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All Quiet on the Law Firm Front

by Jennifer Allen

Since the unveiling of amendments to the *Copyright Act* by the minority Conservative government recently, a steady stream of sensational stories have appeared in the mainstream press. "Copyright law could result in police state: critics" and "Government ready to drop copyright bomb" stated the COO; "Win-win Copyright Act still has plenty of losers" and "Uncle Sam's fingers are all over the Canadian copyright bill" proclaimed the *Vancouver Sun*; and in the *National Post*, "Copyright bill's fine print makes for disturbing reading". But within the legal profession, the reaction to Bill C-61 has been much more serene.

Introduced on June 12, the bill to amend the *Copyright Act* (last amended in 1997 before the first portable MP3 player became widely available) reflects the proposals by the Ministers of Industry and Canadian Heritage to prohibit circumventing technological measures that restrict access as well as the manufacture, provision, offering for sale or rental and distribution of circumvention tools. But, consumers would be able to lawfully copy a book, newspaper, periodical, photograph, video cassette or recorded music accessed legally onto their own devices for private use as well as legally record TV programs for later viewing (time-shifting).

In regard to educational institutions, teachers and students would be able to use material found online for educational or training purposes and use copyright material in lessons conducted over the Internet. As well, performers and producers would have a "making available" right to ascertain whether their material is posted and shared online and in what manner.

Other proposed amendments include exempting Internet Service Providers (ISPs) from liability for copyright infringements by subscribers but requiring them to forward to a subscriber a notice received from a copyright owner claiming the subscriber has posted or is sharing infringing material (the so-called "notice and notice" system that is already widely used on a voluntary basis in Canada).

As far as fines, statutory damages would be fixed at \$500 where private, non-commercial activities are involved. However, cases wherein public infringements of copyright law occurred — such as posting music to the Internet or even giving an iPod loaded with your music — would garner fines as high as \$20,000.

The *Copyright Act*," says Stephane Caron, a partner with the Ottawa office of Gowling Lafleur Henderson LLP and chair of the firm's copyright national practice group, "is a compromise between various interests so that whether you're on one side of the fence or the other, you might have very different views."

But, many lawyers are not on one side or the other but more accurately on the fence.

The legal community has been careful because [Bill C-61 is] is very controversial," Caron continues. "Positions have remained neutral."

And perhaps this is expected seeing that the copyright reform process over the last few years has met its fair share of opposition. The introduction of the bill itself was postponed by the Conservative government last December after an outpouring of protest by organizations across the country over fears that it would be a duplicate of the controversial *Digital Millennium Copyright Act* [DMCA) in the United States, especially in the area of anti-circumvention provisions. The DMCA was passed in 1998 by then-President Bill Clinton and has been criticized for opening the door for copyright owners to enact large lawsuits against violators.

The criticism in Canada has been hard to ignore: A protest group was started on Facebook by University of Ottawa Internet and e-commerce Professor Michael Geist that now boasts more than 40,000 members. Geist, a vocal opponent of the legislation, argues that the anti-circumvention clause invalidates all other new provisions. The reforms, he says, are laden with so many limitations that in many cases they are rendered inoperable.

And the backlash doesn't stop there. Bill C-61 wasn't much more than an hour old when the domain

KillBiliC61.ca was registered. Liberal industry critic Scott Brison also quickly fired back at the government with the following: "There's no excuse for why the government has not consulted broadly the diverse stakeholders. The government has not thought this through. It has not thought about how it will enforce these provisions." And, he added, "There's a fine line between protecting creators and a police state."

Adding to the *je ne sais quoi* reaction in the legal community is the skepticism that the bill will pass now that Parliament's summer recess has begun and that even after its second reading when Parliament resumes, the government would require support from some opposition Members of Parliament for the bill to pass.

"There is a lot of skepticism in the legal community as to whether the bill will pass. A lot of lawyers are sitting back a little bit and not spending a lot of time analyzing the bill because many people don't think it's going to pass over to the next parliament," says Mark Hayes, a partner with the intellectual property group of the Toronto office of Blake, Cassels & Graydon LLP.

Caron echoes the same uncertainty: "It's not necessarily a government's favourite amendment to push forward," he says. "It won't bring the government tremendous goodwill."

The copyright issue surfaced as a priority for the Conservative government in the throne speech when it was declared that the government "will improve the protection of cultural and intellectual property rights in Canada, including copyright reform." But the contentious nature of the issues involved make it a difficult piece of legislation to pass through in the House of Commons — especially without a majority government in place.

"The Conservative government prided itself on living up to its commitments in the throne speech," says Hayes. This is one of those items that had to be checked off before an election is called.

And if the bill does survive through the summer, it could very well die in the event of a Fall election before it's even fully debated.

"If the government survives long enough, there's a reasonable chance it will go through," says a laughing Glen Bloom, a partner with the Ottawa office of Osier, Hoskin & Harcourt LLP who practises in intellectual property law and litigation.

But would anyone bet on it?

Not Hayes. "I think there are scenarios that will see it pass but if I were to put odds on it, I would say that the odds are against it before the election."

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