The Development of American Intellectual Property Policy in East and Southeast Asia, 1868-1994

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Introduction

Intellectual property rights have been a source of contention between the United States and East and Southeast Asian nations since Japan began studying the economic system of the United States for purposes of industrialization in the late 19th century. Defined in a variety of ways that will be explained in the following paragraph, intellectual property as an entity has always been subject to specific legal definitions and thus has been protected differently by most nations which in turn has led to international disputes with increasing frequency. This paper will be structured around six different chronologically organized case studies focusing on American intervention in East and Southeast Asian intellectual property laws: American support for the pre-war industrialization of Japan; American efforts to project influence into China before the Communist takeover; Cold War efforts by the United States to economically develop Japan, Korea, and Taiwan; the formation of an active American intellectual property lobby against piracy in East Asia in the late 1970s; the United States actively linking intellectual property protection to fair trade practices in the 1980s; and finally American efforts to emphasize intellectual property during the Uruguay round of the General Agreement on Tariffs and Trade (GATT) negotiations from 1986 to 1994. Because these six case studies are broad measured both by geography and time, they can uniquely present a comprehensive survey of American intellectual property policy in East and Southeast Asia. This type of survey has not yet been made by academic literature, which has focused on American relations with specific countries, while non-academic literature has been written for and by lawmakers or businesses with very specific agendas. Thus, an opportunity exists to fully explain the causes for the evolution of US foreign policy towards intellectual property protection in East Asia, which should prove of interest to those concerned with the major international intellectual property issues that face global markets today. This paper will make the case that the dominant factor in US intellectual property policy in East and Southeast Asia has always been the continuing and occasionally adversarial relationship between American business interests and geopolitical concerns. In
particular, this paper will build towards highlighting the role of unprecedented collaboration between American lawmakers and businesses that made possible reforms of intellectual property in East and Southeast Asia in the 1980s.

Notions of intellectual property far predate the modern global age, yet nations still dispute specific definitions of intellectual property and how it should be protected. Simply put, intellectual property is a government granted exclusive right to one’s own intellectual creations. Although specific definitions can be complicated and controversial, most intellectual property can be classified by three major types of protection. The first type takes the form of a patent, which protects the rights of an inventor to a specific invention for a period of time. The second type is similar to the first, protecting the creations of artists with a copyright, usually automatically without registration but also with an expiration date. Trademarks are the final form of protection and prohibit the unauthorized use of brands on commercial products for the lifetime of a brand. Although rationales for protection (or lack thereof) differ between nations and form the basis for international debate, the general principle behind a state granting monopolistic power for a period of time in the form of a patent or a copyright is that such protection gives a financial incentive for further creative work that benefits society as a whole. The rationale behind trademark protection is that it gives consumers a way of verifying the authenticity of a product and encourages quality in branded products. Intellectual property is similar to any other form of physical property in that it can be sold, leased, licensed, rented, etc, but intellectual property is particularly vulnerable to being stolen or disputed because it has no physical manifestation. Theft, sometimes termed infringement, takes the form of unauthorized copying, and legitimate disputes commonly arise about the extent of protected property which in its nature can be rather abstract. Thus, in every case, it falls to the authority of a government to define and protect intellectual property rights and mediate disputes.
Internationally, intellectual property rights are granted to the citizens and corporations of foreign nations by governments on the principles of reciprocity and greater economic cohesion, although a centuries-old rift in protection standards exists between developed and developing nations. Developed nations, with technology and information-fueled economies, usually push for strong protection that requires businesses in developing nations to pay for the right to use technologies, publish copyrighted works, and avoid brand infringement. In turn, developing nations argue that, for them to successfully compete in the global marketplace, they need cheap access to the latest technologies that they do not have the capital to purchase or create themselves. This is not just a modern dynamic: through the late 19th century, the developing United States refused to agree to European standards of intellectual property protection on the grounds that it should not pay for what it famously deemed to be the common ingenuity of humanity. As explored by this paper, relations between the United States and East Asian nations from 1871 to 1994 have always featured a comparatively more economically developed United States. Thus intellectual property arrangements have all been negotiated at the behest of the United States with the understood reality of a net intellectual property transfer from America to East Asia.

The United States government has been developing formal and informal relationships regarding intellectual property with East Asian nations since the uninvited arrival of the American Navy in Edo (Tokyo) harbor in 1853 and continuing into the present day. This paper will attempt to explain how trans-Pacific relations developed by analyzing six chronologically organized episodes of interaction and negotiation. The first period corresponds to the Meiji Restoration in Japan and the Iwakura Mission of 1871 that toured the United States with American encouragement to find technologies to copy and bring back to industrialize Japan. In this period, no entrenched American economic interests existed that could be immediately harmed by such a generous arrangement, and the United States had a lot to gain politically by developing Japan. In the second period analyzed by this paper, the United States began
negotiating a series of arrangements in China beginning with a bilateral treaty in 1903 that mandated intellectual property rights in the aftermath of the Boxer Rebellion. The United States negotiated with a far different set of concerns in China than it had done when negotiating with Japan, and these concerns had much more to do with containing rival European powers and projecting American influence into China than it had with actually affecting any realistic reform that would benefit American businesses. The third case study will analyze American efforts after World War II to prop up the economies and regimes of Japan, South Korea, and Taiwan. This paper will show that American policymakers believed that control of communism in Asia hinged on tacit American acceptance of blatant intellectual property infringement which allowed these nations to pursue rapid modernization efforts. Indeed, during these postwar years, America’s geopolitical interests were deemed by the American government to be more important than any fledgling American economic interests that were being damaged by such infringement. In the fourth study of this paper, the flattening global economy by the late 1970s created concern to such a degree among American businesses as they lost international market share to cheap pirated exports originating in East Asia that they decided to take unprecedented political action. Several large industry lobby groups, such as the International Intellectual Property Alliance (IIPA) and the Business Software Alliance (BSA), formed in these years to document this growing problem of intellectual property theft and bring it to the attention of the American government. Other industry advocacy groups, such as the International Federation of the Phonogram Industry (IFPI), the Recording Industry Association of American (RIAA), and the Motion Picture Association of America (MPAA), began to shift the focus of their efforts in these years to prominently advocate for stronger intellectual property protection in foreign markets. Although these groups were initially unsuccessful in bringing about any meaningful reform, their efforts publicized the growing issue of insufficient international intellectual property protection and laid a foundation for the stronger American reform efforts that emerged a few years later. The fifth study of this paper concerns the mid 1980s, when the American
government became increasingly worried about the growing American trade deficit and Congress sought non-protectionist ways to help lessen it. Not coincidentally, those countries with the greatest trade surpluses were also the greatest infringers of American intellectual property, and most were located in East and Southeast Asia. In 1984, the United States Congress passed the Trade and Tariff Act, which declared that a foreign nation’s failure to comply with American intellectual property rights qualified as unfair competition and could provoke US retaliation through a measure called Section 301. Retaliatory Section 301 proceedings, moreover, could be triggered at the request of US businesses, signaling the first meaningful collaboration between American lawmakers and businesses in the field of international intellectual property protection. The pressure on East Asian nations that resulted from this alliance of American business and government created reforms to intellectual property laws abroad with unprecedented speed oftentimes resulted in bilateral trade agreements favorable to the United States. The final episode that will be analyzed by this paper will be the international General Agreement on Tariffs and Trade (GATT) negotiations between 1986 and 1994, and specifically the landmark Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement that created improved global standards of intellectual property rights and paved the way for China to begin the formal process of joining the World Trade Organization (WTO). Although broad in scope, these six episodes were selected to provide critical and substantial insight into the evolving relationship between the United States government and American business interests as efforts were taken to establish intellectual property rights in East Asian nations.

Most writing on the subject of trans-Pacific intellectual property relations has been written for governmental, corporate, or legal consumption, and has not been written from an academic perspective nor looks at the East and Southeast Asian region as a whole. The materials that exist for government consumption are often in the form of briefings or congressional hearings and consist of biased statements by various lobbying groups, both domestic and international, and often do not look at the
larger causes for intellectual property development in these Asian nations but instead focus on suggesting various specific policy options for the US government. Likewise, legal and corporate writings give a strong insight to the intellectual property situation from a practical standpoint, but are much more focused on specific markets and legal systems and do not take a critical look at the overall East Asian region nor the American influence on it. The academic writings that do exist explore in great detail specific regions of East Asia, but do not look at the region as a whole. William P. Alford in particular has written a comprehensive history of American involvement in intellectual property reform in China and Taiwan, and Elisabeth Uphoff has written a similarly detailed history of American efforts with intellectual property rights in Southeast Asian nations. Many other good histories have been written, but they focus on specific countries or small groupings of very similar countries. Thus, a general overview that analyzes trends across many Eastern Asian nations for the duration of American involvement in the region until 1994 has not been written.

The core of the approach of this paper comes from the fact that although East Asia is obviously a broad region with many different countries and economies, precisely because it is so broad it can provide a good lens by which to view the specific development of US policy. By considering each East Asian nation as an independent variable, a perspective can be gained that would be impossible to reach by just analyzing American relations with one nation or a smaller grouping of East or Southeast Asian nations. Likewise, by looking at American attempts to influence intellectual property policy in East Asia over such a long time period, from 1871 to 1994, a broad conclusion can be drawn identifying the ultimate factor that shaped American influence and why it evolved the way that it did. Thus, this paper

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1 It is necessary to note here that, for simplicity, this paper often refers to the aggregation of countries being examined as “East Asian.” Many scholars will argue, with reason, that the term “Southeast Asian” better describes Thailand, Singapore, Indonesia and Malaysia, and it is not an objective of this paper to disagree with this classification. However, in the context of intellectual property protection in the decade that these specific nations will be analyzed, the 1980s, it is appropriate to group them with other East Asian nations. This is because they developed similar patterns of intellectual property infringement as East Asian nations and the United States employed indistinguishable policy approaches.
aims to fill a gap in the relevant literature by presenting a case based on American interactions with many East Asian nations over a period of 126 years that develops the primacy of the relationship between American economic interests and political concerns when pursuing intellectual property reform in East Asia.

To analyze and prove the importance of the complex and competing relationship between American economic and geopolitical interests that defined trans-Pacific intellectual property relations, this paper will mainly look at English language commentary in the United States regarding the state of intellectual property relations in East Asia. This commentary will be found in the form of newspaper articles from various perspectives, government hearings, and widely published studies conducted by American businesses and the United States Trade Representatives (USTR) to determine the statistics of American losses to infringement in East Asia. This paper will also take a critical look at the actual legislation passed in East Asian nations at the insistence of the United States and those negotiations, both internal and with the United States, which led to such legislation. A final major source of evidence will be commentary about the American influence on intellectual property reform that originated in the various East and Southeast Asian nations being examined, namely Japan, China, South Korea, Taiwan, Thailand, Indonesia, Singapore, and Malaysia. There are several nations in the broader East and Southeast Asian region that this paper will not discuss, namely the Philippines, Vietnam, Australia, New Zealand, Cambodia, and Laos. Cambodia and Laos are excluded because they historically have not been integrated into the global economy in any meaningful way, and thus any infringement occurring in these nations has been of minimal concern to the United States. Australia and New Zealand are culturally Western countries, and while intellectual property negotiations have occurred between them and the United States, such negotiations do not fall into the trends of other East Asian nations. The Philippines are excluded because, as an American colony from 1898 to 1946, their economy and legal system were developed to be compatible with the United States to a degree that even surpasses those of Japan.
Finally, American relations with Vietnam have been so dominated by the fallout from the protracted military conflict that intellectual property negotiations have been conducted under a very different system of concerns than those with other East Asian nations. Although such a selection is necessarily arbitrary to a degree, it serves to focus this paper on American intellectual property relations with those Asian nations that have globally integrated economies and, with the debatable exception of Japan, have not been subject to sustained direct American influence. Ultimately, from such an analysis, it will be possible to examine the continuing and occasionally adversarial relationship between American business interests and geopolitical concerns that explains the development of American intellectual property policy in East Asia.
Chapter 1: America’s Industrial Tutelage of Japan

Most academic literature makes the generalized assertion that the Iwakura Mission of 1872, explained later, was the first example of a widespread effort on the part of the Japanese to copy Western technology in an effort to industrialize its economy in the latter third of the 19th century. As a broad explanation of the background to this period, the Iwakura Mission was the result of a massive realignment in Japanese politics that was triggered in response to the appearance of threatening Western gunships off of Japan’s shores, notably the Black Ships of the American Commodore Matthew Perry in 1853. Japan, aware of the danger of Western imperialism and its own relative defenselessness that had resulted from centuries of isolation, began a rapid and desperate process of political realignment and industrialization under its newly reinstated Emperor in a period called the Meiji Restoration. The last article of the 1868 charter oath proclaimed in the Emperor’s name, generally considered to mark the beginning of the Meiji Period, states that “knowledge shall be sought throughout the world so as to strengthen the foundations of Imperial Rule.”² From this new foundation of Japanese government, the Iwakura Mission was formed with prominent Japanese statesmen to tour America and Europe and implement the lessons from the industrial nations that they explored upon their return to Japan. The United States was the first stop of the mission, and also the stop of the longest duration at six months. While in the United States, the delegation travelled at the expense of the American government, and the Americans sought to impress their guests with the latest and most impressive aspects of their society. From a position of complete economic, technological, and military dominance, the United States allowed the Japanese unrestricted access to objects of their curiosity, notably military installations, transportation hubs, and factories with the latest industrial technology.

Yet, while there is a general consensus among historians that the Iwakura Mission gathered industrial technology from Western nations,\(^3\) there are several points of evidence contrary to this viewpoint, and a revised analysis should say the mission was investigative more in spirit than in any usable detail. The first reason why the mission should be classified as non-technical is that of the 46 delegates who participated in the Iwakura mission, only three had any technical background; one supervised shipbuilding, one was from mining, and one had a rudimentary knowledge of railways. Since the remaining 43 members had diplomatic or political backgrounds, the mission clearly was not intended to be a major technical exploration team.\(^4\) Tellingly enough, of the 60 sketches that were made in America by the delegation, none depicted factories or machinery, and accounts of factory tours in the official journal written by Kume Kunitake leave the impression that they were cursory at best. Additionally, descriptions by Kume were prone to interchange approximate Japanese units of measurement for Western units instead of using precise conversions.\(^5\) Thus, the popular myth about the Iwakura Mission being an embassy sent to gain technical knowledge must be replaced with a more nuanced analysis. Alistair Swale presents a better account of the Iwakura Mission in his 1991 essay *America 15 January – 6 August 1872; The First Stage in the Quest for Enlightenment* by noting that the mission was really intended to investigate an “industrial society” rather than investigate the particular industries themselves.\(^6\) This account makes much more sense of a complex narrative that includes many descriptions of factories, but even more descriptions of the workers, the transportation networks, and

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\(^3\) This is a widespread view, and it would be difficult to list every example that exists in academic literature. But for a typical explanation of this view of the Iwakura Mission, see *Japan and the Developing Countries; A Comparative Analysis*, edited by Kazushi Ohkawa and Gustav Ranis with Larry Meissner, (New York: Basil Blackwell, 1985), 26.


\(^5\) For example, a *shaku* is equal to .994 feet and a *sun* is equal to 1.193 inches, but it is apparent that these were considered equivalent in the official account. Such approximations would have been adequate for the educating the average Japanese reader, but no machinery or tools could have been made from these writings. See Kume, *The Iwakura Embassy*, p.xliii.

the financial systems that sustained those factories. For example, the mission’s visit to the United States’ Patent Office on April 2nd, 1872 must be seen in the context of a desire to learn about which societal and governmental practices encouraged innovation, and the descriptions of recent American inventions that were on display were more an accounting of the fruits produced by the patent system than an attempt to learn about their particular workings. Thus, in contrast to the common perception that the Iwakura Mission was the first attempt by the Japanese to gain technical knowledge of Western industrial processes, the mission was instead simply an attempt to evaluate the workings of the industrial society that Japan explicitly hoped to become.

Widespread appropriation of Western intellectual property was no fiction however, and the first medium by which the Japanese learned Western technology was through hired Western experts called oyatoi gaikokujin. Starting in 1871, these American experts were brought in as educators and to help with the colonization of the northern island of Hokkaido, which was hostile to Japanese agriculture but thought to have a similar climate to the United States. Indeed, as an undeveloped country, most of Japanese interest in Western technology centered on agricultural instruments that could easily be incorporated into Japanese farming. To demonstrate their service as experts in Western technology, American experts in Hokkaido built in quick succession “a forge, a steam lumber mill, and a grist mill, and instructed the Japanese in their operation. Americans also tried tanneries and successfully instructed the Japanese in canning salmon.”7 These facilities were not constructed for their own sake, but rather to serve as models that the Japanese could study and duplicate later. Richard Henry Brunton, a Scottish expert in lighthouse design who was employed in Japan for eight years until 1876, wrote in his memoirs that “although Japan has originated not one of the scientific developments which distinguish the present era... it must be conceded that she has been remarkably successful in the adoption of

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them.”

In all, through the advice of the *oyato gaikokujin*, the Japanese purchased and imported over 30,000 examples of agricultural tools and machinery from around the world and even established a special shop specifically for their repair and maintenance. The Japanese government also sent Japanese students abroad to study in Western universities, but while many of these students eventually returned to become leaders in Japan, none matched the contribution of the *oyato gaikokujin* in terms of technical expertise to help the early industrialization of Japan.

The primary draw of Western experts to Japan was unquestionably financial. *Oyato gaikokujin* in Japan could uniformly expect to make between double and triple their normal salary; a famous agriculturalist named Horace Capron made a salary of $10,000. As a point of comparison, a general in the Japanese army made on average $500 a year. Such an expensive workforce posed a considerable financial drain on the Japanese government, and by the peak year of 1874 the combined salaries of hired experts of all nationalities totaled 2.272 million yen, or 33.7% of Japan’s total national budget. Such an arrangement was obviously not sustainable, and indeed, from the beginning of their employment, the *oyato gaikokujin* were instructed to spend the majority of their time educating Japanese students to do their jobs. Thus, as little more than living machines in the eyes of the Japanese government, *oyato gaikokujin* were instruments to facilitate technology transfers, and were never considered part of the permanent workforce. Indeed, the average tenure for a hired American worker in Japan tended to be between three and four years. This was generally an acceptable proposition to most *oyato gaikokujin*, who tended to be fresh graduates of Western technical institutions who relished the high salaries and the chance to develop their own methods and theories in Japan at such a young

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age, but never intended to permanently stay in Japan. Yet from these short tenures, Japan gained a secondary benefit as it built a human network of Americans sympathetic to Japanese interests; Capron helped procure American arms to the Japanese government during the Satsuma Rebellion of 1877 and other former oyatoi gaikokujin sent the Japanese government agricultural machines on a commission as soon as they were developed.\textsuperscript{14} Indeed, it is unlikely that Japan would have had the same success industrializing without the use of these expensive but effective mediums for technology transfer.

American politicians, businessmen, and journalists were hardly ignorant of the massive transfer of technology that Japan was gaining as a result of the oyatoi gaikokujin, but the prevailing sentiment was that such a transfer would only serve to boost America’s trade and gain America goodwill in a developing and strategic nation. Japan was after all opened by Commodore Perry as a potential fueling base and a source of regional resources for ships engaged in the much more valuable China trade, and the primary focus of American diplomats in the early years of Japan’s industrialization was always to better position Americans in China. Thus, by being helpful and friendly to Japan, American politicians believed that they were best serving their larger regional interests. And indeed, relations between the United States and Japan proceeded very positively for their first 30 years, purposefully helped by the contributions of the oyatoi gaikokujin. When Horace Capron set off with his small team for Japan in 1871, President Grant sent him a letter that explicitly stated that the United States government supported his important undertaking as a way to foster national goodwill and trade.\textsuperscript{15} Later, when an American oyatoi gaikokujin named Benjamin Lyman wished to quit his job in Japan in frustration, Capron convincingly warned him that if he left, the British would take over his surveying job and take credit for advancing Japan.\textsuperscript{16} American efforts to gain Japanese goodwill were hardly constrained to the gift of technology: the Iwakura Mission was surprised upon their arrival in America that the Americans were

\textsuperscript{14} Fukimo, American Pioneers, 103.
\textsuperscript{15} Fukimo, American Pioneers, 8.
\textsuperscript{16} Fukimo, American Pioneers, 53.
generously willing to renegotiate the provision of extraterritoriality in Japan, and in 1883 the United States returned to Japan an indemnity from 1864 as a sign of friendship. The *New York Times* showed some of the paternalistic feelings that many American policymakers felt towards Japan at the end of the 19th century when explaining the benefits of gaining goodwill in Japan:

> Even today the kindly justice of America, showing in such marked contrast to the actions of Great Britain, France, and Holland, who have made no move to return their shares of the plunder, is mentioned by almost every Japanese with whom the American tourist enters into chance conversation... it is a well known fact that our legation at Tokyo can, and does, secure for private citizens of the United States favors and privileges which are denied the average foreigner... we have never been insensible to the claims of this our godchild.

Yet, as if to prove that the American government was constantly making a geopolitical calculation with regard to the role of the oyatoi gaikokujin, and not just blindly supporting Japan, the only American to ever be disowned by the government was an ex-Civil War officer helping Japanese forces to invade Taiwan in 1873 because the American government preferred Chinese rule on the island. Thus, the vast majority of oyatoi gaikokujin were seen by the American political establishment as one of several ways that America might increase trade with Japan and foster goodwill, and the technology transfer that they facilitated was a small price to pay for these valuable gains so long as the general political balance in the region was not disrupted.

Strangely enough, American businessmen, even manufacturers, were also in support of the mission of the oyatoi gaikokujin, and sent their own representatives to Japan to aid Japan’s progress. The thinking of these American businessmen was that by shaping Japanese industry to American standards, trade with the United States would be made easier at the expense of other Western nations.

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17 While the Iwakura Mission was specifically tasked with requesting such a revision to the treaty, they did not expect to be initially successful, and America’s professed willingness to negotiate caused some confusion among the Japanese delegation. Ultimately, several senior members of the Mission were sent back to Japan to convey the news. [Find Kume page #]
19 Neeno, *The Oyatoi Gaikokujin*, 44.
For example, in 1874 American manufacturers at the Silk Association of America found Japanese raw silk to be thin and uneven, and in an attempt to improve the quality of Japanese silk they sent to Japan machinery from America’s silk boom of the 1830s and technicians to explain the machines.\(^{20}\) The result of this collaboration became an industrial silk standard known as the “Standard American Skein.” The striking flaw in the thinking of American businessmen was the assumption that Japan would be content to industrialize only the production of raw materials,\(^ {21}\) and as Japan industrialized it increasingly moved into higher level manufacturing and threatened the very factories that helped develop it.

When Japan created its first patent system in 1885, it was only appropriate that it did so under the authority of the Agricultural Ministry, given the fact that the vast majority of the inventions that Japan studied and occasionally improved were agricultural in nature. The patent system itself was hardly noteworthy as a basic combination of French and American patent laws which had been studied by Japanese legal scholars. The more noteworthy fact of this event was that while Americans were certainly annoyed by the lack of patent protection in Japan prior to 1885, Japan acted largely unilaterally in implementing a system. This improvement in intellectual property rights largely came as a surprise to American politicians and businessmen, especially since other developing nations showed no inclination of adopting such protection. But as the first president of Japan’s patent office, Takahashi Korekiyo, explained to American representatives, “we have looked about us to see what nations are the greatest, so that we can be like them. We said ‘what is it that makes the United States such a great nation?’ and we investigated and found that it was patents, and we will have patents.”\(^ {22}\) Clearly the Japanese were proud of their adoption of intellectual property rights; the adoption of a patent system in Japan is indicative of the larger Japanese trend of copying the government structures of Western nations

\(^{21}\) This critical misassumption is elaborated on in an opinion piece by United States Senator George C. Perkins titled “The Competition of Japan,” *Overland Monthly and Out West Monthly*, October 1896.
\(^{22}\) Wilhelm Rohl, *History of Law in Japan since 1868*, (Boston: Koninklijke Brill NV, 2005), 405.
wholesale in an effort to modernize and gain acceptance as their equal. In the analysis of the legal
historian Wilhelm Rohl, "it does not come as a surprise that industrial property laws in Japan were not
enacted due to foreign pressure or in order to have a negotiating tool against foreign nations, but were
rather perceived to be in Japan’s own interest."23 What Rohl omits in his account is that by 1885, the
majority of agricultural inventions had already been studied and copied and that the national
government was discontinuing its system of intense foreign study and employment of oyatoi gaikokujin.
This is not to say that Japan had absorbed all the technology that the West had to offer, but that those
technologies that remained unstudied were of a much more industrial nature and thus required a much
higher level of training and understanding. By implementing a patent system, the Japanese government
encouraged foreign investment and partnerships between Japanese and foreign firms that would be
prove to be much more effective than simply studying and copying technology from an isolated
distance.

However, even though in the years following 1885 Japan continued to rapidly industrialize and
benefit from improved relationships between its industries and foreign technology companies,
particularly American ones, two last major hurdles remained to foreign involvement in Japan. The first
hurdle was that the Japanese government, having watched the course of Western colonization of China,
had legally forbidden foreign ownership or partial ownership of extractive industries and foreign land
ownership of any kind (although exceptions were made in certain instances for the residences of
merchants and oyatoi gaikokujin). These conditions, interpreted and enforced broadly, had the effect of
prohibiting almost all foreign direct investment in Japan’s budding industries. As a result, Japanese
companies struggled at the end of the 19th century to implement some of the more advanced Western
technologies. For example, the Japanese government directed a promising technical specialist named Oi
Saitaro to travel to America in 1888 and purchase four switchboards from the Western Electric Company

23 Rohl, History of Law in Japan, 405.
to start commercial telephone services in Japan. Although public telephone service was nominally started in 1890 in Tokyo and Yokohama, the inexperience of the Japanese with operating, repairing, and adapting the equipment meant that the telephone service was unreliable at best. Thus, while the legal prohibitions against foreign businesses taking an interest in Japanese industry did not slow early industrialization, the absence of willing tutelage by foreign companies with technical expertise retarded Japanese efforts to develop industries which required knowledge of complex equipment by the end of the 19th century.

The second hurdle to foreign investment was that the existence of a Japanese patent system did not mean an extension of intellectual property rights to Americans or other foreigners. As the *New York Times* wrote in a short article in 1894:

> A fact not generally known is that there is no treaty agreement between the United States and Japan regarding inventions and trademarks... Commissioner Seymour of the Patent Office, with a view to protecting American inventors in Japan, has recommended to Acting Secretary Sims of the Interior Department the desirability of giving American manufacturers the benefit of the patent laws of Japan at the earliest practicable date. He urged that this treaty matter be presented to the Secretary of State for his consideration.  

This article shows that intellectual property policy was far from foremost in the minds of American diplomats, and that advocacy for intellectual property rights in Japan needed to come from the bureaucratic back channel of the Patent Office rather than being treated as a larger trade issue. The frustration on the part of Americans concerned about Japan’s intellectual property theft was at times palpable, as is apparent in this article from the *Chicago Daily Tribune* in 1987:

> But what must be said of our manufacturers, who, while zealously guarding the secrets of their inventions from their competitors by patents, expose these results of their ingenuity to spies [Japanese students] whom no sense of honor or gratitude will deter

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from using them to their own advantage... the Japanese are only and perfectly willing to profit by our good nature, which, in their eyes, is nothing but stupendous folly.26

Legally, American patent holders did have some protection in Japan, but the status of their claims as foreigners were ambiguous and most companies chose not to bother litigating against infringement in a Japanese legal system that afforded such unclear protection of foreigners. Yet with very little demonstrated support from the American political establishment, American owners of intellectual property had little choice but to simply refuse to do business in Japan, which had the effect of becoming a second obstacle to Japan’s growth in higher-level industries.

To a modern reader, it might seem strange that American politicians at the turn of the century might regard Japanese advancement into competition with American manufacturing interests as good thing, or at least as an acceptable thing, but such was indeed the case. This phenomenon has been concisely worded by William Lockwood, a historian of Japanese development, “Among the Western nations, business came first. Any misgivings as to the ultimate repercussions on established industries or national interests of building up Japan were overridden in any case by the principle of common interest in world economic development.”27 This “principle of common interest in world economic development” is perhaps overused in Lockwood’s analysis, as manufacturing interests undoubtedly had a powerful lobby that kept in place a large system of subsidies, tariffs, and other protectionist measures at the turn of the century, but Lockwood’s principle is nevertheless valid. The Salt Lake Herald summed up this complex and ambivalent prospective on Japanese industrialization in 1895: “They are stealing our patents and copying our inventions and thereby enter into ruining competition with our nation. There is, however, a splendid market for machinery, as well as for cotton, iron, and other raw materials.”28 The Herald was of course not writing from a major manufacturing region of the United

26 “No Japanese Reciprocity,” The Chicago Daily Tribune, September 29, 1897.
States, and thus less inclined to be apocalyptical about Japan’s rise, but the article shows that many Americans did see opportunity in Japanese industrialization even as intellectual property theft was acknowledged to be destructive. The powerful cotton and shipping industries saw dramatic growth as a result of increased Japanese demand, and they were inclined to support the status quo of Japanese growth. The Chicago Daily Tribune gave another reason why general international advancement might be good for America:

> Japan will be from now on the great civilizing, regulating, dominating power of Asia: she will let the whole world reap the result of [China’s] resources... The day when lucifer matches and mills and railroads and other results of civilization can be shut out of one of the richest and broadest countries in the world ended with the decisive battle of the Japan-China war.²⁹

Thus, the lack of political will in America to actively attempt to negotiate stronger intellectual property protection in Japan came from a combination of a lack of awareness among American diplomats of the harm done to its manufacturing interests by infringement and a general belief that the benefits of global economic advancement outweighed the costs, especially as America’s cotton and shipping industry profited from Japan’s growth.

In 1895, when Japan began to negotiate a treaty with the United States to explicitly extend patent rights to American inventors and allow direct foreign investment, it did so from a position of geopolitical security and a growing recognition that continued industrial progress would require closer collaboration with foreign businesses, which would in turn require the protection of intellectual property. Just a few months earlier, Japan had shocked the world with its victory in the Sino-Japanese War when its newly modernized armies and navy routed China’s Western equipped but poorly trained forces. Following this result, there was widespread recognition in domestic and foreign media sources that Japan had joined the ranks of the Western imperial powers, and thus Japanese legislators no longer

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²⁹ “Our Trade is in Imminent Danger,” *Chicago Daily Tribune*, April 28, 1895.
felt the danger of foreign colonization and were more open to an increased foreign presence in Japan. As with the creation of an initial patent system in 1885, Japan largely acted without political pressure from America when extending these rights to foreigners. Noting this fact, when the treaty was being concluded in 1897, the Washington Post wrote that “the initiation, both in the formation of the treaty and in the hastened enforcement of the [patent related articles], was taken by the Japanese, who are strongly desirous of increasing and extending the intercourse between themselves and the nations of the world.”

Thus, Japan would have felt too vulnerable to Western nations prior to 1895 to even consider opening itself to foreigners, but the result of the Sino-Japanese War allowed Japanese officials to reevaluate foreign policies, including the granting of intellectual property rights to foreigners.

While the American government was rightly given no credit for the establishment of a Japanese intellectual property system that respected the rights of foreigners, the role of American business has been undervalued by previous academic literature. In some ways, American manufacturers had no choice but to passively allow Japanese firms to purchase and copy their intellectual property, such as the Western Electric Company’s switchboards. As Gunton’s Magazine of American Economics and Political Science decried in 1896, the Japanese “will buy only one outfit of certain machinery. We will sell them one set, which they will copy and supply all future demands themselves. This will go on until the new treaties take effect, when American patents will be protected.”

But in less obvious ways, American businesses were not so resigned waiting for treaty protection; in such instances as the electrical boom in Japan in the 1890s, American companies dutifully sold equipment but refused to send technicians to operate that same machinery. The extra delays and required studying on the part of Japanese businesses to accommodate to this lack of American cooperation proved expensive to Japanese commercial interests, and likely increased the desire of the Japan to extend intellectual property

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31 Schwantes, Japanese and Americans, 65.
protection to foreigners.\textsuperscript{33} In reforming treaties in 1895-1899, the desire for international goodwill on the part of Japan certainly existed, but the refusal of American businesses to help Japan crack the secrets of advanced industrial technology without patent protection and a right to invest in Japan’s industry undoubtedly put the required pressure on Japan to conform to a modern system of intellectual property rights.

Once the major obstacles to foreign investment in Japan were removed, American businesses were remarkably quick to set up mutually beneficial partnerships with their underdeveloped Japanese counterparts. The Western Electric Company, whose switchboards had previously been purchased and copied with only partial success by the Japanese, gave direct technical aid and financial investment to several Japanese firms in exchange for stock in those companies in 1899. The result of this collaboration was the quick implementation of an effective telephone service in Japan. Similarly, General Electric exchanged patent rights for a 25% share of Tokyo Shibaura Denki Kabushiki Kaisha in 1909, and this pairing enjoyed annual profit margins ranging from 20-29% for over 30 years.\textsuperscript{34} Thus, the extension of patent rights and ownership privileges to foreigners by the Japanese government in 1899 set up a process of further technology transfer and prosperity that included the creators of that intellectual property for the first time in Japanese history.

Thus, it was the oyatoi gaikokujin, helped by Japanese students simultaneously studying in the West, who began the process of technology transfer that industrialized Japan in the last third of the 19\textsuperscript{th} century, and not the politically minded Iwakura Mission. These young experts found personal gain and the gratitude of Japan as they taught modern technologies, and they largely acted with the support of the American political establishment and the businesses that developed the technologies on the theory that a modernized Japan would provide better trading opportunities and be an American ally near to

\textsuperscript{33} Schwantes, \textit{Japanese and Americans}, 66.
\textsuperscript{34} Schwantes, \textit{Japanese and Americans}, 67.
China. Yet as Japan successfully industrialized and became a competitor to Western nations, American feelings toward Japanese development grew increasingly ambivalent, and the mortal danger to American manufacturing posed by the combination of technology and cheap Japanese labor became a major theme in domestic media. Notably absent from discussions in the United States about the lack of intellectual property protection in Japan were the major publishing houses and other holders of copyrights. This was a result of a widespread practice among American publishers until the 1950s of selling the international rights to their portfolio of works wholesale to the more globally minded British publishing firms, and thus American publishers saw no financial losses when the Japanese copied textbooks and other works. Ultimately, the American government never put significant pressure on the Japanese to respect American intellectual property, deeming an industrialized Japan to be in American geopolitical interests and encouraged by booming cotton and shipping industries. Instead, it was the Japanese reacting to an unwillingness by American and other Western manufacturing firms to provide crucial expertise in complex technologies without intellectual property protection that prompted the Japanese to unilaterally develop a patent system and later extend patent rights to foreign inventors. Such protections, once developed, fostered lasting international partnerships which developed Japan’s more complex industries and proved to be highly profitable to participants on both sides of the Pacific until the outbreak of World War II.
Chapter 2: Westernizing Pre-Communist China’s Legal System

The second case study that this paper will analyze is the United States’ role in shaping Chinese intellectual property law before warfare brought by the Communist Revolution and Japanese invasion increasingly distracted the Nationalist government in the 1930s. But before examining foreign influence on Chinese intellectual property law in the early 20th century, this paper would be remiss not to include a brief background of the role of the so-called unequal treaty system in China and the United States’ position within such a system. The unequal treaty system refers to a series of treaties that Western Powers compelled China to sign, usually with either the direct application or the threat of military might, which granted Westerners extraterritoriality, trading privileges, and diplomatic recognition among other benefits. But within this system, in many ways, the United States was an outsider in China. The other Western Powers largely had interlocking arrangements outside of China and treaties by the beginning of the 20th century, such that by failing to respect each other’s interests in China they would have risked larger concerns elsewhere in the world. The United States by the end of the 19th century was only just beginning to emerge from an isolationist status, and did not have the leverage on the other Western Powers necessary to be successful in such a system. To gain a political foothold in China, the United States declared the so-called “Open Door” policy in 1898, in which each Western Power nominally agreed to respect China’s territorial sovereignty and allow the other Western Powers commercial access.

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35 As an important note before continuing this analysis, the term “Western Power” is a loose one to begin with, and in this case includes Japan along with the principal European nations. This extension of the term is not so much a stretch, as post-Meiji Japan actively modeled itself after the modern European powers and consciously sought status among them. 36 Extraterritoriality was the practice of extending a nation’s laws to protect its own citizens in another country. Hated by the Chinese as a violation of sovereignty and a national humiliation, extraterritoriality was enforced by the Western Powers under the threat of military action and proved to be among the most contentious issues in Chinese politics. 37 As a couple of examples of interlocking concerns, Japan and Britain were allied against Russia militarily, Britain and France had an agreement to mutually respect each other’s colonies in India and South East Asia, and many of the powers had other colonial concerns in Africa. See Varg, The Making of a Myth, 128. 38 To be sure, the United States enjoyed Most Favored Nation status in China starting with the signing of the Treaty of Wanghia in 1844, and moreover acquired the colony of the Philippines in 1898, yet the American policy of abstaining from European politics made it an outsider among the interrelated European powers.
to ports. While such a policy changed affairs very little in reality, by getting the other Powers to agree to its provisions, the United States gained goodwill with the Chinese government and enhanced its diplomatic clout among the other Western Powers. But yet the protection of intellectual property in such a system was a persistent difficulty, as the Western Powers had competing interests. Americans were certainly wary of infringement by the other Powers, and an article in the *Scientific American* advised American readers in 1898 that “The competition of British, German, and Japanese manufacturers upon the Chinese market is very keen, and American exporters will do well to secure protection for inventions which otherwise might be controlled by their foreign competitors.” Yet, precisely because there was no single intellectual property system acceptable to all Western merchants in China, and the Chinese government proved reluctant to adopt any legal measures that would seem to extend the regime of extraterritoriality, Western Powers found the need to act assertively in concert in diplomatic matters, even as they saw each other as rivals. This collaboration, in the words of the legal scholar Robert Heuser, caused Western merchants to believe in the inevitability of “a modern state in their own image,” particularly in legal matters. And so, regardless of the “Open Door” policy, the interests of each Western Power depended on respecting those of the others and presenting a united front to the Chinese government in order that China would be opened to commercial interests and its laws Westernized.

Much has been said about the fact that China, which once led the world in such inventions as the compass, gunpowder, and printing, had undoubtedly fallen critically behind the Western world in technological prowess by the late 19th century. While it is beyond the scope of this paper to argue the role of intellectual property rights in this lack of progress, it is fair to assert that China did not develop a

39 “Changes in Foreign Patent Laws and Practice,” *Scientific American* 78.8 (1898).
cultural sensitivity to intellectual property to the degree that occurred in the West. Confucian tradition in China did not stress innovation and change, but rather emphasized deference and modeling upon the past. As quoted in the Analects of Confucius, “The Master said: I transmit rather than create; I believe in and love the Ancients.” This emphasis was no temporary matter in Chinese civilization, for among the more famous and respected contemporary Chinese artists is Chang Dai-chien, who rose to preeminence for creating nearly flawless forgeries of ancient Chinese art in the 1960s. In such a cultural environment, it is understandable that the state did not develop policies, such as the establishment of intellectual property rights, to encourage innovation. Indeed, those examples of intellectual property protection which can be found in China before Western influence can be better explained by Confucian notions of Imperial control and harmony rather than a desire to promote modernization. Specifically, a version of a copyright did exist in Imperial China since the Southern Song Dynasty (1127-1279), which simply stated on certain works the name of the publisher and that the proper authorities would prevent it from being reprinted. Guilds were also given the exclusive right to produce certain products. Yet, given that these monopolies were granted to certain favored families or groups, and did not mention discovery as the basis for the privileges, these seemingly early examples of intellectual property rights are better explained by a system of imperial patronage and control rather than any explicit desire to foster innovation. Thus, Westerners encountered in China a different set of cultural values rooted in Confucian thought and imperial control that resisted the implementation of any mechanism of state sponsored private innovation.

41 There is some disagreement in the academic community regarding intellectual property rights in pre-Western China. For more information regarding positive and negative views of native Chinese intellectual property protection, see the writings of Zheng Chengsi and William Alford respectively.
43 Chang Dai-chien is but a single example of a general cultural preference for artists who emulate the past. See Alford, To Steal a Book, 26-29.
45 Alford, To Steal a Book, 16.
Yet, by the late 19th century, Western technological dominance had very real implications in international politics, and some factions within the Chinese Imperial court favored reforms to aid modernization, including the adoption of intellectual property rights. Just as Japan’s victory in the Sino-Japanese War in 1895 gave it confidence in international affairs, China’s defeat awakened some Chinese leaders to the dangers of not modernizing as Japan had done. In 1898, during the short lived Hundred Days Reform movement, the liberal Guangxu Emperor issued a series of edicts that were based upon study of Western society. One edict in particular sought to bring a more official version of intellectual property rights to China:

Henceforth, if any subject of ours who should write a book on new subjects, or who should invent any new design in machinery, or any useful work of art and science which will be of benefit to the country at large, he shall be honored and rewarded by us in order to serve as an encouragement and exhortation to others of similar genius and talent. Or, if it be found that such geniuses have real ability to become officials, we will appoint them to posts as reward... they shall also be allowed to enjoy the fruits of their labors by being presented with papers empowering them to be the sole manufactures and sellers within a certain limit of time.

This edict clearly understands the societal benefits behind the Western concept of encouraging innovation, but yet it has a very Chinese characteristic in that it highlights official recognition as the main reward, before continuing to promise a vague grant of a Western style monopoly to an inventor. A coup by conservative elements within the Imperial Court, followed by the Boxer Rebellion beginning in 1898, ended any liberal minded Chinese imperial focus on intellectual property reform, but the

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46 Internal efforts had been made to modernize China prior to 1895, generally known as the “Self-Strengthening Movement,” yet these reforms were narrow in focus and had limited success.
47 This movement was undertaken by liberal elements within the Chinese imperial house, and sought to modernize China’s educational and bureaucratic system and create a Western-style economy. After 104 days, it was violently ended by Chinese conservatives.
48 This edict went on to specifically reward military and agricultural innovations, as such were deemed to be most valuable to the security of the Empire. See “Patents and Copyrights in China,” Scientific American 79.19 (1898).
49 The Boxer Rebellion lasted from 1899 to 1901 and was started by a collection of Chinese underground societies, “Boxers,” that sought to rid China of Western influences. The Boxers were eventually joined by Imperial Chinese forces in attacks on foreign merchants and missionaries. The rebellion was brutally suppressed by the allied armies of the Western Powers.
aftermath left Western Powers in a much stronger position to mandate a legal atmosphere according to their desires.

Following a general treaty signed in 1901 to end hostilities, each Western Power signed a separate treaty with Imperial China to restore diplomatic relations and secure concessions; among other provisions, the United States used the 1903 “Treaty for the Extension of Commercial Relations” to mandate the establishment of intellectual property rights. Articles IX, X, and XI of this treaty provided for the protection of American trademarks, patents, and copyrights respectively, albeit in vague language. In negotiating this treaty, the United States was bargaining from a position of strength, and was little inclined to either explain the provisions to the Chinese or draft the language to fit better within Chinese law or culture. Notably, of all similar treaties signed with the other Powers at the conclusion of the Boxer Rebellion, only the United States insisted on a provision to protect patents. While the language of this article is vague, only providing that the Chinese government would establish a Patent Office at some undefined later date, it does explicitly provide that this proposed Office would immediately “issue certificates of protection, valid for a fixed term of years, to citizens of the United States on all their patents issued by the United States on all their patents issued by the United States.” That this article is only explicit in terms of the protection of American citizens according to their patents in the United States demonstrates the American goals of protecting its own citizens and extending its laws into China, yet also of allowing China to gain the input and approval of the other Powers through the use of flexible language. Indicative of both the priorities of China’s regime and its prior association between intellectual property and imperial control of media, Article XI, on copyright, explicitly concludes: “This article shall not be held to protect against due process of law any citizen of the United States or Chinese subject who may be

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50 Trade-names were traditionally deemed to be more important to the Chinese than trademarks, yet Americans had no legal or cultural equivalent, and thus the omission of trade-names is indicative of the one-sided nature of the drafting of the treaty. See Norwood F. Allman, *Handbook on the Protection of Trade-Marks, Patents, Copyrights, and Trade-Names in China*, (Shanghai: Kelly & Walsh Ltd, 1924), 86.

author, proprietor or seller of any publication calculated to injure the well-being of China.”\textsuperscript{52} Given the state control inherent in such a statement, this is the only provision of Articles IX-XI that seems to have been drafted by Chinese diplomats. The 1903 treaty marks the first time that the United States actively mandated the creation of intellectual property law abroad, and, while vague about the specifics of implementation, the existence of Articles IX-XI shows the growing importance to America of intellectual property protection in China by the turn of the 20\textsuperscript{th} century.

Yet, just a year later in 1904, the implementation of the provisions regarding intellectual property caused a diplomatic crisis specifically resulting from the vagueness of the language in the commercial treaties that China had signed with each Western Power. The United States initiated this crisis in March of 1904 when E. H. Conger, the American Envoy Extraordinary and Minister Plenipotentiary of the United States to China, wrote to the Chinese court reminding them that Articles IX-XI of the 1903 treaty had not been implemented:

I have the honor to inform your imperial highness that I am continually in receipt of inquiries regarding [the lack of intellectual property protection] from citizens of the United States, and I have to request that your highness will inform me what procedure it is necessary for Americans to take in order to secure the promised protection of their trade-marks, patents, and copyrights.\textsuperscript{53}

When the reply from the Chinese foreign office was noncommittal, the acting American Secretary of State at the time, Francis Loomis, directed Conger in an angry letter to “insist upon some provisional rules for the protection of copyrights, trade-marks, and patents, and get a date fixed for the coming into force of the regulations provided for in the treaty.”\textsuperscript{54} This pressure was strikingly effective, for by June 9, 1904, the Chinese imperial court sent Conger a set of preliminary trademark regulations that were set to be implemented within a few months. Yet these regulations created an outcry among representatives of

\textsuperscript{52} Treaties and Agreements with and Concerning China, Compiled and Edited by John V. A. MacMurray, 429.
\textsuperscript{53} Allman, Handbook on the Protection of Trade-Marks, 143.
\textsuperscript{54} Allman, Handbook on the Protection of Trade-Marks, 144.
the other Western Powers, who were caught unaware by these new proposed laws. Insulted that they were not consulted on the regulations, each Power requested to the American minister that the regulations would be postponed until better ones could be proposed; the American delegation refused, and a flurry of diplomacy ensued. Upon examination, while the substance of the disagreements between the powers may have at times seemed petty, they amounted to a larger desire on the part of each nation to model China’s new laws after its own, rather than after those of its rivals. However, by October, the month that the proposed regulations were to go into force, the combined pressure of the other Powers was enough to cause the Chinese government to postpone the legislation without notice to the American delegation.

The solution to this impasse was an arrangement between the Western Powers, whereby each Power exchanged diplomatic letters with every other Power, pledging to protect the other’s intellectual property rights in China according to the rules by which they protected their own citizens. This arrangement demonstrates that, to the frustration of the Western Powers, extraterritoriality cut both ways and could inhibit the establishment of well functioning intellectual property system. By not having a central court with jurisdiction over all merchants in China, any holder of intellectual property would have to sue infringers in the defendant’s specific national court. The costs associated with litigation in

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55 Take, for example, a letter from Alvey A. Aldee, the American Acting Secretary of State, to the United States Minister to China: “The Commissioner of Patents points out that the retention of Section 22 of the project is of the greatest consequence from the American point of view; that its exclusion by the Deutsche Vereinigung represents the German view of trade-mark in which the property right arises from and depends upon registration; while the American trade-mark position is and always has been predicated upon the origin of the property right in adoption and use.” See Allman, *Handbook on the Protection of Trade-Marks*, 176.

56 The role of Japan in these negotiations is beyond the scope of this paper, but it is worth mentioning that Japan was the only other Power to support implementation of the regulations, as it had supplied advisors to help China draft the codes in a way that favored developing nations, such as China and Japan. See Heuser, “Chinese Trademark Law of 1904,” 197.

57 By 1907, the United States had exchanged letters with every notable Western Power except Japan, which saw no benefits in such a binding arrangement for its merchants abroad.

58 For example, an American would have to sue an Italian in an Italian court according to the specific understanding between the United States and Italy. See Sanqiang Qu, *Copyright in China*, (Beijing, Foreign Languages Press, 2002), 20.
such a chaotic system could be prohibitive to any practical attempts by a merchant to protect against infringement. Yet the failed 1904 negotiations made any promised reforms to such a system by the Chinese government much more unlikely, as the rising discord among Western Powers ended any momentum afforded by the recent treaties. In the resigned words of John Gardner Coolidge, Chargé with the American Legation in China, to the Secretary of State, “This postponement [of the 1904 trademark provisions] probably also involves the abandonment, for the present, of any attempt at framing patent or copyright regulations, as provided by recent treaties.”⁵⁹ Thus, the failed trademark negotiations of 1904 exposed the weakness of a system of competing Powers in China and mandated the creation of a complex and ineffective system of bilateral intellectual property arrangements.

Given that China was not an industrial nation during the early 20th century and posed no immediate danger of exporting pirated products, unlike the example of Japan, it is worth investigating the actual extent of American losses due to intellectual property theft. Certainly, for all the diplomatic pressure exerted by the government, American businesses had a comparatively small presence in China.⁶⁰ Nevertheless, American merchants were a part of a close knit foreign community and were very aware of the theft of trademarks, copyrights, and patents from Westerners as a group. The Chinese historian Sanqiang Qu explained several advantages of the theft of Western trademarks in the early 20th century:

Chinese merchants chiefly used the names of Western businesses in order either to avoid paying the likin [an internal tax on commerce] to which Chinese, but not foreigners, were subject, or to secure internal transit permits. In addition, by using the names of Western companies, they could capitalize on the hesitancy of local Chinese officials to enforce the law stringently against foreigners.⁶¹

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⁵⁹ Allman, Handbook on the Protection of Trade-Marks, 158.
⁶⁰ By 1914, American business interests in China were only 3.1% of the foreign total. See Paul A. Varg, The Making of a Myth: The United States and China 1897-1912, (East Lansing: Michigan State University Press, 1968), 125.
⁶¹ Sanqiang Qu, Copyright in China, 18.
And thus, in an ironic development, the high level of protection that the Western Powers provided to their merchants encouraged the growth of a Chinese piracy industry that preyed exclusively upon Western products. Another version of intellectual property theft developed in China as a result of the spread of written vernacular Chinese in the early 20th century (sometimes known as the Baihua Movement) and the growth of an urban middle class. The resulting demographic changes created a Chinese population with an increasing demand for literary works and textbooks, most often of Western origin, and an industry of literary pirates grew in the major Chinese cities to meet this demand quite effectively. 62 The American author W.S. Hall fumed in his 1939 article in The Publisher’s Weekly that “as the publisher of the Reader’s Digest probably already knows, pirated copies of the magazine are on sale... not more than forty-eight hours after the first copy arrives from America.” Hall went on to complain about the inadequacy of America’s protection of its authors in China, and suggested that “a concerted yell should be let loose that will be heard all the way to Washington.” 64 While no such lobbying effort ever developed at this time among American intellectual property holders, the extent to which American publishers were increasingly aware of and vocal about piracy of copyrights in China should not be underestimated. 65 Indeed, in many ways Americans were shaped by fears that China might go the way of Japan and become an industrial competitor if intellectual property rights were not protected: “whatever we may now be able to sell to them, the Chinese, with the introduction of modern methods directed by foreign capital and enterprise, will soon be able to make for themselves.” 66 As this pressure grew from American intellectual property holders, frustration grew among American diplomats in China, who found themselves caught between two contradictory positions as a result of

62 Alford, To Steal a Book, 43.
65 Large and influential publishers were dealt significant financial losses from Chinese piracy, such as the example of G. & C. Merriam, which developed a bilingual version of its Webster’s Dictionary for China at great expense only to find pirated versions in Chinese bookstores even before it had shipped the first edition. See Alford, To Steal a Book, 43.
extraterritoriality. In one way, extraterritoriality was seen as vital to American interests, yet the lack of a central legal structure resulting from extraterritoriality often left American diplomats unable to effectively protect those merchants whom such a system supposedly favored.\textsuperscript{67} China in the early 20\textsuperscript{th} century was clearly a diplomatic morass, and the effects increasingly hurt American holders of intellectual property since the unequal treaty system precluded any meaningful legal reform.

Yet, despite this impasse, diplomatic and economic relations continued to grow between the United States and China, and technology certainly factored into this relationship. Although the government of China, unlike that of Japan, did not actively encourage the adoption of Western technology, one should not conclude that in the absence of direct government intervention all technology transfer was instead accomplished as a result of private market forces as the only alternative. Indeed, the United States, for various reasons, was foremost among the Western Powers in China in encouraging Chinese students to study Western technology, and the stories of two Chinese universities should bring this somewhat obscure policy to light. The first university, St. John’s in Shanghai, was founded by the American Anglican Church in 1879 as a way to encourage Christianity among Chinese students through Western learning, primarily natural philosophy and science. By 1905, the University had been registered in the District of Columbia, U.S.A., with the result that students from St. John’s could freely continue graduate education in America, thus achieving the missionaries’ goal of facilitating the study of Western principals.\textsuperscript{68} A second university, Tsinghua University in Beijing, was founded in 1911 by the United States government itself as a sign of goodwill between the nations using money from the large indemnity China paid as a result of the Boxer Rebellion. Tsinghua University, known colloquially at its founding as the “American Indemnity College,” purposefully channeled many of

\textsuperscript{67} Such frustration on the part of American diplomats in regard to their inability to protect intellectual property can be seen in an exchange of letters between Minister Rockhill and the Secretary of State regarding an official inquiry by the Remington Typewriter Company asking for information about legislation regarding patents and copyrights in China in 1906. See Allman, \textit{Handbook on the Protection of Trade-Marks}, 179.

\textsuperscript{68} Shanghai Municipal Archives, “St. John’s University,” http://www.archives.sh.cn/docs/200803/d_160503.html.
its students on a scholarship program to the United States with the goal of fostering closer commercial
and diplomatic relations between the nations, and many of those scholarship students went on to lead
scientific ventures in China.\textsuperscript{69} Thus, as was the case of Japan, Americans associated better geopolitical
relations in China with the promotion of higher education, resulting in a large scale transfer of American
technical knowledge that did not come directly from the more obvious commercial ventures.

The Chinese Revolution of 1911 and the end of the imperial system did not materially affect
American relations with China regarding intellectual property. As the 20\textsuperscript{th} century progressed, Chinese
bureaucrats continued to control matters in China and continued to resist implementing the provisions
of the treaties. In many ways such a delay was obvious, for in the frustrated words of Norwood Allman,
the former American Consul, “all the efforts towards treaty revision [to include a timetable for
intellectual property enforcement] must come from the foreign side, as the Chinese have no reason to
be concerned about the current status.”\textsuperscript{70} As the Chinese authorities delayed implementing a system to
protect intellectual property rights, foreign merchants gradually sought other ways to protect the future
value of their products. Starting in 1919, Westerners began the practice of registering patents,
copyrights, and trademarks at the Western-run Imperial Maritime Customs houses at the treaty ports,
not as a way of ensuring their rights, but as a way of dating their claims in the expectation of eventual
legal protection.\textsuperscript{71} However, this commercial strategy was complicated by the fact that the Chinese
bureaucracy had meanwhile independently started a convoluted and unenforced system of provisional
copyright and trademark regulations in the aftermath of the 1904 negotiations. This Chinese system did
not offer tangible protection for Western intellectual property holders, but nevertheless was publically
announced as the only valid basis for all future protection by the Chinese government. By doing so, the

\textsuperscript{70} Allman, Handbook on the Protection of Trade-Marks, 110.
\textsuperscript{71} Allman, Handbook on the Protection of Trade-Marks, 7.
Chinese government was passively combating foreign influence in China that was maintained under the larger umbrella of extraterritorial rights, a fact that was not overlooked by the Western Powers, which continued to support the Imperial Maritime Customs houses. Specifically, as Robert Heuser described the competing patent registration systems, “what provoked the utmost opposition of the European governments was the attempt of the Chinese government to limit or redefine the sphere of the extraterritorial regime of the foreigners.” In the midst of this confusion, Allman suggested that American intellectual property holders actually register with both systems to have any reasonable expectation of eventual protection. But as William Alford points out, in the years since the Boxer Rebellion, the Western Powers made very little effort to educate the Chinese populace and bureaucrats about the benefits of intellectual property rights. When combined with a general cultural aversion to such state sponsored innovation, intellectual property law often was seen by Chinese officials as just another measure imposed upon China for the benefit of the Western Powers. Thus, in the aftermath of the Revolution of 1911, the petty Chinese bureaucrats who moved from governing under an imperial system to governing under the Republic saw little need to reform China’s intellectual property laws. But the pressure was continually mounting on foreign governments from their respective intellectual property owners to reach a solution in China. As Allman explained:

Treaties were made over twenty years ago, and still there is no patent office. At the time there was perhaps little need for one... conditions, however, have changed considerably since these treaties were made and those merchants who are now suffering by having their patent rights used by unauthorized persons will doubtless agree that a remedy ought to be provided.

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73 Allman, Handbook on the Protection of Trade-Marks, 7.
74 Illustrative of this, the Chinese characters for patent mean “monopoly, or exclusive controlling advantage,” and don’t include the Western principal of disclosure or teaching. See Zheng, Chinese Intellectual Property, 51, and Alford, To Steal a Book, 46.
75 Allman, Handbook on the Protection of Trade-Marks, 97.
By the 1920s, China’s intellectual property system was still in the shadow of the failed 1904 trademark negotiations, with progress nonexistent as a result of internal Chinese resistance and the political realities facing foreigners.

But while Westerners had problems with getting the Kuomintang Party, the ruling nationalist organization in Chinese politics since 1928, to agree to intellectual property reform, some progress was indeed possible for a variety of reasons. Importantly, the Kuomintang’s tenuous grasp on power favored the United States, as China’s rulers saw implementing intellectual property laws as a way of gaining the crucial favor of America and the other Western Powers. Indicative of Chinese awareness of the need to gain foreign support, in 1912, immediately after the overthrow of the imperial regime, the central government passed a provisional set of patent laws, the “Interim Regulations on Awards for Devices.” In 1923, China’s Northern warlords passed a trademark law that materially protected foreigners, a law that was affirmed by the Kuomintang government in 1930. Yet these laws were rather outdated and ineffective by the time they were passed, and it must be observed that they were likely passed only for the sake of China having such laws. In order for the Republican government, and specifically the Kuomintang Party, to affirm their rule in China, they had to reestablish China’s lost sovereignty, and to do this, they had to end the regime of extraterritoriality imposed by the Western Powers. As reported by the New York Times, the Western Powers used concerns about the inadequacy of China’s legal system to deny relinquishment of extraterritoriality: “Included among the suggestions as a condition precedent to the relinquishment of extraterritorial rights was the adoption by China of civil and commercial codes, a revised criminal code, banking laws, patent laws and a land expropriation law.”

Thus, the Kuomintang’s reform of intellectual property laws contained a clear calculus, in that they

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76 Such favor was important to the Kuomintang government as a way to alleviate threatening political pressure, both foreign and domestic. Indeed, the Kuomintang had relatively good relations with the United States in many ways, and Sun Yat-Sen, the Nationalist movement’s founder, had begun many of his revolutionary efforts from America.


wanted to bow to international pressure just enough to both retain independence and yet gain critical Western acceptance of an end to extraterritoriality.

Thus, the United States had a constant interest in the framing of China’s intellectual property policy in the first several decades of the 20th century, yet such efforts were held back as a result both of international political maneuvering within the framework of the unequal treaty system in China and a Chinese cultural aversion to such reform. While American merchants may not have been a major presence in China, nor were they losing a significant portion of their trade due to intellectual property infringement, there was a widespread belief that if Chinese laws were not revised, China would create an increasing problem for intellectual property holders as it industrialized. Likewise, American diplomats recognized that taking a lead on intellectual property matters was a way to be politically relevant in China, where the United States was oftentimes an outsider among the other Western Powers. Ultimately, as shown by the 1904 trademark negotiations, the United States made the decision to work within this international framework created by the Western Powers and engage in the politics of extraterritoriality. Intellectual property reform was manipulated within this system and became inseparable from the Western desire for control over China, as explained by Robert Heuser: “the creation of modern trademark legislation became a treaty obligation, a kind of crystallization of the general request for legislation along Western lines.”79 Thus, as the 20th century unfolded, American policy was not rooted in immediate commercial desires, as little effort was made to educate the Chinese about the benefits of intellectual property protection and American diplomats preferred to insist upon the adoption of Western laws rather than working with the Chinese to create an intellectual property system according to Chinese values. These policies and their results demonstrate that the United States placed a higher value on geopolitical relations with both China and America’s Western counterparts.

than on mandating efficient intellectual property protection for American merchants in China before the communist revolution.
Chapter 3: Cold War Development of Northeast Asia

At the end of World War II and the start of the Cold War, the United States occupied Japan and Korea, supported the Kuomintang government on Taiwan, and all the while monitored the growth of communist influence on the Chinese mainland and in Northern Korea. The United States developed a policy of strengthening each of these Northeast Asian nations through economic, military, and technical aid in order that they could more effectively resist Soviet and other communist pressure, in line with larger American goals in the Cold War. And yet, the United States eventually found itself stuck between competing foreign policy objectives, as protecting American intellectual property often conflicted directly with efforts to economically develop these nations. While American occupiers did use a rare window of direct influence to Westernize laws in general in Japan and Korea in the late 1940s, and Taiwan indirectly in the 1950s, such efforts were done more under the desire to more closely link the countries with America than to increase protection of American business interests. And thus, in the early years of the Cold War, American foreign policy regarding intellectual property in Northeast Asia was another example of a balancing act between the geopolitical interests of the United States and the business interests of American holders of intellectual property.

Japan’s interaction with the United States in the post-war years was defined by the American occupation from 1945 to 1952, but as with other Northeast Asian countries, it was also defined by an American desire to build the nation to resist Soviet influence in the Cold War. While the occupation was certainly unwelcome for most Japanese, the opportunity to gain American technical knowledge was not lost on Japanese officials. As explained by the historian Kenneth B. Pyle, “Since the beginning of the Pacific War, Japan had been cut off from most of its Western industrial contacts, and by the 1950s a large body of Japanese engineers and skilled technicians was ready and anxious to close the

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technological gap that had opened in the intervening years.” The United States also saw Japanese industrialization and innovation as within its interests, for reasons of both development and revenue, as shown by a declassified 1949 letter from the United States Political Advisor for Japan to the Secretary of State:

The enclosed study recommends that... this Headquarters should permit Japanese to file applications for patents in countries which will receive them in order to protect and give incentive to Japanese inventors and in order to provide dollars for the SCAP commercial account from royalties received as a result of licensing to foreign manufacturers. Yet the American occupation did not wish to simply aid Japan without reforming its economic structure, and one of the first policy objectives of the occupation was to break up the industrial combines, the zaibatsu, that formed the backbone of Japan’s war-making potential. One of the ways that this was accomplished, besides directly mandating the split of several firms, was by manipulating the intellectual property rights of the zaibatsu. As reported by Burton Cranes in the New York Times in 1947, of an economic directive written by MacArthur’s Headquarters in order to break up the zaibatsu, a provision “that is likely to have important implications for foreign companies with Japanese connections is that ‘all separate companies resulting from reorganization should be permitted to enjoy all patent rights owned or controlled by the company.” Since each division of the former zaibatsu held the same rights to a given technology, the monopoly inherent in patent rights was effectively broken. This policy benefited American interests in two ways, as it both allowed a more competitive use of Japanese technology without changing the legal framework of patent protection, and it also lowered barriers to American competition. As Japan rebuilt, it used experts with the support of the American government that were similar in function to the oyatoi gaikokujin of the 1870s, as reported by the Wall Street Journal in 1951:

The Japanese also are on the lookout for deals in which they can hire American firms to come in with patents, engineers and advisors over a period of four to 20 years. This hiring method allows Japanese businessmen to pay for new American methods on a sort of pay-as-you-go basis as they sell their new goods made with American aid. In the past months, Japanese firms have signed between 50 and 60 of these technical assistance contracts with American, French, Swiss, British and other foreign firms.84

Thus, the goals were of the United States in Japan at the onset of the Cold War were to strengthen Japan and make it economically competitive, foster ties with American industry, and all the while attempt to preserve and improve existing intellectual property protection.

American troops took over control of the southern Korean Peninsula from surrendering Japanese troops in 1945, and were immediately faced with the Cold War reality of occupying Soviet armies to the North. Prior to the 1945, American involvement in Korea was unofficial and primarily carried out through the actions of Christian missionaries, and thus the United States government had no previous experience participating in policy decisions in Korea nor had much functional knowledge of the nation. The Korean intellectual property system was very similar to that of Japan, largely due to Japanese colonization between 1908 and 1945, and, importantly, Korean industry for this period had relied on Japanese technical assistance and engineers.85 Thus, the United States entered into a situation in a nation that was economically reliant on an infusion of foreign technology and expertise, and it was soon apparent that Korean industry would collapse if the United States did not supplant Japan as a supplier of technical knowledge, an event which could invite Soviet dominance on the peninsula. Yet American technical assistance to Korea was limited for several reasons, including the fact that Korean industry was not sufficiently developed as to need significant technical assistance outside a few key

relatively low-tech industries. Moreover, it is not clear that the South Korean leadership actively sought infusions of American technology, for as American troops were withdrawing according to an arrangement in 1949, President Rhee focused almost exclusively on demands for military equipment, and a divided American congress was generally hesitant to provide unrequested technological aid.

Following the armistice that effectively ended the Korean War in 1953, American efforts in Korea focused on rebuilding South Korea to resist North Korea and were concerned very little with efforts to build a legal system more favorable to American interests: “Bureaucratic structures were either left in place or else adopted from a country whose language was fairly familiar to those shaping the country after the devastating Korean War,” that is, Japan. Additionally, to contain any further communist expansion, the United States committed itself militarily to South Korea by signing the Mutual Defense Treaty in 1954, forging a partnership with the Korean government. Thus, in the aftermath of the Korean War, the United States needed to strengthen South Korea, partially through technical aid, in order to continue to meet its geopolitical goal of containing communist influence in Northeast Asia.

Regarding intellectual property, the United States had a dismal time dealing with the Kuomintang regime before their retreat to Taiwan in 1949 following their defeat by the Communist Party under Mao Zedong. But while the United States may have formerly had little choice but to support the Kuomintang or else risk losing all of China to communist control, the historian Nancy Bernkopf Tucker points out that American diplomats took these negative experiences from the 1940s

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86 In a message to the United States Congress on June 7, 1949, regarding economic assistance to the Republic of Korea, President Truman focused on coal, electric power, and fertilizer as the main Korean industries that should be reinforced. See Documents on Korean-American Relations, edited by Se-Jin Kim (Seoul: Research Center for Peace and Unification, 1976), 75.

87 President Rhee requested weapons for 500,000 soldiers in 1949, when the Republic of Korea only had 65,000, causing doubt among American lawmakers regarding his defensive rationale. See Dobbs, The Unwanted Symbol, 170.


89 As an example, in 1944, reliant on American support in its civil war against the communists, the Kuomintang government grudgingly agreed to change its copyright law to place foreigners on an equal footing with Chinese, yet took minimal action to ensure the implementation of this reform. See Varg, The Making of a Myth, 26.
into account when dealing with the regime once it had relocated to Taiwan.\textsuperscript{90} Indeed, the United States was actually prepared to abandon the regime on Taiwan, but the 1950 communist invasion of South Korea “galvanized American policymakers and completely altered the direction of American China policy.”\textsuperscript{91} But as the United States committed itself to strengthening Taiwan, it looked to use its influence as Taiwan’s protector to reform the Taiwanese economy and support privatization, both as a way to increase economic production and also to create a higher living standard among the populace so that it would resist communist appeals.\textsuperscript{92} To encourage privatization efforts, the United States held out much-needed private foreign investment as a reward that would follow reform and actively encouraged companies such as the Singer Sewing Machine Corporation to establish a presence in Taiwan.\textsuperscript{93} As Taiwan slowly privatized, American aid workers avoided directly subsidizing private industries, and instead concentrated their efforts on social and physical infrastructure in order to create an optimal environment for private industry to grow. Indicative of American influence in Taiwanese reform efforts, meetings held by Taiwanese economic planning bodies were often held in English so that American advisors might understand.\textsuperscript{94} Technical aid and training was another tool used by the United States to strengthen Taiwan, and “by 1965, American funding had facilitated the training in the United States of significant numbers of Taiwan’s political and technological elite.”\textsuperscript{95} Ultimately, in a period of 15 years, from 1950 to 1965, the United States provided Taiwan with an annual average of over $100m in non-

\textsuperscript{91} Tucker, \textit{Taiwan, Hong Kong, and the United States}, 32.
\textsuperscript{92} In 1953, 80% of Taiwanese industry was government owned, resulting from the tight control exercised by the Kuomintang regime. The regime resisted reform, as it would give more political power to ethnic Taiwanese and could dilute the effectiveness of any potential efforts to return to the mainland. See John W. Garver, \textit{The Sino-American Alliance: Nationalist China and American Cold War Strategy in Asia} (Armonk: M. E. Sharpe, Inc, 1997), 237.
\textsuperscript{93} American representatives reminded reluctant Taiwanese regarding the relocation of the company that “technology transfer and local procurement would compensate for initial sales losses.” See Tucker, \textit{Taiwan, Hong Kong, and the United States}, 57.
\textsuperscript{94} Garver, \textit{The Sino-American Alliance}, 239.
\textsuperscript{95} Training was also accomplished in Taiwan, as in 1959 the Taiwanese National Council on Science Development was established and endowed by the US Agency for International Development. See Tucker, \textit{Taiwan, Hong Kong, and the United States}, 80-82.
military assistance, supporting the Kuomintang regime and firmly allying Taiwan to the United States in the Cold War. And so, in Japan, South Korea, and Taiwan, the United States committed itself to using technical and other economic aid to build these nations into strong allies that might aid American geopolitical goals as the Cold War was launched.

From the close of WWII on, technical knowledge was a contentious issue that framed the Cold War, and the United States at times actively sought to use technology as a direct policy tool against the USSR. In the years following the surrender of Japan, Russian diplomats repeatedly attempted to gain access to Japanese factories under the justification of wartime spoils, while the United States outright refused to share access to such technology. Rhetoric in the United States by both the government and industry trade groups showed a strong sense of ownership towards Japan in this regard, as demonstrated by a statement in 1948 by the Patents, Trade Marks and Copyright Committee of the Foreign Trade Council on this issue:

Strong disapproval has been voiced by the committee of the principal in carrying out the Far East Commission directive permitting technical representatives of the eleven member governments of the commission, including Russia, to take copies of technical and scientific processes of Japanese origin and ownership which were developed prior to December 31, 1945.

Similarly, as military occupation of Korea grew less attractive to American strategists in the late 1940s, economic aid, including technology transfer, seemed to be the suitable way to demonstrate to the Soviets continuing American commitment to the peninsula. A March 31, 1947 joint memo by the State and War Departments read in part:

“It is important that there be no gaps or weakening of our policy of firmness in containing the USSR because weakness in one area is invariably interpreted by Soviets

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96 Tucker, Taiwan, Hong Kong, and the United States, 54.
as indicative of an overall softening... a firm ‘holding of the line’ [using economic aid] in Korea can materially strengthen our position in our other dealings with the USSR.”

In this context, economic aid seemed interchangeable with a direct military presence on the Peninsula in 1947 as a way to dissuade Soviet aggression. That this calculation was incorrect, as North Korea invaded the South in 1950, does not discount that the United States actively used technological knowledge as a diplomatic tool to counter the Soviet Union early in the Cold War.

In addition to using technology policy as a way to counter the USSR, the United States more explicitly used gifts of intellectual property as a way of gaining publicity and good will for America among the people of Northeastern Asia. Given the volatile political structure of Japan, Korea, and Taiwan at the onset of the Cold War, and the American belief that they were susceptible to a popular communist takeover, America certainly wished to publicize its beneficial efforts to the general population. Within the “Agreement on Aid” signed between Korea and the United States in December of 1949, Article IX stated that “the Government of the Republic of Korea will cooperate with the United States Aid Representative in providing full and continuous publicity in Korea on the purpose, source, character, scope, amounts and progress of the economic and technical aid provided.” Thus, explicitly, the United States required Korea to publicize to its people American gifts of technology as a condition of that aid.

Loose intellectual property laws in Northeast Asia also likely helped American propaganda efforts in an indirect way, as recognized in an article in the *Baltimore Sun*:

> We read constantly of the tremendous amounts of money and effort the Soviet Union is putting into its scheme to flood the bookstalls of Asia with cheap literature, often in English. There is a lot to be said from the propaganda angle for a system under which

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99 *Documents on Korean-American Relations*, edited by Se-Jin Kim, 82.

100 This publicity was important, as the government of President Rhee tentatively positioned itself as anti-American in the late 1940s. See Dobbs, *The Unwanted Symbol*, 91.
Asians can get, at a price they can afford, an American rather than a Soviet encyclopedia for technical or political work.\footnote{David Kaser, \textit{Book Pirating in Taiwan} (Philadelphia: University of Pennsylvania Press, 1969), 66.}

This article advocated the United States accepting ineffective copyright protection in Northeast Asian nations as a way to further American geopolitical goals, while largely ignoring the economic harm caused by such indifference, concisely summarizing one viewpoint in American foreign policy. And so it is clear that technical aid and an initial apathy regarding copyright protection was at least an indirect component of an anti-communist strategy that was employed by the United States in Northeast Asia.

Yet as America was actively encouraging the growth of these Northeast Asian nations in order to ally them to the United States in the Cold War, it did seek to encourage the adoption of Western-style laws, particularly in the area of intellectual property rights. Because the lack of intellectual property rights hindered American business involvement in Japan in the years immediately after 1945, the United States attempted to use its influence during the occupation to end such controversial Japanese practices as compulsory licensing and similar measures that diminished a property holder’s “right to exclude.”\footnote{The “right to exclude” is considered crucial in the Western understanding of intellectual property rights, as it protects the monopoly of the property holder on the holder’s own terms.}

This was at least partially in response to input from American businesses, as shown in an excerpt from the \textit{New York Times} in 1948:

\begin{quote}
W. E. F. Bradley of the Otis Elevator Company, chairman of the Patents, Trade Marks and Copyright Committee of the National Foreign Trade Council, pointed out that none of the big American companies as yet has resumed pre-war activities in Japan. He ascribed this as largely due to the patents and tax situation. Mr. Bradley indicated that his committee will soon renew conversations with the State Department on recommendations sponsored by the council to clarify and improve the procedure with respect to patents... these modifications would make the Japanese requirements conform more nearly to United States patent law.\footnote{Conroy, “Rule on Patents Asked for Japan,” \textit{New York Times}, November 21, 1948.}
\end{quote}

The Americans were only moderately successful in such reforms, as Japanese economic planners insisted that such measures were critical to Japanese recovery in the wake of the splitting of the
Yet towards the end of the occupation, in an echo of American tutelage of Japan at the end of the 19th century, Japanese officials and businessmen were compelled to actively tour the United States to learn the beneficial effects of American laws. Demonstrating American interest in the progress of these legal revision efforts, the New York Times reported in 1951 that “The Commissioner [of Patents] and Judge Masuki Hara of the High Court... have been touring United States Government offices and industrial plants for the last month to study patent and trade-mark procedures with the view to incorporating changes in Japanese laws on industrial property rights.” While the United States certainly had more urgent policy goals in Japan than reform of intellectual property law, an overall shaping of Japanese law to be favorable to American business interests was undoubtedly a long term objective. In Taiwan in the early 1950s, the United States sought to avoid repeating the by-then-recognized mistake of not educating Chinese bureaucrats about the rationale behind protecting intellectual property, and actively began educational efforts. In a larger sense that explains the American rationale, according to Nancy Bernkopf Tucker, the United States Information Service “sought to explain American society to people on the island in order to win adherents to the ways of the ‘free world.’”

Thus, in addition to building up the industry of its Northeast Asian allies, the United States sought to gain long-term security by attempting to use its influence to Westernize the laws of those nations.

And yet, even as the United States was negotiating stricter intellectual property laws, piracy by Taiwan, Japan, and South Korea was increasingly and significantly harming American businesses in the 1950s and 1960s. Although the copyright industry was perhaps the worst hit, initially, even as commercial losses grew more apparent to American firms, many potentially influential intellectual property owners regarded the situation in Asia with apathy:

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106 Tucker, Taiwan, Hong Kong, and the United States, 82.
Lack of a battle plan [in the early 1950s], however, to a large degree resulted from the fact that a substantial majority of member [publishing] houses in the appropriate organizations were not sufficiently active in the foreign markets – especially Asian – to warrant much interest or concern from them.\(^{107}\)

Still, the market for American copyrighted material was quickly growing in Northeast Asia as a result of the growing technical dominance of the United States and the international prestige of the English language. Additionally, as the United States took on an increasingly permanent military presence in Northeast Asian nations, American soldiers and diplomatic personnel stationed there became consumers of cheap pirated works.\(^{108}\) Copyright protection in these nations was nominal at best, as Taiwan in particular charged a high price for registering American copyrights relative to the very low purchasing power of Asian populaces, angering American publishers.\(^{109}\) As explained by David Kaser:

> Many [publishers] felt that, since American books were necessarily often among the highest priced in the world, [the registration] fee was intentionally discriminatory in effect to keep registration of American books with the Ministry of the Interior to a minimum so that they could be freely reprinted locally and purveyed at rock-bottom prices to Taiwan’s growing masses of university students.\(^{110}\)

And thus there were growing indicators of trouble between the United States and those Northeast Asian nations that were the beneficiaries of its unspoken policy of ignoring copyright infringement as American businesses increasingly understood the financial losses that such a policy allowed.

But American businesses were pragmatic and recognized that the United States had neither the ability nor the inclination to substantially change the situation in Northeast Asia that allowed such infringement. And so, as American firms increasingly understood the losses that they suffered, particularly from copyright infringement, as the Japanese, Taiwanese, and Korean economies

\(^{107}\) Kaser, *Book Pirating in Taiwan*, 22.  
\(^{109}\) Taiwan charged 25 times the sale price of a book to register it, a very high fee for a small impoverished market. Because Taiwan did not join the Universal Copyright Convention of 1952, books registered in the United States would not automatically be registered in Taiwan as desired by American publishers. See Kaser, *Book Pirating in Taiwan*, 31.  
developed, some publishers developed an innovative response. Encouraged by the United States’
government, American publishing houses began releasing cheaper Asian editions of works that were
previously widely copied, and these editions “tended to reduce materially the temptation to continue
piracy” within targeted Asian nations.\textsuperscript{111} Moreover, the United States government increasingly took
steps to balance American geopolitical interests in the late 1950s with the needs of the American
publishing industry. In 1958, the United States Government established the Informational Media
Guaranty Program to bypass the reluctance of American publishers to extend needed technical
materials, such as scientific and industrial textbooks, to Korea in light of poor intellectual property
protection. In the wording of the agreement, the “program is designed to facilitate the procurement of
American informational materials through regular commercial channels by Korean institutions and
individuals by means of guarantees issued to American exporters by the Government of the United
States of America.”\textsuperscript{112} In effect, the United States government offered that it would pay American
companies for losses of intellectual property in Korea as long as they continued to do business. This
agreement is clearly an example of the United States government working around but also satisfying
American businesses to advance its geopolitical goals. Thus, while not resolving the problem of
copyright infringement outright, these steps by both the American government and publishing houses
mitigated the problem of copyright infringement, and moreover allowed United States publishers a
foothold in Asian markets.

It was the actions of Taiwanese publishers that first exposed the fatal flaws in this tacit
arrangement, and the fallout caused American publishers to begin a concerted effort to mandate a
higher level of protection for American intellectual property in Asia. Books protected under American
copyright but printed in Taiwan increasingly became available through unofficial channels in the United

\textsuperscript{111} Kaser, \textit{Book Pirating in Taiwan}, 24.
\textsuperscript{112} \textit{Documents on Korean-American Relations}, edited by Se-Jin Kim, 82.
States in the late 1950s, punctuated by the large-scale arrival of Taiwanese pirated textbooks at Iowa State University at Ames in February of 1960. The response of the publishing industry to this new threat should not be underestimated. In August 1959, a representative from the American publisher Macmillan testified the following narrative regarding Taiwanese infringement in front of the Senate Appropriations Committee which was meeting on the subject of Mutual Security Aid to Taiwan:

The United States Government has done much to encourage the provision of scientific and technical books and textbooks for the students, physicians, scientists, and engineers of [Northeast Asian] countries... It has encouraged American publishers to ship books to those countries and manufacture inexpensive editions in Asia especially for sale there... the operations of publishers in Taiwan are having a disruptive effect through much of the Far East.

In essence, American publishers were reacting to an unspoken agreement that infringement was acceptable in these Asian nations, as long as they did not export nor threaten other markets. Taiwan’s Embassy in Washington urgently forwarded home this testimony with a worried analysis about the impact that it made on the congressional committee, since it explicitly threatened the Mutual Security Aid that Taiwan depended on. The Informational Media Guaranty Program for Taiwan, modeled after the Korean program of the same name, was terminated in 1959 by pressure from US publishers on the grounds that they were mortally threatened by widespread Taiwanese exports of Western books. Moreover, American publishers publically claimed that the Taiwanese government’s delay in registering those Western copyrights which were applied for, officially on grounds of censorship, was “a deliberate effort to assist local pirates.” As an indication of the intensity with which American publishers lobbied against Taiwanese piracy, “Robert Frase, the able Associate Managing Director of the American Book Publisher’s Council, and others literally camped on the doorsteps of appropriate government officials

113 Kaser, Book Pirating in Taiwan, 53.
114 Kaser, Book Pirating in Taiwan, 58.
115 Kaser, Book Pirating in Taiwan, 68.
116 Alford, To Steal a Book, 96.
during the period.\textsuperscript{117} Thus, it was specifically the act of exporting copyrighted materials that American publishers found so objectionable, and the consequences of Taiwanese publishers crossing changed American diplomatic efforts in Northeast Asia.

Foreign governments, especially the Taiwanese government, took notice of the changing American opinion on the protection of intellectual property while also attempting to preserve the status quo. In 1959, Taiwanese officials, in an effort that William Alford describes as a way to “ameliorate American pressure while keeping alive the domestic reprint industry” made token reforms to the ROC’s undeveloped rules concerning copyright. A year later, Taiwan followed this up with a proclamation declaring that persons exporting unauthorized copies of books and records would be subject to prosecution for smuggling.\textsuperscript{118} To a large extent, the same export of infringed goods did not occur in Japan or Korea, as Japan had adopted nominal protection of foreign copyrights under foreign pressure by joining the Universal Copyright Convention in 1952 and, rebuilding after the Korean War, South Korea “had much less time to develop structures which were not in accordance with international obligations due to increasing pressure from industrialized countries to grant proper protection.”\textsuperscript{119} And so, the comparison of Japan and Korea to Taiwan shows that it was primarily Taiwan’s export of pirated goods that caused it to draw American criticism, and Taiwan responded by legislating to end those exports rather than reforming its protection of copyrights outright. Indeed, since United States generally supported Japan, Korea, and Taiwan with a broad transfer of technical knowledge, as shown by the existence of the Informational Media Guaranty Programs, this minimal reform on the part of Taiwan was exactly enough to placate American policymakers.

\textsuperscript{117} Kaser, \textit{Book Pirating in Taiwan}, 60.
\textsuperscript{118} However, there is little indication that this had any material effect on Taiwan’s export industry, as Taiwanese courts did not have an effective mandate to define copyrighted materials. See Alford, \textit{To Steal a Book}, p.97.
\textsuperscript{119} Heath, \textit{Industrial Policy and Intellectual Property in Japan}, 203.
And thus, a form of equilibrium was established in Northeast Asia regarding intellectual property in the early years of the Cold War. America committed itself to protecting the governments of Japan, Korea, and Taiwan from Soviet and other communist pressures, and often extended technical aid as part of this support. Moreover, for reasons of both publicity and to as a way of countering the USSR, the United States largely declined to pressure these governments to restrain infringement of American intellectual property, even as American diplomats sought a broad adoption of Western style laws. In Japan, compelled during the American occupation to accept provisions that would protect intellectual property rights in line with Western interests, Japanese economic planners ultimately struck a somewhat dubious compromise as described by Christopher Heath: “Japan found the perfect fuzzy logic formula by enacting [intellectual property] laws to avoid foreign sanctions, but declining to apply the law in order to avoid unwelcome results at home.”120 In other words, Japan adhered to the implicit borders of American diplomatic pressure by legally prohibiting infringed products from export in line with international standards, but allowing infringement at home. Taiwan crossed this line in the late 1950s, exporting copyrighted materials to the United States, but quickly amended its laws to more closely adhere to the standards required by American foreign policy. The Republic of Korea, while supported by American economic aid, had a low tech industry and did not require assistance of a technical nature in any significant sense from the United States. By not making the mistake made by Taiwan when it began exporting American copyrighted works, Korea remained the secure beneficiary of America’s Informational Media Guaranty Program, and did not draw the ire of American publishers in the early years of the Cold War. Ultimately, the foreign policy of the United States was concentrated on Cold War geopolitics in the post-war years, and the transfer of technical knowledge and access to American copyrights was a means to an end for many American policymakers. Although intellectual property

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120 As an example, the Japanese Supreme Court ruled in 1965 that a Japanese citizen who had registered an almost identical trademark to the famous Popeye cartoon had acted legally, since he had not done so in “bad faith.” In fact, the lack of finding such “bad faith” would be used by Japanese courts to excuse many cases of blatant infringement until the 1980s. See Heath, *Industrial Policy and Intellectual Property in Japan*, 202.
infringement hurt American business interests, such was considered an acceptable cost of supporting regimes in Northeast Asia that favored the United States as long as those beneficiaries did not abuse their privileges by exporting technical knowledge or copyrighted materials beyond their home markets. And thus did American foreign policy reach an acceptable compromise in Northeast Asian nations at the onset of the Cold War regarding intellectual property; while weak intellectual property protection was permissible to American allies in the interests of their economic development, the exportation of those same infringed products to the United States was strongly deterred.
Chapter 4: The formation of American intellectual property advocacy groups

In the late 1970s and early 1980s, American intellectual property holders finally established a permanent lobby in Washington, changing the nature of American foreign policy in regards to intellectual property. Although this fractured lobby represented various interests and was established largely in response to threats of domestic piracy within the United States, it quickly shifted focus to concentrate on advocating for strong responses to foreign piracy, particularly in East Asian countries. As the various groups that composed the lobby coordinated their efforts, they became a powerful force in Washington in a matter of a few years. While the specific proposals and policies that they advocated on behalf of intellectual property rights were perhaps a bit haphazard as the lobby established a permanent presence, the economic and political conditions in the United States at the time resulted in the lobby gaining some quick victories and the valuable support of important policymakers. Thus, the organization of an involved intellectual property lobby is an important turning point in the history of American efforts to establish intellectual property protection abroad, one which is often glossed over in relevant academic works, and it deserves a complete case study in order that it can be adequately analyzed.

As can be seen in the preceding chapters, American intellectual property holders had certainly conducted sporadic lobbying efforts on behalf of stronger intellectual property laws prior to the late 1970s and had achieved varying levels of success. For example, as previously discussed, American publishers organized a rapid and effective response to pirated Taiwanese books entering the American market in 1959 and 1960. Moreover, in the immediate wake of the Taiwanese publishing debacle, the American Book Publishers Council and the American Textbook Publishers Institute together formed a joint committee to study further aspects of Taiwanese piracy and to determine the overall stance that the industry should take against Asian copyright infringement in general. After debate, these groups decided that an industry-wide refusal to grant licenses to their work in any Asian nation with poor protection was their best available option, however symbolic, as it would “at least serve as one more
way of expressing their indignation over the rampant piracy situation.” A decade later, the International Federation of the Phonographic Industry (IFPI), a trade group representing the recording industry, initiated an anti-piracy effort directly in Hong Kong in 1973 with the assistance of the Motion Picture Association of America (MPAA). These groups worked directly with local law enforcement agencies, and “managed to secure increased criminal penalties for copyright infringement, crackdowns on duplicating labs, and enhanced export laws that led to a significant reduction in piracy.” However, despite short-term effectiveness, the only persuasive argument that these industry groups could make to foreign officials was that a general crackdown on this nominally illegal activity would undermine organized crime. This argument had limited effectiveness abroad, leading to the conclusion, in a resigned testimony on these efforts by the president of the IFPI before the U.S. congress, that “piracy cannot be beaten in Asia unless copyright industries have the U.S. government’s active support.” Thus, with a lack of credible American diplomatic pressure to back stronger anti-piracy laws abroad, these early industry efforts had limited success, leading intellectual property holders to devise new approaches to the issue.

Previously established industry groups largely led these new intellectual property initiatives in the United States, although it was typically not Asian piracy but rather the domestic threat of increased theft resulting from newly developed technologies that caused the impetus to begin lobbying efforts. These new technologies created in the 1970s included cassette recording and video-taping devices which were intended to allow users to store publically broadcasted material, but also allowed pirates to

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124 Bettig, *Copyrighting Culture*, 218.
duplicate intellectual property with unprecedented ease.\textsuperscript{125} Commenting on the affects of domestic pirates using these new devices on a commercial scale, a representative from the Recording Industry Association of America (RIAA) estimated in 1978 that “we think the cost exceeds $200 million a year in illegal records and tapes.”\textsuperscript{126} Additionally, copyright owners were increasingly worried about other, less conventional forms of copyright infringement. In 1984, after years of debate on the issue of Latin American pirate broadcast stations using the signals and programming of American media satellites, a spokesperson from the MPAA wrote:

> These satellites are being used as instruments of grand theft. In the coming years, most of the world’s visual materials will be delivered by satellite. If copyrighted material can be used without the permission of the owners, not only could the overseas film industry be destroyed, the ownership of all intellectual material could be endangered.\textsuperscript{127}

In such an environment of perhaps slightly hyperbolic rhetoric from industry leaders, it is logical that industry groups would necessarily shift their focus and begin treating the general protection of intellectual property as a top concern. Thus, as domestic piracy took advantage of new technologies and expanded in the United States, intellectual property gained the attention of established copyright industry groups and eventually became a permanent topic of advocacy.

Once industry groups began to seriously tackle the issue of intellectual property protection as a whole, Asia quickly became a specific focus. Like it did with intellectual property advocacy domestically, the copyright industry led the resurgence of efforts to address Asian piracy and lobby for American diplomatic pressure against this threat. Specifically, the RIAA was one of the first industry groups to focus on Asian piracy, largely because American audio recordings were increasingly duplicated overseas.

\textsuperscript{125} After years of legal uncertainty, the 1984 Supreme Court case of Sony Corp. of America v. Universal City Studios, Inc., popularly known as the “Betamax Case,” established the precedent that home users could legally use these devices for the purpose of “time-shifting” programming to fit their schedules, a decision strongly lobbied against by copyright industry groups. With this decision, technologies that could be used to quickly pirate an increasing variety of media gained legal protection and fostered a small domestic piracy industry.


in the 1970s, owing to their increased popularity that was enabled by new consumer technologies that provided cheap listening devices to individual listeners. As a sign of industry awareness of Asian piracy, Ernest Meyers, the general counsel of the RIAA, stated as early as 1971 that “international action has become necessary because of the technical revolution recently achieved by professional record pirates... especially in the Far East.” Although such international action would not begin to take shape for another decade, clearly interest was forming among copyright holders as to the extent that their products were being infringed upon abroad, leading individual corporations and industry groups to begin to study the issue in depth. Their conclusions were as much political as financial: according to a statement that Malcolm Brown, director of music operations in Southeast Asia for EMI Group, made to the *Washington Post* in 1978:

> The governments in countries where revolution is just under the surface, where without exception they are all dictatorships and almost every country is corrupt, are interested in pleasing the people. Pleasing the people means not giving them bread and circuses today but rice and readily accessible music.

Thus, in this apt analysis of Brown, it was not simply going to be a matter of the United States pushing through mandated legislation in these countries, but would require more significant changes abroad before American intellectual property could be adequately protected. Yet as industry groups recognized that their losses were mounting, they actively attempted to formulate responses to this complicated situation, eventually leading Jack Valenti, the president of the MPAA, to acknowledge in 1981 that “I spend about 65 percent of my time on foreign [Asian] problems.” And so, even though industry groups began focusing on intellectual property issues in a domestic context, the sheer magnitude of Asian piracy caused these groups to shift and expand their focus in the 1970s.

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128 Of course, this problem was not unique to Asia, but the increasingly lower cost of these devices made them accessible to the majority of Asian consumers. As demand for cassettes to play on these devices grew, so did piracy.
It is worth examining why it was largely the copyright industry, as opposed to patent-derived industry groups, that took the lead in pressing for American diplomatic pressure to reform intellectual property laws abroad. Importantly, because intellectual property debates started in response to domestic infringement, copyrights were under a more imminent attack by American pirates than patents or trademarks were in the 1970s. Thus, in a sign of the early divided nature of lobbying efforts, notable members of the copyright industry began arguing their views in Washington under the heading of the Coalition to Preserve the American Copyright, without reaching out to other parties concerned with intellectual property.\(^{132}\) Partially this was due to a lack of interest by their counterparts in the patent industry, as intellectual property was not of such central importance to the American technology, chemical, and pharmaceutical firms of the time. Indeed, as pointed out by Christopher May and Susan K. Sell, the patent system experienced a “dark ages” of sorts in the middle of the 20th century, as “aggressive antitrust enforcement and judicial attacks” rendered patent protection in the United States far less valuable than it would become:

The effective neutering of the US patent system between the 1940s and the early 1980s seems to have had a particularly deleterious effect on US consumer electronics companies... therefore, although US firms pioneered technologies such as the transistor, the video cassette recorder, and the integrated circuit, other countries, most notably Japan, successfully commercialized these US inventions.\(^{133}\)

As a result of this weak protection, American firms certainly patented inventions, but derived less of their business from the successful defense of those patents, and increasingly relied on trade secret protection or non-disclosure for sensitive inventions. Moreover, regarding the lack of formation of a lobby specifically on behalf of trademark protection, the third major category of intellectual property, any prospective trademark lobby was not deemed to be worth the expense to many potentially

\(^{132}\) [confirm this]
interested firms, as trademark infringement was recognized to largely occur regardless of legislation. As explained in a relevant economic policy publication in 1987:

> It is frequently the case that a foreign buyer will place an order for a product to be made to certain specifications [in Asian factories], and after the order is completed the product is given additional finishing, a new label and a new package before it enters trade channels; the logos of famous firms like Rolex and Gucci are affixed in New York or Los Angeles to places left blank for the purpose.\(^{134}\)

In an environment such as this, with patent industries organized but only loosely concentrating on preventing infringement and the trademark lobby completely non-existent, the copyright industry was largely on its own to bring the issues of intellectual property protection to Capitol Hill in the 1970s.

But as Supreme Court rulings starting in 1980 strengthened patent protection,\(^{135}\) and the political environment in general favored the growth of large research-driven firms,\(^{136}\) the patent industry gained clout and quickly joined the copyright industry in its efforts to lobby for international intellectual property protection. As explained by Michael P. Ryan, IBM and Pfizer, both heavily reliant on legally protected research and development, were early leaders in advocating reform to intellectual property laws abroad. Indeed, in the late 1970s, the CEOs of IBM and Pfizer each “devised a strategy to improve intellectual property protection internationally until American standards became the international norm, especially in developing countries.”\(^{137}\) Although their efforts were separate, each sought to extend the definition of intellectual property to cover its own business, as Pfizer focused on


\(^{135}\) The Supreme Court shifted the nature of the legal protection of patent rights in *Dawson Chemical Company v. Rohm & Haas Company*. The opinion stated that “the policy of free competition runs deep in our law... but the policy of stimulating invention that underlies the entire patent system runs no less deep.” See May, *Intellectual Property Rights*, 141.

\(^{136}\) Susan K. Sell suggests that in post-Watergate America, politicians weakened the anti-trust laws that hindered patent-accumulation both in an attempt to spur growth, but also to create a private-industry counterweight to unchecked Federal power. Regardless of the accuracy of this analysis, patent accumulation was more economically desirable by American firms in this period than ever before. See Susan K. Sell, *The Origins of a Trade-Based Approach to Intellectual Property: The Role of Industry Associations*, edited by Christopher May in “The Political Economy of Intellectual Property Rights, Volume II” (Northampton: Edward Elgar Publishing, Inc., 2010), 350.

reforming the standards held by the World Intellectual Property Organization (WIPO)\textsuperscript{138} regarding the patentability of pharmaceuticals and IBM focused on achieving recognition of software as copyrightable matter. But after each was frustrated by lack of progress abroad, largely as a result of inadequate American clout in the one-nation-one-vote system of WIPO, together these companies began to use their positions within the domestic forum of the Advisory Committee on Trade Policy and Negotiation (ACTPN)\textsuperscript{139} to advise ongoing international negotiations on the General Agreement on Tariffs and Trade (GATT).\textsuperscript{140} ACTPN actively publicized and coordinated its efforts with other industry groups such as the Pharmaceutical Manufacturers Association and Chemical Manufacturers Association, which used their own lobbying power in Washington to magnify ACTPN’s push on intellectual property issues in the early 1980s. As a major part of its lobbying efforts, ACTPN starting hosting conferences to educate government officials on intellectual property rights overseas:

These conferences emphasized that American competitiveness in innovation-based industries was injured by policies of many developing countries that denied effective protection of patents and trade secrets, compelled outside companies to license production to local partners picked by the state, discouraged direct investment, and encouraged piracy of pharmaceutical and chemical products.\textsuperscript{141}

As these advocacy initiatives became increasingly publicized in private channels and in the domestic media, other technology groups and corporations rapidly joined the effort, and, as a result, the CEOs of IBM and Pfizer together formed the Intellectual Property Committee in 1986 to coordinate the lobbying efforts of American intellectual property holders.\textsuperscript{142} In general, the patent industry formulated its appeal

\textsuperscript{138} WIPO is a specialized agency of the United Nations, founded in 1967 to administer international intellectual property agreements such as the Berne and Paris conventions.

\textsuperscript{139} ACTPN was founded earlier by the 1974 Trade Act to institutionalize business input into American foreign trade policy. See Ryan, \textit{Knowledge Diplomacy}, 68.

\textsuperscript{140} GATT was an international agreement governing all aspects of international trade that was periodically modified between 1949 and 1994, when it was replaced by the World Trade Organization. The nature and politics of GATT negotiations between 1986 and 1994 regarding intellectual property will be addressed in depth in the 6th chapter of this thesis.

\textsuperscript{141} Ryan, \textit{Knowledge Diplomacy}, 69.

\textsuperscript{142} The original members represented a broad range of leading intellectual property holders, although with the exception of Warner Communications, all were outside the publishing industry: IBM, Pfizer, Merck, GE, DuPont,
to Congress on the basis of protecting the growth of American industry, an effective tactic as the American economy struggled in the 1980s and people looked to politicians for answers.\textsuperscript{143} Simply put, as the decade progressed, “competitiveness concerns, especially as regards the increasingly important high-technology sector, animated a number of significant changes in US policymaking and its institutions.”\textsuperscript{144} And so, although it mirrored the growth of the copyright industry, and eventually came to be allied with it, the patent industry took a parallel path to establish lobbying efforts in Washington.

As both the copyright and patent industries began to plan considerable lobbying efforts on Capitol Hill, they built quickly and utilized an effective network of high powered advocates to their advantage. Granted, some established advocacy groups, such as the MPAA and the RIAA, already had a network of lobbyists and sympathetic legislators in Washington DC, and merely needed to boost or shift the emphasis of existing infrastructure to achieve results. But the MPAA in particular made an effort to enhance its lobbying presence when warning policymakers about the dangers of a lack of intellectual property protection abroad: in addition to generous campaign contributions, the MPAA increasingly relied on their president, Jack Valenti, a former high powered aide in Johnson’s White House. Valenti was typical example of a Washington insider, personally approved by Johnson to leave his administration to head the MPAA,\textsuperscript{145} and his lobbying firepower was put to good use. Valenti gained a reputation for entertaining lavishly, and used incentives such as exclusive movie screenings at a private purpose-built salon “across the street from the White House” to gain the attention of policymakers.\textsuperscript{146}

Further hires by the MPAA were covered in the \textit{Washington Post} in 1984:

\begin{itemize}
\item Warner Communications, HP, Bristol-Myers, FMC Corp, GM, Johnson & Johnson, Monsanto, and Rockwell International.
\item The shifting balance in the global economy did not favor the United States, and between 1980 and 1985, the American trade deficit increased by 309 percent – from $36.3 to 148.5 billion. See Sell, \textit{The Origins of a Trade-Based Approach to Intellectual Property}, 352.
\item May, \textit{Intellectual Property Rights}, 143.
\end{itemize}
Led by Jack Valenti... the Hollywood forces have beefed up their already star-studded cast of lobbyists by hiring the daughter of Senator Paul Laxalt and a former top aide to Senator Dennis DeConcini who acknowledges that he has spent at least some of his time making calls from DeConcini’s office.¹⁴⁷

Technology lobbying groups also boosted their efforts when addressing intellectual property issues, but chose a slightly different strategy. David Yoffie, in a 1988 article in the *Harvard Business Review*, explores how the celebrity power of young semiconductor industry CEOs became a cornerstone of lobbying efforts:

> These men opened many doors that might have been closed to lobbyists or lower ranking businesspeople. Noyce, for example, is something of a legend in the electronics world. A multimillionaire, co-inventor of the integrated circuit, he was general manager of Fairchild Semiconductor during its rise in the 1960s and one of the founders of Intel. The Washington establishment wanted to get to know him as much as he wanted to develop political contacts. Noyce spent 20% of his time during the early 1980s on political action.¹⁴⁸

Thus, while the approaches of the copyright industry groups and patent industry groups were different, the former focusing on enhancing a traditional lobbying network while the latter used its own fame from its recent growth within the American economy, the combined intellectual property lobby had considerable firepower at its disposal by the early 1980s. The significant investments in high powered lobbyists, whether at a cost of dollars or executive time, would pay handsome rewards for the intellectual property industry, as legislators quickly became aware of the industry’s concerns.

The rapid growth of the intellectual property lobby in the late 1970s and early 1980s created a certain chaotic nature to early proposals, but the ambition of these initiatives provided a framework for future lobbying and also achieved some early results for the concerned industries. As an example of one of the early goals of copyright industry, by 1981, various advocacy groups on behalf of the copyright industry were making explicit plans to influence upcoming GATT negotiations and make intellectual

property a central topic of those discussions. And yet, some early initiatives were poorly calculated.

Also in 1981, responding to a congressional debate over home taping, the RIAA and MPAA jointly argued that without the money that was made by the copyright industry on the major hits that were commonly pirated, they could not afford to invest in riskier efforts. As analyzed by Ronald Bettig, “in essence, these representatives of capital were threatening an investment strike unless the state was willing to protect and extend their copyright monopoly.” Certainly, blackmail was not a typical strategy by the intellectual property lobby, but such threats as these were examples of an inexperienced lobby experimenting with new methods to draw political attention to the harm of piracy. But regardless of occasionally questionable statements such as these, the backers of increased intellectual property protection enjoyed early results from their advocacy efforts. In 1979, an important section of the Trade Act of 1974 dealing with unfair trade practices abroad was amended, allowing private parties to play a defined role in identifying intellectual property infringement abroad:

One of the key features of the 1979 amendments required the government to take account of the views of the affected industry, effectively establishing a cooperative relationship between the private and public sectors.

Additionally, regarding the aforementioned campaign to curb unlicensed broadcasting of the signals from American media satellites, Congress responded favorably in 1983 and denied economic aid to countries that allowed such practices. Additionally, and perhaps more importantly, industry groups succeeded in getting American lawmakers to acknowledge the issue as a general problem facing the

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150 Bettig, Copyrighting Culture, 173.
151 The section in question was Section 301, which would be further revised in 1984 and is the subject of the following chapter of this thesis. The quotation is from Sell, The Origins of a Trade-Based Approach to Intellectual Property, p.351.
152 As reported by the New York Times: “Last summer, Congress included a provision in the Caribbean Basin Initiative to deal with satellite signal theft. The initiative provides a wide range of economic benefits to nations in the area, including duty-free access to United States markets. Under the new provision, the President of the United States is authorized to withhold benefits to countries where television stations rebroadcast programs transmitted by satellite without the consent of the programs’ owners.” See Peter Kerr, “Foreign ‘Piracy’ of TV Signals Stirs Concern,” New York Times, October 13, 1983.
United States, gaining critical political allies for future national policy debates. While the most significant results for the intellectual property lobby, those that addressed Asian piracy, were obtained in the mid-and late-1980s (and are the focus of the next chapter of this thesis), these early victories were significant in that they sustained needed momentum in Congress. The rapid buildup of advocacy groups for intellectual property in the late 1970s and early 1980s created a somewhat disordered set of policy initiatives, but these efforts undeniably achieved quick results for such a young lobby.

And so, the organization of the intellectual property industry and the development of a corresponding lobby in the late 1970s and early 1980s undoubtedly ushered in a new phase of American efforts to establish intellectual property protection abroad. Originally organized in response to domestic piracy threats, and led by the copyright industry before it was joined by other owners of intellectual property, the lobby grew quickly and enlisted influential talent to help it in its goals. And indeed, as policy objectives were defined and debated between the allied industry groups that composed the growing intellectual property lobby, early results were seen in the form of minor revisions to existing legislation and new prohibitions against piracy in the United States and in the Caribbean. These intellectual property advocacy groups, once organized and achieving results in Washington by the early 1980s, would remain a fixture in American foreign policy. Indeed, the nature of the interaction between American intellectual property holders and American policymakers would change as a result of the establishment of this lobby, as American foreign policy became more beholden to economic interests rather than strictly focusing on geopolitical calculations.
Chapter 5: The Rise of Section 301 and Linked Economic Bargaining

It was in the 1980s that the government of the United States fully embraced the concerns of the intellectual property industry by passing a series of legislative reforms that pushed intellectual property protection to the fore of America’s foreign trade policy. Partly, as will be explained, this was a result of a shift in the nature of America’s economy and new international threats to America’s industries, and partly this was a result of the growing influence of the intellectual property lobby which was analyzed in the previous chapter. Two large reforms to America’s trading laws will be the focus of this chapter, the 1984 Trade and Tariff Act and the 1988 Omnibus Trade and Competitiveness Act, and together they will show how foreign trade was made conditional upon a trading partner having adequate intellectual property protection. This new link in American policy between intellectual property protection and trading rights allowed American diplomats to extend their efforts to affect legislative reforms abroad from Japan, Taiwan, and South Korea into certain Southeast Asian nations which were being recognized as growing centers of piracy. As a favorable result of this linked economic bargaining, bilateral trade agreements were signed by many Asian countries with the United States in a short period of time in the late 1980s and early 1990s which established strict protection of American intellectual property abroad, at least in theory. Ultimately, this chapter will present an overview of perhaps the most important decade in American foreign intellectual property policy, chronicling the power of a new alliance between intellectual property interests and the American government.

Before analyzing any specific intellectual property legislation passed by Congress in the 1980s and the affect that such laws had on American intellectual property policy abroad, it may be useful to offer an overview of the global economic and political situations that confronted lawmakers throughout the decade. In the 1980s, the economic situation in the United States was dire in several respects, all of which significantly affected the leverage that the intellectual property industry had upon American
lawmakers. First, as was mentioned in a footnote in the previous chapter, the U.S. trade deficit had grown by 309 percent between 1980 and 1985, from $36.3 billion to $148.5 billion.  

This indicator of economic vulnerability was constantly mentioned in the American media in the 1980s, creating great pressure on United States lawmakers to devise a solution. Moreover, as the United States economy struggled, Americans grew less patient with prior concessions made to developing countries for strategic geopolitical reasons. Resentment was growing towards developing countries in general for “stealing” American manufacturing jobs, and was growing towards Japan in particular for the threat it posed to American technological dominance in the important electronics industry:

Japan is merely good at exploiting foreign technology, especially in the U.S., without making much effort to establish its own technological base... the U.S. strong focus on basic research has not been translated into increased global competitiveness, thereby generating strong U.S. reactions to Japan’s success at exploitation and application of technology through highly efficient manufacturing and marketing.

More specifically, although Japan had been legally licensing US technologies, one estimate determined that by the mid-1980s, Japan had “acquired several hundred billion dollars worth of U.S. technology at a total cost of only about $9 billion.” This discrepancy in value was not a product of poor American valuation, but rather resulted from closed markets and government manipulation, particularly by the Japanese Ministry of International Trade and Industry (MITI). Thus, as the United States lost economic competitiveness in the 1980s, there was a growing animosity on the part of American citizens and lawmakers towards those developing nations, largely in Asia, which were driving up America’s deficit and threatening its industries.

Meanwhile, as the decade progressed, there was an ever increasing sense of a shared interest on the part of American policymakers towards the intellectual property industry. Without a doubt, this

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trend was heavily influenced by the continued political activities of the intellectual property lobby (which was discussed in the prior chapter), but there were also more fundamental reasons for this growing alliance. Indeed, as American lawmakers saw the technological dominance of the United States wane in the late 1970s and 1980s in the face of foreign challengers, largely from Japan, they began specifically increasing government support for technological research. In a way, this support had always existed indirectly, as the United States military had been a major purchaser of American semiconductors and other technology since the 1940s, providing a guaranteed, lucrative, and occasionally exclusive market for American firms. But as foreign competition threatened the viability of the technology industry, Congress took specific measures to counter this threat, such as exempting the semiconductor industry from anti-trust laws and providing funds for American research consortiums. Ultimately, by 1983, the American government funded the extraordinarily high amount of 29.3% of all business research and development expenditures in the United States through the use of military contracts and outright grants. This was not a wasted investment from the lawmakers’ point of view, for the businesses that formed the high-tech industry comprised the largest and most profitable American manufacturing sector, positively contributing to America’s trade balance, a fact that was repeatedly testified by industry representatives at Congressional hearings. And so, developing a sense of ownership and shared interest in the industry’s fortunes, the United States Congress focused ever increasing efforts to protect the viability of the high-tech industry, oftentimes using the justification of military precautions as much as the justification of economic benefits. While the publishing and media

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156 Abolishing anti-trust laws allowed the previously fractured American technology industry to pool resources to overcome the threat from highly-capitalized research arms of Japanese conglomerates by eliminating redundant research efforts. See the National Cooperative Research Act of 1984.
157 Conteh-Morgan, Japan and the United States, 82.
158 Pete McCloskey, President of Electronics Industries Association, reminded Congress in 1983 that “we [the high-tech industry] are one of the few manufacturing sectors of the U.S. economy that produced a trade surplus [of $3.2 billion] in 1982.” See the Senate Committee on the Judiciary, Research and Development Joint Ventures, 98th Cong., 1st Sess., July 12, 1983.
159 The basis of this rationale was that high-tech semiconductor chips were critical to modern weapon systems and that the United States needed the security of its own supply, despite the fact that Japan ranked among America’s
industries were not the specific beneficiaries of such government concern, their positive contributions to the American economy gained them an increasingly sympathetic arrangement in Congress in the business-friendly political climate in the 1980s. Thus, as the intellectual property industry as a whole, and high-tech businesses in particular, began making a case for American pressure for intellectual property protection abroad, the entire industry could count on an unprecedented level of support from American lawmakers.

In another development that directly favored the intellectual property industry, a powerful minority factor within American politics throughout the 1980s loudly advocated implementing strong protectionist measures, such as high tariffs and subsidies, to shield the United States from job losses and reduce its growing trade deficit. Towards this end, the struggling manufacturing sectors and unions continually used their considerable influence on Congress, and one particular congressman, Representative Richard Gephardt of Missouri, unsuccessfully sought passage of an extreme protectionist bill between 1986 and 1988 that would have targeted countries running a trade surplus with the United States and mandated an annual 10 percent reduction of those surpluses. But because many congressmen were reluctant to pass laws that would reduce the imports which fueled America’s large consumer economy or otherwise invite foreign retaliation which would stunt exports, many politicians actively sought a middle road. Laws that forced protection of intellectual property overseas proved to be that middle ground, applying foreign trade pressure in the geographic locations needed, but not providing any grounds for retaliation. As further observed by the historian Elisabeth Uphoff, “not many Congressmen had constituents who would be hurt if developing countries protected American closest military allies and was willing to fully supply semiconductors as needed. Congressional hearings repeatedly stressed this problem; for an example, see the testimony from the Senate Committee on Finance, Hearing for the Promotion of High Growth Industries and U.S. Competitiveness, 98th Cong., 1st Sess., January 19, 1983.


It did not escape the notice of American policymakers that those nations which had the most unfavorable balance of trade with the United States were also those nations which had the most lax intellectual property laws; nearly all of them were in East or Southeast Asia.
patents or copyrights, so it was an easy issue on which to prove one’s “toughness” on trade.\textsuperscript{162}

Sometimes referred to as “fair trade” measures, the intellectual property protections embodied in these bills throughout the 1980s were thus deemed to be a satisfactory solution to a difficult problem by lawmakers concerned with their prospects for reelection.\textsuperscript{163} By continually labeling insufficient intellectual property protection in developing nations as “trade barriers,” proponents of intellectual property protection were able to cast their proposals as simultaneously both protectionist and free-trade.\textsuperscript{164} Perhaps more importantly, because a full 27.5% of all United States exports were derived from either patent or copyright ownership by 1986, increased protection of intellectual property abroad promised to yield considerable benefits for the struggling American economy.\textsuperscript{165} As summarized by one political economist:

[The prescriptions of the intellectual property lobby] offered an attractive alternative to mounting protectionist pressure, pressure that many policymakers found politically distasteful given the long standing American free trade ethos. Therefore, the ideas and solutions promoted by the industry associations captured the imaginations of U.S. policymakers as both feasible and politically beneficial.\textsuperscript{166}

Although political proponents of this trade remedy occasionally went well beyond the suggestions of the intellectual property lobby to protect American intellectual property, hurting the overall industry, the general political climate grew increasing favorable towards the interests of patent and copyright holders as the decade progressed.\textsuperscript{167} Thus, it was intellectual property legislation in the 1980s that proved to be

\textsuperscript{163} As observed by one Democratic congressman, voting for fair trade “will get you through November 1986.” See Uphoff, Intellectual Property, 11.
\textsuperscript{164} A notable example of this line of thinking is contained in the statement by Norman Alterman, vice president of the Motion Picture Export Association, in testimony to Congress in 1985: “We are troubled by frustrating trade barriers which prevent the development of a fair and reasonable marketplace – the most critical trade issue in the Pacific region.” See the House Committee on Ways and Means, Hearing on U.S. Trade with Pacific Rim Countries, 99th Cong., 1st Sess., July 18, 1985.
\textsuperscript{165} Conteh-Morgan, Japan and the United States, 82.
\textsuperscript{166} Sell, The Origins of a Trade-Based Approach to Intellectual Property, 348.
\textsuperscript{167} In certain instances, growing Congressional protection of domestic intellectual property could be termed “techno-nationalistic,” as shown by the case of a 1983 bill that required a waiver before any patent created with at least partial government funding could be purchased by a firm that produced a substantial proportion of its
the most viable way for political moderates to diffuse protectionist pressure without actually adopting explicitly protectionist measures, setting the stage for a series of bills designed to protect American intellectual property abroad.

As a last point of discussion before specifically analyzing the trade laws of the 1980s, it is important to introduce a series of American concessions, together known as the Generalized System of Preferences (GSP), that were made to certain developing nations in the 20th century. Formalized in 1976, GSP benefits by the 1980s allowed for duty-free access to American markets of about 3,000 categories of products originating in developing nations that the United States wished to encourage. Many Asian economies developed under the constant support of this privileged access to American markets, and, as these benefits began to be reconsidered by American lawmakers in the 1980s, many Asian governments felt domestic pressure to do what was necessary to maintain them. Just as the American government was influenced by special interests, so were the governments of East and Southeast Asian nations, and the political pull of pirating operations simply did not compare to the combined pull of the larger industries being threatened by loss of GSP benefits, such as steel, textiles, and raw materials. Thus, the decades of American preferential support that helped certain Asian countries develop to an extent that they threatened the American balance of trade in the 1980s actually also simultaneously created the key to influencing those nations in matters of intellectual property rights.

The 1984 Trade and Tariff Act was the first major piece of American legislation to tie intellectual property protection to other trade issues, sometimes referred to as linked bargaining, although the intellectual property provisions were hardly assured as the bill was being framed. Showing the relative lack of awareness that American lawmakers had to intellectual property issues at the time, although the product overseas. Such measures did not aid intellectual property holders by restricting buyers, but did keep a few minor technologies within the United States. See Conteh-Morgan, Japan and the United States, 84.

1984 Act radically changed the nature of America’s policy towards intellectual property protection abroad, such reform was initially hardly considered a key objective by most of the bill’s proponents. Indeed, as explained by the trade historian Stephen Lande, the initial framers of the bill were motivated by a desire to protect traditional industries and address evolving issues such as trading in services and trade-related investment, and it was only after the intellectual property lobby started actively petitioning for favorable provisions in the bill that lawmakers agreed to include a measure of intellectual property reform into this wide ranging legislation.\textsuperscript{169} When lawmakers did, they rolled it in with more traditional measures, thereby granting intellectual property the same protection generally reserved for more conventional trade disputes.

Although the entire bill was technically a reform of the previously enacted Trade and Tariff Act of 1974, there were three key provisions in the Trade and Tariff Act of 1984 that fundamentally changed the nature of American efforts to protect intellectual property abroad. The first was an overhaul of a rather weak but important aspect of the 1974 law, Section 301.\textsuperscript{170} Specifically, the impetus for initiating a Section 301 investigation shifted from a formal complaint process by private industry players to the judgment of the Office of the United States Trade Representative (USTR). The importance of this shift, as explained by Susan Sell, was that it “lessened the prospect of retaliation against an industry or company filing a section 301 complaint” and thus made the measure much more likely to be used.\textsuperscript{171} The second key feature, related to the first, was that the Act was amended to specify that a lack of adequate intellectual property protection was an actionable cause for a Section 301 investigation, clearing up an ambiguity contained within the 1974 law. The last feature of the 1984 Act to address intellectual property issues on an international scale was a provision that included intellectual property “as a new

\textsuperscript{170} Simply put, Section 301 authorized the President to identify nations that engaged in unfair trading practices with the United States. If that nation did not reform its laws, it could be subject to any economic retaliation at the President’s discretion until an agreement could be reached.
\textsuperscript{171} Sell, \textit{The Origins of a Trade-Based Approach to Intellectual Property}, 355.
criterion for extending and/or maintaining trade benefits under the GSP. As mentioned in a previous section, GSP benefits were considered crucial to the economies of many of the East and Southeast Asian nations which were the largest infringers of American intellectual property, and this provision was specifically targeted at them. Thus, while intellectual property protection was not the purpose of the overall law, these three fundamental changes in American intellectual property policy laid the groundwork for increased pressure on foreign pirates.

In the wake of the passage of the 1984 Trade and Tariff Act, it was apparent that many changes needed to quickly occur within the American diplomatic system regarding intellectual property, not least of all at the unprepared Office of the USTR. Indeed, as observedconcisely by Michael Ryan, “the use of Section 301 for lack of effective intellectual property protection was a policy change more easily drafted by Congress than implemented by the Office of the U.S. Trade Representative, since the agency knew little about intellectual property issues in 1984.” As a necessary but temporary measure, the Office hired an intellectual property lawyer as a deputy to assist the organization in learning the principals of the law and how it could be applied. Of course, the American intellectual property lobby was more than willing to add its viewpoints on the topic, and USTR officials became new participants in the seminars that the lobby had been hosting since the late 1970s. Spurred on by the 1984 law, the intellectual property industry did not stop at education alone, but began extending its own mandate and started advising government officials in negotiations outside the United States. As pointed out by Susan K. Sell, the United States Department of Commerce noted in a memo that, after the 1984 law, it expected “the close involvement of the industry associations... in all follow up activities” to amend intellectual property laws in developing nations. Partially this involvement was a natural result of the growth of the intellectual property lobby, but it also reflected the growing collaboration between government officials

173 Ryan, Knowledge Diplomacy, 73.
and the intellectual property industry in the 1980s. To coordinate future efforts, the various trade associations involved in advocating for intellectual property protection formed the International Intellectual Property Alliance (IIPA) in 1984 specifically in light of the strengthened provisions of the new Trade Act. And so, as the USTR began to use the mandates of this new legislation in negotiations with developing nations, ultimately bringing intellectual property to the fore of foreign trade policy, the intellectual property lobby made a strong effort to continually offer education and advice.

In nations where the United States had previously attempted to strengthen intellectual property laws, namely Japan, South Korea, and Taiwan, the provisions of the 1984 Trade law gave American negotiators new weapons. South Korea was selected by the USTR to be the first test of these new powers, and a Section 301 investigation was initiated in 1985. Since the Korean War, South Korea had relied heavily on American support, both militarily and economically, and by 1986, 41 percent of Korean exports were sent to the United States. Moreover, inviting a strong response from the USTR, bilateral talks about intellectual property had been conducted between the United States and Korea since 1983, but “the Korean government claimed it had not yet reached a level of economic development sufficient to make intellectual property protection a cost-effective government policy,” and this undesirable situation threatened to persist indefinitely. The complaint of the USTR hinged upon a specific pharmaceutical patenting disagreement, as Korean law only provided protection for processes of manufacturing a drug, not the drug itself, and moreover required patents to be licensed to Korean firms,

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175 Although the membership changed, the original members of the IIPA were the Association of American Publishers, the American Film Marketing Association, the Computer and Business Equipment Manufacturers Association, the Computer Software and Services Industry Association, the Motion Picture Association of America, the National Music Publishers’ Association, and the Recording Industry Association of America.
177 Ryan, *Knowledge Diplomacy*, 75.
effectively negating any realistic protection.\textsuperscript{178} Korea, aware that it was becoming the subject of a test case, resigned itself to the fact that the USTR would not back down in its pursuit of its objective and, less than a year after the Section 301 investigation was initiated, Korea agreed to create broad new intellectual property laws and “exert its best efforts to ensure that the legislation is enacted so as to become effective no later than July 1, 1987.”\textsuperscript{179} Satisfied with the effectiveness of its new bargaining tools, the USTR next turned its efforts to creating stronger intellectual property protection in Taiwan, which was also economically dependent on the United States and its GSP benefits. Although Taiwan had passed minor legislative reforms to its intellectual property law in the early 1980s, it had remained a targeted nation by American intellectual property holders ever since the textbook dispute of 1959 and 1960. Thus, Taiwanese lawmakers knew that Taiwan was in significant danger of a Section 301 investigation that was being called for by members of the American intellectual property lobby, a lobby which labeled Taiwan’s recently enacted laws, in testimony to Congress, as “containing serious substantive, administrative, and procedural defects which will continue to encourage piracy and hamper effective enforcement... Taiwan is one of the world’s most egregious pirate nations.”\textsuperscript{180} Eager to avoid such an investigation, Taiwan preemptively strengthened its copyright and trademark laws in 1985, and its patent laws in 1986, which adequately satisfied USTR negotiators into recommending a continuation of GSP benefits and a postponement of any Section 301 investigation. Lastly, Japan, by the mid 1980s, had securely established itself as a developed nation and largely adopted intellectual property befitting a developed nation. Yet in the area of high-tech electronics in particular, Japanese firms still reverse-engineered American semiconductor designs to avoid prohibitively expensive research and

\textsuperscript{178} Ryan, \textit{Knowledge Diplomacy}, 73. As evidence of the harm that this policy did to innovative American pharmaceutical companies, in 1984, $29 million of American pharmaceutical products were sold in Korea, whereas Korean pirates sold $70 million worth of the same products. See Ralph Oman, \textit{Korea and the United States: The State of Intellectual Property Relations}, edited by Yeomin Yoon and Robert W. McGee in “Korea’s Turn to Globalization and Korea-US Cooperation” (South Orange: Seton Hall University Press, 1996), 123.

\textsuperscript{179} Ryan, \textit{Knowledge Diplomacy}, 76.

\textsuperscript{180} House Committee on Ways and Means, \textit{Hearing on U.S. Trade with Pacific Rim Countries}, 99\textsuperscript{th} Cong., 1\textsuperscript{st} Sess., July 18, 1985.
development costs, a practice that Japan’s MITI was protective of, prompting Congress to pass the Semiconductor Chip Protection Act in 1984.\(^{181}\) Although the USTR did not require passage of conventional intellectual property laws by Japan, the looming threat of penalties resulting from a potential Section 301 investigation into Japan’s high-tech industry provided enough pressure to force Japan to sign a bilateral agreement with the United States to protect semiconductor circuitry designs in 1985.\(^{182}\) Thus, the 1984 Trade and Tariff Act provided the USTR with the tools necessary to advance a wide range of American objectives regarding intellectual property in East Asia, providing progress in nations where American efforts had previously stalled.

But the 1984 Trade and Tariff Act also allowed American diplomats to extend initiatives regarding intellectual property protection into a new set of Asian nations, specifically Singapore, Indonesia, Malaysia and Thailand. Although these nations relied upon American markets and were recipients of GSP benefits, no specific pressure had previously been applied to them by the United States to establish stronger intellectual property rights. Singapore, repeatedly called the world capital for piracy, was particularly vulnerable to the new American strategy of linked economic bargaining because it annually exported over $500 million worth of GSP-protected goods to the United States by 1985.\(^{183}\) Moreover, in the 1980s, Singapore had begun to increasingly violate America’s unspoken prohibition against exporting pirated goods to other markets: “in 1984, Singapore shipped over $270 million worth of pirated tapes and books to Asia, Africa, the Middle East and Europe, and by 1986 it was frequently cited as the biggest exporter of pirated tapes in the world.”\(^{184}\) Yet immediately after the 1984

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\(^{181}\) The Semiconductor Chip Protection Act, passed in November of 1984, used a mixture of copyright and patent theory to protect the design of lithography masks that were used to create complex semiconductor circuitry. Targeted against Japanese reverse-engineering of American designs, protection was extended only to Americans and nationals of foreign countries who recognized American rights.


law was passed in the United States, the government of Singapore began a two year process of reforming its copyright laws according to the suggestions of American businesses, specifically citing the threat of the loss of GSP privileges as a primary factor. In May of 1987, President Reagan signed a bilateral agreement with Singapore that all but eliminated piracy in that nation. America’s implicit threat of GSP denial also worked against Malaysia, as described by Elisabeth Uphoff:

The Malaysian Government began work on amending the copyright law almost immediately [after the passage of the 1984 Trade Act], and the first draft of a new bill covering software and increasing general penalties was published by November 1, 1986. The government actively sought US advice on the new law. The USTR commented on the draft, and copies were circulated among several of the concerned foreign companies.

As a sign of the effectiveness of American pressure, Malaysia created a police unit, specifically focusing on piracy prevention, which was mandated to respond to the complaints of American companies. In Indonesia, although its economy relied far more upon oil revenues than GSP benefits, American leaders as prominent as President Reagan visited and spoke specifically and publicly about Indonesia’s inadequate intellectual property protection, embarrassing Indonesia’s leaders in front of their own people. This embarrassment, combined with the mostly symbolic threat represented by a lobbying campaign by the IIPA in 1987 to remove GSP privileges, caused the Indonesian government to yield and enact a stronger copyright law just months before such GSP penalties would have taken effect, although Indonesia’s government maintained a refusal to recognize patenting of pharmaceuticals, another contentious issue. Chronologically, the last Southeast Asian nation against which the United States

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focused new efforts to establish intellectual property reform in the wake of the 1984 Trade law, Thailand, proved to be the least willing to reform. Although Thai negotiators throughout the mid-1980s repeatedly had to promise the USTR that Thailand would accommodate American requests for new legislation, because it was able to minimize pirated exports, Thailand was not considered a priority country in Asia by the USTR until 1987.\textsuperscript{190} To a degree that more authoritarian Southeast Asian nations could not match, Thailand could and did blame its lack of progress in enacting reforms on a parliament that was oftentimes deadlocked on the issue, a defense that American negotiators could not easily overcome. Thus, importantly, the provisions of the 1984 Trade and Tariff Act expanded American diplomatic pressure into a wider range of Asian nations, most of which responded quickly to the threat of the revocation of GSP benefits. Yet, while these reforms were noteworthy as representing unprecedented attention to intellectual property issues, proving the effectiveness of linked economic bargaining, intellectual property protection was hardly comprehensive in these Southeast Asian nations, and it is important to note that the USTR encountered increasing resistance as the decade progressed.

Although not directly a part of new American foreign policy initiatives to enact intellectual property protection in these Southeast Asian nations, this paper would be remiss not to mention several other sources of pressure that complemented American diplomatic demands. Certainly, intellectual property holders outside the United States were a substantial force in these efforts, as demonstrated by the somewhat famous Live Aid scandal that plagued Indonesia in 1986.\textsuperscript{191} Additionally, there was a genuine awareness on the part of each nation’s media and government about other reforms taking place throughout the region, and no nation wanted the stigma of being the last to modernize its laws.\textsuperscript{192}

\textsuperscript{190} Uphoff, *Intellectual Property*, 38.
\textsuperscript{191} Live Aid was a charity concert held in 1985 to benefit African famine victims. Pirated versions of the concert recordings, originating in Indonesia, began appearing all over the world months later, prompting the British musician Bob Geldorf to launch a highly publicized worldwide media campaign to embarrass the Indonesian government for allowing such theft. See Uphoff, *Intellectual Property*, 29.
\textsuperscript{192} For example, as researched by Elisabeth Uphoff, a report by the US Copyright Office in 1986 noted that it seemed as if “Malaysia and Singapore were competing to see which of them could modernize its laws first.” See
In other words, as ever more Southeast Asian nations adopted stronger intellectual property protection, the pressure on the remaining unreformed nations intensified. Separately, but no less importantly, Malaysia in particular found that copyright regulations could be a politically expedient method to censor material deemed immoral as demanded by the nation’s Islamic fundamentalists without prompting international condemnation. Lastly, although most Southeast Asian governments maintained that weak intellectual property protection was crucial for their nations’ economies, there were significant economic costs of weak protection as well. Each nation struggled to foster a creative economy, and local artists, although not a politically powerful entity, often complained. Moreover, as governments looked for direct foreign investment to fund continuing economic modernization, the barrier posed by inadequate legal protection of intellectual property seemed increasingly less desirable. Thus, while American diplomatic pressure provided the crucial force needed to prompt new reforms in Southeast Asian intellectual property law in the mid-1980s, it was certainly aided by significant other sources of domestic and international advocates of change.

The mixture of both difficulties and successes experienced by the United States in continuing and fresh negotiations in Asia convinced many in the intellectual property industry that, while linked economic bargaining was the right tool in foreign negotiations, more powerful legislation was needed. Indeed, while negotiators from the USTR achieved some noteworthy victories, in a larger sense, piracy across East and Southeast Asia was continuing and, in some cases, growing. In Washington, the

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For example, as oil prices declined in the mid 1980s, Indonesia’s government began recognizing the need for investment in non-petroleum based sectors of the economy. The Repelita IV, a five-year development plan published by the Indonesian government in 1984, outlined the need for non-oil revenue, and recognized the lack of intellectual property protection as an impediment to needed foreign investment. See Andrew Rosser, *The Political Economy of Institutional Reform in Indonesia; the Case of Intellectual Property Law*, edited by Kanishka Jayasuriya in “Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions” (New York: Routledge, 1999), 105.
intellectual property lobby stepped up efforts to influence legislators, who were increasingly receptive
to new ideas to reduce the national trade deficit and promote American manufacturing. In some ways,
legislation to protect American intellectual property had not stalled since passage of the 1984 Trade Act,
as the semiconductor industry had gained an important new form of protection with the passage of the
Semiconductor Chip Protection Act only a few months after the Trade and Tariff Act. But there was a
growing sense that the 1984 laws were not powerful enough to actually affect the change that was
needed overseas, largely in light of the fact that Section 301 resolutions did not automatically contain
penalties. Vico E. Henriques, testifying on behalf of the IIPA, argued as much in front of the House
Committee on Energy and Commerce in 1985:

Unless countries that permit piracy show significant and tangible improvements in both their copyright laws and their efforts to enforce those laws, the President must use the authority granted to him under the Trade Act of 1984 to leverage increased protection from countries that do not adequately protect American intellectual property.

Jack Valenti, president of the MPAA, echoed this statement in slightly more colorful language to the Senate Committee on Finance in 1986, tying the protection of the film industry to the Reagan administration’s efforts to win the Cold War:

As a matter of fact, we are the dominant visual force in this world. I tell you Mikhail Gorbachev would probably give up his Baltic fleet and five dozen SS-99s if he could have the Russians claim the kind of visual dominance that we enjoy ourselves... I salute the Administration for its clear call to arms on the intellectual property front, and I certainly say the USTR’s office has been most helpful with the meager weaponry they have.

Such a militaristic statement may have exaggerated the Administration’s drive for intellectual property protection, but it did successfully tie copyright protection to the strategic interests of the United States

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195 [Find evidence that it was never used]
at the same time that it pointed out inadequacies in the powers granted to the USTR by the 1984 Act.\(^{198}\) The IIPA adopted a more balanced approach to the shortcomings of the 1984 Act and “endorsed a carrot-and-stick approach by supporting efforts to provide technical training to foreign officials in intellectual property issues, while also strengthening U.S. trade leverage over reluctant foreign governments.”\(^{199}\) Other debate and dissatisfaction regarding intellectual property legislation centered upon Section 337 of the 1930 Tariff Act, which was similar to Section 301 but targeted specific foreign companies rather than nations for intellectual property infringement. The flaw of this section, which required American plaintiffs to prove that their business was threatened by the actions of foreign companies, was explained by Senator Frank Lautenberg in 1985:

> The main problem is this: it isn’t enough to prove piracy. Currently, one has to prove that it hurts. One has to prove that imports would destroy or injure a U.S. industry... an industry that is efficient and economically operated. To exclude foreign goods, proof of piracy should be enough.\(^{200}\)

While this provision of Section 337 may have been an appropriate safeguard against frivolous lawsuits by exclusively domestic businesses unharmed by overseas piracy in 1930, the globalizing economy in the 1980s made the provision outdated. Ultimately, when the United States International Trade Commission (ITC) concluded in 1988 that inadequate protection of intellectual property abroad cost American industries between $43 billion and $63 billion per year, and cost the economy 750,000 jobs, the pressure became too much upon American lawmakers to not enact further measures.\(^{201}\)

\(^{198}\) Granted, the Reagan Administration did make some modest efforts to strengthen intellectual property protection as explained by an Administration spokesman in 1986: “The Administration will work for the enactment of the Administration’s Intellectual Property Rights Improvement Act of 1986 [this bill was never passed] to strengthen and expand the protection of U.S. intellectual property rights.” Nevertheless, Reagan often hesitated to act on Section 301 proceedings on the grounds that they jeopardized America’s larger trade interests. See Harvey E. Bale, *Administration Policy and Actions Concerning Intellectual Property Protection Abroad*, Address before the American Bar Association Annual Meeting, Section of International Law and Practice, August 11, 1986.


In 1988, the United States Congress passed the Omnibus Trade and Competitiveness Act, which dramatically enhanced the power of the USTR and expanded American efforts to enact intellectual property protection abroad. In this legislation, lawmakers fully supported the demands of the intellectual lobby, and the vast majority of shortcomings that were evident in the mid-1980s were addressed. Section 301 was further amended to include two distinct and aggressive new versions, in addition to the original procedure, which came to be known as Special 301 and Super 301. Special 301 required the USTR to compile an annual list of nations that violated American intellectual property rights and initiate investigations against them, which required the creation of an impartial metric that could no longer ignore specific countries for geopolitical reasons. Furthermore, the authority for implementing penalties after the conclusion of a Special 301 investigation was transferred from the Administration to the USTR. This reform, as explained by Representative Bill Richardson, was “intended to enhance the USTR’s position as the lead trade agency and to make it less likely that trade retaliation would be waived because of foreign policy, defense, or other considerations.” Super 301 was far more controversial, and was even labeled by one writer from the Wall Street Journal as “the economic equivalent of civilian bombing” in 1989. It was limited to two years, 1989 and 1990, but mandated that any targeted country change its economic conditions within twelve months or be subjected to harsh penalties, creating a performance standard for the first time in a specific attempt to end the delaying tactics that had been used by Asian nations throughout the 1980s. In each of these 301 proceedings, the USTR was bound to consult with American industry representatives when creating an estimate of damages, further formalizing the American industry’s role in the foreign intellectual property policy of the United States. Regarding the aforementioned Section 337, it was amended to strike the requirement of a proof of danger to American industry before a lawsuit could proceed. Thus, the 1988 Omnibus Act was a decisive

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and aggressive expansion of the authority of the USTR, and cemented the alliance between American diplomats and intellectual property holders to reform the laws of developing nations.

As it was after the passage of the 1984 Trade and Tariff Act, South Korea was the first nation to be targeted under the new provisions of the 1988 Omnibus Act. The soon to be merged pharmaceutical firms Squib and Bristol-Myers submitted Special 301 complaints against Korea in 1988, on grounds that Korean governmental research money was aiding pirating efforts of Korean companies. Korea protested this Special 301 complaint as a threat to its security, and claimed that any resulting penalties would be tantamount to giving certain economic matters greater priority than security issues” and threatened that “it would not be wise to destabilize South Korea's democratization program.” But unlike in 1986, when it settled for only a promise of future legislation from Korea, the USTR proceeded with the Special 301 investigation, threatening a Super 301 investigation, until Korea created a specific intellectual property policing unit and agreed to specific reforms in its laws. This added resolve on the part of the USTR was analyzed by Michael Ryan:

American diplomats learned that vigorous enforcement is the most crucial matter in building intellectual property institutions and that enforcement procedures must be specified in detail if effective change in protection is to occur. The 1986 bilateral agreement with Korea simply had too much loose language.

Elsewhere, it was no secret within the American media that Japan was the primary target of the Super 301 provision of the 1988 Omnibus Act, as it maintained a closed domestic market using technology exclusion but yet was not generally in explicit violation of intellectual property standards; indeed, in 1989 and 1990 the USTR initiated Super 301 investigations against Japan on the basis of unfair competition towards American semiconductors and satellites. The threat of Super 301 worked against Japan, and shortly before the twelve month deadline for reform, Japan agreed to limit technology

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204 Ryan, Knowledge Diplomacy, 77.
205 Elliot, From Super 301 to DEC, 91.
206 Ryan, Knowledge Diplomacy, 79.
subsidies and open its markets to American high-tech products. As the USTR learned how to effectively use its new tools, Special 301 investigations were launched against Indonesia and Taiwan in 1989 and 1992 respectively, both resolving favorably for the United States.\textsuperscript{207} As an important policy, after obtaining concessions, the United States moved to conclude bilateral treaties in all of these nations that were subject to added pressure from the 1988 Omnibus Act in order to solidify the gains made in intellectual property protection. When analyzing the speed by which foreign countries changed their laws in response to Section 301 investigations, it is worthwhile to note that any investigation could gradually do as much harm as any imposed penalties, as the insecure trading status of investigated nation could cause foreign divestment and loss of manufacturing contracts well before any verdict was made. Thus, although its measures were harsh, the 1988 Omnibus Act was the culmination of a gradual alliance between American business interests and legislators, resulting in intellectual property reform in developing countries with unprecedented speed.

So far, this chapter has not addressed the growing economy of the People’s Republic of China as it normalized relations with the United States in 1972 and entered the global economy following a long period of isolation from the Western world. Technically, the United States began applying pressure on China to reform its intellectual property laws following the passage of the 1974 Trade and Tariff Act, which had a provision which mandated that any nation must have intellectual property protection at the level of international conventions before the United States could conclude any bilateral trade treaty with it. In the aftermath of the Cultural Revolution (1966-76), as China sought to catch up and open to the Western world, it enacted barely enough provisional laws that President Carter could conclude a trade agreement in 1979. Realistically, these provisional laws provided protection in name only, as intellectual property protection was a tricky issue in a state economy, such as China’s, since all economic

\textsuperscript{207} In the case of Taiwan, reformation measures were initiated within a week of the Special 301 designation. See Alford, \textit{To Steal a Book}, 104.
output officially belonged to the state.208 Thus, when China’s leadership passed a more detailed patent law in 1984, it was so circumscribed with exceptions to accommodate China’s communist politics as to render it practically meaningless. Part of the problem, as pointed out by William Alford, was that there was no effective way to establish an anti-competitive privilege such as a patent in an inherently anti-competitive economy where the state owns everything.209 But as China modernized in the 1980s, it increasingly pirated American intellectual property, particularly copyrighted material, using the typical defense that it needed to do so for its development and could not afford to pay licensing fees.210 In reply to this public justification, American publishers specifically maintained that they were willing to print Asian editions of their works in China using Chinese workers, and argued that “the official defense on behalf of Chinese consumers and workers masked a corrupt support of pirate printers by government officials.”211 It was only after passage of the 1988 Omnibus Trade Act that China showed any vulnerability to American trade threats, even as American pressure rose:

For 1989 the priority offenders included Brazil, India, South Korea, Mexico, Saudi Arabia, Taiwan, and Thailand, but nowhere was the sense of urgency to initiate negotiations greater than it was with China. While negotiations were being conducted with the Koreans, American producers of books, films, music, and software were claiming that the absence of copyright protection in China was costing them $400 million a year in lost revenue.212

Yet even after 1988, China’s actions were slight and calibrated only to avoid a Section 301 investigation, such as was the case in China’s new software codes in 1991 and bilateral Memorandum of Understanding with the United States in 1992, which simply showed progress without affecting change.

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208 According to a popular saying during the Cultural Revolution (1966-76) in China, “Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?” Translated by William P. Alford.

209 In fact, for a Chinese citizen to achieve a patent, they would have had to produced the invention entirely using their own time and materials, a near impossibility. See Alford, To Steal a Book, 69.

210 Amusingly, as pointed out by William Alford, among the first American products to be pirated, often in a comically inaccurate form, were items such as Johnny Walker Black Label, Levi’s jeans, and Heinz Ketchup, made desirable in China through smuggled Western media. See Alford, To Steal a Book, 85.

211 Ryan, Knowledge Diplomacy, 81.

212 Ryan, Knowledge Diplomacy, 80.
Thus, China, while a growing infringer of American intellectual property, was unique among many East and Southeast Asian nations in that it was not dependant on trade with the United States in the 1980s, rendering measures that Congress took to compel it to protect American intellectual property largely ineffective.

But regardless of the problems posed by China, it is clear that it was the trade legislation passed by the United States Congress in the 1980s that created the tools needed by the USTR to achieve unprecedented protection of American intellectual property in the majority of East and Southeast Asian nations. Rationalized by Congress as “fair trade” measures, the laws established linked economic bargaining as the primary strategy of American diplomats, who could extend or deny important GSP benefits. Moreover, through these reforms, large American intellectual property owners were given a protected role in American foreign policy:

Whether industry representatives sit across the table suggesting specific revisions in foreign countries’ draft legislation, avail themselves of the Section 301 machinery, play the GSP trump card, compile reports of the latest violations and estimates of lost revenue, or monitor compliance in a vigilant effort to keep the pressure on, they have become important players in the crusade for the worldwide protection of their valuable intellectual property.\(^{213}\)

While this paper would make the slight amendment that it was rather the American government which created this potent alliance by joining an existing effort by industry representatives, who were already “players” in advocating for intellectual reforms abroad by the 1980s, Susan K. Sell is correct to note the crucial role that American copyright and patent owners played in American policy in East Asia. Although some trade economists worried that, in light of America’s new trade policies, the “East-West military strategic rivalry is going to be replaced by an era of trade wars and neomercantilism,” it is certain that the legislation of the 1980s advanced American interests in terms of intellectual property protection in a way that was only possible as the Cold War drew to a close and the United States could afford to take a

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harder line with its allies.\textsuperscript{214} Indeed, the acceptance by American lawmakers of intellectual property as being central to American economic interests in the 1980s created an alliance between government and business that was able to finally compel East Asian nations to adopt adequate levels of intellectual property protection after more than a century of American involvement in the region.

\textsuperscript{214} Conteh-Morgan, \textit{Japan and the United States}, 85.
Chapter 6: Intellectual Property in the Uruguay Round of GATT Negotiations

In September of 1986, ninety-two nations, including the United States, launched the negotiations of the Uruguay round of the General Agreements of Tariffs and Trade (GATT), an evolving international trade agreement that was to set to include intellectual property protection for the first time in its history. Ultimately, by the conclusion of the Uruguay round in 1994, the negotiations represented a near total victory by American intellectual property holders to bring intellectual property rights within developing nations up to the standards of the United States. This victory, embodied in the Agreement on Trade-Related Aspects of Intellectual Property Rights (abbreviated as TRIPS), extended the scope of patentable material, lengthened the minimum term of patent protection, provided for enforcement measures for all intellectual property, and, most importantly, made such protection compulsory. TRIPS was made possible by a combination of a looming threat of an American Section 301 investigation against resistant countries as well as a realization among some developing countries that TRIPS could be used to gain concessions by developed nations regarding more basic industries such as steel and textiles. As an important note, because GATT was an international convention, at times this chapter must extend its scope beyond a strict analysis of America’s foreign relations in East Asia, although an effort will be made wherever possible to restrict the study to relevant material. But this temporarily widened focus should not detract from the overall relevance of the GATT negotiations and TRIPS to the development of American intellectual property policy in East and Southeast Asia. Indeed, it is necessary as a final case study to examine these developments, for they evolved simultaneously with America’s aggressive bilateral linked bargaining and ultimately brought all East Asian nations into at least nominal compliance with the intellectual property standards of the United States. Thus, this

The entirety of the Uruguay round of GATT negotiations is far too large a topic for this paper, and discussion of other related accomplishments of the talks, such as the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade Services (GATS), will have to be avoided. For a more comprehensive survey of the negotiations related to intellectual property, see Donald G. Richards, Intellectual Property Rights and Global Capitalism: The Political Economy of the TRIPS Agreement (New York: M.E. Sharpe, 2004).
chapter will show that the United States, pushed by domestic intellectual property owners, purposefully broadened its efforts to strengthen intellectual property rights in East Asia by extending intellectual property protection into an important international agreement.

Ultimately, the inclusion of intellectual property rights as a topic of negotiation in the Uruguay round can be directly attributed to American dissatisfaction with the limits of bilateral negotiations to accomplish meaningful intellectual property reform in developing nations in the 1980s. Specifically, as argued by the political economist Donald G. Richards, the United States understood that an international consensus would contain an important “mantel of moral authority and historical necessity lacking in the bilateral agreements that often emerge from Section 301-type negotiations." But such a lofty argument had practical considerations as well, especially in light of developing countries’ long standing view that intellectual property rights were bullied upon them strictly for the benefit of richer nations. By replacing this narrative with a narrative of an international consensus, intellectual property reforms were far more likely to be adhered to in a lasting fashion. As an additional reason why the United States wanted intellectual property rights in GATT, because these rights had not been included in previous iterations, GATT had occasionally proved to be a hindrance to America’s effort to protect its intellectual property, particularly in regards to the revised Section 337 of the 1988 Omnibus Trade Act. As explained by the USTR Carla Hills in 1989, “the reason we have the problem with 337 is because the GATT does not cover intellectual property, which only drives us to want to get that coverage in this round all the more.” Thus, while the United States moved to implement bilateral

217 This is because a GATT panel had ruled in 1988 that Section 337 violated international codes of trade for excluding foreign goods, identical to American versions, from American markets.
218 Senate Committee on Finance, Oversight of the Trade Act of 1988, Part 2. 101st Cong., 1st Sess., April 20, 1989. Additionally, it should be noted that, in a more fundamental sense, many American economists simply realized that the old GATT provisions were outdated for the global economy. Such was testified by the USTR Carla Hills in the same Senate hearing in 1989: “The GATT today covers primarily only trade in goods, not services. So, of course, as the world economy has moved on to be involved in services, intellectual property, high technology, agriculture,
agreements with developing Asian nations using linked bargaining in the 1980s, American policymakers simultaneously realized that an international agreement would further their objectives in ways that direct linked bargaining could not do.

Certainly, the Uruguay round of GATT negotiations was not the first time that intellectual property rights were included within international agreements. In 1883, the Paris Convention for the Protection of Industrial Property established protection for patents, in 1886 the Berne Convention for the Protection of Literary and Artistic Works established protection for copyrights, and further agreements covering other aspects of intellectual property were signed in subsequent years. Yet these international agreements offered extremely weak protection for several reasons. First, the majority of the agreements did not contain requirements of any minimum level of protection, and only required that a nation protect foreign applicants to the same standard that it protected its own citizens. In terms of extending intellectual property protection to the developing world, which generally did not protect its own citizens, this was a major limitation from the perspective of developed nations. Second, these treaties were all stand alone agreements, not tied into any other trading rights that might provide an incentive for developing nations to sign. Lastly, and perhaps most importantly, nations could choose to join or abstain as they saw fit. This of course rendered all the provisions of any international agreement entirely voluntarily, effectively ruining their value to American intellectual property owners worried about the threat of the developing world. These faulty conditions remained when these separate agreements were merged into the World Intellectual Property Organization (WIPO) in 1893, and again when WIPO was absorbed by the United Nations in 1974. The Universal Copyright Convention of 1952 provided a commercially-oriented alternative to the Berne Convention but otherwise contained

\[ \text{and the like, the GATT does not cover those. And that is what we are trying to accomplish in the current Uruguay Round.} \]

\[ ^{219} \text{Indeed, for example, the United States, like many other nations, refused to sign onto the Berne Convention because it objected to a provision of Berne that mandated “moral” protection of artistic material beyond the scope of commercial ownership until 1988. Of the 135 members of WIPO, only 108 were signatories of the Paris Convention and only 95 were signatories of Berne – each of the other agreements had less than 50 signatories.} \]
the same limitations as the other WIPO-governed agreements. Perhaps Donald Richards analyzed these conditions best when he wrote that “the inadequacies of WIPO can fairly be identified as the inspiration motivating [intellectual property proponents] to establish the TRIPS agreement as part of the multilateral trade negotiating system and institutional framework.” Simply put, these prior international agreements were fundamentally unable to provide the international intellectual property protection desired by the United States by the 1980s.

As it was with establishing the United States’ bilateral linked bargaining policy, the intellectual property lobby was a driving force in pushing intellectual property onto the agenda of the Uruguay round of GATT. The Advisory Committee on Trade Policy and Negotiation (ACTPN), which was briefly discussed in chapter 3, led the way in convincing the USTR to introduce intellectual property rights as an American objective in the upcoming round of GATT. Together, according to Michael Ryan, “U.S. business interests and the USTR constructed a “GATT Strategy” to overcome the developing-country opposition,” which involved creating the Intellectual Property Committee (IPC) in 1986 to coordinate their efforts. The USTR believed that European and Japanese diplomatic support would be necessary once the negotiations began, and urged American technology and media companies to reach out to their foreign counterparts in order that they might pressure their own governments. As a direct result, the IPC launched a joint advocacy effort in 1988 with the Japan Federation of Economic Organizations and the Union of Industrial and Employers’ Confederation of Europe to urge their governments to include intellectual property rights in the GATT negotiations:

It was a historic occasion, being the first time that the world business community had jointly expressed the need for such action in GATT. The participation of the corporate and governmental elite throughout the Uruguay Round on negotiations underscored the importance of the revisions to big capital.

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221 Ryan, *Knowledge Diplomacy*, 105.
222 Bettig, *Copyrighting Culture*, 223.
Certainly, as pointed out by Donald Richards, in terms of public relations, “the fact that media industries have such a keen interest in the strict interpretation of information as private property was a tremendous advantage for the [intellectual property lobby] as a whole.” Eventually, influential groups that were not directly reliant on intellectual property, such as the American Bar Association, came out in favor of the initiative as intellectual property was being debated as a suitable topic for GATT negotiations. As approval for the inclusion of intellectual property spread to a wider spectrum of American industries, the Reagan administration made a favorable official statement that declared that intellectual property rights would be a priority of the administration as it considered GATT proposals. Thus, the intellectual property lobby proved to be influential and effective both in introducing intellectual property into GATT negotiations and in the effort to pass TRIPS.

As could be guessed, not all nations supported the agenda of the intellectual property rights industry at the GATT negotiations, and battle lines were quickly drawn between developed and developing countries. Developing nations maintained that any changes to international intellectual property standards should be made through existing WIPO-governed conventions as had been done since the late 19th century. Developed countries, led by the United States, countered that WIPO had clearly been ineffective over the past century, and that it would be an unacceptable forum to continue discussion, leading to an apparent impasse. But while many countries indeed fit into one of these two categories, a third group existed in the world economy that would play a decisive role in deciding the outcome of intellectual property negotiations in favor of the developed nations, a group that counter-intuitively contained many East Asian nations. As described by Donald Richards, these nations “had in common with the poorer countries a need to access and imitate innovations that emanate from the

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223 Richards, Intellectual Property Rights and Global Capitalism, 121.
225 Harvey E. Bale, Administration Policy and Actions Concerning Intellectual Property Protection Abroad, Address before the American Bar Association Annual Meeting, Section of International Law and Practice, August 11, 1986.
technologically advanced parts of the world. They are also characterized by increasing, in some cases quite sophisticated, capacities for technological innovation and product development.” In other words, while many East Asian nations may have opposed international intellectual property rights on the grounds that they currently benefitted from copying the United States, as their economies modernized these countries realized that they would not be in such a position forever, and thus were willing to consider an international agreement under certain conditions.

Although the bloc of developing countries initially posed a strong obstacle against the TRIPS agreement, simultaneous American bilateral trade action under Section 301 in the late 1980s provided important and favorable indirect benefits to American diplomats in the negotiations. Perhaps this strategy of using Section 301 to accomplish auxiliary goals can be best demonstrated by Senate testimony by Constantine L. Clemente on behalf of the IPC in 1989:

The IPC urges that, when Ambassador Hills [the U.S. Trade Representative] designates priority countries under the Special 301 intellectual property procedures contained in the 1988 trade bill, she take into account how such a designation can move the TRIPS negotiations forward. Creatively used, the designation process could provide incentives to gain the support of key countries in the GATT negotiations while directly improving intellectual property protection in those countries. 227

Obviously, the nations that were targeted by Section 301 for inadequate intellectual property protection were often the same nations that opposed intellectual property in the GATT negotiations, meaning that Section 301 investigations almost always provided pressure on GATT issues. Indeed, as described by Michael Ryan, the United States had been using this strategy of threatening Section 301 investigations against non-cooperative nations since the negotiating agenda for GATT was being determined in 1985:

During several years of preround negotiation, [developing countries] did not budge from their opposition, so the USTR decided to take the unprecedented step of initiating 301 action against South Korea and Brazil to bully the developing countries to the GATT negotiating table. The action was intended to signal that negotiations could go on one-

by one under threat of bilateral trade sanctions or they could take place within the GATT round, but negotiations would take place.

The fact that intellectual property was introduced into GATT negotiations not long after the United States began its process of aggressive bilateral trade pressure was no coincidence, for Section 301 was a powerful tool that helped with the passage of TRIPS. However, when improperly used, Section 301 could occasionally be counter-productive for American interests at the GATT negotiations. In January of 1989, as one of his last acts in office, President Reagan suspended $165 million worth of GSP privileges to Thailand as a rebuke for Thailand’s delay in adopting new intellectual property standards. In response, Thailand downgraded its representation at the GATT talks and gave the new diplomats instructions not to take any positions, whereas it had formerly given grudgingly loyal support to the United States.  

Although such a lack of support did not significantly hinder American efforts, it did provide a warning to American policymakers that Section 301 had limitations and could cause a backlash. But, ultimately, because Section 301 was far more often brandished than used by American diplomats, it remained an effective tool, coercive as it was, and contributed positively to the acceptance of TRIPS by developing nations.

But the direct threat of bilateral trade pressure by the United States was not the only reason why the TRIPS resolution ultimately passed, because, to a certain extent, many less developed nations decided that agreeing to TRIPS would work to their benefit. Just as the United States wished to link intellectual property rights to other trade issues as a threat, such a link could serve as a bargaining chip for issues important to developing countries as well:

Many developing countries had much to gain from liberalized trade in textiles and apparel and agricultural products... U.S. trade diplomats hypothesized that linkage bargaining in the GATT forum could achieve unprecedented multilateral agreement.  

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228 Uphoff, Intellectual Property, 43.
229 Ryan, Knowledge Diplomacy, 92.
Thus, because TRIPS was ratified as a part of an overall GATT agreement, developing countries had to accept or reject the deal being offered by the United States and other developing countries as a package. As a secondary consideration, TRIPS could serve as protection for developing countries concerned about any future American bilateral pressure under Section 301, as the agreement had a clause known as the Dispute Settlement Understanding which would allow any nation being investigated under Section 301 to appeal the investigation to an international panel. The third grouping of countries, discussed earlier as belonging to neither the bloc of developing countries nor the bloc of developed countries, were particularly persuaded by this defense against Section 301 investigations which they deemed to be inevitable under current conditions. Thus, while TRIPS was generally resisted by developing countries, the agreement was not entirely unbeneﬁcial to certain nations that ultimately provided the crucial support in favor of the accord.

One of the reasons that TRIPS was determined to be such a victory for the United States was that it effectively brought intellectual property protection throughout the world up to the standards of the United States, after a limited adjustment period, through the use of several speciﬁc provisions. The first provision broadened the ﬁeld of patentable material to include chemical, pharmaceutical, and food products as well as new plant varieties and integrated circuit design, many of which categories had been fiercely resisted by developing countries, even those under Section 301 investigations. In the second provision, important for the long product development cycle of pharmaceutical companies, patent protection was lengthened to a minimum of twenty years, “which is the standard under U.S. law but substantially longer than for most other countries, including those of the developed world.”\textsuperscript{230} In the third important provision, the burden of proof for settling cases involving intellectual property infringement was shifted from the plaintiff to the defendant, which hindered the ability of courts in developing nations to undermine the actual effectiveness of the agreement by simply ruling that any

\textsuperscript{230} Richards, \textit{Intellectual Property Rights and Global Capitalism}, 54.
infringement was inconclusive. TRIPS also called for “border controls, preliminary injunctions, seizure and/or destruction of illegal goods, and civil and criminal penalties. Moreover, disputes involving the agreement will be subject to the settlements procedures applied to alleged trade violations brought before the World Trade Organization (WTO).”\textsuperscript{231} Thus, it was made explicit that the United States could continue to monitor its borders pursuant to Section 337 and that intellectual property would be explicitly tied to other future trade issues in the international forum. It is important to mention that prior international agreements were not replaced by TRIPS, and WIPO maintained its status as the enforcer of technical standards regarding patent and copyright agreements.\textsuperscript{232} Thus, the provisions of TRIPS addressed the vast majority of American concerns going into the negotiations and were widely lauded by the intellectual property industry upon ratification of the agreement.

Because the People’s Republic of China (PRC) was largely unaffected by bilateral trade pressure in the late 1980s by the United States, some American diplomats hoped that China’s desire to gain international recognition would cause it to adopt intellectual property protection if TRIPS was passed. As explained by the historian Mark Groombridge, “sanctions may improve the immediate IPR climate in the PRC... but the victories won through Special 301 provisions and other forms of external pressure are likely to be hollow. The problem is that unilateral sanctions (or their threat) could very well undermine the long-term goal.”\textsuperscript{233} One of the major problems that the United States faced when proceeding with coercive negotiations with China, as observed by the legal scholar James V. Feinerman, was that such negotiations stirred resentment in China for appearing to be a continuation of the extraterritoriality era

\textsuperscript{231} To clarify, a side accomplishment of the GATT negotiations was to establish the WTO as the successor organization to GATT, a topic that this paper will not address.
\textsuperscript{232} One of the most important remaining duties of WIPO is to render patent services pursuant to the Patent Cooperation Treaty of 1970, which allows an inventor to use a common application through WIPO to patent an invention in all member countries.
in the early 20th century when Western legal traditions were automatically assumed to be superior.\textsuperscript{234} An additional problem of bilateral negotiations for the United States was that all too often other developed nations received a free-ride from American diplomatic efforts, undermining the process by forming economic ties to China as the United States applied pressure, but also benefitting from any greater intellectual property protection that was accomplished as a result.\textsuperscript{235} But nevertheless, lack of intellectual property protection in China was not a problem that the United States believed that it could simply ignore, as shown by the fact that one of the first diplomatic contacts that President Bush allowed with China after the Chinese crackdown in Tiananmen Square was low level GATT talks about China joining the international organization.\textsuperscript{236} Clearly, the United States believed that the solution to its difficult problem of reforming China’s intellectual property laws was in international action, and an additional incentive for the United States to include intellectual property within the GATT agreement was the knowledge that China was seeking to join that organization.

Thus, the international framework accomplished by the TRIPS agreement in 1994 is the final stage in the development of American intellectual property policy in East Asia that this paper seeks to examine. As an alternative to bilateral linked trading pressure, the international consensus of TRIPS provided American intellectual property holders the advantages of legitimacy of their cause, a single set of international minimum standards of protection, and even a way to potentially reform China. This landmark agreement was accomplished by developed nations, led by the United States and its intellectual property lobby, over the objection of developing nations by the means of the threat of Section 301 pressure as an alternative to an international consensus and by the incentive of other linked trade concessions made in GATT. Thus, this final case study attempts to show how America’s struggle to

\textsuperscript{235} Groombridge, \textit{The Political Economy of Intellectual Property Rights}, 33.
establish intellectual property protection in East Asia took on international significance, and the how successful outcome was made possible by the gradual alliance between American policymakers and holders of intellectual property.
Conclusion:

By the end of the 20th century, as the world economy integrated, intellectual property existed as an entity in a somewhat problematic state, a result of the inherent dependence of intellectual property rights on government affirmation and protection. On one hand, certain developed nations, such as the United States, saw a creative industry as in their best interests, and increasingly sought to encourage innovative businesses through the use of incentives such as intellectual property protection. But on the other hand, as the economy globalized, no single market alone was able to provide an effective incentive for the increasingly high cost of research and development efforts required by a creative industry, meaning that the policies of a single government could no longer be adequate to foster innovation. And thus, because “optimal” levels of intellectual property protection varied between nations, the 1980s saw a marked increase in contentious bilateral and international negotiations that attempted to determine an intellectual property arrangement that could secure innovation beyond the borders of a single country. As a result, according to Andrew Rosser, “intellectual property issues have constituted more than half the duties of the U.S. Trade Representative” by the 1990s.237 And thus, while intellectual property protection may not have been a foreign policy priority of the United States at the end of the 19th century, by the end of the 20th century it had become one of the United States’ most important foreign economic policies.

Until the final stages of the Cold War, when the United States showed a remarkably greater willingness to press its allies in the developing world on trade issues important to the American economy, intellectual property was often subject to the United States’ larger geopolitical interests. In the first case study made by this paper, Japan’s modernization efforts were shown to have been substantially helped by American technological assistance through the oyatoi gaikoujin and a careful

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237 Rosser, The Political Economy of Institutional Reform, 103.
Japanese study of American industry as a whole. To many American policymakers and even business leaders, Japan’s geographic proximity to China and its growth as a trading partner made this approach worthwhile in the latter parts of the 19th century. As Japan successfully industrialized using American technology and consequently posed an increasingly mortal threat to some American manufacturing interests, American politicians justified their role in this growth on the grounds that global economic advancement as whole outweighed the costs, and indeed, the powerful cotton and shipping industries profited from Japan’s rise. While Japan did enact intellectual property reform, it did so to attract foreign investment and continued technological assistance from foreign technology firms rather than as a direct result of American foreign policy. In the second case study of this paper, intellectual property was a part of the foreign policy of the United States in China, but this policy existed far more in order for the United States to exert influence on China during the era of the unequal treaty system. Indeed, American efforts often did not extend to pressing for protection beyond that in name only, proving that the overall goal of American foreign policy was political rather than economic. While some leaders of American industry considered a lobbying effort in Washington during these years to address this concern, American business losses in Asia resulting from inadequate intellectual property protection were too small for this to be a realistic course of action. The third case study of this paper profiled American intellectual property policy during the early stages of the Cold War, when the United States used technological aid, turning a blind eye to blatant intellectual property theft, to build the economies of several strategic Northeast Asian nations on the hope that they would assist in containing communism’s spread. Nevertheless, the United States did so under the unspoken agreement that these nations would not export pirated products into other markets, and when Taiwan violated this arrangement, the United States responded swiftly and effectively. Thus, for much of this period of American foreign relations in East Asia, intellectual property matters were often subjected to larger American geopolitical goals.
Yet as the United States lost some of its global economic competitiveness and became increasingly reliant on industries derived from intellectual property, American foreign policy shifted to ultimately place intellectual property rights among its most important objectives. The fourth case study of this paper documents the rise of the intellectual property lobby in Washington, DC, led by the copyright industry but eventually joined by representatives of technology-based industries as well. The growth of this lobby, as shown by the fifth and sixth case studies, resulted in an alliance between lawmakers and the intellectual property industry that pushed for reforms in international intellectual property protection through linked bilateral trade negotiations and a major international agreement, TRIPS. The use of Section 301 in particular, strengthened by lawmakers over the course of the 1980s, coerced developing nations to adopt intellectual property protection as a way of saving their other industries from American retaliation. While these aggressive trade measures were referred to as “fair trade” by many American politicians seeking to avoid the unpleasant label of protectionism, they nevertheless were explicitly designed to aid American industries that were struggling in the globalizing economy. Thus, as this paper attempts to show, American intellectual property policy in East and Southeast Asia developed as a primary result of the changing relationship between American economic and geopolitical interests from 1868 to 1994.
Bibliography

Primary Sources

Note: Although this paper uses historical media sources extensively, by convention, newspaper and other periodical sources can be found in the footnotes but are not cited in this bibliography.


**Secondary Sources**


