ABSTRACT  The first part of this article reviews Canada's international copyright history and the role Canada has played in international copyright from the nineteenth century to the present day. In the part two, the author asks whether we can be optimistic or pessimistic about Canada's role, and the role of international institutions more generally, in promoting solutions to the social policy and social justice concerns raised by the expansion of intellectual property. The author argues that Canada's history, while demonstrating Canada's potential to support progressive change, has not borne out certain middle power ideals.

KEYWORDS  Copyright/intellectual property; History; International relations

Every so often, windows of opportunity, where change is possible in the structure of international copyright relations, present themselves. These opportunities are rare. They are occasions for international copyright organizations to reinvent themselves, for states to reposition themselves and to restructure their international copyright relations, and for policy advocates to enrol member states and international organizations in initiatives to reform the international copyright system.

While NGOs have increasingly powerful voices in international fora, states continue to play powerful roles (Braithwaite and Drahos, 2000). Middle powers in particular may have a special role at these moments of change. Some theorists have envisioned middle powers like Canada as being particularly well suited to play a role in furthering issues of social policy and social justice in international forums. Various groups, according to Mark Neufeld (2006), have recast the idea of a middle power “to
signify the influence enjoyed by middle powers, and the potential such influence offers to effect radical progressive change in terms of disarmament, economic development and wealth re-distribution, environmental policy and democratization of the foreign policy-making process” (p. xx). Robert W. Cox argues, in a 1989 article, that middle powers have the potential to transform the international system by promoting greater social equity and a wider diffusion of power in the world system. Toward these goals, he argues that middle powers “could work as [agents] of change towards achievement of the multi-level order” (p. 837).

What role does Canada, as a middle power, have within current initiatives to reform international copyright? In the first part of this article, I review Canada’s international copyright history and the role that Canada has played in international copyright from 1886 to the present. In part two, I ask whether we can be optimistic about Canada’s role, and the role of international institutions, in promoting solutions to the social policy and social justice problems within the context of intellectual property reform initiatives today. Canada’s history shows that Canada can indeed be enrolled in social policy and social justice initiatives in the context of international copyright. However, a series of missed opportunities have left the middle power role empty, forfeiting rare opportunities for change.

I. History of Canadian international copyright

The foundation of international copyright since 1886 has been the Berne Convention—the world’s first broadly multilateral copyright treaty, which still acts as the cornerstone of international copyright today. In 1886 the Berne Convention established a set of minimum standards for the recognition of the rights of foreign authors, which were revised approximately every 20 years until 1971. The Berne Convention today requires that copyright last for a minimum period of the life of the author plus 50 years. It disallows member states from requiring domestic manufacture of works, or the active registration of copyright, as a condition for the grant of copyright. Copyright is required, under the Berne Convention, to be granted automatically without such formalities. The right to authorize translations is deemed generally, with some exceptions, to rest with the copyright owner for the full term of copyright. Some of these provisions have been historically controversial, especially to developing countries wishing to protect burgeoning printing, publishing, or manufacturing industries; or to countries wishing to encourage more strongly the local availability of foreign works in translation.

Originally attracting a membership consisting of Germany, Belgium, Spain, France, Haiti, Italy, Liberia, Switzerland, Great Britain, and Tunisia (Conseil Fédérale Suisse, 1886), the convention now encompasses 164 member states. The main provisions of the Berne Convention have been incorporated into the intellectual property provisions of the TRIPS Agreement and into the 1996 WIPO Internet treaties. The membership of the Berne Convention is collectively called the Berne Union.

Canada’s history with international copyright can be divided into five periods:

1. Imperial unity (1886-1889). Canada joined the Berne Convention under Great Britain’s signature as a British colony in 1886. The Canadian govern-
ment’s decision to join the Berne Union was undertaken as part of a policy of uniformity with the British imperial government.

2. Copyright rebellion (1889-1910). After joining the Convention in 1886, the Canadian government departed from the policy of imperial unity and, beginning in 1889, attempted to denounce the Berne Convention, viewing it as a treaty that benefited major European countries against the interests of developing North American economies. Although Canada was prevented from denouncing the Convention by the British imperial government, the Canadian government’s stance of skepticism towards the Berne model of copyright lasted through this period until about 1910.

3. Reconciliation (1910-1957). Following changes to the international copyright system that were made at Canada’s request and an agreement with the imperial government, Canada joined the Berne Union as an independent member. From the 1920s to the present Canada has been a member of the Berne Convention.

4. Scepticism (1957-1971). Between 1957 and 1971, Canadian policymakers expressed skepticism about the benefits that the Berne Convention had brought to Canada and other copyright importers, and they lobbied for fundamental changes to the way the international copyright system worked. These efforts failed.

5. Second reconciliation (1971-). Since 1971, Canada has joined other countries in formulating a number of international treaties that are aimed chiefly at expanding the intellectual property rights granted to rightsholders.

These five periods have seen Canada vacillate between upholding the status quo and pressing for change in the international copyright system. Canada moved from a policy of imperial unity to copyright rebellion, from reconciliation to skepticism, and from skepticism to a second reconciliation. Canada’s efforts to push for major international copyright reform have been largely unsuccessful, especially since the early twentieth century when Canada emerged as an independent nation. In order to understand the failure of these efforts at reform, and Canada’s vacillating relationship to the Berne Convention, I examine these five periods in more detail.

1. Imperial unity

When the Berne Convention was founded in 1886, Canada was a British dominion. The British imperial government had ultimate authority over Canadian legislation and foreign affairs. Imperial copyright law applied in Canada alongside Canadian copyright law, which was required under the Colonial Laws Validity Act to be consistent with imperial law (Hogg, 2007).

Domestically owned printing industries were to spread across the country by 1900. Some Canadian publishing enterprises were profitable, but their businesses were primarily in republishing British, French, and American works; they could not afford the risks associated with new Canadian authors, and none had the capacity to publish on a national scale (Parker, 2004). Works published in Canada were, in 1886, unlikely to
find an international audience (Parker, 2004). International copyright protection was therefore not as important, in Canada, as was gaining access to foreign literature. The United States, being in a similar situation, did not recognize international copyright until 1891 and therefore had a plentiful and cheap supply of foreign reading material, reprinted without authorization (“pirated”) by domestic printers and publishers.

The United States took a skeptical view of the Berne Convention and refused to sign the treaty when it was founded in 1886. The United States would refuse to join the Berne Union until more than a century later, in 1989. As with many countries at that time, Americans viewed cheap access to foreign literature as an important source of educational and industrial development. Printers and publishers argued that if the United States joined the Berne Convention, book prices would increase by tenfold, that the book publishing business in the United States would be destroyed, and that the destruction of the book printing business in the United States would leave thousands unemployed (Clark, 1973). The United States was not unlike other countries in this regard; Ricketson (1986-1987) notes that

whilst prepared to protect their own authors, [many countries at this time] did not always regard the piracy of foreign authors’ works as unfair or immoral. Some countries, in fact, openly countenanced piracy as contributing to their educational and social needs and as reducing the prices of books for their citizens. (p. 12)

McGill (2003) suggests use of the term “reprinting” rather than “piracy” (p. 3) because the reprinting of foreign works was legal, consistent with cultural norms, and viewed as a contribution to democracy and enlightenment.

The Canadian government’s decision to join the Berne Convention in 1886 was not undertaken in public. Had a parliamentary debate been held, Canadian printers and publishers would likely have made similar arguments to those made by their American counterparts; Canadian printers and publishers had long argued not for the abolition of international copyright, but for a compulsory licensing system that would have given Canadian printers and publishers the ability to reprint British books without the permission of British copyright holders, by paying a fee to the copyright holder at a rate set by the government. This, it was felt, would put Canadian printers and publishers on a more even playing field with their American counterparts. However, attempts by the opposition party to raise the issue of copyright for debate in the Canadian parliament failed in March of 1886, just prior to the signing of the Convention (Canada, House of Commons, 1886). Instead, a decision was taken personally by Prime Minister Macdonald, without debate. On June 10, 1886, Macdonald sent a short telegram from his library at Earnscliffe: “Canada consents to enter Copyright Convention” (Herbert, 1886; Lowe, 1889).

The Canadian government’s decision to join the Berne Union under the signature of Great Britain was not based so much on concern for Canadian authors, which at the time were seen as “belonging rather to the future than to the present” (Thompson, 1892). Rather, it was part of a larger policy of maintaining uniformity in the British Empire. Key officials within the Canadian government in 1886 convinced Macdonald to act in the (future) interests of Canadian authors and in conformity with the imperial
government (Lowe, 1889). Prime Minister Macdonald’s telegraph was premised on a series of documents shown to him by John Lowe, secretary to the Minister of Agriculture, the catch-all department responsible for copyright. As Lowe (1889) later described, these documents laid down “the principle that the author’s interest should be primarily considered in all Copyright arrangements, the publisher’s interest being a matter for Tariff legislation, and that Canada should be in accord with the mother country in the matter of Copyright.” According to Lowe, Macdonald was guided to see Canadian adherence to the Berne Convention as being based on already-established principles of unity with the imperial government and the primacy of authors’ interests over other interests.

2. Copyright rebellion
For many, the Berne Convention symbolized the forward march of international law, civilization, and progress. In some countries, however, this idea ran up against national sentiment and nationalist trade policies. This was particularly true in Canada. The Canadian National Policy, a system of protective tariffs, had been implemented in the 1870s by the federal government in efforts to build a diverse economy with varied occupations and opportunities. This system had expanded and matured into the foundational strategy of the Macdonald government (Brown, 1966; Hillmer & Granatstein, 2005). Its protectionist approach would come to be reflected in other areas of government policy, including copyright.

The decision to join the Berne Union would soon be called an act of “profound ... almost criminal—negligence” (Poulton, 1971, p. 107) on the part of Canadian politicians, because the principles of the international agreement were out of step with the protectionist policies that Canadian printers and publishers at the time were calling for. Although Canada had agreed to join the Berne Convention in 1886, it soon reversed its position; for years following Canada’s initial accession. The Canadian government would attempt unsuccessfully to denounce the agreement (Canada, House of Commons, 1891; Earl of Aberdeen, 1894; Great Britain, 1892; Lord Stanley, 1889; Lord Stanley, 1891).

Canadian copyright lobby groups began to organize shortly after Canada joined the Berne Convention in 1886. These groups, including the Canadian Copyright Association in particular, were powerful enough to convince the government in 1889 to reverse direction in its international copyright policies. As a result, the bill that would have implemented the Berne Convention in Canadian copyright law was promptly withdrawn (“Copyright Bill,” 1888; Lancefield, 1896, para. 89; “Notes,” 1888).

In 1889 a new bill was unanimously passed by the Canadian parliament, implementing the printers’ and publishers’ demands. Parliament requested that the imperial government denounce the Berne Convention on behalf of Canada (Canada, 1889). The new bill, however, was never proclaimed into force by the imperial government. The imperial parliament’s refusal to proclaim the bill into force set off fiery debates in Canada about Canadian sovereignty and the appropriateness of the Berne Convention to a developing North American country.

John Thompson, Canada’s minister of justice and future prime minister, argued that “the Berne Convention had in view considerations of society which are widely different from those prevailing in Canada” (Thompson, 1892, p. 7). Thompson felt that
the terms of the Berne Convention, in granting foreign copyright owners monopolies over the Canadian market, favoured densely populated and highly urbanized countries such as those in Europe, and the Convention was therefore unsuited to relatively less developed countries like Canada where affordable book prices, and printing and publishing industries, required greater encouragement. In a letter to the governor general he wrote:

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. (Thompson, 1892, p. 7)

Canada’s 1889 act was social policy as well as economic policy, addressing concerns that overly strong international copyright might tend to reproduce in Canada “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” (Hunter, 1892).

Despite the Canadian government’s position on the Berne Convention, British imperial copyright laws had effect in Canada and protected foreign works within the Dominion. The imperial government refused Canada’s request to denounce the Berne Convention because it feared that if Canada were to withdraw from the Berne Convention, other countries would follow:

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? (Henry Bergne as quoted in Seville, 2006, p. 118)

British efforts to hold together the Berne Union were successful; the Berne Union remained intact and expanded to eventually become the foundation of international copyright throughout the world (Ricketson & Ginsburg, 2006; WIPO, 2010c).

The United States, in 1891, took measures to recognize international copyright on strictly limited terms. Instead of adopting the Berne Convention, the United States granted copyright to foreign nationals on a bilateral basis, on the condition that works be registered and printed in the United States (Boyle & Lofquist, 1991-92; United States, 1891). In this way, the United States adopted a bilateral and protectionist international copyright policy, while Canada was bound to the Berne Convention, which disallowed the types of industry protections built in to the American law.

3. Reconciliation
Canada’s position on the Berne Convention reversed again in the early twentieth century. In 1910, Britain, wishing to consult with British dominions on imperial copyright
laws, held an Imperial Copyright Conference. The resolutions of the conference set the path for eventual copyright independence for the dominions (Great Britain, 1910).

At the conference, whose proceedings were kept secret, the Canadian representative secured a commitment that the imperial government would negotiate, for Canada, terms that took the form of a protocol to the Berne Convention in 1914 (Protocole additionnel, 1914). This protocol eased Canadian concerns and paved the way for Canada to adhere to the Convention. Under the 1896 revision of the Berne Convention, authors from non-Union countries such as the United States could obtain copyright throughout the Berne Union by publishing their works first in a Berne country (such as Canada). This gave non-Union countries “back door” access to the rights granted by the Berne Convention without requiring said countries to join the Berne Convention. Berne Union authors (including Canadians) did not receive reciprocal protection from the United States; they faced stringent domestic manufacture provisions before they were eligible to receive copyright protection in that country (Berne Convention, 1896, Article 1, Item II; Berne Convention, 1908, Article 6). The 1914 protocol, however, allowed a country of the Union to restrict protection granted to the works of non-Union authors whose government failed to protect in an adequate manner the works of authors of the Union (Protocole additionnel, 1914). This gave Canada the flexibility of recognizing American copyright on a more reciprocal basis, a key requirement for Canadian adhesion.

Following this compromise and World War I, Canadian copyright legislation in 1921 and 1923 implemented the Berne Convention, abandoning domestic printing and publishing requirements and including special retaliatory provisions against the United States (Canada, 1921; Canada, 1923). During the interwar years, which were characterized by optimism about international institutions’ potential to bring about justice and peace, the Berne Convention represented for Canada a powerful international community and a forum for the expression of Canada’s newfound international personality (Hillmer & Granatstein, 2005). Canadian leaders felt that a failure to join in that Union would make Canada “an outlaw among the copyright nations of the world” (O’Hara, 1919), an “outsider in the general community of nations” (Canada, House of Commons, 1921, p. 3833), and a “non-harmonious and non-musical instrument” (Canada, House of Commons, 1931, p. 2309) within the concert of nations.

4. Skepticism

Skepticism about the appropriateness of Canada’s participation in the Berne Convention reappeared beginning in the 1950s, when doubts were raised about whether Canada was “well advised” in joining the Berne Convention in the first place. A 1957 Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs concluded that the Berne Convention represented a European approach to copyright, granting high levels of copyright and placing the rights of authors above the interests of users, consumers, and the public. The commission suggested that a more American approach—with a utilitarian view of copyright that understood copyright as serving the public interest above the interests of authors—might be more suitable to Canada as a net copyright importer—a nation of copyright consumers more than a nation of copyright exporters. This more American approach was embodied in a new Universal Copyright Convention, which had been formed as an alternative to the Berne Conven-
tion as a result of American initiative in 1952. The commission reported: “It may be that, in becoming a party to the Berlin Revision of the Berne Convention in 1923, Canada was not too well advised. Apart from Haiti and Brazil no nations in the Western Hemisphere are members of the Berne Union...” (Canada, Royal Commission on Patents, Copyright, Trade Marks and Industrial Designs, 1957, p. 18). Following the commission's recommendations, Canada joined the Universal Copyright Convention in 1962, also retaining its membership in the Berne Convention (Canada, Department of External Affairs, 1962; UNESCODEL Paris, 1962).

In the 1960s and 1970s, the Canadian government sent representatives to fewer meetings related to the Berne Convention, and refused to sign or implement the 1967 revision of the Convention. Although many countries refused to ratify that revision due to controversies over special provisions it contained for the benefit of developing countries, Canada refused for different reasons. Canada's Secretary of State for External Affairs questioned whether expanding international copyright was in the national interest:

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

The Secretary therefore recommended to Cabinet that Canada should refrain from supporting any proposed revision to the Berne Convention that would reduce the government's flexibility of action (Secretary of State for External Affairs, 1967). Canada did not sign the revised Berne Convention of 1967 (Records, 1971). For similar reasons, Canada did not sign the revised text of the Berne Convention of 1971 (Cabinet Committee on External Policy and Defence, 1971; Memorandum to the Cabinet, 1971; Records, 1973). Canada would not accede to the 1971 revision of the Berne Convention until the 1990s, when it did so in order to conform to the North American Free Trade Agreement (Handa, 1997).

Canadian scepticism was related to the view that international copyright, as implemented under the Berne Convention, primarily responded to the interests of the most developed copyright-exporting nations. A 1977 report by Andrew A. Keyes and Claude Brunet concluded that

the fully developed nations, largely exporters of copyright material, have a stronger voice in international copyright conventions, and a tendency has existed over the past half century for developing countries, including Canada, to accept too readily proffered solutions in copyright matters that do not reflect their economic positions. (p. 234)
In response to such arguments, Canadian officials attempted to form a coalition of “intermediate” countries who were not classed as “developing” countries, but who were net copyright importers as opposed to net copyright exporters (Canadian Delegation, 1969b). Officials hoped, through this vehicle, to press for major structural change to the international copyright system that would allow different countries to adhere to different levels of copyright protection, according to domestic circumstances (Canadian Delegation, 1969a). This would have represented a tremendous structural change to an international copyright system that had striven for decades to achieve uniformity and universality with a single set of copyright norms. It was an initiative intended to alter, both for Canada and for developing countries, uneven international flows of royalty distribution. However, the initiative failed due to Canada’s inability to attract sufficient support and due to fears that such a stance would affect Canada’s relations with countries like the United States, the United Kingdom, and France (Canadian Delegation, 1969a; Canadian Delegation, 1969c). The Canadian delegations’ inexperience, and the fact that Canada had been disengaged from the Berne Union for a number of years, meant that Canada’s proposal came late in the game after key decisions had already been taken.

5. Second reconciliation
Following the failures of Canadian efforts in the 1960s and 1970s to effect radical change in the international copyright system, views within the government shifted once again. Skepticism about the appropriateness of Canada’s participation in the Berne Convention was replaced with the view that Canada should adhere to the same major copyright conventions as its trading partners (Canada, Department of Consumer and Corporate Affairs and Department of Communications, 1984). This philosophy has generally guided Canadian participation in international copyright agreements since.

Canada’s second reconciliation with international copyright came in part as a result of a changing American approach to intellectual property and resultant pressure on Canada to increase intellectual property protection. The United States adopted, beginning about 1979, a trade-based approach to intellectual property, pushing for the inclusion of intellectual property provisions in multilateral trade agreements, beginning (unsuccessfully) at the Tokyo round of General Agreement on Tariffs and Trade (GATT) talks in 1979 (Handa, 1997). In 1986, countries agreed to include intellectual property in the GATT talks, which ultimately led to the World Trade Organization’s Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in 1994 (Handa, 1997). The United States also incorporated intellectual property into other trade agreements, such as the 1992 North American Free Trade Agreement (NAFTA) (Handa, 1997). In 1996, two additional treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), were negotiated under the World Intellectual Property Organization to extend copyright and neighbouring rights in the digital environment.

Efforts to increase Canadian intellectual property protection and enforcement continue. A new Anti-Counterfeiting Trade Agreement (ACTA) seeks to raise the minimum standards of intellectual property enforcement at national borders and in digital net-
works. Spearheaded by countries with large intellectual property export industries, ACTA deals with customs and criminal enforcement of intellectual property rights (ACTA, April 21, 2010; ACTA, July 1, 2010). Canadian officials are also negotiating a free-trade agreement with the European Union (EU)—the Canada-EU Comprehensive Economic and Trade Agreement (CETA)—that contains an extensive chapter on intellectual property, under which the EU seeks to extend Canadian copyright considerably (Canada-EU, 2010). Under CETA it appears, according to leaked documents, that the European Union is pushing for Canada to adopt a longer term of copyright protection (70 years rather than 50 years after the death of the author for standard works and other term extensions in other areas), a new resale right for art, a new distribution right, new rights for broadcasters, including a fixation right and a retransmission right, and the extension of reproduction rights to performers and broadcasters (Canada-EU, 2010).

Other initiatives, further on the horizon, include a possible treaty for the protection of broadcasting organizations and a possible treaty for the protection of audiovisual performances, which would extend rights granted to broadcasting organizations and audiovisual performers respectively (WIPO, 2010b).

The expansion of intellectual property rights through vehicles such as TRIPs, NAFTA, the WIPO Internet treaties, ACTA, and CETA have raised the stakes for a growing number of groups not only in copyright as economic policy, but also in its social and distributive effects, including its effects on specific groups, and on civil liberties and public interests generally. Concerns surround a number of issues: the misuse of intellectual property to inhibit free expression; the increasing commoditization of information and creative works; the health of the public domain; high concentrations of ownership over cultural works and the tools of cultural expression; eroding national, regional, ethnic, and group autonomy over the governance of creativity and access; eroding democratic participation in cultural expression; and increasing inequalities between people and nations (Bettig, 1996, see chapter 7; Smiers & van Schijndel, 2009). On a global level, expanding copyright, and the foreign policies of those countries that promote it, exacerbate current inequalities in the balance of cultural and economic production, thus raising important issues of social justice (Bettig, 1996, see chapter 7; Story, 2003; Story, Darch, & Halbert, 2006). Copyright, for all of these reasons, continues to be a site of struggle both nationally and in international forums.

The most recent round of Canadian copyright reform has been on the Canadian agenda since 1996, when Canada signed the Internet treaties of the World Intellectual Property Organization (WIPO). Though signed, the treaties have not yet been implemented in Canadian law. Canada is under pressure from the United States government, which has included Canada on its Special 301 priority watch list for what American industry groups see as inadequate intellectual property protection (USTR, 2010). Bill C-32, introduced in June 2010, marks Canada’s third attempt since 2005 to revise its copyright legislation in order to implement the WIPO Internet treaties. Bill C-32 follows several rounds of public consultations and two previous bills that died with the dissolution of the government. Today, as in the past, copyright reform in Canada is one of the most contentious and most-lobbied issues on the Canadian political agenda (Canada, Senate, 1923; Doyle, 2009; Geist, 2009; “Prentice to Unveil,” 2007; Schick, 2007).
The stakes for Canadians in copyright reform are significant. Creators are concerned not only about protecting their rights in a digital environment; some also seek provisions allowing the legitimate re-use of works in parody, satire, or mash-ups. Consumers seek provisions allowing them to time-shift by recording works for later viewing, to format-shift by converting works into formats usable by other devices, and to make backup copies of works. Students and educators want reasonable access to works for use in the classroom and private study. Groups such as the print-disabled require measures that will make works in accessible formats more widely available. Music and video lovers want to ensure that their ability to make legitimate uses of works is not disabled by digital locks, and that they are not subject to spurious copyright lawsuits. The current Bill C-32 makes important strides in many regards, creating fair dealing exceptions for parody, satire, non-commercial remixes, and education; allowing time-and format-shifting, certain backups, and provisions for the benefit of the print-disabled. However, these strides may be largely undermined by strong digital locks provisions that would make it a copyright infringement to break digital locks, even for many of these legitimate purposes.

Broader issues, beyond copyright provisions aimed at specific groups, are also at stake. These include the need to avoid either underprotecting or overprotecting works so as to encourage optimal levels of creation, access, and competition; the ability of Canada as a net copyright importer to ensure that Canadians benefit adequately from the Canadian copyright regime; the need to balance or manage royalty flows under international copyright arrangements; and the ability of national governments to retain a degree of copyright sovereignty and flexibility within international copyright agreements. For all of these reasons, Canada has a large stake in the international developments that play a role in shaping Canadian legislation.

International copyright regimes, from those established in the nineteenth century to ACTA today, have long been used by copyright exporters to protect their works abroad and to encourage relative uniformity in national copyright regimes around the world. However, different levels of copyright and intellectual property protection may be appropriate to countries at differing levels of development and in different domestic circumstances. While special provisions may be necessary to ensure more equitable access internationally to information, education, and technology, today’s international regimes make adjustment to local circumstances and special provisions for access to works increasingly difficult (Chang, 2003).

Counter-initiatives
The expansion of copyright via international agreements has sparked a number of international counter-initiatives aimed at addressing social policy, social justice, public interest, and development concerns arising from expanded intellectual property regimes. In 2004, a group of developing countries known as the “Friends of Development” put forward a proposal for the establishment of a development agenda for WIPO that would acknowledge that intellectual property came with costs as well as benefits for developing countries and that would see WIPO focus on the objective of international development rather than solely on the protection of intellectual property. In so doing, the Friends of Development sought to redefine WIPO’s core mandate and
to bring the organization in line with its role as a specialized agency of the United Nations (Argentina and Brazil, 2004; May, 2006; WIPO, 1967). They proposed various changes to the organizational structure and oversight of WIPO and a new treaty on access to knowledge (Argentina and Brazil, 2004; Friends of Development, 2005). Such a treaty would outline minimum standards for limitations, exceptions, and flexibilities to intellectual property. This would have represented a dramatic reversal from WIPO’s traditional role of promoting treaties on the protection of intellectual property.

The WIPO Development Agenda, following negotiations, was formally adopted in 2006 and is currently undergoing implementation (WIPO, 2010a). The Canadian government’s role in the debates that culminated in the formal adoption of the WIPO Development Agenda was to indicate support for the discussions in general and to raise useful technical concerns. However, Canada did not support more radical proposals for a treaty on access to knowledge, and Canada is a part of the coalition of OECD countries (Group B) that opposed any major reforms to WIPO’s mandate or structure and opposed the negotiation of a treaty on access to knowledge (Bannerman, 2008). The Development Agenda that was approved in 2006 is much more reserved than the one proposed by the Friends of Development, does not include major structural change, and does not include a treaty on access to knowledge (WIPO, 2007).

Following on the earlier stalled efforts toward a broad treaty on access to knowledge (CP Tech, 2005), the World Blind Union put forward a proposal for a narrower treaty aimed at rectifying current shortages of accessible works for the visually impaired. Currently, more than 95% of printed works are inaccessible to people with visual impairments (Mara, 2009). The new treaty would require that national governments provide exceptions to their copyright laws that would allow certain copying and distribution of accessible works (Brazil, Ecuador, and Paraguay, 2009). Argentina, Bolivia, Brazil, Chile, Ecuador, Jamaica, Peru, Nicaragua, Paraguay, and Uruguay as well as a number of non-governmental organizations examined the proposal and issued the Montevideo Declaration, stating their intention to push the proposed treaty forward (Mara, 2009; Montevideo, 2009).

Since the treaty proposal was brought to WIPO, a number of objections have been raised. African countries prefer a broader approach that would encompass a wide range of exceptions and limitations, rather than simply exceptions and limitations for the visually impaired (Saez, 2010b; WIPO, 2010b). For their part, Group B countries have been hesitant to commit to a treaty at all, preferring other non-binding approaches (Saez, 2010a; WIPO, 2010b). Canada is a part of Group B. The Canadian government’s emphasis during the discussions has been on the importance of maintaining flexibility within any international instrument (whether binding or non-binding) for a variety of domestic approaches (George, 2009).

II. Canada and the future of international copyright

On rare occasions, opportunities for change have appeared in the history of international copyright. On these occasions, international organizations are invented or reinvented, actors are enrolled in new visions of how the international governance of access to and production of copyright works should operate, and states reposition themselves. One such opportunity occurred in the years leading up to 1886, when the Berne Union
was invented, when states positioned themselves with regard to the Union, and when policy advocates and the British Empire enrolled member states—and colonies like Canada—in support of the internationalization of authors’ rights. Canada was enrolled in relative secrecy. Between 1889 and 1910, although there were successes in enrolling the Canadian government in a different vision of Canadian copyright, British imperialism made change and denunciation of the British status quo very difficult.

In 1910 another opportunity was presented, when copyright sovereignty for British dominions was put up for negotiation. However, the negotiations were again done in secrecy, making it impossible for domestic policy advocates to make good on the opportunity to enrol their governments and to advocate for greater change. The result of that negotiation favoured continuance of the existing order. In 1967 the international copyright system was thrown into crisis as a result of developing countries’ concerns about access to foreign copyright works. Various domestic groups attempted to enrol the Canadian government, both in favour of the international status quo and in favour of change. Canadian efforts to effect radical change failed, coming too late, engendering insufficient support, and resulting in a lost opportunity. The efforts of developing countries to enrol WIPO in their vision of development achieved limited gains, and the measures achieved have led to few concrete practical results (Ricketson and Ginsburg, 2006).

More recent opportunities have also presented themselves: the negotiation of a Development Agenda for WIPO was a call for radical reform—a call for the reinvention of WIPO, an attempt to reposition developing countries within the organization, and an opportunity for policy advocates to put their initiatives on the international agenda. Although some policy advocates made use of the opportunity to put their initiatives forward, and developing countries had some success in repositioning themselves within WIPO, Canada and other Group B countries were not enrolled in major reform initiatives and have now gone elsewhere, to less transparent forums like ACTA, to negotiate new treaties, weakening the broader multilateral system (Saez, 2010c).

Canada’s periods of copyright rebellion and skepticism toward the model of international copyright embodied in the Berne Convention show that Canada has the potential to be enrolled in efforts to push for major structural change in the international copyright system. However, the policy that Canada should adhere to the same major copyright conventions as its trading partners, as did its policy of imperial unity in the 1880s and the 1920s, restricts the Canadian government’s position and ensures that Canada is enrolled in the projects of copyright exporters in expanding intellectual property regimes. The result of this for Canadians today is the possible erosion of Canadian copyright sovereignty, the possible Americanization of Canadian copyright law via American-style digital locks provisions—without the extensive fair use safeguards of the American system, the potential unbalancing of rights and rewards, and the further unbalancing of international flows.

Advocates of international counter-initiatives aimed at forwarding the interests of the blind, visually impaired, and reading-disabled, or of the social justice initiatives of developing countries, operate on the hope that international institutions like WIPO can be used as tools to further social justice and social policy initiatives. Some theorists
are optimistic about the potential for international institutions to be useful in this regard. International systems, national interests, and the choices available to states are constructed by interested actors and naturalized in ways that make alternatives invisible (Wendt, 1992). Susan Sell (1998) argues, however, that “choices are not preordained, and the way that actors frame the problem and perceive those constraints matters” (pp. 5-6). Sell adds that international forums can contribute to processes where “people learn, change their minds, and redefine their interests in ways that make a difference in international politics” (p. 12).

The reformulation of international agendas and national interests is shaped by a plurality of “webs of many kinds of actors which regulate while being regulated themselves” (Braithwaite & Drahos, 2000, p. 9). While member states and NGOs shape international institutions, international initiatives also have the potential to reshape governments’ perceptions of national interests. For example, the international initiative toward a WIPO Treaty for an Improved Access for Blind, Visually-Impaired and Other Reading Disabled Persons has put a set of issues on the international agenda, and has in turn helped to put the interests of the print-disabled on the Canadian reform table; provisions for the print-disabled have been incorporated into Canada’s Bill C-32. Other international initiatives, including ACTA and CETA, also frame national interests and agendas. While multilateral intellectual property forums have been most effectively used to help reformulate national interests according to the demands of intellectual property exporters, they can also be used to place social policy and social justice concerns onto international and national agendas (Sell, 1998).

Optimistic views of the potential of international institutions to forward the agendas of public interest organizations and developing countries can be contrasted with realist views that suggest international institutions are ultimately tools of powerful states, and that, therefore, the backing of powerful states who see reform as in their interests is necessary for change to take place. The potential for WIPO or other international copyright institutions to be effective in social policy and social justice initiatives thus depends on their ability, as part of a web of actors, to help define the national interests of powerful states.

WIPO is a policy space where social policy advocates have gained ground, influencing WIPO’s direction and operations, and where new expansions of intellectual property and enforcement initiatives have been, for the time being, blocked. However, such gains can backfire and fail if powerful member states are not convinced that such events are in their interests (Sell, 1998). The major copyright exporters, finding WIPO inhospitable to their agendas, have gone outside of WIPO to formulate new bilateral and plurilateral agreements in relatively secret forums. There, they advocate new norms of expanded intellectual property protection and enforcement, instrumentally choosing and creating institutions suited to their interests.

Canada’s position as a member of the Berne Convention has been, on one hand, a small-country realist position premised on the idea that Canada’s prosperity and prominence comes from working together with and enrolling its largest trading partners. On the other hand, it is consistent with Canada’s support for multilateralism and international institutions generally (Keating, 2002), and with the view that interna-
tional institutions can work in the interests of smaller powers. Multilateralism is viewed as being particularly suited to middle powers like Canada, providing voice opportunities, as well as providing insurance against strong power unilateralism (Cox, 1989; Holmes, 1970; Shadlen, 2004). However, Canada's policy of adhering to the same international copyright agreements as its major trading partners has allowed Canada to be led away from broader multilateral institutions like WIPO and has made Canada a "policy-taker" whose policies are, in broad outline, defined by its trading partners.

Cox (1989) argues, "[t]he middle power thesis has been more of an idea, a potentiality, than a realized and effective strategy of world politics" (pp. 827-828). It has been, in other words, "a role in search of an actor" (p. 827). Advocates of social justice and social policy change in international intellectual property have, in large part, failed to enrol the most powerful member states, and middle powers such as Canada have been more strongly enrolled in the policy visions of their largest trading partners. Mark Neufeld (2006) argues that middle powers actually serve not to encourage progressive change but to legitimate the existing international order. Canada's history, while demonstrating Canada's potential to support progressive change, has not yet borne out the middle power ideal.

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