

## Canada and the Berne Convention: Reluctant Acceptance of the International Copyright Protection Regime

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The Berne Convention is the international treaty that provides for international copyright protection of works and the rights of authors. The treaty is based on the principle of national treatment, which requires that a country party to the treaty protect foreign works from treaty countries in the same way domestic works are afforded copyright protection. Effectively this means that if an author's work is granted copyright protection in its home country (assuming it is a party to the Berne Convention), that work is granted copyright protection in all countries party to the treaty. This creates a global regime for copyright protection and provides significant benefits to authors seeking international copyright protection.

Canada has been a party to the Berne Convention since its inception in 1886. Interestingly, Canada was strongly opposed to the Convention, but reluctantly signed on in order to maintain uniform treaty obligations with the United Kingdom, a major proponent of the Berne Convention.<sup>1</sup> Canada's objections to the treaty arose out of opposition from the Canadian publishing industry's fear of significant increases in the prices of books and other protected works as a result of foreign authors' works receiving protection under the Treaty. Currently, Canada remains a signatory to the Berne Convention, and has domestic copyright protections that are, in fact, more stringent than what is required under the Berne Convention.

The Basic principles of the Berne Convention provide that where an author of any literary, scientific, or artistic work is a national of a Berne Convention signatory state, they have a number of exclusive rights that apply in every other Berne Convention country.<sup>2</sup> These authorship rights include the right to: translate, adapt and arrange, perform, recite, communicate to the public, broadcast, reproduce or adapt to an audiovisual work<sup>3</sup> for a period of the life of the author, plus 50 years.<sup>4</sup> These provisions have the effect of requiring publishers of foreign works to obtain a license from the author, typically through royalty payments. For countries that are net importers of copyrighted works, such as Canada, reluctance to grant copyright protection to foreign works is understandable given the resulting cost of exporting large sums of money to foreign authors for royalty fees.<sup>5</sup>

Apprehension to accepting international intellectual property regimes is common among developing countries looking to avoid having to export capital for copyright fees.<sup>6</sup> Canada's

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<sup>1</sup> Sara Bannerman, "Canadian Copyright: History, Change, and Potential" (2011) 36:1 Canadian Journal of Communication 31 at 33-34.

<sup>2</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 S. Treaty Doc. No. 99-27 (1986), Article 5.

<sup>3</sup> *Ibid*, Article 2.

<sup>4</sup> *Ibid*, Article 7.

<sup>5</sup> David Vaver, "Copyright in Foreign Works: Canada's International Obligations" (1987) 66:1 Canadian Bar Review 76 at 79-80.

<sup>6</sup> Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism 1842-1971* (Vancouver: UBC Press, 2013) at 2.

reluctant acceptance of the Berne Convention is illustrative of this phenomenon, albeit in a developed country context. Canada has actually framed itself as a developing country in the context of copyright through the negotiation and renegotiations of the Berne Convention.<sup>7</sup> When initially signing on to the Treaty, some Canadian politicians objected on the basis of international copyright protections not being appropriate for a developing country that is a net importer of copyrighted works, such as Canada.<sup>8</sup> Throughout the renegotiations of the Berne Convention, Canada advocated on numerous occasions for an international copyright system that would allow different countries to apply less stringent copyright measures based on domestic circumstances.<sup>9</sup> Drastic proposals like this from Canada were abandoned out of the fear that it would alienate Canada from major trading partners pushing for stronger international copyright protection such as the UK, France, and US.<sup>10</sup>

Vehement opposition to the Berne Convention from the Canadian publishing industry was a primary source of Canadian reluctance to sign on to the Convention.<sup>11</sup> Since the 1800s, Canadian book publishers have fought against copyright protections for international works. This attitude partly stemmed from the fact that British law prevented Canadian publishers from unauthorized reprinting of foreign works, while, to the south, the US publishing industry flourished, ostensibly from not being subject the same international copyright restrictions.<sup>12</sup> This opposition to foreign copyright protection spilled into nationalist sentiment with Canadian publishers and politicians, particularly in Quebec. Canadian publishers argued that foreign copyright protection in Canada was inhibiting the development of Canadian culture through the literary arts.<sup>13</sup> In particular, there was concern that the Canadian book market would be overrun by American literature.<sup>14</sup> This culminated in Canada refusing to sign the 1967 revision of the Berne Convention out of concern that it was not in the national interest.<sup>15</sup>

Canada ultimately acceded to the Berne Convention and has strengthened its copyright regime to be more stringent than required under the Convention. This is likely the result of a desire to achieve concessions in trade negotiations with major Canadian trading partners. This is seen by the incorporation of intellectual property protections in several of Canada's most recent trade

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<sup>7</sup> Sara Bannerman, "Canadian Copyright: History, Change, and Potential" (2011) 36:1 Canadian Journal of Communication 31 at 39.

<sup>8</sup> *Ibid.*, at 37.

<sup>9</sup> *Ibid.*, at 39.

<sup>10</sup> *Ibid.*

<sup>11</sup> Eli MacLaren and Josée Vincent, "Book Policies and Copyright in Canada and Quebec: Defending National Cultures" (2010) 204 Canadian Literature 63.

<sup>12</sup> *Ibid.*, at 68.

<sup>13</sup> *Ibid.*, at 72-78.

<sup>14</sup> *Ibid.*, at 68..Note that there was a strong desire among some English Canadians for the Canadian population to read works by British authors perceived to underpin Canada's British heritage. American books were far cheaper and easier to access due to the robust American publishing industry and burgeoning American literature scene, in comparison to expensive imported British literature. American literature was thus considered by some to undermine Canadian Anglo-Saxon heritage. There was similar sentiment amongst Quebec nationalists with regard to imported French literature compromising Quebec's national identity. These issues are still alive today as Canada seeks to promote Canadian creative content in the digital space. For example, see proposed Bill C-10 *An Act to amend the Broadcasting Act and to make consequential amendments to other Acts*, which includes greater power for the Federal Government to regulate streaming services.

<sup>15</sup> Sara Bannerman, "Canadian Copyright: History, Change, and Potential" (2011) 36:1 Canadian Journal of Communication 31 at 38.

agreements. The *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the EU includes a dedicated chapter on intellectual property and re-affirms Canada and the EU's commitment to upholding the Berne Convention, as well as numerous other IP related treaties.<sup>16</sup> Additionally, the recent Canada-US-Mexico Agreement (CUSMA) includes a chapter on copyright protection that increases the term of copyright protection to the life of the author plus 70 years, significantly higher than the 50 years after the life of the author required under the Berne Convention.<sup>17</sup> This demonstrates that Canada has been willing to cast aside its opposition to international copyright protection as a way to appease its major trading partners.<sup>18</sup>

Canada's relationship with the Berne Convention has been characterised by opposition coupled with reluctant acceptance. From the beginning, Canada was dragged into the agreement as a result of being part of the British Empire. As Canada gained agency as a country, it became clear that in order to actively participate in the multi-lateral trading system, it would need to accept the global framework for copyright protection, in spite of significant domestic opposition. This has led to the current position where Canada is effectively promoting the Berne Convention through its international trade agreements and accepting more stringent copyright protections than the Convention requires.

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<sup>16</sup> Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016, O.J. (L 11) 23, Chapter 20.

<sup>17</sup> Canada-United States-Mexico Agreement 7/1/20, Article 20.62 "Term of Protection for Copyright and Related Rights.

<sup>18</sup> See, e.g., Sara Bannerman, *The Struggle for Canadian Copyright: Imperialism to Internationalism 1842-1971* (Vancouver: UBC Press, 2013).