

PART ONE

Context

Copyright:

Characteristics of Canadian Reform

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Canadian copyright has been called “the most contentious, the most controversial subject that has ever been before the Parliament of Canada,” occasioning “more friction in the parliament of Canada . . . than any other subject.”¹ That statement, though made in 1923, is still true today as Canada embarks on its third attempt in five years to revise Canadian copyright law. Tensions arise not only out of the conflicting demands of Canadian copyright stakeholders; they also arise out of the various international pressures on Canadian copyright policy and efforts to meet those demands while tailoring Canadian copyright to domestic circumstances. The attempt, under Bill C-32, to bring Canada into conformity with the World Intellectual Property Organization (WIPO)’s 1996 Internet treaties is an effort to navigate these tensions — occasioning as much friction and controversy as its predecessors.

The current copyright reform initiative can be viewed in light of a number of trends that have characterized Canadian copyright reform since the time that Canada’s first copyright Act was put in place in 1868. Most importantly, Canadian copyright has always taken place in the context of the push and pull of international pressures. Domestic and international demands often conflict, and there is often significant resistance within Canada to demands for reform coming from outside the country. While

1 *Debates of the Senate, Second Session — Fourteenth Parliament, 1923 (13-14 Geo. V)*, at 568–69.

in the early days of Canadian copyright such conflict resulted in rebellion against Imperial and international copyright norms, this type of conflict has been replaced by a slow and relatively obliging tendency in reform, generally involving unhurried progress, minimalist adhesion to international treaties, and carving out made-in-Canada approaches. Although there have been instances where Canada has stepped into the role of a leader on international copyright, that position has been quickly abandoned and leadership left to stronger powers. In general, made-in-Canada approaches result in innovative policy solutions on narrow issues alongside a general acquiescence to the visions of copyright forged in international institutions and larger countries.

Since Canadian Confederation in 1867, there have been four major successful copyright reforms. Canada's first *Copyright Act* of 1868 underwent major revisions in 1875, 1924, 1985, and 1997. Canada passed its first post-Confederation copyright Act in 1868, basing the Canadian Act on the American model.² In 1875, provisions were added to the Act intended to encourage British copyright holders to print and publish (or reprint or republish) their works in Canada.³ In 1924, Canada put a new Act into effect, adopting more directly the British legislative model and the wording of the British *Copyright Act*.⁴ The *Copyright Act* of 1924 has remained the basis for Canadian copyright and has undergone several revisions, most significantly in 1985 and 1997.⁵ Bill C-32 represents the third attempt to initiate a fifth major reform to Canadian copyright, following previous attempts in 2005 and 2008.

Seen in light of past trends, Bill C-32 includes some made-in-Canada solutions on narrow issues but, on broader issues, abandons made-in-Canada solutions in favour of a more American maximalist approach. In important regards it abandons the tendency, adopted in past reforms, to maintain Canadian policy flexibility by adhering on a minimalist basis to international treaties.

2 *An Act Respecting Copyrights*, S.C. 1868 (31 Vict.), c. 54 [*Canada Copyright Act 1868*].

3 *An Act Respecting Copyrights*, S.C. 1875 (38 Vict.), c. 88 [*Canada Copyright Act 1875*].

4 *An Act to Amend and Consolidate the Law Relating to Copyright*, S.C. 1921 (11–12 Geo. V), c. 24 [*Canada Copyright Act 1921*]; and *An Act to Amend the Copyright Act*, S.C. 1923, (13–14 Geo. V), c. 10 [*Canada Copyright Act 1923*].

5 *Copyright Act*, R.S.C. 1985, c. C-42, <http://laws.justice.gc.ca/eng/C-42/index.html> [*Canada Copyright Act 1985*]; and *An Act to Amend the Copyright Act*, R.S.C. 1997, c. 24, www.wipo.int/clea/en/text_html.jsp?lang=EN&id=624 [*Canada Copyright Act 1997*].

A. INTERNATIONAL PRESSURE

Canadian copyright holders form, with their international counterparts, an epistemic community that exerts significant international and domestic influence, and that acts as a driver of copyright reform internationally. This epistemic community of copyright holders has been highly influential, especially among governments who view copyright, creators, and the creative industries, as important drivers of economic growth, national culture, and national pride, and as important symbols of civilization and modernity. Copyright reform responds to an internationalized agenda that enrolls domestic governments and international institutions, and that is inscribed in legal statutes and in international texts and treaties.

In the nineteenth and early twentieth century, the British Imperial government was enrolled in an international effort on behalf of copyright owners to maintain and expand markets for British books throughout the British Empire, as well as in efforts to create a legal regime that covered the whole British Empire. In the twentieth century, international institutions and networks have been enrolled in efforts to create an international copyright regime that spans the globe. Such efforts have been driven by the efforts of copyright exporters to protect and expand foreign markets. Though the *Berne Convention* has remained the foundation stone of international copyright, the two WIPO Internet Treaties — the *WIPO Copyright Treaty* (WCT) and the *WIPO Performances and Phonograms Treaty* (WPPT) — as well as the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPs Agreement), and various trade and plurilateral agreements are now the main vehicles for the internationalization and expansion of copyright and the protection of foreign markets by copyright exporters today.

Following Canadian confederation in 1867, Canada's first copyright Act, enacted in 1868, was instituted in relative freedom from international pressures.⁶ It was modelled on earlier legislation of the Province of Canada and Lower Canada, and was based on the American model of copyright. The American model, in turn, derived a number of features from the British model, such as the requirements to register the work and deposit copies with specific institutions.⁷ The Canadian *Copyright Act* also differed from the British model in several key ways that mirrored the American

6 *Canada Copyright Act 1868*.

7 *An Act for the Protection of Copy Rights*, S.Prov.C. 1832 (2 Will. IV), c. 53 [*Canada Copyright Act 1832*] and *An Act for the Protection of Copy Rights in this Province*, S.L.C. 1841 (4 & 5 Vict.), c. 61 [*Canada Copyright Act 1841*]; see also W.L. Hayhurst, "Intellectual

approach to copyright, in that it required a copyright notice to appear on most types of works⁸ and emulated the American term of protection (twenty-eight years with a possible extension of fourteen years, whereas Britain provided a term of the life of the author plus seven years, or forty-two years from the date of first publication, whichever was longer).⁹ The emulation of American law was voluntary and reciprocal; American law would also follow the Canadian law of 1868 in 1891, when it added domestic manufacture provisions.¹⁰

After 1868, reform to Canadian copyright took place under imperial and international pressure. Initially, this came primarily from the British Imperial government, acting on behalf of British copyright owners to ensure that Canadian copyright provisions did not interfere with British authors and publishers' ability to capitalize on the Canadian market. The Imperial government worked to ensure that Canadian copyright was compatible with Imperial law and that Canadian policies did not interfere with British efforts to establish a copyright treaty with the Americans — a key to establishing British publishing houses in the United States.¹¹

Canada's rebellious reaction to imperial pressures was first evidenced in 1872, when Canadian Parliament unanimously passed a copyright Act that provided for the compulsory licensing of British books.¹² This was a

Property Laws in Canada: The British Tradition, the American Influence, and the French Factor" (1996) 10 IPJ 281 [Hayhurst].

- 8 *Canada Copyright Act 1868*; and *An Act to Amend Several Acts Respecting Copy Rights*, § 5, 4 Stat. 436 (1831), www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1831%22 [US Copyright Act 1831].
- 9 *Canada Copyright Act 1868*; *An Act to Amend the Law of Copyright, 1842* (U.K.), 5 & 6 Vict., c. 45, www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22uk_1842%22 [UK Copyright Act 1842], s. 3; and *US Copyright Act 1831*, §§ 1 & 2. See also Hayhurst.
- 10 The 1868 act required that works be "printed and published" in Canada to be eligible for Canadian copyright protection: *Canada Copyright Act 1868*. The United States did not include such a provision in their copyright act of 1831, but introduced their "manufacturing clause", which required books to be "printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom," in 1891. *An Act to Amend Title Sixty, Chapter Three, of the Revised Statutes of the United States, Relating to Copyrights*, § 4956, 26 Stat. 1106 (1891), www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabe/%22us_1891a%22 [US Copyright Act 1891].
- 11 Great Britain, *Correspondence with the United States Respecting Copyright Convention, Part 1: 1881–1884*. (London: n.p., n.d.) See also Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006) [Seville].
- 12 Seville at 103.

made-in-Canada solution intended to meet specifically Canadian needs. The Canadian government wanted to encourage a domestic printing and publishing industry that could viably compete with American printers and publishers to serve the Canadian market. The compulsory licensing provisions were intended to put Canadian printers and publishers on an equal footing with the Americans who, in 1872, did not yet recognize international copyright. American printers and publishers were therefore able to reprint British works without permission of the copyright holder and export them to Canada by paying a 12.5 percent tariff. The Act of 1872 would have allowed Canadian printers to reprint British works in Canada as well, upon license from the Governor General for a fee of 12.5 percent that would go to the British copyright holder.¹³ The Act, however, was refused royal assent by the Imperial government.¹⁴ A number of reasons were given. Alongside concerns about the practicality of the proposal and its fairness to British copyright holders, the British did not want Canadian reprints circulating in Canada that would be cheaper than those sold in Britain.¹⁵ In addition, the British were apprehensive that the Canadian proposal might affect British international copyright interests; British officials were interested in establishing a bilateral copyright agreement with the United States and were worried that the United States would not be willing to establish a treaty recognizing British copyright “whilst every publisher in Montreal can reprint [British works] on payment of a moderate percentage without the author’s leave, and can smuggle them into the United States.”¹⁶ An Anglo-American copyright arrangement was not reached until almost twenty years later in 1891.¹⁷

13 *Ibid.*

14 “Earl of Dufferin to Earl of Kimberly, 9 August 1872” in Great Britain, *Copyright (Colonies): Copies of Extracts from Correspondence between the Colonial Office and any of the Colonial Governments on the Subject of Copyright* (London: n.p., 1875).

15 These concerns had been expressed in “Board of Trade to Colonial Office, 27 July 1869” in Canada, House of Commons, *Colonial Copyright: Return to an address of the Honourable the House of Commons* (29 July 1872).

16 *Ibid.*; see also *Seville* at 90-94.

17 In 1891 the United States passed a new copyright act, providing another front on which Canada could attempt to assert its copyright independence. The 1891 Act, called the “Chace Act” after American Senator Jonathan Chace who introduced the bill, extended copyright protection, under specific conditions, to citizens of certain other countries. The countries to which this would apply were to be declared by Presidential proclamation. Countries eligible for such a proclamation included those who granted copyright to American citizens on substantially the same basis as its own citizens, and countries “party to an international agreement which provides for reciprocity in the grant of copyright, by the terms of which agreement the United

It was in this context that Canada's 1875 *Copyright Act* was passed by the Canadian Parliament and sanctioned by the Imperial Parliament.¹⁸ The 1875 *Copyright Act* continued to emulate, like the Canadian *Copyright Act* of 1868, the American model, but it did not include the compulsory licensing system. It granted Canadian copyright to works first or simultaneously printed or published in Canada (or reprinted or republished in Canada), subject to the same set of formalities (domestic printing, registration and deposit) as had been in place under the 1868 Act, and banned importation of foreign reprints of such works. In prohibiting the import of foreign reprints of British works copyrighted in Canada, the Act put in place a compromise solution that did not go so far as the compulsory licensing provisions of the 1872 Act in encouraging domestic printing, but did provide some incentive for British publishers to republish their work in Canada. Under the 1875 Act, only by obtaining Canadian copyright protection via printing and publishing (or reprinting and republishing) in Canada could British publishers gain exclusive access to the Canadian market by excluding foreign reprints.¹⁹ This was a made-in-Canada solution tailored to fit within imperial constraints.

Following this compromise, the revolutionary approach to Canadian copyright reappeared in 1889. A second attempt to institute a compulsory licensing system was made in that year, when Canadian Parliament again passed a copyright Act containing compulsory licensing provisions.²⁰ By 1886, Imperial control had been transferred, in part, onto international agreements. The *Berne Convention for the Protection of Literary and Artistic Works* had been put in place in 1886, and Canada had been signed on to the convention by the Imperial government.²¹ Although Prime Minister Macdonald and his government had, behind closed doors, agreed to sign the *Berne Convention* under the British signature in 1886, by 1889 domestic interest groups had voiced their objection to implementation

States of America may at its pleasure become a party to such agreement." *US Copyright Act 1891* at 1110.

18 *Canada Copyright Act 1875*.

19 *Ibid.* See also Gordon Roper, "Mark Twain and His Canadian Publishers," (1966) 5 *Papers of the Bibliographical Society of Canada*, at 40–41.

20 *An Act to Amend "The Copyright Act," Chapter sixty-two of the Revised Statutes, S.C. 1889 (52 Vict.)*, c. 29.

21 *Actes de la troisième conférence internationale pour la protection des oeuvres littéraires et artistiques réunie à berne du 6 au 9 septembre 1886*, (Berne: Conseil Fédérale Suisse, 1886) (<ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/BerneConference1886>).

of the treaty.²² The *Berne Convention* was seen as being inappropriate for the North American situation, disallowing the types of domestic printing and compulsory licensing provisions that would have put Canadian printers and publishers on par with their American counterparts who did not yet recognize international copyright — measures seen as important drivers of development in the Canadian printing and publishing industries. Canada's 1889 copyright Act, which contained such provisions and therefore constituted a rebellion against of British copyright norms and a rejection of the norms of the recently-instituted *Berne Convention*, was unanimously passed in Canadian Parliament along with a request that the *Berne Convention* be denounced on Canada's behalf.²³ The Act of 1889, however, like the Act of 1873 before it, was prevented from coming into force by the Imperial government, and Canada's request to denounce the convention was rejected.²⁴ Canada's revolutionary approach to copyright had failed, and British control over Canadian law was retained.

The United States did not recognize international copyright until 1891, and did not join the *Berne Convention* until over a century later in 1989, preferring a made-at-home model of copyright. American requirements of registration and domestic manufacture, which were seen as protecting the American printing and publishing industry, were disallowed for parties to the *Berne Convention*.²⁵ The *Berne Convention*, however, remained in

22 Sir R. Herbert to Sir J. Pincefort (12 June 1886), *Switzerland No. 2: Further Correspondence Respecting the Formation of an International Copyright Union* (C. 4606) (London: 1886), Ottawa, Library and Archives Canada (RG7 G21 Vol. 115 File 206 Part 2b); John Lowe, Memorandum (9 February 1889), Ottawa, Library and Archives Canada (RG13 A-2 Vol. 2361 File 1912-1424 Part 4); "The Copyright Bill" *The Globe Toronto* (16 May 1888) 8; "Notes" *The Globe Toronto* (18 May 1888) 3; "Copyright Law as Before" *The Globe Toronto* (18 May 1888); John Lowe to Fred Daldy (13 June 1888), Ottawa, Library and Archives Canada (RG17 A16 Vol. 1655); Richard T. Lancefield, *Notes on Copyright Domestic and International* (Hamilton: Canadian Literary Bureau, 1896).

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

24 Lord Knutsford to Lord Stanley of Preston (25 March 1890), *Correspondence on the Subject of the Law of Copyright in Canada* (C. 7783) (London: George Edward Eyre and William Spotiswoode, 1893), Ottawa, Library and Archives Canada (RG13 A-2 Vol. 2361 File 1912-1494 Part II).

25 Interpretations of the principle of no formalities was still unclear in 1897, with various countries taking different positions on the issue. Bureau International de

force in Canada, providing, along with Imperial control, a further set of restrictions on Canadian law that prevented Canada from following more closely the American model of copyright. Efforts to incorporate provisions that would meet specifically Canadian needs, especially in the context of Canada's close proximity to the United States and their variant approach to copyright, were restricted by Imperial and international controls.

Imperial control continued to be exerted on Canada's 1921 *Copyright Act* through an arrangement made eleven years earlier, under which British colonies agreed to adopt British copyright provisions in exchange for continued copyright recognition throughout the British Empire.²⁶ This arrangement saw Canada copy, word for word, the British *Copyright Act* into Canadian law in what is often referred to as Canada's "first sovereign" copyright law, which came into force in 1924.²⁷

Although earlier Canadian copyright was based on American and British copyright models, beginning in the 1930s, Canadian copyright legislation began to incorporate some elements of the European authors' rights tradition. In 1931 Canada became the first copyright country to incorporate moral rights in its legislation.²⁸ Canada's move in 1931 was the result of an effort to conform to the moral rights provisions of the newly revised *Berne Convention*.

Canada's next major copyright reform did not take place until 1985. The 1985 reform took place again in a period of relative independence from international pressures. The United States had still not yet formally adhered to the *Berne Convention* and, in 1984, withdrew from the United Nations Economic, Scientific, and Cultural Organization (UNESCO), home

l'Union, *Actes de la conférence réunie à Paris du 15 avril au 4 mai 1896*, (Berne: Bureau International de l'Union, 1897) at 161. However, the principle was solidified in 1908. Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed. (London: Oxford University Press, 2006) at 96.

26 Great Britain, *Minutes of Proceeding of the Imperial Copyright Conference, 1910*, Ottawa, Library and Archives Canada (Microfilm reels B-2392 to B-2393).

27 The Canadian act was, in almost all sections, copied from British legislation, with a few differences regarding registration and compulsory licensing, as well as some minor variations with regard to compulsory licensing of gramophone recordings intended to make Canadian law reflective of American legislation. *Canada Copyright Act 1921; Canada Copyright Act 1923; An Act to Amend and Consolidate the Law Relating to Copyright, 1911* (U.K.), 1&2 Geo. V, c. 46.

28 *An Act to Amend the Copyright Act, S.C. (21-22 Geo. V)*, c. 8 (assented to 11 June 1931) [*Canada Copyright Act 1931*]; see also Ysolde Gendreau, "Surfacing: the Canadian intellectual property identity," in Ysolde Gendreau, ed., *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham, UK: Edward Elgar, 2008) 295 at 298 [Gendreau].

to the *Universal Copyright Convention*. The country was in the process of moving towards adhesion to the *Berne Convention* and towards the inclusion of intellectual property measures under the *General Agreement on Tariffs and Trade (GATT)*. During the time that Canada's 1985 revision took place, however, the United States was sidelined in international copyright policy-making, with no role in the *Berne Convention* and a reduced role in UNESCO's *Universal Copyright Convention*.²⁹ Absent American pressure, Canada's 1985 reforms extended Canadian copyright but did not see Canada implement the 1971 revision of the *Berne Convention*. Canadian copyright was extended to include computer programs, to strengthen moral rights, and to institute copyright collectives.³⁰

Revisions to Canadian copyright that followed responded more directly to international agreements. Canada implemented the 1971 revision of the *Berne Convention* in 1993 in order to comply with the *North American Free Trade Agreement (NAFTA)*, which, at American insistence, had made compliance with the 1971 revision a requirement—a measure probably aimed at Canada, the only party to NAFTA not yet in compliance.³¹ Canada also added a rental right for computer programs and protection for compilations of data and other material (copyright in databases) as a result of its NAFTA obligations.³² Further amendments were made to the *Copyright Act* in 1994 under the *World Trade Organization Agreement Implementation Act* in response to the *TRIPs Agreement*. These extended the rights under the *Copyright Act* to all WTO member countries, and expanded performers' rights.³³

Canada's 1997 reform, seen as a Phase II that completed the Phase I of reform which had occurred in 1985, brought Canada into compliance with the 1961 *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* by granting rights in public performances and broadcasts for performers and producers of sound recordings.³⁴ It also instituted the private copying levy; exceptions for non-

29 Orrin G. Hatch, "Better Late than Never: Implementation of the 1886 Berne Convention" (1989) 22 *Cornell International Law Journal* 171 at 178.

30 *Canada Copyright Act 1985*.

31 *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 52-80, <http://laws.justice.gc.ca/en/N-23.8/index.html> [*Canada NAFTA Implementation Act 1993*]; also see Sunny Handa, "A Review of Canada's International Copyright Obligations," 42 *McGill Law Journal* (September, 1997), 976 [Handa]. The NAFTA also required compliance with the substantive provisions of the *Geneva Phonograms Convention*.

32 See Handa.

33 Canada, *World Trade Organization Implementation Act*, SC 1994, c. 47 (www.canlii.org/en/ca/laws/stat/sc-1994-c-47/latest/sc-1994-c-47.html).

34 *Canada Copyright Act 1997*.

profit educational institutions, libraries, archives, museums, broadcasters and persons with perceptual disabilities; statutory damages, and wide injunctions.³⁵ Following the Phase II reform, Canada acceded formally to the most recent (1971) revision of the *Berne Convention* on 26 March 1998.³⁶

The current round of reform takes place in the context of domestic and international pressure, most significantly from the United States, to ratify the WIPO Internet Treaties and to increase copyright enforcement. Canada has been repeatedly placed on the United States Trade Representative's Special 301 Priority Watch List and is often cited as a copyright backwater by American industry groups.³⁷ The first effort of the Conservative government to reform copyright was, according to Haggart, an effort to demonstrate that the Conservative government was more friendly to the United States than had been the previous Liberal government; direction came from the Prime Minister's Office to satisfy US demands.³⁸

Canada's early efforts to follow the American model of copyright in some respects were a result largely of pressure to compete on a level playing field with the United States. Whereas early American influence took place through lobbying, diplomacy, modeling and competition, Canada's recent efforts at reform respond to demands that are now also backed by the WTO dispute settlement mechanism and possible US trade sanctions under the Special 301 process. At the same time, there remains room — as in the past — for Canadian policy innovation. While international, as well as domestic, pressure is a relatively constant feature of Canadian copyright reform, Canada's responses to this pressure have ranged between rebellion and compliance. Bill C-32, like C-60 before it, bows to international demands by going above and beyond the minimum requirements of the WIPO Internet treaties.

35 *Ibid.*; Canada, Department of Industry Canada and Department of Canadian Heritage, *A Framework for Copyright Reform* (Ottawa: Department of Industry Canada and Department of Canadian Heritage, 2001) 4–5, <http://strategis.ic.gc.ca/pics/rp/framework.pdf> [*A Framework for Copyright Reform*]

36 Handa at 969; World Intellectual Property Organization, *Berne Notification 193: Accession by Canada to the Paris Act (1971)* (26 March 1998) (www.wipo.int/treaties/en/notifications/berne/treaty_berne_193.html).

37 United States Trade Representative, 2010 Special 301 Report, 30 April 2010, www.ustr.gov/webfm_send/1906

38 Blayne Haggart, "North American Digital Copyright, Regional Governance and the Persistence of Variation," Paper presented at the Annual Conference of the Canadian Political Science Association, Montreal, 1–3 June 2010 at 10 (www.cpsa-acsp.ca/papers-2010/Haggart.pdf).

B. RESISTANCE TO INTERNATIONAL NORMS

Bill C-32, like its 2005 and 2008 predecessors, is intended to “bring Canada in line with international standards” by implementing the WIPO Internet treaties.³⁹ Although the implementation of international copyright agreements is often portrayed as an uncontentious technical step — as a matter of keeping up with technology and progress — the implementation of international copyright treaties has, in Canada, historically been highly contentious and problematic. Canada, as a result, has adhered in fits and starts to the various texts of international copyright treaties, first refusing to adhere, then adhering with great fanfare. Canada’s slowness in implementing the treaties, now 14 years old, reflects traditional tensions between transnational groups of rights holders and Canadian consumers and users.

Beginning with the copyright rebellion of 1889, Canada maintained its opposition to the *Berne Convention* until 1910. Canada’s fourth Prime Minister, John Thompson, took the view that the benefits that Canadian copyright holders received under the *Berne Convention* did not equal 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.”⁴⁰

The terms of the *Berne Convention*, Thompson felt, 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

39 Canada, Industry Canada and Canadian Heritage, *Press Release: Government of Canada Introduces Proposals to Modernize the Copyright Act*, 2 June 2010, http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1149.html

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

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.⁴¹

However, views changed after the turn of the century. At an Imperial Copyright Conference in 1910 Canada was the strongest voice among the colonies arguing for colonial copyright sovereignty. At the conference, the British colonies agreed in principle to implement the *Berne Convention* in exchange for copyright sovereignty — the ability to repeal Imperial copyright law in the dominions and to enact domestic copyright laws without interference from the Imperial government, as long as these were “substantially identical” to Imperial copyright legislation.⁴² In cases where a self-governing dominion failed to enact legislation that was “substantially similar”, they could expect to lose copyright recognition throughout the British Empire and internationally.⁴³

Fourteen years later, according to the agreement made in 1910, Canada put in place its own “sovereign” copyright Act, copied word-for-word from the British Act, and adhered to the *Berne Convention* in 1924 with great fanfare.⁴⁴ Canadian newspapers trumpeted Canada’s entry into the *Berne Convention*; the headline in *The Globe* read: “Copyright Troubles Finally Adjusted: Canada at last adheres with other Nations to the Berne Convention.”⁴⁵

Despite the fanfare, Canada later refused to implement the next revision of the *Berne Convention* in 1948. Canada’s delegate to the revision conference in 1948 made the distinction between countries who were net copyright importers and net copyright exporters: “Canada is a nation that consumes literary and artistic works,» noted the Canadian delegate.⁴⁶ This

41 *Ibid.*

42 Great Britain. *Minutes of Proceeding of the Imperial Copyright Conference, 1910*, 207—Resolution 2c. Imperial copyright laws were in place and governed copyright in Canada alongside domestic Canadian legislation until 1924.

43 *Ibid.* — Resolution 2d.

44 See note 27, above.

45 “Copyright Troubles Finally Adjusted: Canada at last adheres with other Nations to the Berne Convention,” *The Globe*, 18 March 1924, 2.

46 Author’s translation; emphasis added. *Documents de la conférence réunie à Bruxelles du 5 au 26 juin 1948*, 204–5 (<ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/BruxellesConference1948>)

overt identification of Canada as a copyright consumer — one which had not been as much highlighted in the 1920s when Canada was new to the *Berne Convention* — would remain at the centre of Canadian copyright policy throughout the 1950s, '60s, and '70s.

The revisions to the *Berne Convention* made in 1948 would have made necessary a number of changes to Canadian copyright law that the government was unwilling to make. The Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs (the Ilsley Commission) reported that implementing the 1948 revision of the *Berne Convention* would entail the following changes to Canadian copyright: first, Canada would have been required to grant more extensive performance rights to authors; second, Canada would have been obliged to give authors a right to authorize retransmission of their works such as by a satellite or cable retransmission of a broadcast; and finally, Canada would have been obliged to submit unsettled disputes with other union members to the International Court of Justice. As well, Canada would have become tied to a term of copyright (already in place since 1924) that lasted for the life of the author plus fifty years. The Commission recommended against all of these changes on the argument that they would reduce Canada's ability to legislate freely,⁴⁷ that Canada's term of protection should emulate that of the United States rather than retain the term of life plus fifty years, as required under the Brussels revision,⁴⁸ and that Canada ought not to "submit itself to the interpretation of the Convention by any authority other than its own Parliament."⁴⁹ Ratification of the 1948 version of the *Berne Convention* was due 1 July 1951.⁵⁰ Although work towards a redrafting of the *Copyright Act* had begun prior to June 1949,⁵¹ no new copyright Act was passed in Canadian Parliament. Canada would never ratify the 1948 Act of the *Berne Convention*.

Canada also refused to sign or implement the 1967 revision of the *Berne Convention*. While many countries refused to ratify that revision, Canada had its own reasons.⁵² The Secretary of State for External Affairs, in the

47 Canada, Royal Commission on Patents, Copyright, Trade-marks and Industrial Designs, *Report on Copyright*. (Ottawa: Supply and Services Canada, 1957) 13.

48 *Ibid.*, 19–23.

49 *Ibid.*, 15.

50 *Berne Convention for the Protection of Literary and Artistic Works*, Brussels Act of 26 June 1948, Art. 28 (www.oup.com/uk/booksites/content/9780198259466/15550020).

51 C. Stein, Under-Secretary of State to the Under-Secretary of State for External Affairs, 9 June 1949. RG103 Vol. 4 File 5-3-2-2.

52 The revision of 1967, once signed, did not receive a sufficient number of ratifications to come into force. This was due to controversy over special provisions put in place for developing countries under the revision.

days leading up to the conference, questioned whether Canada's commitment to the *Berne 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 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.⁵³

It was 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.⁵⁴ Canada did not sign the revised *Berne Convention* of 1967.⁵⁵

Canada, again, did not sign the revised text of the *Berne Convention* of 1971.⁵⁶ Canada's position again was that it did not support the revisions as a whole because they were seen as involving a commitment to higher levels of intellectual property rights.⁵⁷ The Canadian delegation was instructed not to sign the revised treaties.⁵⁸ This position was consistent

53 Secretary of State for External Affairs, Memorandum for Consideration by the Cabinet Committee on Economic and Fiscal Policy, 8 June 1967. Library and Archives Canada, RG19 Vol 5167 File 8510-C785-1 Pt 1.

54 *Ibid.*

55 *Records of the Intellectual Property Conference of Stockholm June 11 to July 14, 1967*. Geneva: World Intellectual Property Organization, 1971, 1282, 1319 (<ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/StockholmConferenceRecords1967>)

56 *Records of the Conference for Revision of the Universal Copyright Convention, Unesco House, Paris, 5 to 24 July 1971* (Paris: UNESCO, 1973) (<ftp://ftp.wipo.int/pub/library/ebooks/Internationalconferences-recordsproceedings/ParisConference1971RevisionOfTheBerneConvention-en>).

57 *Memorandum to the Cabinet*, 29 June 1971, Cabinet document 700-71, Library and Archives Canada, RG19 Vol 5574 File 8510-C785-1, Pt 2.

58 *Ibid.*, and in RG25 Vol 10904 File 55-19-4-BERNE pt 6-1; Record of Cabinet Decision, Cabinet Committee on External Policy and Defence, 29 June 1971, Library and Archives Canada, RG25 Vol. 10904 File 55-19-4-BERNE pt 6-1.

with the recent report of the *Economic Council of Canada*, which had recommended that Canada not adopt higher levels of copyright protection and was therefore viewed as precluding accession to the revised treaties.⁵⁹ It continued to be viewed as questionable whether Canada should accede to the 1948 revision of the *Berne Convention*.⁶⁰ Canada would not accede to the 1971 revision of the *Berne Convention* until the 1990s, when it did so in order to conform to the *North American Free Trade Agreement*.⁶¹

Canada's lengthy refusal to adopt the provisions of 1971 was based on views outlined in a number of domestic reports and policy studies. In 1977 Andrew A. Keyes and Claude Brunet prepared a report titled *Copyright in Canada: Proposals for a Revision of the Law*. Following an examination of the available options with regard to the *Berne Convention*, including accession, withdrawal, and maintaining the status quo, the authors came to the conclusion 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.⁶²

Further, they argued that "succeeding revisions of [the *Berne Convention*] or, indeed, that of the *Universal Copyright Convention*, do not meet Canadian needs, at least at this stage in Canada's growth."⁶³ As such, they concluded that Canada should "remain at the present level of international participation in respect of the *Berne Convention* and the *Universal Copyright Convention*."⁶⁴

By 1984, prevailing views within the government had once again begun to change. The Department of Consumer and Corporate Affairs and the Department of Communications jointly prepared the paper *From Guten-*

59 *Paris Revision Conference of the Universal Copyright Convention and the Berne Copyright Convention, Paris, July 5-24, 1971: Report of the Canadian Delegation*, 24. Library and Archives Canada, RG25 Vol. 10904 File 55-19-4-BERNE pt 6-2.

60 *Ibid.*

61 *Canada NAFTA Implementation Act 1993* s. 52-80; also see Handa at 976.

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

63 *Ibid.*

64 *Ibid.* at 236. Keyes affirmed this view again in 1993, arguing that "Canada . . . as a net importer would only increase its trade deficit by assuming further commitments." Andrew A. Keyes, "What is Canada's International Copyright Policy?" 7 *IPJ* (1993) 299 at 302.

berg to Telidon: A White Paper on Copyright, issued as part of a public consultation on copyright reform. The paper did not address the topic of possible accession to the 1971 revision of the *Berne Convention* in any extended discussion, but took the position that:

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.⁶⁵

At the same time, the government observed that a number of flexibilities were available to Canada as a result of Canada's not being bound by the later text.⁶⁶

Following the 1984 report *From Gutenberg to Telidon* under the Liberal government, the Conservatives came to power. In January 1985 the Conservatives referred the question of copyright, along with the 1984 report, to the Standing Committee on Communications and Culture. An all-party subcommittee, following ten months of hearings held in Ottawa, Toronto, and Montreal and the examination of over 300 written briefs, tabled a new report in 1985 called *A Charter of Rights for Creators*.⁶⁷ Copyright reform was seen in *A Charter of Rights for Creators* as being important to encouraging what some hoped would be "a new era of Canadian cultural production."⁶⁸ In contrast to the 1977 Keyes-Brunet report, the subcommittee placed the creator as the primary and foremost interest in copyright law: "because of the special contribution creators make to Canadian society, they must be fairly rewarded."⁶⁹ Such a reward would demonstrate that the Sub-Committee recognized "how much value [Canada] attaches to the contribution of creators to the national life. The *Copyright Act* is seen as a very significant symbol of the country's scale of values and a sig-

65 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) at 4.

66 *Ibid.* See in particular the discussion of a retransmission right in Appendix I.

67 Canada, House of Commons, Sub-Committee on the Revision of Copyright, *A Charter of Rights for Creators: A Report of the Sub-Committee on the Revision of Copyright, Standing Committee on Communications and Culture* (Ottawa: Queen's Printer, 1985) xii.

68 *Ibid.* at 5. The subcommittee noted such optimism must be dampened by realism.

69 *Ibid.* at xii.

nal to creators of their social merit or worth.”⁷⁰ The resulting 1985 revision of the *Copyright Act* did not see Canada adhere to the 1971 revision of the *Berne Convention*.⁷¹ It did, however, set the tone for further revisions in the 1990s that would bring Canada into conformity with the *Berne Convention* and other international copyright treaties.

Canada signed the WIPO Internet treaties in 1996 and has, in the time since, repeatedly stated its intention to implement the treaties.⁷² Implementation requires parties to grant copyright holders ‘making-available rights’ — the exclusive right to make their work available, for example on the Internet; to provide legal remedies against the circumvention of technological protection measures, and to provide legal remedies against the removal or alteration of rights management information or the distribution of works whose rights management information have been removed.⁷³

Canada’s future adherence to the WIPO Internet treaties is often portrayed as an uncontentious technical step — as a matter of keeping up with progress.⁷⁴ However, the implementation of those treaties, like the implementation of past international copyright treaties, has been, in Canada, highly contentious and has spawned widespread criticism, controversy, and Internet activism. The implementation of WIPO Internet treaty provisions with regard to technological protection measures has been a prime issue of contention in Canada. The first effort to do so, in 2005 under Bill C-60, was viewed as a made-in-Canada approach to implementation. Under Bill C-60, an infringement would only occur if the purpose of the circumvention was to infringe copyright; and no limitations were placed on the manufacture or sale of circumvention devices.⁷⁵

70 *Ibid.* at 4

71 *Canada Copyright Act 1985.*

72 *A Framework for Copyright Reform*, 6; Canada, Industry Canada and Canadian Heritage, *Press Release: Government of Canada Introduces Bill to Amend the Copyright Act*, 20 June 2005 (www.ic.gc.ca/eic/site/ic1.nsf/eng/02279.html); Canada, Industry Canada and Canadian Heritage, *Press Release: Government of Canada Proposes Update to Copyright Law: Balanced Approach to Truly Benefit Canadians*, 12 June 2008 (www.ic.gc.ca/eic/site/ic1.nsf/eng/04204.html); Canada, Industry Canada and Canadian Heritage, *Press Release: Government of Canada Introduces Proposals to Modernize the Copyright Act*, 2 June 2010 (http://strategis.ic.gc.ca/eic/site/crp-prda.nsf/eng/h_rpo1149.html)

73 *WIPO Copyright Treaty*, 20 December 1996 (www.wipo.int/treaties/en/ip/wct/index.html); *WIPO Performances and Phonograms Treaty*, 20 December 1996 (www.wipo.int/treaties/en/ip/wppt/index.html).

74 *WIPO Copyright Treaty*, *ibid.*; *WIPO Performances and Phonograms Treaty*, *ibid.*

75 Bill C-60, *An Act to Amend the Copyright Act*, 1st Sess., 38th Parl., 2005 (as read on First Reading 20 June 2005), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&Mode=1&Language=E [Bill C-60]; Michael Geist, “Anti-Circum-

The next effort in 2008, although heralded as a “made in Canada bill,”⁷⁶ stepped away from this made-in-Canada approach. Bill C-61 was viewed as adopting a solution that stood closer to the American approach—a “Canadian DMCA” (the American *Digital Millennium Copyright Act*)—by its critics.⁷⁷ Bill C-61 would have made circumvention illegal regardless of whether the circumvention was for infringing purposes, and would have prohibited the manufacture, import, and provision of circumvention devices.⁷⁸ Bill C-32 would also place a ban on the manufacture, import, distribution, sale, rental, or provision of circumvention devices, like C-61, does not include a general exception for circumvention for non-infringing purposes.⁷⁹ Such provisions remain highly controversial and place consumers and users at risk of infringement for a wide variety of things, such as circumventing to gather a clip from a DVD for classroom use, to transfer a CD track to an MP3 player, or to transfer ebook content from an old device to a new one. In light of such controversy, and in light of Canada’s history with international copyright, any expectation that Canadian copyright revision should proceed smoothly or quickly belies Canada’s history with international copyright agreements generally.

C. A SLOW AND MINIMALIST APPROACH

Because Canadian copyright reform is often bogged down by conflicting domestic and international demands, Canadian copyright reform often involves three elements: slow progress, a minimalist approach to conformity with international treaties, and carving out made-in-Canada approaches that attempt to respond to domestic Canadian demands while meeting the technical requirements of international treaties.

vention Legislation and Competition Policy: Defining a Canadian Way?” in Michael Geist, ed., *In the Public Interest: The Future of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 211–50.

76 Industry Canada and Canadian Heritage, “Government of Canada Proposes Update to Copyright Law: Balanced Approach to Truly Benefit Canadians,” 12 June 2008 (<http://www.ic.gc.ca/eic/site/ic1.nsf/eng/04204.html>).

77 Cory Doctrow, *Canadian DMCA is worse than the American one*, 12 June 2008, <http://boingboing.net/2008/06/12/canadian-dmca-is-wor.html>.

78 Bill C-61, *An Act to Amend the Copyright Act*, 2d Sess., 39th Parl., 2008 (as read on First Reading 12 June 2008), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3570473&file=4 [Bill C-61]

79 Bill C-32, *An Act to Amend the Copyright Act*, 3d Sess., 40th Parl., 2010 (as read on First Reading 2 June 2010), www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=4580265&Mode=1&Language=E [Bill C-32], s. 47.

At the time of writing, it has been fourteen years since the *WIPO Internet Treaties* were signed. Compared to past experience, fourteen years is not a long time for Canadian implementation of an international copyright treaty. Canada was signed on to the original *Berne Convention* under the British in 1886. However, it took Canada thirty-eight years to implement the agreement. It therefore wasn't until 1924 that Canada implemented what by then was the 1908 revision of the *Berne Convention*, doing so under the imperative of conformity with the British approach.⁸⁰

Canada's early copyright followed the British model rather than taking a minimalist approach; although a term of the life of the author plus fifty years was not required under the *Berne Convention* until 1948, Canada adopted that term in 1924. Following that, it took Canada a relatively short three years to implement the 1928 revision of the *Berne Convention*, which it did in 1931, granting moral rights and broadcast rights in copyright works.⁸¹

It took ten years for Canada to ratify the *Universal Copyright Convention* (UCC), which it did in 1962.⁸² Indecision over whether or how to change Canadian law in order to implement the convention contributed to the long wait. After ten years spent considering a possible copyright overhaul, Canada decided, in keeping with a truly minimalist approach, that no change to the actual law was necessary in order to meet the standards of the UCC, which was ratified without legislative change.⁸³

Canadian implementation of the 1971 (current) revision of the *Berne Convention* in 1993 in order to conform with NAFTA took twenty-two years.⁸⁴ Canada then formally acceded to the convention in 1998 — twenty-seven years after the agreement was put in place — making the few chan-

80 *Canada Copyright Act 1923*; *Note du Conseil fédéral adressée à tous les États membres de l'Union pour la protection des œuvres littéraires et artistiques* (29 January 1924), Ottawa, Library and Archives Canada (RG25 G-1 Vol. 1260 File 218 Part I).

81 *Canada Copyright Act 1931*.

82 Telegram messages 9 and 10 May 1962 from UNESCODEL Paris; Department of External Affairs Press Release (10 May 1962), Ottawa, Library and Archives Canada (RG103 Vol. 6 File 5-3-5-2 Part 2). See also RG103 Vol 5 File 5-3-5-2 Vol 1 Part 2

83 Noel Dorion, Secretary of State, Memorandum to Cabinet (22 February 1961), Ottawa, Library and Archives Canada (RG103 Vol. 6 File 5-3-5-2); Memorandum signed by W.A. Kennett (26 May 1961), Ottawa, Library and Archives Canada (RG19 Vol. 5167 File 8510-C785-1 Pt 1). See also *Debates of the House of Commons, Fourth Session — Twenty-Fourth Parliament 9–10 Elizabeth II, 1960–61*, Vol. VI, 1960–61 (Ottawa: Roger Duhamel, 1961) at 5677; and *Debates of the House of Commons, Fifth Session — Twenty-Fourth Parliament 10–11 Elizabeth II, 1962*, Vol. III, 1962 (Ottawa: Roger Duhamel, 1962) at 3023, and generally RG103 Vol. 6 File 5-3-5-2.

84 *Canada NAFTA Implementation Act 1993*, ss. 52–80.

ges to the *Copyright Act* required under the agreement.⁸⁵ Implementation of the *TRIPs Agreement* also involved making the several specific changes to Canadian law required under the agreement.

Implementation of international copyright treaties takes place, in general, more quickly if either no reform to domestic law is required or if the changes required are relatively uncontroversial. If however, the changes required are controversial, or if a significant overhaul of the *Copyright Act* is contemplated—as in the current case of contemplated copyright reform—implementation in Canada can take much longer. Canada’s generally minimalist approach to the implementation of international copyright treaties, adopted in the 1960s and seemingly abandoned under Bill C-32, reflects Canada’s position as a net copyright importer—a consumer of foreign works—preserves policy flexibility, and can, as Gendreau notes, allow Canada to reserve further revisions as bargaining chips for use in future international negotiations.⁸⁶

D. CANADIAN POLICY INNOVATIONS

Conflicting domestic and international demands have led not only to slow progress and a minimalist approach in implementing international treaties; it has also led to a number of made-in-Canada approaches to copyright intended to meet domestic needs while satisfying international requirements. A general acquiescence to international demands is often accompanied by innovative policy solutions on narrow issues. At times, made-in-Canada solutions present challenges as to whether the new solution is in compliance with international treaty obligations. In some cases, the result is a useful made-in-Canada approach. In other cases, Canadian policy innovations are never used in practice. This pattern is true not only for Canada, but also for less powerful countries generally.

The Canadian copyright reforms of the 1870s resulted in innovative publishing requirements that encouraged domestic printing without going so far as to deny copyright to foreigners as was the practice at the time in the United States. Reforms to Canadian copyright in 1900 built on the innovations of the 1970s; whereas the 1875 *Copyright Act* had allowed a publisher who had obtained a license from the copyright owner to publish a British work in Canada to exclude the import of foreign reprints from

85 World Intellectual Property Organization, *Berne Notification 193: Accession by Canada to the Paris Act (1971)*, (March 26, 1998).

86 Gendreau at 307.

the United States, the 1900 Act would also allow the licensee to apply to the Minister for an order that would prohibit imports of the same work from England, thus reserving the Canadian market entirely for the licensee.⁸⁷ These were Canadian policy innovations that were relatively successful in meeting Canadian concerns while setting out an approach that satisfied the British while also taking into account Canada's place next to the United States.

The establishment of the Canadian Copyright Board in 1936 as the Copyright Appeal Board is often seen as a Canadian contribution to the structure of international copyright.⁸⁸ The creation of the Board resulted from two Canadian Royal Commissions in the 1930s, held to investigate the activities of the Canadian Performing Right Society in Canada. The first was chaired by Mr. Justice Ewing and reported in 1932, following private meetings in Alberta between the parties involved. The second, chaired by Judge James Parker, held sittings in Toronto, Montreal, Ottawa, Halifax, Moncton, Winnipeg, and Regina, and reported in 1935. While the Ewing Commission recommended certain changes to the way that broadcast license fees were calculated, the Parker Commission went further to recommend the creation of an independent body to examine the fees charged.⁸⁹ This presented a question as to whether such a body might contravene rights guaranteed under the *Berne Convention* by regulating performance rights; the Commission concluded that such regulation was permissible.⁹⁰ Amendments to the Canadian *Copyright Act* in 1936 created the Copyright Appeal Board, now known as the Copyright Board of Canada.⁹¹

Canada's made-at-home solution to the dilemma of uncontrolled private copying of audio recordings was, in 1997, to legalize the copying of

87 *Canada Copyright Act 1875*, ss. 11 and 15; Canada, *An Act to Amend the Copyright Act*, S.C. 1900 (63–64 Vict.), c. 25; see also Eli MacLaren, "Against all Invasion: The Archival Story of Kipling, Copyright, and the Macmillan Expansion into Canada, 1900–1920" 40 *Journal of Canadian Studies* (2006) 139 at 144.

88 *Gendreau* at 96 and 304.

89 Canada, Commission to Investigate whether or not the Canadian Performing Right Society Limited is complying with the terms and conditions of the *Copyright Amendment Act, 1931*, in relation to certain radio broadcasting stations in Alberta, *Report* (N.p.: n.d., 1932.); Canada, Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, and Similar Societies, *Report* (Toronto: n.p., 1935).

90 Canada, Royal Commission Appointed to Investigate the Activities of the Canadian Performing Rights Society, and Similar Societies, *Report* (Toronto: n.p., 1935) 49.

91 *An Act to Amend the Copyright Amendment Act, 1931*, S.C. 1936 (1 Ed. VIII), c. 28 (assented to 23 June 1936), ss. 10A, B, & C.

audio recordings of musical works onto an audio recording medium for the private use of the person making the copy, while also instituting a remuneration mechanism to compensate eligible authors, performers, and makers of sound recordings by collecting a levy on blank audio recording media.⁹² The proceeds of this levy are distributed to both Canadian and foreign composers, but only to Canadian performers and sound recording makers and foreign performers and sound recording makers from countries that provide reciprocal rights.⁹³ While this solution has provided millions of dollars in remuneration to some copyright and neighbouring rights holders, it has also been controversial and may not comply with Canada's international treaty obligations under the *Rome Convention*, nor the *WIPO Performers and Phonograms Treaty* (WPPT), should Canada, as expected, move to ratify that treaty.⁹⁴ Bill C-32 proposes no change to the private copying regime and, if passed unchanged in this respect, may not comply with the WPPT.⁹⁵ Canadian innovations occasionally butt up against international treaties and sometimes require innovative legal arguments as to their compliance therewith.

Canada has also created a number of made-in-Canada policy solutions designed to simultaneously meet domestic and international demands that, for one reason or another, can be considered failures. Canada's first efforts to conform to international treaty obligations while custom-building domestic policies to Canadian demands took began during the drafting of Canada's 1924 *Copyright Act*.⁹⁶ That Act varied slightly from the text of the British *Copyright Act*; Canadian legislators went to great lengths to include, inside the otherwise British text, certain compulsory licensing provisions and a voluntary registration system. The compulsory licensing provisions were implemented in retaliation for American domestic printing requirements (the manufacturing clause) and, in order to conform to the *Berne Convention*, were severely narrowed so as not to apply to British subjects (other than Canadian citizens) or to countries adhering to the 1908 revision of the *Berne Convention* and additional protocol.⁹⁷ These provisions were intended to allow Canadians to obtain a government license

92 *Canada Copyright Act 1997* at Part VIII.

93 Andrew F. Christie, John Davidson, and Fiona Rotstein, "Canada's Private Copying Levy — Does it Comply with Canada's International Treaty Obligations?" (2006) 20 IPJ 111 (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=980845).

94 *Ibid.*

95 Bill C-32; *Ibid.*

96 *Canada Copyright Act 1921*; *Canada Copyright Act 1923*.

97 *Canada Copyright Act 1923*, s.2.

to republish American books if these were not printed in Canada. This provision might be seen either as unnecessary or as a failure, as it was rarely, if ever, used.⁹⁸

The domestic demands of smaller net copyright importers often conflict with international efforts to bolster rights holders' demands in ways that make workable compromise difficult. Efforts to create compulsory licensing systems or other special provisions in the interests of developing or intermediate countries have, in many cases, resulted in narrow and complex solutions that fail to be used. For example, the 1971 Appendix to the *Berne Convention*, instituted for the benefit of developing countries, has also had little practical effect.⁹⁹ Ricketson and Ginsburg write:

It is hard to point to any obvious benefits that have flowed directly to developing countries from the adoption of the Appendix. Indeed, only a handful of developing countries have availed themselves of its provisions in the time since its adoption. Furthermore, of those countries that have made the necessary declarations, very few actually seem to have implemented such licensing schemes in their domestic laws.¹⁰⁰

The current copyright bill also proposes a number of made-in-Canada solutions.¹⁰¹ First, it would institute a notice-and-notice system requiring internet service providers to forward notice of claimed infringement to the Internet user in order to avoid paying statutory damages.¹⁰² The notice-and-notice system was created by Canadian internet service providers and has been in use by them for some time. It acts as an alternative to the American notice-and-takedown system, which requires internet service providers to remove allegedly infringing content on notification of an alleged infringement under certain procedures. The American system has been criticized for requiring the takedown of content without sufficient oversight, leading to potential abuse. Second, the current copyright bill provides a set of made-in-Canada provisions for the benefit of people

98 Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, *Report on Copyright*. (Ottawa: Supply and Services Canada, 1957) at 31.

99 *Berne Convention for the Protection of Literary and Artistic Works. Paris Act of July 24, 1971, as Amended on September 28, 1979*, (Geneva: World Intellectual Property Organization, 1979) at Appendix (www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html)

100 Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2d ed. (London: Oxford University Press, 2006) 957.

101 *Bill C-32*.

102 *Ibid.*, s.47.

with print disabilities.¹⁰³ These provisions are intended to allow, on certain conditions, non-profit organizations working for the benefit of persons with print disabilities, to make special-format copies of works and to share those special-format copies with similar organizations in other countries. They respond to efforts internationally to allow greater international circulation of works for the benefit of the visually impaired. The approach set forward in the current copyright bill has been trumpeted as being forward-thinking, and criticized for placing too many limitations and conditions on organizations attempting to work for the benefit of the print disabled.¹⁰⁴ Third, C-32 creates an exception for user-generated content, also known as “the YouTube exception,” to allow individuals to create “mash-ups” using existing works and to post these online, on various conditions, including that the use of the new work is non-commercial, and that there is no substantial adverse effect on the exploitation of the existing work.¹⁰⁵

It remains to be seen whether Canada’s latest copyright innovations will meet with success domestically, and whether they will be taken up as examples for other countries to follow. Canada’s notice-and-notice regime, while practicable and well-used, may be ill-timed to act as a model for other countries, many of whom have already adopted the American notice-and-takedown approach. The proposed provisions for the benefit of the print disabled may, on the other hand, be well timed. However, if critics are correct, they may prove narrow, burdensome, and bureaucratic, consigning them to the same failure that has met various other approaches intended to meet the needs of Canadian interests, developing countries, and other special cases. The “YouTube exception” is narrower than exceptions provided under fair use, and this narrowness may restrict its attractiveness as model. Gendreau notes that, generally, made-in-Canada approaches have not met with the success that would see them set precedents for other countries to follow:

Even when it has been the first to introduce certain schemes, whether it be moral rights in copyright countries, an administrative tribunal

¹⁰³ *Ibid.*, s.36.

¹⁰⁴ Vincent Doré, *Bill C-32: Improving Global Access to Copyrighted Material for the Print Disabled*, www.iposgoode.ca/2010/06/bill-c-32-improving-global-access-to-copyrighted-material-for-the-print-disabled; Knowledge Ecology International, *KEI critical of Canada’s Bill C-32 provisions on export of accessible works for persons with disabilities*, <http://keionline.org/node/866>.

¹⁰⁵ Bill C-32, s. 22.

to oversee the setting of copyright royalties, or compulsory licenses for the exportation of patented drugs to developing countries, these measures have not been recognised as trail-blazing breakthroughs that were meant to be followed by other countries.¹⁰⁶

The made-in-Canada solutions under C-32 may not be intended to act as a model for other countries to follow. This may make Canada's international negotiating position less favourable. For example, had Canada's notice-and-notice regime been legislated earlier, Canada might be in a stronger position now to press for the preservation of flexibility for such solutions under international agreements, such as the *Anti-Counterfeiting Trade Agreement* (ACTA), which is currently under negotiation. Policy solutions that have widespread appeal and that have been adopted by many countries are more likely to be incorporated and made room for in international agreements, whereas unique solutions that are not taken up elsewhere can be left to butt up against international obligations.

E. CANADIAN LEADERSHIP

Canada has often historically been situated as a *potential* leader in international copyright, but has generally ceded this leadership to stronger powers. Canada's copyright rebellion of 1889 failed after being put down by the British who feared that Canada's withdrawal from the *Berne Convention* might break up the Berne international copyright system. British officials saw Canada as a leader among British colonies and feared that if Canada were to withdraw from the *Berne Convention*, other colonies and countries might follow Canada's lead. A British committee studying the matter wrote that "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."¹⁰⁷ Canada's rebellion was put down and the *Berne Convention* held together.

In the early twentieth century, Canada was the lead colony in the British Empire and the colony with the most radical stance on copyright issues. In 1910 Canada led efforts at the Imperial Copyright Conference for significant change in the Imperial copyright system; Canada's loud protests against Imperial copyright law and insistence on copyright autonomy

¹⁰⁶ Gendreau at 296.

¹⁰⁷ Great Britain. *Report of the Departmental Representatives Appointed to Consider the Canadian Copyright Act of 1889* (E 1701), London: n.p., 1892, Ottawa, Library and Archives Canada (Prime Minister Abbott fonds (MG26 C), Vol. 5 File: Copyright) 19.

led to eventual copyright “sovereignty” for British colonies. At the same time, the copyright sovereignty won by Canada was a relative sovereignty tempered by obligations that had been transposed onto the international copyright system.

In the 1960s and ’70s, Canada attempted to take leadership to create a coalition of intermediate countries who were not considered to be “developing” but who were net copyright importers. After discussions with several other countries in 1969, Canadian delegates reported that:

There is strong evidence that support for Canada’s position is available from certain other countries if it is properly explored and developed. There appears to be every possibility that Canada for the first time can play a leading role in shaping the course of international copyright by fostering and leading a block of countries with interests similar to Canada. To a large extent we could conceivably control a certain balance of power, given active participation.¹⁰⁸

However, this initiative failed for a number of reasons: the lack of support found amongst other countries; hesitancy of various government officials to support such a stand; the clash between visions of an activist Canada and the more traditional vision of Canada as a good international citizen aligned with major powers; and fears that such a stance would affect Canada’s relations with countries like the United States, the United Kingdom and France. Perhaps what was missing more than anything was a firm high-level policy on Canada’s position in international copyright; Canadian delegates, returning from international meetings, repeated the hope that a more in-depth examination of Canada’s position would soon become available, and the need for such an undertaking.¹⁰⁹

Canada is one amongst a large majority of countries in the world that are net copyright importers. Canadian expertise in copyright; the country’s bilingualism and bijuralism that place Canada between the major traditions of copyright and *droit d’auteur*, the country’s long history of commitment to copyright multilateralism; Canada’s position as a significant economy that is nevertheless a copyright importer; and Canada’s

108 *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).

109 *Ibid.* See also, *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).

proximity to the United States all place Canada in a position of potential leadership in international copyright. However, tensions among domestic and international demands often prevent a leadership position from being realized.

If Canada is to lead in the sense of proffering workable made-in-Canada solutions to problems in international copyright, three problems must be overcome: first, the tendency to take a very slow approach to implementing international copyright norms. This is because this slow approach, while allowing Canada to benefit from the experiences of other countries, prevents Canada's solutions from setting a timely example for others to follow. Second, Canada must avoid instituting solutions that are so narrow, burdensome, and bureaucratic that they are not used by those they are intended to benefit. Third, firm high-level policy direction has been historically difficult to ascertain on matters of copyright. Such direction — consistent with the historical emphases on copyright independence, safeguarding the interests of Canadian consumers and creators, finding innovative solutions to meet the needs of both consumers and creators, and support for international copyright and copyright multilateralism — is necessary if Canada is to leverage its position on international copyright and create made-in-Canada solutions to problems in international copyright.

F. CONCLUSION

David Vaver predicts that, in the new millennium, “there will be no *Canadian* copyright law.”¹¹⁰ Due to the pressure of international agreements, he argues that Canadian copyright law will come to look more and more like the laws of other countries. Since 1842, Canada's law has operated under international and imperial pressures to conform to norms that left little room for variance. At the same time, space has been made for distinct, if minor, Canadian variations that sometimes comply with and sometimes challenge international copyright norms.

Bill C-32 responds to the same pressures, domestic and international, that have historically characterized Canadian copyright reform. Canada's past responses to this pressure have ranged from rebellion to compliance. Bill C-32, to a greater extent than its predecessor in Bill C-60, bows to international demands and goes beyond the minimum requirements of the WIPO Internet treaties. Bill C-32 thus abandons the trend, adopted in

110 David Vaver, “Copyright in Canada: The New Millennium,” (1997) 12 IPJ 117 at 120.

past reforms, of maintaining Canadian policy flexibility and adhering on a minimalist basis to international treaties.

Canadian copyright has traditionally focussed on copyright independence, safeguarding the interests of Canadian consumers as well as Canadian creators, finding innovative solutions to meet the needs of both consumers and creators, and support for international copyright and copyright multilateralism. The made-in-Canada elements of C-32 are relatively narrow compared to previous bills that asserted a made-in-Canada stance on the broader issue of anti-circumvention. Bill C-32, while including innovative solutions for the benefit of specific interests such as the print disabled, internet service providers, and mash-up video creators, departs from the tradition of maintaining maximum independence and safeguarding consumer interests on the issue of anti-circumvention measures.

Although Canada has historically been situated as a *potential* leader in international copyright, leadership has generally been ceded to stronger powers; under C-32, Canada would repeat this trend. The previous Bill C-60 was trumpeted as a “made-in-Canada” copyright bill. Bill C-32, on the central issue of anti-circumvention, would drop this vision of Canadian independence and innovation, instead following an American-led maximalist implementation of the WIPO Internet treaties.