, G. 1796. [Washington's Farewell Address:] To the people of the United States - Sept. 19 1796. In Washington's Farewell Address, 106th Cong. 2nd Sess., 1-32, 2000 www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf

World Intellectual Property Organization (WIPO). n.d. Contracting parties > Berne Convention. http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15

World Intellectual Property Organization (WIPO). 1983. *Paris Convention centenary.* Geneva: WIPO.

World Intellectual Property Organization (WIPO). 1986. *Berne Convention centenary*. Geneva: WIPO.