

Berne Buster: Canada and the *Berne Convention*, 1887-1908¹

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*We make our own tariff; we raise our own troops we regulate our own Patent laws, but our Copyright law is dominated by an Imperial statute passed in 1842, which still binds us.*²

The first multilateral copyright treaty, known as the *Berne Convention*, was established in 1886. For many, it symbolized the forward march of international law, civilization, and progress. In some countries, however, this idea met up against national sentiment and nationalist trade policies. This was particularly true in Canada.

Canada had quietly joined the *Berne Convention* as a British colony in 1886. However, the federal government, in efforts to create and reinforce Canadian national economic boundaries, had also implemented a system of tariffs designed to protect key Canadian industries. This system, known as the 'Canadian National Policy', had expanded and matured into the foundational strategy of the Macdonald government.³ Its protectionist approach would come to be reflected in other areas of government policy, including copyright.

Copyright lobby groups began to organize in Canada shortly after Canada joined the *Berne Convention* in 1886. This would have a strong effect on copyright policymaking. Criticism of the *Berne Convention* by some of these lobby groups was fierce. Numerous publishing interests, including those controlling domestic newspaper outlets, opposed implementation of the *Berne Convention*. These voices were powerful enough to cause the government in 1889 to reverse direction in its international copyright policies. In this paper, I will discuss the about-face performed by the Canadian government with regard to the *Berne Convention* and the events that followed from that move.

After a brief introduction to the political and economic conditions of Canadian copyright in the late nineteenth and early twentieth century, I will, second, outline Canada's about-face on international copyright and, third, Canada's position in relation to the United States. Fourth and fifth, I will discuss the diplomatic conferences held in 1896 and 1908 to revise the *Berne Convention* and Canada's attempts on those occasions to remain outside the agreement. In each of these cases I will focus on certain key factors; I will discuss the control exercised, first by Britain, and then by the international copyright union, in attempts to stop Canada from deviating from the international norms being established by the more powerful members of the Berne Union. I will also outline some of the normative and institutional factors, such as Canada's capacity, as a British colony, to strike its own path in efforts to achieve copyright independence. In addition, I will touch on a number of individuals whose efforts were central to these events, arguing that key battles waged in the realm of knowledge and expertise over competing interpretations of the newly-hatched international copyright norms were important grounds for the formation of the international copyright regime and the place of countries like Canada in it.

International copyright can be viewed through the dual lens of international relations and communications. Studies both of international relations and

² *Canadian Copyright: A Series of Articles that Appeared in the Toronto Telegram from the Pen of a Gentleman Thoroughly Versed in the Question of Copyright.* (N.p.: Canadian Copyright Association, n.d.).

³ Craig Brown, "The Nationalism of the National Policy" In *Nationalism in Canada*, ed. Peter Russell (Toronto: McGraw-Hill, 1966), 155-163.

communications have tended to focus a great deal on economic and political dominance and dependency, while giving little attention to some other forms of dependency, including legislative dependency, institutional dependency, and dependency on outside knowledge and expertise.

Critical international theory highlights the importance not only of economic factors, but also of institutional norms, knowledge, and expertise in determining international relationships. Critical international theory also looks beyond economic and political paradigms and beyond simple concepts of class to include questions of about the inclusion of various peripheral groups in politics and political decision making, and to examine the roles of knowledge and expertise in perpetuating or altering power relations.⁴ Critical theory posits that access to adequate resources of communication is a necessary component of an ethical discourse of government.⁵

International copyright history should be viewed in terms of how various groups had differing levels of access to communication resources such as legislative influence, institutions, knowledge, and expertise. From 1889 to the early twentieth century, Canada was able to establish some resources for independent analysis of its own copyright situation, without relying on British knowledge and expertise to the extent that it had in the past. This helped Canada to formulate an independent copyright policy and to resist, to some extent, international pressures. However, because Canada was still dependent on Britain for legislative approval and in the conduct of foreign affairs, Canada was unable to fully implement these policies. As such, British imperialism and the international copyright union bound Canada to the fledgling international copyright system and helped ensure the dominance of a set of international copyright norms that is still in place today.

1. Canadian Copyright Interests

It is difficult to fit copyright interest groups into simple Marxist classifications. While a broad range of groups were affected by copyright law in Canada in the nineteenth and early twentieth century, the main areas of conflict were between the interests of authors and publishers of copyrighted works on the one hand, and the interests of the printers and publishers who wished to *reprint* copyrighted works on the other. Authors, in copyright matters, are posed both as intellectual labourers and as the owners of intellectual property; and printers and publishers are posed both as capitalists exploiting the work of intellectual labourers and as representatives of a public interest in widespread access to literature and learning.

The situation of Canadian copyright interests was quite different from that of their counterparts in Britain or other more powerful countries. Authors and publishers, in Britain, were aligned together in promoting the international copyright protection of British works, while authors and publishers in Canada were often divided; authors often in favour of strong international copyright protection, and publishers in favour of more flexible copyright protection that would allow them to reprint foreign works and thereby provide greater access to affordable literature for the Canadian reading public. In this,

⁴ Andrew Linklater, "The Achievements of Critical Theory" In *International Theory : Positivism and beyond* , eds. Steve Smith, Ken Booth and Marysia Zalewski (Cambridge: Cambridge University Press, 1996), 279-298.

⁵ Linklater, *The Achievements of Critical Theory*, 290-295.

Canada's copyright interests were similar to those of other countries that were also dependent on foreign books.

Canadian copyright in the nineteenth and early twentieth centuries was also affected by Canada's status as a British colony. Canadian Confederation in 1867, which created today's Canada, conferred on the Canadian federal parliament the authority to make laws on copyright, as well as on patents. However, although Canadian legislation operated independently in many areas, there were some areas, including merchant shipping, extradition, naturalization, the preservation of neutrality, and copyright, which were subject to legislation from both the Imperial and Canadian Parliaments.⁶ Nineteenth century copyright in Canada therefore operated under two sets of laws: British law, which was in force in Canada as a British colony, and Canadian law. Furthermore, Canada did not have full independence in foreign affairs, which were governed – often with full consultation – by the Imperial government.

Canada's 1886 adherence to the *Berne Convention* passed, at first, with little comment either in the Canadian press or among Canadian interest groups. In fact, the move was, if anything, initially praised.⁷ However, that would change as soon as the Canadian government moved to *implement* the convention. (Signing an international treaty is to implementation and ratification, as Canadian lawyer Howard Knopf likes to say, what dating is to marriage: "the latter does not necessarily follow from the former."⁸ Canada had become a party to the *Berne Convention* under Britain's signature in 1886, but had neither implemented nor ratified its provisions.)

Initial reaction to the *Berne Convention*, as I said, was positive. The passage of the *Berne Convention* and its adoption into British law dramatically extended the range of protection afforded to Canadian copyright owners. Copyright in works first published in Canada was now, under British law, recognized in Britain, the colonies, and all countries of the Berne Union, which also included Germany, Belgium, Spain, France, Haiti, Italy, Liberia, Switzerland, and Tunisia.⁹ Toronto's *Globe* lauded the benefits that British implementation of the agreement would bring to Canadian authors:

Hitherto it had been the case that first publication in a British colony entitled a work to copyright in that colony only, whereas copyright on a first publication in the British Islands protected it both there and in all the colonies. But by the change of law it is now the case that a work first published in a colony and copyrighted there gains protection thereby in all the other colonies and dependencies as well as in the Motherland, and in all the countries of the International Copyright Union as well.¹⁰

⁶ David M. L. Farr, *The Colonial Office and Canada, 1867-1887* (Toronto: University of Toronto Press, 1955), 261.

⁷ "International Copyright," *The Globe Toronto*, 22 Sept. 1886, 4.

⁸ Howard Knopf, "The Continuing CRIA Copyright Canard." *Excess Copyright*. <http://excesscopyright.blogspot.com/2007/04/cria-copyright-canard-continued.html> (accessed 16 May 2008)

⁹ Francis Adams and J.H.G Berne to the Earl of Iddelsleigh. *Report on the third International Copyright Conference at Berne*. 10 September 1886. Secretary of State fonds, National Archives of Canada.

¹⁰ "International Copyright," *The Globe Toronto*, 22 Sept. 1886, 4.

However, praise turned quickly to criticism. Despite the attitude of the Conservative government favouring the *Berne Convention*, opposition to the agreement from printers, publishers, and related industries grew and mobilized. This reaction, and some of the reasons for it, was summarized by Canadian Prime Minister John Sparrow Thompson, who saw the *Berne Convention* as being highly disadvantageous to Canadian interests. He 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 mind, 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."¹¹

Thompson also felt that the terms of the *Berne Convention* largely favoured densely populated and highly developed countries in 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.¹²

Howard Hunter, educator, civil servant and author, had similar views.¹³ He called the *Berne Convention* a step towards reinstating an exploitative colonial system. According to him, the agreement represented the imposition of the interests and values of a few countries on others for whom its strictures were entirely inappropriate:

¹¹ John Thompson to Governor General in Council, 1892, 7. Department of Justice fonds, National Archives of Canada

¹² Ibid.

¹³ "Hunter, John Howard" In *Dictionary of Canadian Biography*, ed. Frances G. Halpenny, Vol. XIII (Toronto: University of Toronto Press, 1985).

...the Berne Convention had in view conditions of society happily very different from those prevailing in Canada. England and the other European Countries that formed this convention for their own convenience took no account of any other continent than Europe.¹⁴

Canada's population distribution and class structure was very different, he argued, than those in the countries that negotiated the *Berne Convention*. Canada did not have libraries where rural or less wealthy people could obtain books. Books, therefore, were accessible only to Canadians who could purchase them – and the Canadian government, he argued, should preserve a more equitable class structure wherein all Canadians could afford to do that:

It is not the policy of any Canadian Legislature to reproduce here the social conditions of European Countries, with their dangerous antagonisms of classes and masses, of vast wealth and appalling destitution, of privileged intellect and brutish ignorance. It is the bound duty of the Parliament of Canada to see that under color of any international convention our social and economic conditions are not interfered with.¹⁵

Furthermore, Hunter argued, the *Berne Convention* would limit Canada's right to self-government, re-imposing the strictures of the previous colonial system:

...self-governing powers of Canada would be cut down to narrower jurisdiction than any of the Provinces of Canada had continuously enjoyed since 1847. The present pretension really involves an attempt to re-impose upon Canada in respect of copyright...such a monopoly or exclusive privilege as was characteristic of the old colonial system...long since abandoned in respect of all other commodities other than books.¹⁶

2. Canadian Copyright Legislation and the *Berne Convention*

In May of 1888, Minister of Justice John Thompson announced that Canada would put in place laws giving effect to the *Berne Convention*.¹⁷ The implementation bill would have meant several important changes to Canadian copyright law. First, it would have abandoned Canada's requirement that works be printed and published in Canada.¹⁸ In a further blow to Canadian publishers and printers, compulsory licensing provisions, which were long sought-after by those interest groups, were not included.¹⁹ A compulsory licensing system would have allowed Canadian publishers, on the payment of a fee set by the Canadian government, to legally reprint British books not

¹⁴ Howard Hunter to John Ross Robertson, 17 November 1892. Secretary of State fonds, National Archives of Canada

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ George D. Parker, *The Beginnings of the Book Trade in Canada* (Toronto: University of Toronto Press, 1985), 220.

¹⁸ 38 Victoria c. 88, Article 2.

¹⁹ Memorandum. 1 May 1888. Secretary of State fonds, National Archives of Canada.

published in Canada – without obtaining permission from British copyright holders. The fees collected through this system would, however, go to British copyright holders. While some considered this to be a form of legalized piracy, others felt it was a fair and efficient way to ensure that British copyright holders were paid while simultaneously encouraging a domestic publishing industry and allowing Canadian publishers to supply the Canadian market with inexpensive reprints. Without these provisions, American publishers, whose government did not recognize international copyright, dominated the Canadian market for inexpensive reprints, which were imported into Canada under a 12.5% duty, paid to British authors.

A draft memo explained the reasoning behind the legislation, focussing on the benefits it would provide “in the event that” a Canadian author should become internationally successful:

By the act of joining the Berne Convention, Canadian copyright also runs throughout all the countries parties to it, as above recited. This privilege would be of the highest importance both to the Canadian author and publisher in the event of the production of a work for which there should be an Imperial and an international demand.²⁰

Further, it was thought that the United States would soon pass an international copyright bill. As such, officials argued that the sort of licensing clause that printers and publishers wanted would be inappropriate: “the present would seem to be an inopportune time to ask for the creation of a right of literary piracy in Canada, when the neighboring States, which have so long practiced it, are about to give it up.”²¹

The announcement that Canada would implement the *Berne Convention* in this manner led to protest. Printers, publishers, booksellers, and papermakers objected that they would be “ruinously affected.”²² Outcry was especially sharp because it was apparent that the Americans, even if they did pass an international copyright act, intended to continue to require domestic printing; the copyright bill then before the American Congress retained a domestic printing requirement.²³ Printers and publishers sent petitions and delegates to Ottawa,²⁴ where they received prompt attention; their objections led the government to withdraw the bill almost immediately – only two days after a large 17 May protest meeting and promptly upon the arrival of lobbyists in Ottawa. *The Globe* reported:

Mr. Wm. Bryce, Dr. D.A. Ross, Mr. James Murray and Mr. A. F. Jury, of Toronto, and Mr. Farrell, of Ottawa, saw the Government to-day in reference to the Copyright Bill and were informed that it would be dropped, and dropped it was when the House assembled.²⁵

²⁰ Ibid.

²¹ Ibid.

²² “The Copyright Bill.” *The Globe Toronto*. 16 May 1888, 8; “Copyright Law as Before,” *The Globe Toronto*. 18 May, 1888.

²³ John Lowe to Fred Dalby, 13 June 1888. Department of Agriculture fonds, National Archives of Canada.

²⁴ “The Copyright Bill,” *The Globe Toronto*, 17 May 1888, 1; “Notes,” *The Globe Toronto*, 18 May 1888, 3.

²⁵ “Notes,” *The Globe Toronto*, 18 May 1888, 3.

These events led also, several weeks later, to the formation of the Canadian Copyright Association, which would lobby in future years on behalf of Canadian printers, publishers, and related interests.²⁶ The association would have a large presence in the policymaking field through the coming years.

1889: Copyright Challenge

In 1889 a new bill was passed in the Canadian Parliament that was radically different from the one planned in 1888. This act did not include the simple domestic printing and publishing requirements that had been included in the previous Canadian acts;²⁷ it went further to require *first or simultaneous* printing and publishing in Canada – that is, printing and publishing in Canada within one month of publication or production elsewhere.²⁸ 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 – including the exclusion of foreign reprints from import to Canada. Furthermore, failure to meet these requirements 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.²⁹

Because it was anticipated that this act might conflict with Imperial law, provision was made for its proclamation into force by the Governor General.³⁰ The act received royal assent on 2 May 1889.³¹ In August of 1889 the Canadian government, acknowledging that the 1889 act did not conform to the requirements of the *Berne Convention*, informed the British government that the passage of the new copyright law would require the denunciation of the *Berne Convention* on Canada's behalf.³²

The British government was loathe to allow Canada to abandon the *Berne Convention*, as denunciation “would involve abandonment of the policy of international and Imperial copyright which Her Majesty's Government adopted, and to which Canada assented only six years ago.”³³ Denunciation, the British Secretary of State for the Colonies Lord Knutsford informed Canada's Governor General in 1890, would be

²⁶ “Copyright Question,” *The Globe Toronto*. 26 May, 1888, 16.

²⁷ The 1875 *Copyright Act* required that works be “printed and published or reprinted and republished in Canada.” 38 Vict. c. 88, Article 2.

²⁸ “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.

²⁹ See below.

³⁰ 52 Vict. c. 29, article 7.

³¹ 52 Vict. c. 29.

³² See further discussion below. 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, National Archives of Canada. 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 Spotiswoode, 1893.

³³ *Report of the Departmental Representatives Appointed to Consider the Canadian Copyright Act of 1889*, 20.

unnecessary since the 1889 act contravening the *Berne Convention* would not receive the necessary approval from Britain.³⁴

Canada continued to advocate for the confirmation of the 1889 act in Imperial Parliament and denunciation of the *Berne Convention*. In 1891, when no move had yet been made by the Imperial government to proclaim the act into force, a resolution was passed in the Canadian Parliament asking that the International Office of the Berne Union be notified of Canada's denunciation of the convention.³⁵ The Imperial government responded by commissioning a report on the matter, and forwarding it to the Canadian government for consideration.³⁶ In 1894 the Canadian government replied to the report, noting that it did not change the government's position in requesting denunciation of the *Berne Convention*:

The Minister [of Justice] deems it unnecessary to remind your Excellency that Canada has been repeatedly assured that her continuance in any treaty arrangement of this kind would be subject to her desire to withdraw at any time on giving the prescribed notice, and, now that the policy of Canada has been so firmly established and repeatedly pressed upon Her Majesty's Government, both by Parliament and by your Excellency's advisers, he (the Minister) recommends that your Excellency be requested to remove [sic] Her Majesty's Secretary of State for the Colonies to cause such notice to be given without further delay.³⁷

In the summer of 1894 Daldy came once again to North America and asked to meet with Thompson. Thompson, however, refused:

I have nothing further to say about Copyright at present...I regard the subject as quite past the stage of negotiation. The treatment which Canada has received on this subject is too bad to be spoken of with patience.... the policy of our Parliament was so clear, and so firmly established, that we could not make it a matter for argument.³⁸

In efforts to force the Imperial hand, Canada moved in March 1894 to formally stop collecting the 12.5 percent tariff on foreign reprints, which had never been effectively collected in any case. As a result, the 1847 *Foreign Reprints Act*

³⁴ Lord Knutsford to Lord Stanley of Preston, 25 March 1890, *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

³⁵ Canada. House of Commons, *Debates of the House of Commons, First Session - Seventh Parliament 54-55 Victoria, 1891*, Vol. XXXII (Ottawa: Brown Chamberlin, 1891), 6287-6289. See also Bureau de l'Union internationale pour la protection des oeuvres littéraires et artistiques, *Le Droit d'Auteur*, November 1891, 122-123 and Lord Stanley of Preston to Lord Knutsford, 5 November 1891, in *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

³⁶ Lord Knutsford to Lord Stanley of Preston, 30 Jun 1892. In *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

³⁷ The Earl of Aberdeen to the Marquess of Ripon, 10 February 1894. In *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

³⁸ *Canadian Copyright*, 21 July 1894. Enclosure in Colonial Office to Foreign Office and Board of Trade, 13 September 1894 in *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783.

automatically ceased to have effect, and the 1842 *Imperial Copyright Act's* provisions preventing the importation of foreign reprints of British copyright works into a colony came back into force.³⁹ It was to no avail. Although the 1889 *Copyright Act* had passed unanimously in Canadian Parliament, it was never proclaimed into force by Britain.⁴⁰

British and International Control

Canada's 1889 *Copyright Act* and accompanying denunciation of the *Berne Convention* would have acted very much against British interests, and especially the interests of British authors. Britain was able to assert Imperial control over Canadian legislation, and did so to protect its own interests. The international office of the Berne Union also saw fit to inquire about the Canadian actions.

There were several problems with the 1889 *Copyright Act* from a British perspective. First, the act required that works first published elsewhere be reprinted in Canada within one month in order to qualify for Canadian copyright. This seemed like a very small window to British publishers. Some British groups were concerned that this requirement amounted to an abolishment of copyright altogether if the work was not republished in Canada within the month.⁴¹

Second, the act allowed the Canadian Minister of Agriculture to grant to "any person or persons domiciled in Canada" a license to reprint copyright works in cases where foreign copyright holders had not published their works in Canada, and to prohibit the importation of other unauthorized reprints (from the United States, for example).⁴² This compulsory licensing scheme was deeply contrary to the interests of British authors whose works would, under it, be reproduced without their authorization. Additionally, the act made American authors not domiciled in Canada or British possessions ineligible for Canadian copyright.⁴³

Further, and perhaps most importantly, the 1889 act was a threat to ongoing negotiations towards an Anglo-American copyright agreement. Were the act to pass, American authors would be required to publish in Canada in order to obtain Canadian copyright. The Canadian market would not therefore be freely opened to American printers and publishing operations, making any Anglo-American agreement much less palatable to the Americans. This threat to the Anglo-American treaty was the primary reason given, in 1891, by the British government for its refusal to give Royal Assent to the 1889 act.⁴⁴

³⁹ Earl of Aberdeen to Marquess of Ripon, 30 Marcy 1894 and Treasury to Colonial Office, 30 April 1894. *Correspondence on the Subject of the Law of Copyright in Canada*, C. 7783; John H. Moss, "Copyright in Canada," *University Magazine* (April, 1914), 8; R. A. Shields, "Imperial Policy and the Canadian Copyright Act of 1889," *Dalhousie Review* 60, no. 4 (1980-81), 651-652.

⁴⁰ Pamela McKenzie, "Canadian Interest Groups and Parliament: The Case of Copyright, 1887-1987" (1989); Moss, "Copyright in Canada," 7; "Robertson, John Ross" In *Dictionary of Canadian Biography*, ed. Frances G. Halpenny, Vol. XIV (Toronto: University of Toronto Press, 1998).

⁴¹ W. Oliver Hodges to the Colonial Office, 3 November 1890. Secretary of State fonds, National Archives of Canada.

⁴² 52 Victoria Chapter 29, Chapter 62 of the revised statutes.

⁴³ *Ibid.*

⁴⁴ Lord Knutsford to Lord Stanley. 18 March 1891. *Correspondence on the Subject of the Law of Copyright in Canada*. London: Her Majesty's Stationary Office, 1895. Department of Justice fonds, National Archives of Canada.

For these reasons, according to some, the bill was doomed from the start. In publisher Samuel E. Dawson's perspective, this was no ordinary bill; it was "nothing more nor less than a Declaration of Independence." Writing to Lowe, Dawson expressed his belief that Britain could not concede Canadian independence on a bill such as this one "and maintain any self-respect" because it not only asserted Canada's legislative independence but challenged British copyright laws, Imperial uniformity, and British interests.⁴⁵ According to Dawson, the bill would bring down the wrath of powerful English literary class or, as he put it, "every man in England who holds a pen."⁴⁶ If the 1889 act were to pass, similar acts would follow in other colonies, breaking up Imperial uniformity and the markets for British copyright works: "They know that this Bill of yours means shutting them up to their own little islands."⁴⁷ According to him, the bill would thus surely, even if it managed to pass, be struck down by England as soon as someone tried to use its licensing provisions.⁴⁸

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?⁴⁹

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."⁵⁰

For all of these reasons, Britain held together the Berne Union and attempted to stop the break-up of international copyright by retaining a hold on Canadian copyright, refusing Canada legislative independence on the matter, and refusing to allow Canada to denounce the *Berne Convention*.

The central office of the Berne Union also attempted to intervene in the Canadian issue. It was sufficiently concerned about this in 1890 as to inquire about the status of

⁴⁵ Samuel E. Dawson to John Lowe, 23 September 1889. Secretary of State fonds, National Archives of Canada.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ National Archives of Britain. Foreign Office fonds 881/5989. As quoted in Catherine Seville, *The Internationalisation of Copyright Law : Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge: Cambridge University Press, 2006), 118.

⁵⁰ *Report of the Departmental Representatives Appointed to Consider the Canadian Copyright Act of 1889*, 19. Prime Minister Abbott fonds, National Archives of Canada.

the bill, having read reports of it.⁵¹ There were two areas, as I shall discuss further below, in which the 1889 act potentially conflicted with the *Berne Convention*: first were the domestic printing requirements, and second was the requirement that works be registered in Canada.

Normative and Institutional Factors

According to the general practices established by the late 1880s with regard to the legislative and diplomatic autonomy of British possessions in general and Canada in particular, Canada had the full ability to accede or to decline to accede to the *Berne Convention*. Furthermore, according to the practices of the time, the 1889 Canadian *Copyright Act* should have been passed and Canada should have been able to denounce the *Berne Convention*.

Although some interesting arguments were made as to whether Canada had truly acceded to the *Berne Convention* in 1886, it is clear that Canada did accede. Howard Hunter argued that Canada was not actually a party to the *Berne Convention*. The 1888 act, originally proposed to implement the *Berne Convention*, had been dropped, and the 1889 act was unlikely to conform to the *Berne Convention*. Therefore, he observed, Canadian Parliament had never sanctioned the treaty. Furthermore, he noted that "when any international convention affecting the Dominion is enacted into by England it is the practice for the Government of Canada to promulgate the convention by prefixing it to the next published volume of the Statutes of Canada." This, he noted, had never been done.⁵² However, the fact of Canada's accession to the *Berne Convention* was never seriously in question. Canadian Prime Minister Macdonald had personally assented to the convention on 10 June 1886, sending the message by telegram: "Canada consents to enter Copyright Convention."⁵³ The Canadian Privy Council had also confirmed the decision to assent to the *Berne Convention* on 22 June 1886. A minute of the Privy Council stating that decision was accordingly forwarded to the British Government.⁵⁴ According to the diplomatic practice at the time, Canada would have been free not to accede to the convention.⁵⁵

According to the principle, well established by the late 1880s, of responsible government, Canada should have been able to gain enactment of the 1889 copyright bill. It was a long-established practice that British authorities not stand in the way of Canadian bills – even ones with which they disagreed.⁵⁶

Provisions had also been made for British colonies to denounce the *Berne Convention* separately; the British government had reserved "the power of announcing at any time the separate denunciation of the Convention by one or several...Colonies or

⁵¹ Morel to the Assistant Secretary (Railway Department), Board of Trade, London, 3 July 1890. *Correspondence on the Law of Copyright in Canada*. C. 7783. Department of Justice fonds, National Archives of Canada.

⁵² Howard Hunter to John Ross Robertson, 17 November 1892. Secretary of State fonds, National Archives of Canada.

⁵³ 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. August, 1886. Governor General fonds, National Archives of Canada; John Lowe. Memorandum. 9 February 1889. Department of Justice fonds, National Archives of Canada. .

⁵⁴ Minute of the Privy Council of Canada. Approved 22 June 1886. National Archives of Canada.

⁵⁵ Farr, *The Colonial Office and Canada, 1867-1887*, Chapter 9

⁵⁶ Ibid.

possessions.”⁵⁷ A denunciation would take effect one year from the date it was declared.⁵⁸ Although in principle this would normally have meant that Canada was free to withdraw from the agreement at any time, the power was in fact reserved to the *British* government to denounce the treaty *on behalf of* the British possessions which, in the case of the *Berne Convention*, the British government was unwilling to do.⁵⁹ Canada did not have the authority to autonomously denounce the treaty.

Key Figures, Knowledge and Expertise

A number of key battles waged over competing interpretations of the new international copyright norms enshrined in the *Berne Convention* were important in determining the place of countries like Canada in the international regime. These battles took place first of all at home in Canada, but would later also be waged at the international conferences to revise the *Berne Convention*. A number of individuals were important on the domestic front; they fostered domestic knowledge and expertise that challenged prevailing opinion about the *Berne Convention* and its implications for Canada.

First, domestic lobby groups that formed following the introduction of the 1888 bill to implement the *Berne Convention* challenged what had been the dominant opinion at the time, that the *Berne Convention* was a good thing for Canada. Individuals such as the president of the Canadian Copyright Association, John Ross Robertson, newspaperman, publisher, and later Minister of Parliament, were heavily involved in lobbying the government on copyright questions and in helping to draft the 1889 *Copyright Act*.

The critical view of the *Berne Convention* was advanced by several powerful politicians. Foremost among them was Justice Minister and later Prime Minister John Sparrow Thompson, who lobbied Britain fiercely for the 1889 *Copyright Act*. Prior to Thompson’s involvement in copyright, first as Canada’s Minister of Justice and later as Prime Minister, the Department of Agriculture had had primary control of the copyright issue. Thompson’s involvement brought the more substantial legal resources and expertise of the Department of Justice into play on the issue.

Government officials were also involved. One official, John Lowe, appears to have shifted the dominant views at the Canadian Department of Agriculture dramatically. That department, which was responsible for the copyright portfolio, had been instrumental in pushing the Canadian government in 1886 to accede to the *Berne Convention*. However, there appears to have been a shift in sympathies around the time that Lowe became Deputy Minister of Agriculture. Previously, when Canada joined the *Berne Convention* in 1886, Lowe had been secretary of the Department of Agriculture under Deputy Minister Joseph-Charles Taché. Under Taché, Lowe had provided advice to Prime Minister Macdonald that focussed on the interests of authors to the exclusion of other industries in recommending that Canada join the *Berne Convention*. Taché’s views in this regard had been clear; he himself was an author who had dedicated himself to furthering Canadian national literature and promoting

⁵⁷ Francis Adams and J.H.G. Bergne to the Earl of Iddelsleigh. *Report on the third International Copyright Conference at Berne*. 10 September 1886. Secretary of State fonds, National Archives of Canada.

⁵⁸ *Convention Concerning the the Creation of an International Union for the Protection of Literary and Artistic Works (Berne Convention)*, 9 September 1886, Article 20.

⁵⁹ Farr, *The Colonial Office and Canada, 1867-1887*, Chapter 9

Canadian folklore, and in an 1888 letter to Lowe he had instructed that "Copyright laws are not made to protect the printer, but the author who is sole proprietor of the thing he has produced."⁶⁰ After Taché's retirement in July 1888, Lowe took over as Deputy Minister of Agriculture. Some of the changing views at the department might have been related to Lowe's own interests, as he had owned various printing operations before entering the civil service.⁶¹ These changes were important factors in the formulation of Canada's newly independent stance on international copyright.

The growing intellectual engagement on copyright issues within the Canadian government led to fruitful and important debates over key issues in international copyright. On a singularly important issue, John Thompson and John Lowe disagreed. A question arose over a key interpretation of the *Berne Convention* and whether it allowed countries to require domestic printing and publishing in their copyright laws as the 1889 act did. The issue hinged on competing interpretations of Article 2 of the *Berne Convention*, which stated:

Authors who are subjects or citizens of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work...⁶²

According to one interpretation of this clause of the *Berne Convention*, a country could require foreign authors to submit to domestic printing requirements in order to obtain copyright in that country. According to the other interpretation, the article specifically stated that a country *could not* require foreign authors to submit to domestic printing requirements.

Criticism arising from the suggestion that Canada would abandon its domestic printing requirements in its plan to implement the *Berne Convention* in May 1888 led Lowe to investigate whether it might be possible for Canada to adhere to the *Berne Convention* while retaining requirements for domestic printing. As he prepared to take over as the Deputy Minister of Agriculture Lowe wrote to Frederick Daldy, the Secretary of the British Copyright Association who the Canadian government had consulted many times in the past on copyright matters, to ask whether Canada might be able to retain

⁶⁰ "Taché, Joseph-Charles" In *Dictionary of Canadian Biography*, ed. Frances G. Halpenny, Vol. XII (Toronto: University of Toronto Press, 1988). Joseph-Charles Taché to John Lowe, 21 Oct 1888. Secretary of State fonds, National Archives of Canada.

⁶¹ "Lowe, John" In *Dictionary of Canadian Biography*, ed. Frances G. Halpenny, Vol. XIV (Toronto: University of Toronto Press, 1998).; Lowe's letters of 1888 reveal a great passion on copyright issues as well as greater sympathies towards printers' interests and scepticism towards the views promoted by authors' groups. See, for example, John Lowe to John Thompson, 25 June 1890. Secretary of State fonds, National Archives of Canada.

⁶² *Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works*, 9 September 1886.

the domestic printing requirements while conforming to the *Berne Convention*.⁶³ Daldy was of the opinion that Article 2 of the convention was specifically drawn to *allow* countries like Canada and the United States to maintain their domestic printing and registration clauses, rather than to forbid them.⁶⁴

Lowe therefore interpreted Article 2 of the *Berne Convention* to mean that Canada could adhere to *Berne* while retaining the domestic printing requirements, a position that was supported by some experts. Lowe was, in fact, quite passionate on this point and about copyright in general (as was Thompson). He wrote to Thompson on numerous occasions, apologizing for the intrusion but insisting on his more liberal interpretation of the *Berne Convention*. However, Justice Minister John Thompson held that the printing requirements would have to be abandoned if Canada was to adhere to *Berne*.⁶⁵

Thompson's was to be, in fact, the position officially maintained by Britain, because to admit otherwise would be to admit that Canada, though party to *Berne*, was not in conformity with the treaty.⁶⁶ Although this issue was not resolved until 1896 (see below), the dominant position taken in 1889 was that, under *Berne*, accomplishment of the formalities prescribed by the country of origin alone was sufficient to guarantee protection in other countries.⁶⁷ Although Lowe and Daldy promoted the view that the 1889 act might meet the requirements of the *Berne Convention*, the eventual position taken by the Canadian government was that it did not and that denunciation was required.⁶⁸

This battle among politicians and legal experts was crucial to settling key interpretations of international copyright norms that would be maintained for years to come. The dominance of certain interpretations was crucial not only to whether Canada could be – or aspired to be – included as a part of the Berne Union, but also whether the United States was. This battle would not be settled for several years to come, when it would be taken to the international level.

3. American International Copyright

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

⁶³ John Lowe to Frederick Daldy, 13 July 1888, Department of Agriculture fonds, National Archives of Canada. Also see John Lowe to Frederick Daldy, 3 June 1889, Secretary of State fonds, National Archives of Canada.

⁶⁴ For more information on Daldy's activities in Canada, see Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century*, Chapter 4; John Lowe. Memorandum. 23 May 1892. Department of Justice fonds, National Archives of Canada.

⁶⁵ John Lowe to Dawson, 22 May 1888, Department of Agriculture fonds, National Archives of Canada.

⁶⁶ Sam Ricketson and Jane Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2nd ed. (London: Oxford University Press, 2006), 306.

⁶⁷ Roundell Palmer and Farrer Herschell. Memorandum. Department of Justice fonds, National Archives of Canada.

⁶⁸ Draft memo, Department of Agriculture, May 16, 1888. Secretary of State fonds, National Archives of Canada. See also John Lowe. Memorandum. 23 May 1892. Department of Justice fonds, National Archives of Canada.

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 States of America may at its pleasure become a party to such agreement.”⁶⁹ In essence, this meant that any party to the *Berne Convention* qualified for a presidential proclamation. The law further specified that, to be recognized under American copyright law, a work had to be printed from type set in the United States and that publication in the United States had to be simultaneous with its original publication elsewhere.⁷⁰

There was some question as to whether the United States would, under the 1891 act, be eligible to join the *Berne Convention*. As in Canada, there was uncertainty as to whether the domestic printing requirements of the act were permissible under the international agreement.⁷¹ As the eventual conclusion was that they were not, the United States did not become party to *Berne*.

Between 1891 and 1908 presidential copyright proclamations were made granting copyright recognition to citizens of Belgium, France, Great Britain and its possessions, Switzerland, Germany, Italy, Denmark, Portugal, Spain, Mexico, Chile, Costa Rica, the Netherlands and its possessions, Cuba, Norway, and Austria.⁷² Great Britain and British possessions were first proclaimed to be eligible for recognition on 1 July 1891.⁷³ The proclamation that Great Britain and its possessions were eligible for American copyright protection followed on assurances given by British Prime Minister Salisbury that “the law of copyright in force in all British possessions permits the citizens of the United States of America the benefit of copyright on substantially the same basis as to British subjects.”⁷⁴

While it was true that British copyright law protected citizens of the United States and was in force in Canada, the Canadian Department of Agriculture was not consulted on Salisbury’s declaration and, in a policy move that was extremely embarrassing to the British Prime Minister because it appeared to directly contradict his declaration to the United States, Canada, when American copyright applications began to be received in 1891, refused to grant domestic Canadian copyright to American citizens.⁷⁵

The Canadian position was that, under the Canadian 1875 *Copyright Act*, copyright was available to “any person domiciled in Canada or in any part of the British possessions or any citizen of any country which has an International copyright treaty with the United Kingdom.”⁷⁶ Because the new American recognition of international copyright was not the result of a treaty with Britain, since no such treaty had ever been

⁶⁹ 26 Stat. 1106, 1110, Section 13.

⁷⁰ 26 Stat. 1106.

⁷¹ John Lowe to John Thompson, 25 June 1889. Secretary of State fonds, National Archives of Canada.

⁷² Max M. Kampelman, “The United States and International Copyright,” *The American Journal of International Law* 41, no. 2 (Apr., 1947), 417.

⁷³ *Papers Relating to the Foreign Relations of the United States, transmitted to Congress with the Annual Message of the President*, 9 December 1891. Washington: Government Printing Office, 1892, XV.

⁷⁴ Marquis of Salisbury to United States Minister Lincoln, 16 June 1891. Quoted in Prime Minister Abbott fonds, National Archives of Canada.

⁷⁵ Draft memo from Ministers of Justice and Agriculture to the Governor General in Council. Undated. Department of Justice fonds, National Archives of Canada; John Lowe. Memorandum. 23 May 1892. Department of Justice fonds, National Archives of Canada.

⁷⁶ 38 Victoria Ch. 88

concluded, Americans were considered to be ineligible for Canadian copyright. The Department of Agriculture came to the policy of rejecting American copyright applications in August of 1891 without having, in fact, been aware of Salisbury's declaration to the Americans, which only arrived at that department in January 1892.⁷⁷

By November of 1891 the Canadian position had been noted by policymakers and newspapers. Americans were indignant. According to the *Philadelphia Telegraph*:

As Canada has no literature, no authors to protect, no writers who could profit by copyright privileges in America, the Government has everything to gain and nothing to lose by continuing the old state of affairs under which Canadians can steal from Americans as much as they please.⁷⁸

In fact, Canadians remained bound by British copyright, which protected American works in Canada. A British copyright committee reported as such:

Moreover the inconsistency between the Canadian action and the assurance given by Her Majesty's Government to the President of the United States, is perhaps more apparent than real, for refusal to register under the Canadian Act apparently does not deprive a book first published in any part of Her Majesty's dominions (including Canada) of the copyright to which it is entitled in Canada as well as in the United Kingdom under the Imperial Acts of 1842 and 1886.⁷⁹

American publishers were, in actuality, well aware of this fact.⁸⁰ Nevertheless, in December the American State Department wrote demanding explanations and threatening that the Anglo-American arrangement might have to be abandoned:

The Declaration of Lord Salisbury and its acceptance by the United States Government constitutes an international arrangement which this Government desires to observe and maintain in its entirety, and I should much regret if any untoward circumstance should constrain its abandonment or essential qualification.⁸¹

Over the next several years the Canadian government was pressed to respond to this situation. Canada kept to its position, maintaining that American citizens were ineligible for Canadian copyright under the *Copyright Act of 1875*.

⁷⁷ John Lowe. Memorandum. 23 May 1892. Department of Justice fonds, National Archives of Canada.

⁷⁸ *Philadelphia Telegraph*. [date and page number not noted] Department of Justice fonds, National Archives of Canada.

⁷⁹ Report of the Departmental Representatives (of the Colonial Office, Foreign Office, Board of Trade, and Parliamentary Counsel's Office) appointed to consider the Canadian Copyright Act of 1889 to the Right Hon. Sir Michael Hicks-Beach, Bart. Prime Minister Abbott fonds, National Archives of Canada.

⁸⁰ John Lowe. Memorandum. 23 May 1892. Department of Justice fonds, National Archives of Canada

⁸¹ Department of State, Washington, to Sir Pincefort, 19 December 1891. Department of Justice fonds, National Archives of Canada

British and International Control

British control over Canadian copyright, however, continued. Canada, despite its ability to refuse to grant copyrights to Americans under domestic legislation, had no control over whether Americans were entitled to *British* copyright protection in Canada. Because British copyright continued to have effect in Canada and to bind Canadians – and would for another thirty years – Canada’s refusal to grant copyright protection to Americans had little effect; the copyright of Americans publishing works in Canada was protected by British copyright law.

Normative and Institutional Factors

The Department of Agriculture, under Deputy Minister Lowe and Agriculture Minister Carling, was able to take a defiant stance on the recognition of American copyright, protecting the Canadian market from American copyright holders. This position was likely possible because of the newly independent copyright policy in Canada that was supported by the Department of Justice, and because the protectionist position of the Canadian government was consistent with the protectionist policies of the Canadian National Policy across the government as a whole.

Key Figures, Knowledge and Expertise

In 1891 the copyright policies and positions embedded in the *Canadian Copyright Act* of 1889 received new steam. A period of turmoil within the Conservative Party raised the profile of the copyright issue. In 1892, after Prime Minister Macdonald’s death and following Prime Minister Abbott’s resignation due to ill health, John Thompson, the Justice Minister who had introduced the 1889 act, became Prime Minister.⁸² Despite himself being plagued by ill health and encumbered by the duties of his new office, Thompson continued to press the British government on copyright issues, generating extensive arguments on Canadian copyright sovereignty and recounting Canada’s long and tumultuous history with the issue.

The question of copyright sovereignty, under Thompson, reached new levels of priority on the Canadian policy agenda. Whereas the Canadian government under Prime Minister Macdonald had kept a low profile on copyright, not wishing to make waves, Thompson placed copyright sovereignty on the agenda for discussion when he visited the Colonial Office in London in November 1894. He called it a matter which had “now reached what I consider a critical stage.”⁸³ His extensive writing and arguments on the question apparently received attention; a meeting was arranged in London with Thompson and other interested parties to discuss the matter. *The Globe* reported that, as a result of this meeting and discussions to follow, “a decided step is likely to be taken in the settlement of this vexed question.”⁸⁴

The 1889 act would, however, in 1894, lose its most critical supporter. With the copyright issue still on the agenda and his trip to London not yet complete, Prime Minister Thompson died at Windsor Castle of a heart attack following a ceremony at which he was sworn in to the Queen’s Privy Council.⁸⁵ His body was returned to Canada on the HMS *Blenheim*, the sides of the boat painted black, and a state funeral

⁸² P. B. Waite, *The Man from Halifax: Sir John Thompson, Prime Minister* (Toronto: Toronto University Press, 1984), 299 and 347.

⁸³ Waite, *The Man from Halifax: Sir John Thompson, Prime Minister*, 419.

⁸⁴ “The Copyright Question,” *The Globe*, 11 December 1894.

⁸⁵ Waite, *The Man from Halifax: Sir John Thompson, Prime Minister*, 425.

was held at Halifax.⁸⁶ *The Globe* noted the particular loss that would be felt by Canadian copyright interests.⁸⁷ No Canadian Prime Minister to follow would give copyright as much thought and salience as did Prime Minister Thompson.

4. Paris Revision Conference of 1896

Canada's copyright rebellion advanced, in the following years, to the international stage. Although the first revision of the *Berne Convention* had been expected to take place between 1890 and 1892, the conference was, in fact, held in 1896. By this time Luxembourg, Monaco, Montenegro and Norway had joined Great Britain, Germany, Belgium, Spain, France, Haiti, Italy, Liberia, Switzerland, and Tunisia as a part of the Union, and an International Office had been established in Berne.⁸⁸ The 1896 convention gathered broad international representation, with fourteen non-member countries present for the meetings.⁸⁹ Canada and other British colonies were represented by British delegates.

Most of the changes made to the *Berne Convention* at the 1896 conference relatively minor. They included an alteration to the definition of 'publishing' (it was made explicit that 'published' meant 'published for the first time'), translation rights (adding a right of translation, expiring if not put to use within 10 years, to the list of authors' rights), and serial publications (forbidding the unauthorized reproduction of serial stories published in newspapers or periodicals; the 1886 text had allowed the reproduction of articles in newspapers and periodicals unless it was expressly forbidden).⁹⁰

Two issues arose at the convention in 1896 that would be of great significance to Canada: the rights granted to non-Union authors, and the formalities required in the country where protection is claimed. First, the 1896 text granted that authors from non-*Berne Convention* countries who first or simultaneously published their works in a *Berne Convention* country would have their copyrights recognized in the same way as those citizens of the member states.⁹¹ While the 1886 text had granted a similar right, it was worded such that the right was actually granted to the publisher resident in a member country rather than to the author:

The stipulations of the present Convention shall apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is not a party to the Union.⁹²

⁸⁶ Waite, *The Man from Halifax: Sir John Thompson, Prime Minister*, 429

⁸⁷ "Messrs. Marter and Howland: What the Provincial Opposition Leaders think of the Dominion Premier's Death," *The Globe*, 18 December 1894, 10.

⁸⁸ Francis Adams and J.H.G. Bergne to the Earl of Iddelsleigh. *Report on the third International Copyright Conference at Berne*. 10 September 1886. Secretary of State fonds, National Archives of Canada; Ricketson and Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 86.

⁸⁹ *Ibid.*, 87.

⁹⁰ *Berne Convention, Paris Additional Act and Interpretative Declaration, 1896* and Ricketson and Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 88-89

⁹¹ Kampelman, *The United States and International Copyright*, 412.

⁹² *Berne Convention*, 1886, Article 3.

This article was rewritten in the 1896 according to widespread agreement that copyright should be granted not to the publisher, but to the author:

Authors not being subjects or citizens of one of the countries of the Union, who first publish, or cause to be first published, their literary or artistic works in one of those countries, shall enjoy, in respect of such works, the protection granted by the Berne Convention, and by the present Additional Act.⁹³

The importance of this change to Canada does not appear to have been foreseen by the British government nor by the British delegates. It was a point not fully covered in the instructions to the British delegates, who felt it unobjectionable at the time.⁹⁴

Although the 1896 revision was little noted in Canadian newspapers, it created great controversy in many countries.⁹⁵ No country, however, was more affected than Canada. The altered text now meant that American authors could, without actually signing on to the *Berne Convention*, secure their copyrights throughout all *Berne Convention* countries by first or simultaneously publishing their works in Canada or another member state.

Second, the interpretation of Article 2 of the *Berne Convention* – as to whether countries could require foreign authors to submit to domestic formalities and printing requirements – had to be clarified. (This is the issue upon which John Lowe and John Thompson had disagreed; see above.) Many countries of the Berne Union wished very much to reinforce their interpretation of Article 2 regarding formalities that could be required outside of the country in which a work originated in some manner. Article 2 was felt by most to be clearly worded to mean that submission to formalities in the country of origin would be sufficient for protection throughout the members of the Union.⁹⁶ The fact that the *Berne Convention* had made it possible to gain international copyright through a single process in the country of origin was, in fact, considered by most to be one of the greatest accomplishments of the Berne Union.⁹⁷ Britain, however, was unable to accept this interpretation of Article 2, as it would have been tantamount to admitting that Canada, a British dominion, did not comply with the tenets of the *Berne Convention*.⁹⁸ Had the dominant interpretation of Article 2 been incorporated into the new text of the agreement, Britain declared that it would not be

⁹³ *Additional Act Amending Articles 2, 3, 5, 7, 12 and 20, of the Convention of September 9, 1886, and Numbers 1 and 4 of the Final Protocol Annexed Thereto (Paris Act)*. 4 May 1896. See also Ricketson and Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 888

⁹⁴ Great Britain, *Correspondence Respecting Copyright Conference at Paris. C. 8441* (London: Harrison and Sons, [1897]).

⁹⁵ Based on a review of articles in *The Globe* and *The Evening Star* for the years 1895-1898; Kampelman, *The United States and International Copyright*, 413.

⁹⁶ Bureau International de l'Union. *Actes de la conférence réunie à Paris du 15 avril au 4 mai 1896*, Berne : Bureau International de l'Union, 1897, 161.

⁹⁷ *Actes de la conférence réunie à Paris du 15 avril au 4 mai 1896*, 36.

⁹⁸ Ricketson and Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 306

able to sign.⁹⁹ Britain's signature, however, was highly desired by the rest of the conference delegates, who expressed their willingness to "meet in a conciliatory spirit" the concerns of the British delegation.

A compromise was reached. Because Britain was unable to assent to such a clarification and would have withheld its signature from the convention should a change have been made, the wishes of the other member states were included not in the actual text of the 1896 act, but in a separate additional declaration of interpretation which Britain did not sign.¹⁰⁰ The declaration read:

In accordance with the provisions of Article 2, paragraph 2, of the Convention, the protection granted by the Instruments mentioned above shall depend solely on the accomplishment of the conditions and formalities in the country of origin of the work which may be required by the legislation of that country.¹⁰¹

As a result of this solution Britain did sign the convention, and exchanged ratifications, on behalf of Great Britain and all its colonies and possessions, on 9 September 1897.¹⁰²

James Edgar, who, while in opposition in 1886, had unsuccessfully pressed for further discussion of the *Berne Convention* before Canada agreed to accede to the agreement, was now speaker of the House. He argued that Canada should stand opposed to the Paris revision, advising the Prime Minister as follows:

It cannot be denied that for the Canadian Government to give its sanction to an important amendment to the Berne Convention, such as is contained in the Act of Paris last summer, would properly be held to be a withdrawal of the request so emphatically made for the denunciation of the original Treaty.

It would seem reasonable to explain this position to any of the countries interested, and to express the hope confidently entertained by the Canadian government, that at an early date legislation may be had in Ottawa which will remove the friction existing with reference to the delay in the approval of the Act of 1889, and which may render it unnecessary for Canada to persist in her request for the denunciation of the Berne Convention.¹⁰³

Canada's opposition to the new text of the agreement had, however, little effect, since Britain had signed and ratified the convention on its behalf.

The Laurier government continued to be pressed to back down on its position on the 1889 act, and eventually did. The Liberals proceeded, in 1900, to pass a new

⁹⁹ Great Britain, *Correspondence Respecting Copyright Conference at Paris*. C. 8441, 5.

¹⁰⁰ Great Britain, *Correspondence Respecting Copyright Conference at Paris*. C. 8441, 7

¹⁰¹ *Declaration interpreting certain provisions of the Berne Convention of September 9, 1886, and the Additional Act signed at Paris on May 4, 1896*, Article 1.

¹⁰² Great Britain, *Correspondence Respecting Copyright Conference at Paris*. C. 8441, 5-6 and 226-234; See also Order of Her Majesty in Council no. 374 .7 March 1898. Governor General's fonds, National Archives of Canada.

¹⁰³ James Edgar. Memorandum. 2 January 1897. Wilfrid Laurier fonds. National Archives of Canada.

Copyright Act.¹⁰⁴ The 1900 act did not provide a compulsory licensing system for Canadian publishers and some therefore saw it as a retreat from the position maintained on the 1889 act.¹⁰⁵ It did, however, allow, in cases where British copyright holders *voluntarily* licensed a work to be reprinted in Canada, other reprints to be prohibited from import into Canada. This provided incentive both for British publishers to republish in Canada and for Canadian publishers to republish British works. The 1900 act left in place the domestic printing requirements of the 1875 act.¹⁰⁶

5. Berlin Revision Conference of 1908

The next diplomatic conference for the revision of the *Berne Convention* took place in Berlin in 1908. In the time between, Denmark, Sweden and Japan had acceded to the convention.¹⁰⁷ There were 21 non-member states represented at the conference, including the United States and Russia.¹⁰⁸ The United States again stated its sympathies with the efforts of the Union and its continuing unwillingness to join the convention.¹⁰⁹

The 1908 conference resulted in a number of more substantive changes to the text of the *Berne Convention*. Protection was extended to several new types of works:

- Mandatory copyright protection was extended to architectural works, choreographic works, and pantomimes.
- Translations, adaptations, and arrangements of music were deemed to sustain copyright of their own, with translation rights now being granted in full to authors.¹¹⁰
- A limited form of protection was extended to photographs.¹¹¹

The term of copyright protection was also extended. A term of protection of life of the author plus 50 years was accepted as a principle, although it was not made mandatory. Nationals of countries with shorter terms would not be able to claim the full term of protection in other countries.¹¹²

In addition, several new rights were created as a result of growing industries based on new technologies, including:

- A non-mandatory right in the reproduction of musical works onto phonograph records and piano rolls. The wording of the agreement was broad enough to allow it to be met by systems of compulsory licensing if a country so desired.
- Copyright protection for films.¹¹³

¹⁰⁴ 63-64 Victoria, chapter 25.

¹⁰⁵ 63-64 Victoria, chapter 25; Seville, *The Internationalisation of Copyright Law : Books, Buccaneers and the Black Flag in the Nineteenth Century*, 134

¹⁰⁶ 63-64 Victoria c. 25

¹⁰⁷ Ricketson and Ginsberg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 92.

¹⁰⁸ *Ibid.*, 93.

¹⁰⁹ *Ibid.*, 94.

¹¹⁰ *Ibid.*, 95 and 98.

¹¹¹ *Ibid.*, 95.

¹¹² *Ibid.*, 97.

¹¹³ *Ibid.*, 99-100.

Most significant to the discussion at hand, however, is that the principle of absence of formalities was adopted, wherein it was deemed that member countries should not make copyright protection dependent on compliance with certain formalities, such as domestic manufacture or printing, or registration of a work in a central registrar.¹¹⁴ This principle meant that Canada's domestic printing and registration requirements would contravene the 1908 version of the *Berne Convention*.

Ricketson has observed that at this 1908 conference were laid the seeds of a number of future challenges to be met by the *Berne Convention*:

The most notable was the threat posed to authors' rights by the emergence of new technological means of reproducing and disseminating their works, and the growth of powerful interest groups engaged in the exploitation of these new technologies. In this regard, the gramophone recording and the cinematographic film were the harbingers of other more startling developments which were already in train, such as sound and visual broadcasting. A second problem for the future was that of developing countries which were in the position of 'users' rather than 'producers' of copyright material. Although their time was still to come, their concerns had been clearly anticipated, even at this early stage, in the Japanese proposal [rejected at the conference, that translations into the Japanese language should be free].¹¹⁵

Britain signed the revised convention on 13 November 1908. Although Canada was considered to be a party to the 1886 and 1896 texts of the *Berne Convention* as a colony of Britain, Canada refused to allow Britain to ratify the 1908 text on its behalf.¹¹⁶ Canada's primary difficulty lay with the *Berne Convention's* requirement, as of the 1896 text, that countries grant national treatment to citizens of non-Union countries. This problem would only be resolved with a 1914 additional protocol to the *Berne Convention* that allowed Union countries to restrict protection offered to non-Union countries in cases where non-Union countries did not offer adequate protection to the Union country.¹¹⁷

British and International Control

Britain's control over Canada's international copyright commitments remained firm throughout the 1896 and 1908 diplomatic conferences. Canada, without its own voice at the meeting, without control over all of the copyright laws that were in effect in Canada, without the autonomous ability to denounce the *Berne Convention*, and without the ability to refuse its signature or (in the case of 1896) ratification, was dragged along in international copyright affairs.

Canada, however, also exerted some control over the positions that could be taken by the British at the 1896 and 1908 meetings. In his instructions to the British delegates to the 1896 conference, British Prime Minister Salisbury noted that many of the proposed changes to the *Berne Convention* that had been put forward for

¹¹⁴ Ibid., 96.

¹¹⁵ Ibid., 99-101-102 and 98.

¹¹⁶ Ibid., 103.

¹¹⁷ Ibid.

discussion by various countries prior to the 1896 conference were acceptable to Britain, *but would not be acceptable to the colonies*. Salisbury was greatly concerned that, were too many changes made, Canada or other colonies might leave the convention altogether. This limited the types of proposals and changes that the British delegates could support.

Proposed changes upon which Great Britain and the colonies had opposing positions in 1896 included changes to Article 2 of the convention regarding formalities, but also other items such as the inclusion of photographs as protected works (Britain protected photographs under its copyright law, but it was uncertain whether this protection applied in the colonies), and the seizure of counterfeit works.¹¹⁸

In his letter instructing the British delegates to the 1896 conference, Salisbury therefore wrote that they should not sign the revised convention:

whilst Her Majesty's Government find themselves in agreement in principle, either partially or wholly, with many of the proposals formulated by the French Administration and the International Bureau, they do not consider the amendments of the original Convention which are suggested to be of any very great or pressing necessity. For the purpose of procuring any amendments in the existing Convention in this direction, it would not be worth while to run any risk of rendering the secession of any Party to the Union more probable....

The Berne Convention was only obtained after great and protracted labour. Her Majesty's Government attach great value to its provisions, and anything tending to a break up of the Union would be regarded by them as a misfortune.

It is, therefore, especially desirable that nothing should be done which would tend to induce any of the British Colonies to retire from the Union.¹¹⁹

A declaration to this effect was made at the conference by British delegates:

Great Britain attaches the greatest value to the Convention of Berne, and does not wish to run the risk of any of her Colonies withdrawing from the Union, as might happen if she were at the present moment to accept definitively any material changes in the text of the Convention.¹²⁰

Only because the other delegates to the convention were willing to sequester controversial changes into a separate protocol, allowing Britain to sign the main agreement while standing off from the protocol, could Britain sign the revised text.

The situation was similar in 1908, when Britain once again took the position that, in light of colonial copyright issues, it would be unable to implement any changes to its own copyright law that might be necessary to implement the new 1908 text of the *Berne*

¹¹⁸ Great Britain, *Correspondence Respecting Copyright Conference at Paris. C. 8441*, 3.

¹¹⁹ *Ibid.*, 4.

¹²⁰ *Ibid.*, 5.

Convention. British delegates were sent to the 1908 conference with the following declaration:

It is needful, however, to state clearly that there exist for Great Britain very serious difficulties in connection with the subject of copyright, especially as regards harmonizing the interests of the mother country with those of the great self-governing Colonies. Unless it should be found possible to remove these difficulties, His Majesty's Government would not probably find themselves in a position to propose to Parliament the legislation which would be necessary in order to give effect to any considerable alterations in the Convention of Berne.¹²¹

Thus, although Britain retained a rather firm grasp on Canadian copyright, Canadian and colonial issues restricted Britain's ability to negotiate. These concerns made major alterations to the *Berne Convention* impossible, constraining the movement of international copyright norms.

Institutional and Normative Factors

Canada was represented by Britain at the diplomatic conferences of 1896 and 1908; no Canadian advisor or representative was present at the meetings. This was somewhat unusual for the time; Canada had a High Commissioner posted in London who was tasked with representing Canada's interests in international commercial negotiations. By 1884 the High Commissioner had gained the status of full plenipotentiaries in some international negotiations, and the first treaty concluded by independent Canadian negotiation had been signed in 1893.¹²² In fact, a Canadian advisor had, as early as 1881, accompanied British negotiators for Anglo-American copyright negotiations.¹²³ However, Canada's position in denouncing the *Berne Convention* might have made it difficult for a Canadian representative to attend the negotiations; it would have put both Canada and Britain in awkward and conflicted positions in relation to the Berne Union, and towards each other.

Key Figures, Knowledge and Expertise

Key interpretations of the international copyright norms remained somewhat in flux, and this flexibility ensured both that Imperial copyright unity was maintained and that the Berne Union was not abandoned by Canada and other countries. The British interpretation of Article 2 of the *Berne Convention* during the 1896 meeting served the primary purpose of holding together international and imperial copyright. By refusing to concede that the practices of Canada in its domestic printing requirements were disallowed under the new international norms, and that Canada and other countries in similar positions fell outside the Union, Britain prevented the recognition of a direct conflict between Canada and the *Berne Convention*. It would eventually be accepted

¹²¹ E. Grey to H. Bergne, Mr. Askwith and Cout de Salis, 9 October 1908. Great Britain, *Correspondence Respecting the Revised Convention of Berne for the Protection of Artistic and Literary Works, Signed at Berlin, 13th November 1908 (with Copies of the Conventions of 1886, 1896, and 1908)*. Cd-4467. (London: Harrison and Sons, [1909]).

¹²² Farr, *The Colonial Office and Canada, 1867-1887*, 261.

¹²³ *Correspondence with the United States Respecting Copyright Convention, Part 1: 1881-1884*. National Archives of Canada.

that domestic printing requirements were not compatible with the *Berne Convention*. Canada, eventually, would fall into line with this understanding. In the meantime, however, British knowledge and expertise in interpreting the *Berne Convention* served to maintain a conception of international and Imperial unity.

Two days after the revised convention of 1908 was signed, the lead British delegate, Henry Bergne, who had taken ill during the proceedings, died as a result of illness at his hotel in Berlin.¹²⁴ Bergne was one of the few delegates who had been present since the formation of the *Berne Convention*; he had been an active British delegate at the *Berne Convention* conferences since the 1885 conference at which the convention was drafted. Although he had retired in 1902, he had remained a part of the British delegation. During these years he was involved as a member of the British Society of Authors as chairman of the general committee and member of the management and copyright committees.¹²⁵ He had been one of the strongest voices opposed Canada's bid to denounce the *Berne Convention*, fearing it would break up the international copyright union. His death heralded a new approach to Imperial copyright, which, although still several years off, would finally grant Canada and the other British colonies a greater degree of independence in copyright. In 1896 and 1908, however, several international copyright norms were advanced and solidified. British colonies, when they later gained legislative independence in copyright, would have to work with and around those norms.

6. Conclusion

Idealistic notions that international copyright norms represent the forward march of progress and international civilization met up, in the late 1880s through the early twentieth century, against several realities. First, Britain's legislative and diplomatic control over Canadian international copyright was out of step with the norms of responsible government at the time; they represented, if anything, a backwards step for Canada in terms of its independence as a country. Second, key battles were waged over how international copyright norms would be conceptualized; some interpretations of international norms served protectionist interests, while others served to support a vision of copyright that was more universal, steeped in ideas of Imperial uniformity.

An oscillation between protectionist and universalist policy trends was evident not only in copyright policy, but also in the communications policy more generally. While Canada's protectionist stance during this time conflicted with efforts towards a more universal agreement on copyright, Winseck and Pike have observed that these conflicts were evident in other areas of global communication policy as well, which reflected:

¹²⁴ Great Britain, *Correspondence Respecting the Revised Convention of Berne for the Protection of Artistic and Literary Works, Signed at Berlin, 13th November 1908 (with Copies of the Conventions of 1886, 1896, and 1908)*. Cd-4467., 21; T. H. Sanderson, "Bergne, Sir John Henry Gibbs (1842–1908)," rev. H. C. G. Matthew, in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004), <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/30724> (accessed November 26, 2007).

¹²⁵ T. H. Sanderson, "Bergne, Sir John Henry Gibbs (1842–1908)," rev. H. C. G. Matthew, in *Oxford Dictionary of National Biography*, ed. H. C. G. Matthew and Brian Harrison (Oxford: OUP, 2004), <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/30724> (accessed November 26, 2007).

a subset of global politics that registered countries' willingness to seriously entertain the idea of cooperatively organizing a world system through the League of Nations and international law. Such efforts also revealed just how elusive such goals were, as countries continued to pursue realist policies and their own national interests.¹²⁶

Canadian politicians were no longer prepared to view the Berne Union as a product of a neutral process leading to the expansion of civilisation and law. Copyright policymaking was embedded, rather, in larger struggles over key interpretations of newly established international copyright norms, and over Canadian legislative independence and the constitutional questions that were high on the agenda of the Justice Department and Prime Minister's Office. The copyright battle was very much a battle to define the shape of international copyright and the competence and independence of state authority in international affairs.

Canada's decision in 1889 to back away from the fledgling international copyright regime is especially interesting today. The *Berne Convention*, though established in the nineteenth century, is still the cornerstone of international copyright. It was incorporated into the intellectual property provisions of the World Trade Organization's multilateral trade agreements in 1994, and into the World Intellectual Property Organization (WIPO)'s multilateral copyright treaties in 1996. Canada's hesitation in recent years to implement the 1996 WIPO copyright treaties in some ways recalls Canada's early relationship with international copyright.

Canada's struggles over international copyright policy in the late nineteenth century were emblematic of many other struggles in communication policy. They were attempts to maintain or bolster domestic communication industries in the face of powerful international competition, to protect Canadian communication markets, to ensure that Canadians had access to books and other copyrighted works at affordable rates, to create innovative domestic communication policies that responded to the demands of domestic interest groups, and to establish a strong and sovereign voice in international affairs.

¹²⁶ Dwayne Roy Winseck and Robert M. Pike, *Communication and Empire : Media, Markets, and Globalization, 1860-1930* (Durham: Duke University Press, 2007).

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