

6

“WE ARE ALL DEVELOPING COUNTRIES”:
CANADA AND INTERNATIONAL COPYRIGHT
HISTORY: FAULT LINES IN THE MAP OF
INTERNATIONAL COPYRIGHT

*Dr Sara Bannerman*¹

“Canada consents to enter Copyright Convention.”² These six words, sent by Canada’s Prime Minister in reply to the British government’s inquiries as to the willingness of the colonial governments to enter the *Berne Convention*, masked domestic tension that surrounded the issue of copyright in Canada. Canada would follow Britain into the *Berne Convention* but Canada, as a British dominion and, eventually, a middle power, would have a very different story from other, more familiar, copyright histories. Canada’s path crossed hidden fault lines that would later appear in the political map of international copyright.

Current mappings of the politics of international copyright – alignments that classify the various copyright interest groups – tend to mask the tensions within these categories. Such categories and classifications have a powerful ability to mask tensions, to organize, to mobilize, and to shape the history of copyright.

In this paper I will make three arguments, drawing on the historical experience of Canada with the *Berne Convention* between 1886, when the *Berne Convention* was founded, and 1971, its last revision. First, Canada, though aligned with the most powerful countries on issues of international copyright, has a unique and important history with international copyright that is very different from the histories of the major powers. Second, for many middle powers, the *Berne Convention* was a symbol of

¹ B.Mus., MA, PhD, SSHRC Postdoctoral fellow, Centre for Governance of Knowledge and Development, Regulatory Institutions Network, College of Asia and the Pacific, Australian National University.

² Sir R. Herbert to Sir J. Pincefort, 12 June 1886. *Switzerland No. 2: Further Correspondence Respecting the Formation of an International Copyright Union*; John Lowe. Memorandum. 9 February 1889. RG13 A-2 Vol. 2361 File 1912–1424 Part 4. Library and Archives Canada.

progress in international law, and a hallmark of a civilized country. Canada has aligned with the major powers on issues of international copyright. Though this alignment has not always comfortable, it stems in part from a desire to be associated with ideas of progress and civilization, and to be aligned with one's largest trading partners. Third, I ask, what contribution do middle powers make to the international copyright system today?

I

CANADA'S COPYRIGHT HISTORY IS DIFFERENT FROM THOSE OF THE MAJOR POWERS

Canada's historical experience with the *Berne Convention* has been very different from the experiences of the major powers. Like many of today's middle powers, Canada signed on to the international copyright treaty in 1886 not as an independent country but as a British colony. Canada had no foreign affairs institutions or diplomats and was not directly represented at the founding meetings of the convention.

Economically, unlike France or Great Britain, nineteenth-century Canada, like many other colonies, stood to gain little from the new international regime; Canada's copyright industry was almost non-existent.

In 1886 just 574 copyrights were registered in Canada, and, since Canadian authors had almost no international recognition, few Canadian authors would benefit from the internationally expanded copyright protection that would come about through Canada's participation in the *Berne Convention*.³

Competitively, the *Berne Convention* put Canada at a disadvantage. Canadian printing and publishing was in competition with the printers and publishers of the United States – a country that did not yet recognize international copyright. American publishers could reprint the works of foreign authors without permission and without any legal requirement to pay royalties to foreign authors. Canadian publishers, under the *Berne Convention*, would not have this freedom.

As a result, the Canadian printing and publishing industry suffered, affecting authors as well.⁴ Although the industry was expanding – by 1881 the number of people employed in the industry had almost doubled since 1771, and over the next ten years

³ Canada. *The Canada Year Book: Statistical Abstract and Record for the Year 1886*, 270, www66.statcan.gc.ca/u?eng,17565; George L. Parker, "The Evolution of Publishing in Canada" In *History of the Book in Canada*, eds. Patricia Fleming, Yvan Lamonde and Fiona A. Black, Vol. 2 (Toronto: University of Toronto Press, 2004), 17–26.

⁴ William Kirby to John A. Macdonald, 24 March 1885. In Prime Minister Macdonald fonds (MG26 A), pages 61277 to 61281. Library and Archives Canada.

employment in the industry would grow by 30%⁵ – it was also seen to be struggling. Novelist and journalist William Kirby argued, in an 1885 letter to Canadian Prime Minister Macdonald, that his concern was “not primarily to secure copyright to Canadian authors – they have plenty of that,” but to “give our publishing industries such fair play and protections as they might obtain or the trade will become extinct in Canada.”⁶

Nineteenth-century Canada’s strides towards independence from Britain in foreign affairs were slow and gradual. By 1886 there was an increasing trend for Canada to send representatives to international negotiations, and it was established that British colonies were to be consulted on matters of international treaties.⁷ However, consultation with Canada and the other British colonies, in the case of the initial negotiations for the *Berne Convention*, was minimal, and no Canadian representative accompanied the British delegation at the founding meetings of the *Berne Convention*. On 9 September, the British delegates signed the *Berne Convention*, making the following declaration:

Plenipotentiaries of Her Britannica Majesty state that the accession of Great Britain to the Convention for the protection of literary and artistic works comprises the United Kingdom of Great Britain and Ireland, and all the Colonies and Foreign possessions of Her Britannica Majesty.

At the same time, they reserve to the Government of Her Britannic Majesty the power of announcing at any time the separate denunciation of the Convention by one or several of the following Colonies or possessions in the manner provided for by Article XX of the Convention, namely: India, the Dominion of Canada, Newfoundland, the Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, and New Zealand.⁸

There was a conflict at the root of Canada’s position as a party, under Britain, to the new convention – one that would disturb and threaten the new Union. While the

⁵ Éric Leroux, "Printers: From Shop to Industry" In *History of the Book in Canada*, eds. Patricia Fleming, Yvan Lamonde and Fiona A. Black, Vol. 2 (Toronto: University of Toronto Press, 2004), 75–87. Canada. *Census of Canada, 1870–71*, Volume 3, Table LV – Summary of Industrial Establishments, by Provinces.

⁶ William Kirby to John A. Macdonald, 24 March 1885. In Prime Minister Macdonald fonds (MG26 A), pages 61277 to 61281. Library and Archives Canada.

⁷ David M. L. Farr, *The Colonial Office and Canada, 1867–1887* (Toronto: University of Toronto Press, 1955), 234–235.

⁸ Francis Adams and J.H.G. Bergne to the Earl of Iddelsleigh. *Report on the Third International Copyright Conference at Berne*. 10 September 1886. In RG6 A3 Vol. 214 File “Copyright Conference at Berne, 1886.” Library and Archives Canada. Emphasis added.

Canadian government moved to make Canada a part of a copyright system that was being portrayed as the advancement of civilization, there were also significant differences between Canada and the countries that initiated the Berne Convention. Great Britain, France, Italy, Spain, Switzerland and Germany housed major publishers with interests in publishing in foreign countries, while Canada was a net copyright importer. They were highly developed, and Canada was still developing. They had a flourishing literary culture; Canada did not.

The differences between Canada and the lead countries in the movement to establish the *Berne Convention* only grew wider. Although Canada had agreed to join Berne, by 1889 there were strong arguments that Canada should control its own copyright law, independently from Britain, and denounce the *Berne Convention*. Canada's decision to join the Berne Union would soon be called an act of "profound...almost criminal – negligence" on the part of Canadian politicians, because the principles of the international agreement were out of step with what many Canadian interest groups at the time were calling for.⁹ Canada, shortly after joining the *Berne Convention* in 1886, reversed position; for years following Canada's initial accession, Canada would attempt unsuccessfully to denounce the agreement.

Canadian Minister of Justice John Thompson, who came to see the *Berne Convention* as being highly disadvantageous to Canadian interests, felt that the convention allowed foreign copyright holders to gain a monopoly on publishing their works in the Canadian market, causing Canadian printers and publishers to lose out. The benefits that Canadian copyright holders received under the *Berne Convention* did not equal, in Thompson's view, the harm caused to Canadian printing and publishing industry:

the condition of the publishing interest in Canada was made worse by the Berne Convention... The monopoly which was, in former years, complained of in regard to British copyright holders is now to be complained of, not only as regards British copyright holders, but as to the same class in all countries included in the Berne Copyright Union. Canada is made a close market for their benefit, and the single compensation given by the convention for a market of five millions of reading people is the possible benefit to the Canadian author...[who has been described as] "belonging rather to the future than to the present."¹⁰

⁹ John Ross Robertson quoted in Ron Poulton, *The Paper Tyrant: John Ross Robertson of the Toronto Telegram* (Toronto: Clarke, Irwin, 1971), 107.

¹⁰ John Thompson to Governor General in Council, 1892, 7. RG13 A-2 Vol. 85 File 892-217. Library and Archives Canada.

Thompson also felt that the terms of the *Berne Convention* largely favoured densely populated and highly urbanized countries such as those in Europe, but that such terms were unsuited to relatively less developed countries like Canada:

The Berne Convention had in view considerations of society which are widely different from those prevailing in Canada. In Europe the reading population in the various countries is comparatively dense; – in Canada, a population considerably less than that of London is dispersed over an area nearly as large as that of Europe. In the cities of Europe, especially in Great Britain, the reading public is largely supplied from the libraries, while, in Canada, as a general rule, he who reads must buy. In European countries the reading class forms but a fraction of the whole population, while in Canada it comprises nearly the whole population.¹¹

Opposition to the agreement from printers, publishers, and related industries grew and mobilized. As a result, a Canadian copyright act was unanimously passed in 1889 containing domestic printing requirements and a compulsory licensing system that were not compatible with the *Berne Convention*.¹²

The Copyright Act of 1889 contained domestic printing requirements that were disallowed under the *Berne Convention*, which did not allow member states to require any formality as a condition of copyright.¹³ The new act required *first or simultaneous* printing and publishing in Canada – that is, printing and publishing in Canada within one month of publication or production elsewhere.¹⁴ Works that were not first printed and published in Canada or printed and published in Canada within a month of their publication or production elsewhere would not be eligible for the protections provided by Canadian copyright.

The Copyright Act of 1889 went further. The failure to meet the domestic printing and publishing requirements of the act would have opened the way for the grant of compulsory licenses to reprint the work in Canada without permission of the copyright owner under compulsory licensing provisions. These compulsory licensing provisions, designed to make access to books more affordable in Canada, and to enable Canadian printers and publishers to better compete with the Americans, who

¹¹ Ibid.

¹² 52 Vict, c 29.

¹³ *Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works (Berne Convention)*, 9 September 1886. Berne: Office of the International Union for the Protection of Literary and Artistic Works, 1886, Article 2.

¹⁴ “such work shall be printed and published or produced in Canada, or reprinted and republished or reproduced in Canada, within one month after publication or production elsewhere.” 52 Vict. c. 29, article 1.

did not yet recognize international copyright, were also seen to be incompatible with the *Berne Convention*. Therefore Canadian Parliament, in a unanimous decision, requested denunciation of the *Berne Convention*.¹⁵

The British, who had ultimate control both of Canadian legislation and Canadian foreign affairs, refused to let the Canadian act enter into force, and refused to allow Canada to denounce the *Berne Convention*. The British government was loathe to allow Canada to abandon the *Berne Convention*, as denunciation would break up the system of copyright uniformity throughout the British Empire. It infuriated some members of the British government that a colony such as Canada might threaten to break up the *Berne Union*. Henry Bergne, who had been a British delegate to the early meetings creating the *Berne Convention*, wrote:

An International Union has only just been accomplished, with great difficulty, and on principles which commend themselves to the civilized world. To this, Great Britain and all her Colonies are parties, with the express and unanimous consent of the latter. Is a British colony, like Canada, for the sake of their infinitesimal interest in the publishing business, or for the supposed benefit of Canadian readers, to be the first to withdraw, and so to raise a hand to destroy the Union, which comprises a population of four or five hundred millions?¹⁶

Bergne and others feared that if Canada were to withdraw from the *Berne Convention*, other countries would follow. A British committee studying the matter wrote that if “the interests of publishers or printers were allowed to prevail over those of authors, the lead given to Canada would not improbably be followed by other colonies, and thus the whole system of Imperial copyright would be broken up.”¹⁷

Denunciation, the British Secretary of State for the Colonies Lord Knutsford informed Canada’s Governor General in 1890, would be unnecessary since the 1889 act contravening the *Berne Convention* would not receive the necessary approval from

¹⁵ Great Britain. *Report of the Departmental Representatives Appointed to Consider the Canadian Copyright Act of 1889*. E 1701. London:n.p., 1892. Prime Minister Abbott fonds (MG26 C), Vol. 5 File: Copyright. Lord Stanley of Preston to Lord Lord Knutsford, 16 and 17 August 1889, Great Britain. *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783. London: George Edward Eyre and William Spotsiswoode, 1893. In RG13 A-2 Vol. 2361 File 1912–1494 Part II. Library and Archives Canada.

¹⁶ National Archives of Britain. Foreign Office fonds 881/5989. As quoted in Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, 118.

¹⁷ *Report of the Departmental Representatives Appointed to Consider the Canadian Copyright Act of 1889*, 19.

Britain.¹⁸ British imperial power was used to forcefully keep Canada in the Berne Convention.

Thompson, who became Canada's fourth Prime Minister in 1892, was furious at this refusal to recognize Canadian copyright sovereignty. He wrote long letters to the Imperial government; he refused to meet with British representatives who came to negotiate on the issue, and finally he went to London to negotiate on, among other things, the copyright issue.¹⁹ At Windsor Castle on December 12 1894, Prime Minister Thompson died of a heart attack. His body was returned home to Canada in a boat with the sides painted black, and the dream of Canadian copyright sovereignty – and a copyright that differed from the norms of the Berne Convention – was never realized.²⁰

The histories of copyright that focus on major powers such as England, France, and the United States tell a story about copyright that is very different from Canada's story. It is often assumed that Canadian copyright history has been uneventful, and that Canada's association with the *Berne Convention* has been uncontentious and unproblematic. However, the Canadian history stands as a reminder that the international copyright system was built and held together by imperial power. The Canadian history reminds us of the power struggles and conflicts that were part of the Union's history from the very beginning.

It would not be long before Canada's course in international copyright would once again change direction. Following World War I, perceptions of Canada and its place in the world shifted; Canada's participation in the Great War meant that Canada now viewed itself as an independent participant in international affairs, and there were feelings that the rebellious copyright policies of the past might tend to make Canada an "outsider in the general community of nations."²¹ At the same time, Britain began to loosen its grip on the handlebars of Canadian copyright and, with the Canadian *Copyright Act* of 1924 Canada, under Britain, moved to implement the *Berne Convention*.

¹⁸ Lord Knutsford to Lord Stanley of Preston, 25 March 1890, *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

¹⁹ See for example John Thompson to Governor General in Council, 1892. In RG13 A-2 Vol. 85 File 892–217. Library and Archives Canada; Lord Knutsford to Lord Stanley of Preston, 30 Jun 1892. In *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783; "The Copyright Question," *The Globe*, 11 December 1894.

²⁰ P. B. Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: Toronto University Press, 1984), 425 and 429.

²¹ Canada. House of Commons, *Debates of the House of Commons, Fifth Session – Thirteenth Parliament 11–12 George V., 1921*, Vol. CXLVI (Ottawa: F.A. Acland, 1921), 3833.

II

CANADA'S ALIGNMENT WITH MAJOR POWERS ON ISSUES OF INTERNATIONAL COPYRIGHT HAS NOT ALWAYS BEEN EASY

Canada used its copyright policies to gain status – to project an image of Canada as a “civilized country”. Although other alignments were considered, and Canada in the 1960s and 1970s took particular note of its commonalities with the “developing” countries, generally Canada has aligned with the more powerful countries – afraid that if the country took any other route, the country would be considered as “an outlaw among the copyright nations of the world,”²² an “outsider in the general community of nations,”²³ and a “non-harmonious and non-musical instrument” within the concert of nations.²⁴

Today, Canada is aligned, as a part of Group B, with the United States and the other industrialized countries. This was not always the case; Canada also has a history of copyright conflict with the US. In the nineteenth century, Canada was used as the back door to Berne protection for American authors who, by publishing in Canada, received protection throughout the Berne Union.²⁵ This led to a dispute between the two countries, with Canada refusing for some time to grant to Americans Canadian copyright protection.²⁶ Later, Canada's 1924 *Copyright Act* contained special provisions that sought to retaliate for the US manufacturing clause.²⁷ Disputes continued over the manufacturing clause but were mitigated when both countries signed the *Universal Copyright Convention* in 1952. Canada's copyright relationship with the US was never easy, and its association with the major powers has not been unproblematic.

Canada's acquiescence to the norms embedded in the *Berne Convention*, and the country's alignment with the major powers on international copyright issues, had much to do with the association between the Berne norms of international copyright

²² F.C.T. O'Hara to W.M. Dickson, 2 June 1919. RG20 Vol. 91 File 22655 Vol. 1.

²³ Canada. House of Commons, *Debates of the House of Commons, Fifth Session – Thirteenth Parliament 11–12 George V., 1921*, Vol. CXLVI (Ottawa: F.A. Acland, 1921), 3833.

²⁴ Canada. House of Commons, *Debates of the House of Commons, Third Session – Sixteenth Parliament 21–22 George V., 1931*, Vol. I, 1931 (Ottawa: F.A. Acland, 1931), 2309.

²⁵ Gordon Roper, "Mark Twain and His Canadian Publishers," *Papers of the Bibliographical Society of Canada*, no. 5 (1966).

²⁶ Draft memo from Ministers of Justice and Agriculture to the Governor General in Council. Undated. RG13 A-2 Vol. 2361 File 1912–1494 Part I. John Lowe. Memorandum. 23 May 1892. RG13 A-2 Vol. 2361 File 1912–1494 Part I.

²⁷ 11–12 Geo. V, c. 24 and 13–14 Geo. V, c. 10.

and ideas of progress and civilization. For many, the *Berne Convention* symbolized the forward march of international law, civilization, and progress.²⁸ Progress has, as Shanin points out, gone by various names: ‘modernization’, ‘development’, ‘growth’, ‘civilization’.²⁹ According to Shanin, this vision of progress portrays:

all societies ... advancing naturally and consistently “up”, on a root from poverty, barbarism, despotism and ignorance to riches, civilization, democracy and rationality, the highest expression of which is science. This is also an irreversible movement from an endless diversity of particularities, wasteful of human energies and economic resources, to a world unified and simplified into the most rational arrangement. It is therefore a movement from badness to goodness and from mindlessness to knowledge, which gave this message its ethical promise, its optimism and its reformist “punch”.³⁰

The world has thus been classified according to particular systems and ideas of progress – some societies and peoples as “developed”, others as “underdeveloped” – and some in the middle.³¹ These ideas have their own power alongside material realities; because of its powerful ability to organize, to mobilize, and to legitimize the actions of powerful interests and states.

Escobar shows that the discourse of development, beginning in the 1950s, became universally accepted and omnipresent.³² The discourse of development, according to Escobar, constructs the “developing” world through conceptual maps, categories, and social practices.³³ The discourse and categories of development have been powerful not only in constructing the “developing” world; they have also been influential in

²⁸ Bently and Sherman point out that “In most standard histories, the signing of Berne signifies the point in time when national regimes regulating the protection of literary and artistic property came to recognize one another and to provide reciprocal protection. The emergence of the Berne Convention is also seen as the point at which the ramshackle and disorganized collection of bilateral treaties inevitably gave way to the rationality of a multilateral regime that established common standards of copyright protection.” Lionel Bently and Brad Sherman, “Great Britain and the Signing of the Berne Convention in 1886,” *Journal of the Copyright Society of the USA* 48, no. 3 (2001), 311.

²⁹ Teodor Shanin, “The Idea of Progress” In *The Post-Development Reader*, eds. Majid Rahnema and Victoria Bawtree (London: Zed Books, 1997), 66.

³⁰ *Ibid*, 65.

³¹ *Ibid*, 68.

³² Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, N.J.: Princeton University Press, 1995).

³³ *Ibid*, 10–11.

creating conceptualizations of the “developed” world and the copyright policies and positions acceptable for “developed” countries.

Just as nineteenth-century Canadian politicians grappled to identify the copyright policies most appropriate to the leading British colony and to a “civilized nation”, paddling within a sea of discourse largely generated by the international interests that had encouraged the creation of the Berne Union, Canadian officials in the early 1970s struggled to find a position on international copyright that encompassed Canada’s position as a net copyright importer, similar in that sense to developing countries, and an industrialized country aligned with some of the biggest copyright exporters. The weight of categorization, of commonsense notions of the type of country Canada was, played a significant role in the determination of what copyright policies Canada took.

The year 1967 marked a crisis in international copyright. Newly independent countries, beginning in the 1960s, raised important questions about whether the Berne system of international copyright was appropriate to developing countries who were importers, rather than exporters, of copyright materials and for whom international copyright created a net outflow of payments. They noted the lack of availability and high price of copyright materials, and wished to see a copyright system that would do more to solve these problems.

They called for major changes to the *Berne Convention* that would allow for the compulsory licensing of works to make foreign works available at affordable prices in developing countries. This led to the failure of the 1967 revision of the *Berne Convention*, with both developing and developed countries unhappy with the compromise that was reached.³⁴ This crisis in the Berne Union prompted fears that either the core countries or the developing countries might withdraw *en masse* from the Union.³⁵

Scepticism about the appropriateness of the *Berne Convention* to countries at various stages of development also appeared in Canada. Beginning in the 1950s, doubts were raised about whether Canada had been “well advised” in joining the *Berne Convention*. The 1957 Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs took the view that the *Berne Convention* represented a European approach to copyright, granting high levels of copyright and placing the rights of authors in the forefront. The Commission suggested that a more American approach—with a utilitarian view of copyright that understood copyright as serving the public interest

³⁴ *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*. Geneva: World Intellectual Property Organization, 1971. See also Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. (London: Oxford University Press, 2006)

³⁵ *Ibid*, 914–915.

above the interests of authors--might be more suitable to Canada as a net copyright importer.

The Commission reported: "It may be that, in becoming a party to the Berlin Revision of the Berne Convention in 1923, Canada was not too well advised. Apart from Haiti and Brazil no nations in the Western Hemisphere are members of the Berne Union..."³⁶

In the 1960s, following the Royal Commission's report, Canada attended fewer meetings related to the Convention and its revisions, and refused to sign or implement the revision of 1967. Many countries refused to ratify that revision due to its controversial provisions for developing countries. Canada's refusal was for different reasons; Canada's prime objection was not with the provisions for developing countries; rather, Canada's Secretary of State for External Affairs questioned whether Canada's participation in the *Berne Convention*, and the high levels of copyright protection granted under the convention, was in the national interest:

Successive revisions of the Berne Convention have progressively extended the monopoly rights of copyright holders. The current revisions suggested for the [1967] Stockholm conference are intended to extend these rights still further. Unfortunately, this raises the question of the cost in relation to the value of present copyright legislation as a device for encouraging creativity in Canada before the Economic Council's report is available. An important consideration in the study of this matter is the fact that as much as 90% of the total cost (about \$8 million) of copyright to the public in Canada is accounted for by the protection given foreign works. In turn, compensation to Canadian authors by way of payments from overseas to Canada is minimal. That raises the fundamental question of whether protection of the kind Canada is committed to by adhering to the Berne Union is in the national interest.³⁷

The Secretary therefore recommended to Cabinet that Canada should refrain from supporting any proposed revision to the *Berne Convention* that would reduce the government's flexibility of action.³⁸ Canada did not sign the revised *Berne Convention* of 1967.³⁹

³⁶ Canada. Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs. *Report on Copyright*. (Ottawa: Supply and Services Canada, 1957): 18.

³⁷ Secretary of State for External Affairs. Letter to Secretary of State for Dominion Affairs, 16 February, 1928. In RG25 G-1 Vol. 1260 File 218 Part I. Library and Archives Canada.

³⁸ *Ibid.*

³⁹ *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*. Geneva: World Intellectual Property Organization, 1971.

At the same time, the crisis that resulted from the 1967 conference in Stockholm sparked a new resolve that Canada should become a more influential and active player within the Berne Union. Some Canadian government officials hoped that the discourse of development now being established within the Berne Union, having been absent when former colonies like Canada joined the Union, might be translated to apply to Canada.

A government committee, formed in 1969 to assist in the formulation of Canada's position in response to the crisis in international copyright, recommended an adaptation of the definition of 'developing country' such that Canada might benefit from concessions made to developing countries under the *Berne Convention*.⁴⁰ The committee argued that, "Canada's position is somewhat analogous to that of developing countries when compared to countries with higher exports of copyright material."⁴¹ A Memorandum to Cabinet explained:

Although Canada is undoubtedly a "developing country" in so far as copyright is concerned (because of the large import imbalance of trade in copyrighted material), nevertheless it is not so considered by the two Conventions. A "developing country" under U.N. definition is considered a country which has an average per capita income per year of \$U.S. 300 or less. In my view [Minister of Consumer and Corporate Affairs, Stanley Basford], any country with a very large export-import imbalance in copyrighted materials should be entitled, like the developing countries, to maintain a somewhat lower level of international copyright protection.⁴²

The Memo to Cabinet recommended, "That the Canadian delegation suggest to the Joint Study Group that, in so far as international copyright is concerned, the definition of a "developing country" should not be based on per capita income, but on a substantial import imbalance of trade in copyrighted material."⁴³

The reformulation of the concept of "developing country" in such a way as to include Canada was absolutely radical. Such a precedent might have opened the door to a variety of definitions of developing countries based on the balance of trade in different areas, making possible a cascade of unexpected country coalitions and policy alignments unthinkable under the existing categorizations. It is unsurprising that an

⁴⁰ See generally RG25 Vol. 10902 File 55-19-1-ICC Pt 1-1. Library and Archives Canada.

⁴¹ Canadian Statement to the Joint Study Group. RG25 Vol. 10902 File 55-19-1-ICC Pt 1-1. Library and Archives Canada.

⁴² Memorandum to Cabinet re participation by Canada in a Joint Study Group Established by the Berne Union and the Universal Copyright Convention, September 1969. RG25 Vol. 10902 File 55-19-1-ICC Pt 1-1. Library and Archives Canada.

⁴³ Ibid.

idea so radical and so different from the regimes of representation and the practices of categorization that were being inscribed in international institutions at the time did not go far; a note on file called this aspect of the committee's recommendation "utter nonsense":

Efforts to claim Canada is a "developing country" ... are usually greeted with derision. We have the 3rd highest per capita income in the world and this is partly due to our importation of capital and know-how.⁴⁴

The idea that provisions for developing countries should apply to Canada conflicted with the established discourse that by now placed Canada as a middle power, associated with industrialized countries.

Canadian copyright policymakers in the late 1960s and early 1970s nevertheless felt that that international copyright, as implemented under the *Berne Convention*, primarily responded to the interests of the copyright-exporting nations. A 1977 report by Andrew A. Keyes and Claude Brunet in 1977 concluded that:

the fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions.⁴⁵

As a result of such perceptions, Canada attempted to form a coalition of 'intermediate' countries who were not officially "developing" countries, but who were net copyright importers. Canadian government officials envisioned that Canada might "for the first time... play a leading role in shaping the course of international copyright by fostering and leading a block of countries with interests similar to Canada." Officials felt that this coalition "could conceivably control a certain balance of power, given active participation."⁴⁶

Canada hoped, through this vehicle, to press for major structural change to the international copyright system that would allow different countries--including net-copyright importers like Canada--to adhere to different levels of copyright protection,

⁴⁴ Ibid.

⁴⁵ Andrew A Keyes and Claude Brunet. *Copyright in Canada: Proposals for a Revision of the Law*. Ottawa: Consumer and Corporate Affairs Canada, 1977: 234.

⁴⁶ Canadian Delegation to Meetings of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Permanent Committee of the Berne Union. *Report of the Canadian delegation: Meetings of the Intergovernmental Copyright Committee of the Universal Copyright Convention and the Permanent Committee of the Berne Union, Paris, December 15-19, 1969*. Ottawa, Library and Archives Canada, RG19 Vol. 5168 File 8510-6785-3 pt 4.

according to domestic circumstances.⁴⁷ However, this initiative to redraw the political map of international copyright failed due to Canada's inability to attract sufficient support, and due to fears that such a stance would affect Canada's relations with countries like the United States, the United Kingdom and France.⁴⁸

In an effort to resolve the crisis of 1967, simultaneous diplomatic conferences were held in 1971 to come to a more workable compromise and to revise both the *Berne Convention* and the *Universal Copyright Convention* in a way that would unify, and prevent the breakup, of the international copyright system.⁴⁹ Its radical initiatives having failed, Canada supported the revision process and aligned itself generally with the major powers. Adopting a middle power image, Canada portrayed itself at the 1971 diplomatic conference to revise the *Universal Copyright Convention* not as a developing country, but as "both developed and developing", an intermediary that understood the needs of both developing and "developed" countries:

The delegate of Canada emphasized the great interest of his government in the problems of international copyright and the work of the Conference. This special interest arises from a combination of factors, including the existence within Canada of dual languages and cultures, and the problems of reconciling copyright protection and technological innovations in a country of immense size.⁵⁰

Canada portrayed itself as a middle power leader: a country in a unique situation that allowed it to understand the positions of all sides:

Finally, Canada thought, in cultural matters, that it was half-way between industrialized and developing countries, which enabled it to understand the

⁴⁷ Canadian Delegation to the Extraordinary Joint Session of the Permanent Committee of the Berne Union and the Inter-Governmental Committee of the Universal Copyright Convention. *Report of the Canadian delegation on the extraordinary joint session of the Permanent Committee of the Berne Union and the Inter-Governmental Committee of the Universal Copyright Convention, Paris, February 3 to 7, 1969.* RG25 Vol. 10902 File 55-19-1-ICC Pt 1-1.

⁴⁸ Ibid. and Canadian Delegation to the Washington Meeting, *Memorandum to the Minister: Report of the Canadian delegation at the Washington meeting, September 29–October 3/1969, 10 October 1969: 2 and 4.* Ottawa, Library and Archives Canada, RG19 Vol. 5574 File 8510–C785–1 Part 2.

⁴⁹ *Records of the Conference for Revision of the Universal Copyright Convention, Unesco House, Paris, 5 to 24 July 1971.* Paris: Unesco, 1973; *Records of the Diplomatic Conference for the Revision of the Berne Convention (Paris, July 5 to 24, 1971).* Geneva: World Intellectual Property Organization, 1974.

⁵⁰ *Records of the Conference for Revision of the Universal Copyright Convention, Unesco House, Paris, 5 to 24 July 1971, 62.*

problems of both and to foresee perhaps the possibility of reconciling the interests at stake.⁵¹

Canada, however, did not sign the 1971 revision, and a rhetorical hint of Canada's rethinking of the map of international copyright remained; the Canadian delegation declared, "We are all developing countries."⁵²

The 1971 conferences resulted in revised texts of the *Berne Convention* and the *Universal Copyright Convention* that were widely accepted. At the same time, the crisis of 1967 had shown that copyright revision would no longer be easy. Following the 1971 agreement, no further major revisions have been attempted. The 1971 text of the *Berne Convention* is still in force today, and formal country groupings, established under the UN system, have solidified political alignments on international copyright. Under this system, Canada is aligned as a part of Group B, the group of the most powerful countries.⁵³

III

WHAT CONTRIBUTION DO MIDDLE POWERS MAKE TO THE INTERNATIONAL COPYRIGHT SYSTEM TODAY?

Mark Neufeld argues, drawing on Gramsci's concept of hegemony, that the middle power language that portrays Canada as an honest broker is used by dominant groups to advance and legitimise Canadian foreign policy and the existing international order. However, he also argues that the language of middlepowermanship has come to be used by dissident groups who, beginning in the late sixties and early seventies, recast the idea of a "middle power" "to signify the influence enjoyed by a country like Canada, and the potential such influence offers to effect radical progressive change in terms of disarmament, economic development and wealth re-distribution, environmental policy and democratization of the foreign policy-making process."⁵⁴

Countries like Brazil, Argentina, and India are still pushing for changes in the international copyright system, and some would argue that Canada should play a part

⁵¹ Ibid, 105.

⁵² Canadian delegate to the Conference for Revision of the *Universal Copyright Convention*, Paris, July 1971. *Records of the Conference for Revision of the Universal Copyright Convention, Unesco House, Paris, 5 to 24 July 1971* (Paris: Unesco, 1973), 62 and 105.

⁵³ Karl P. Sauvant. *The Group of 77: Evolution, Structure, Organization*. (New York: Oceana Publications, 1981).

⁵⁴ Mark Neufeld, "Hegemony and Foreign Policy Analysis: The Case of Canada as Middle Power" In *Readings in Canadian Foreign Policy: Classic Debates and New Ideas*, eds. Duane Bratt and Christopher J. Kukucha (New York: Oxford University Press, 2006), 94–107.

in advocating for progressive change. A 2004 proposal to WIPO's General Assembly from a group of developing nations (*Proposal By Argentina And Brazil for the Establishment of a Development Agenda For WIPO*) raised issue with both the basic assumption that intellectual property protection contributes positively to international development, and WIPO's core mandate, which is "to promote the protection of intellectual property throughout the world through cooperation among States."⁵⁵

This proposal sparked a series of high-profile international meetings at WIPO in which WIPO's mandate, impartiality, transparency, and core activities, as well as intellectual property's contribution to international development, were broadly questioned. The meetings resulted in an agenda, approved by all member states, intended to make WIPO more transparent and responsive to the needs of developing countries. However, some of the original key proposals made by developing countries, such as a treaty on access to knowledge and an organizational restructuring at WIPO, were not included in the final agenda.

In the discussions, Canada was aligned with the Group B of industrialized countries that opposed such radical proposals.⁵⁶ Similarly, in discussions surrounding a World Blind Union proposal for a narrower treaty aimed at rectifying current shortages of accessible works for the visually impaired, Canada has been aligned with the major powers who have been hesitant to commit to a treaty, preferring other non-binding approaches.⁵⁷ Canada's emphasis during the discussions has been on the importance

⁵⁵ World Intellectual Property Organization. *Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979.*

⁵⁶ Sara Bannerman, "The Development Agenda at WIPO: Where is Canada?" Chapter 10 in *Innovation, Science and Environment: Canadian Policies and Performance 2008–2009*. Edited by Glen Toner. (Montreal: Published for the School of Public Policy and Administration, Carleton University by McGill-Queen's University Press, 2008).

⁵⁷ World Intellectual Property Organization, Meeting documents: Standing Committee on Copyright and Related Rights: twentieth session, June 2010, www.wipo.int/meetings/en/details.jsp?meeting_id=20200; Catherine Saez, "High expectations this week for progress on exceptions and limitations at WIPO," in *Intellectual Property Watch*, 22 June 2010, www.ip-watch.org/weblog/2010/06/22/high-expectations-this-week-for-progress-on-exceptions-and-limitations-at-wipo/; Catherine Saez, "No decision on WIPO treaty for blind persons misses 'golden opportunity'," in *Intellectual Property Watch*, 30 June 2010, www.ip-watch.org/weblog/2010/06/26/no-decision-on-wipo-treaty-for-blind-misses-%E2%80%98golden-opportunity%E2%80%99/

of maintaining flexibility within any international instrument (whether binding or non-binding) for a variety of domestic approaches to ensuring access.⁵⁸

Since the 1970s Canada has been aligned with the major powers. In 1984 the Department of Consumer and Corporate Affairs and the Department of Communications jointly prepared the paper *From Gutenberg to Telidon: a White Paper on Copyright*, issued as part of a public consultation on copyright reform, and set down the path that Canada would follow:

Since Canadian creators receive national treatment protection in [countries that are Canada's major trading partners and who belong to one or both of the major copyright conventions], they benefit from Canada's participation in these conventions. The government intends that Canada's international obligations be met in the spirit as well as in the letter of the law.⁵⁹

This philosophy has generally guided Canadian participation in international copyright agreements since 1984. As in 1928, when Canadian delegates were instructed to support any proposals that seemed likely to meet general approval of the governments represented, "particularly those of the leading countries, such as Great Britain, Italy and France"⁶⁰, Canada today adopts the view that it must align on important issues with its largest trading partners.

Canada is now, more than ever before, an active participant in the coalition of most powerful copyright exporters on matters of international copyright. Objections to and scepticism surrounding the appropriateness of Canada's participation in the *Berne Convention* have been replaced with this Canadian version of a trade-based approach to international copyright. Support for counter-hegemonic projects has been held at bay by a vision of a Canada associated with the major powers.

Change in international copyright is not impossible. Other countries like India, South Africa, Brazil and Argentina have been successfully enrolled by domestic and transnational interests to advocate change within the international copyright system; room for exceptions, such as the 1971 Appendix to the *Berne Convention*, which, though labelled "unworkable", has been achieved; and copyright treaties that would advocate greater access to knowledge are even now being considered.

⁵⁸ Douglas George, *Presentation by Mr. Douglas George*, 13 July 2009, www.wipo.int/meetings/en/2009/vip_ge/presentations/george_douglas.html.

⁵⁹ Canada, Department of Communications and Department of Consumer and Corporate Affairs, *From Gutenberg to Telidon: A White Paper on Copyright: Proposals for the Revision of the Canadian Copyright Act* (Ottawa: Department of Consumer and Corporate Affairs and Department of Communications, 1984): 4.

⁶⁰ Fernand Rinfret. *Instructions to the Canadian Delegates to the Rome Conference on Copyright*. 25 April 1928. RG25 Vol. 1490 File 1827-278 Part I.

Such initiatives and visions press against the great weight of inscribed associations, norms, expertise, authority, institutions, and resources of a Union that has been in place since 1886. Such initiatives and visions are based in a hope that the regime of international copyright might be transformed, might overcome the exclusions of its past, and might embed this overcoming at the core of its ongoing practices. It is only by forming an awareness of the material and discursive structures of international copyright – an awareness that is formed by examining the historical experiences of weaker countries and groups as well as the views of the stronger ones – that such a transformative commitment can be made.