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Copyright Act gets overdue update

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Long-awaited amendments to Canada's *Copyright Act* have finally been unveiled by a minority Conservative government struggling to define the proper balance between owners and users of copyrighted material in the digital age.

"It's one of those statutes that the government wishes it probably didn't have to bring forward," said intellectual property lawyer Mark Hayes, of Blake, Cassels & Graydon LLP in Toronto. "They had to walk a fine line between some very polarized factions."

The copyright reform process over the last few years has been very contentious and that debate is continuing with the proposed Bill C-61, with some praising the bill as a fair balancing of competing interests and others arguing that it adopts the worst of controversial U.S.-style approaches to copyright.

"The government is trying to create a stable, predictable environment where businesses can thrive," said Barry Sookman, who co-chairs the technology law group of McCarthy Tétrault LLP in Toronto. "It's the right approach from a policy perspective."

According to Sookman, the government had three choices with respect to Canada's copyright regime. First, it could leave things as they were, which he said would not be appropriate in light of today's digital environment. Second, it could accept that the market has no chance, and allow widespread copying, which could ultimately lead to the implementation of schemes such as that proposed recently by Canadian songwriters for an additional monthly fee on subscribers' Internet bill to cover downloading. This, said Sookman, would destroy business models such as iTunes and drive business out of Canada. Finally, the government could reform the law in order to create a "favourable legal environment" that creates incentives for businesses to invest in Canada. According to Sookman, the proposed changes reflect this third approach.

The proposed amendments include provisions relating to private use of copyrighted materials by individuals, including allowing individuals to make a copy of a television or radio program or a webstream so they can listen to it or view it later; the ability to copy a legally acquired sound recording to separate devices such as an iPod; and the ability to make a copy of legally acquired copyrighted materials such as books to other devices they own. In addition, statutory damages, which could be as high as \$20,000 previously, will now be fixed at \$500 where private, non-commercial activities are involved. However, some of these exceptions and limitations would not apply in cases where technological measures or digital locks were circumvented.

The amendments also propose a "making available" right for performers and producers to determine whether and how their material is posted and shared online. In one of the most controversial proposals, the bill would also make it illegal to circumvent technologies that control access to protected material, as well as make it illegal to provide, market or import tools that are designed to enable such circumvention. The *law* would also offer protection for rights management information, which is used to identify rights holders or to outline restrictions on the use of the work.

Other proposed amendments include provisions exempting Internet service providers from liability for copyright infringements by their subscribers, but requiring them to forward any notices of infringement to the subscriber (the so-called "notice and notice" system, as opposed to the "notice and takedown" model adopted in the U.S.).

The proposed bill also attempts to harmonize photographs with other copyrighted works, by making the photographer the owner of the copyright, rather than the person who commissioned the photograph. However, the person who commissioned it would not be considered to be infringing the copyright if they made private, non-commercial use of the photograph.

"We're by and large deeply disappointed with what the government has proposed," said David Fewer, Staff Counsel for the Canadian Internet Policy and Public Interest Clinic (CIPPIC) at the University of Ottawa. According to Fewer, the bill is "privileging digital distribution models over consumer rights."

Of particular concern to his group are the provisions dealing with the protection given to digital locks. According to Fewer, the proposed bill would create a two-track system for copyright in Canada, one based on copyright and one based on anti-circumvention. Calling the exceptions too narrow, he noted, for example, that media may have difficulty using copyrighted material in their reporting if such material has digital locks on it. Hayes of Slakes agreed that the provisions on access control may create some problems, noting that there is no fair dealing defence provided for breaking an access control.

Pointing to the controversial Digital Millennium *Copyright Act* in the U.S., which included anti-circumvention provisions, Fewer said that the Canadian government could have learned and applied lessons based on the U.S. experience, but has failed to do so. He noted that countries such as Australia and Israel have adopted models with more flexible anti-circumvention provisions. "If this bill becomes law, it's going to come back to haunt us," said Fewer.

However, according to Hayes, from a practical perspective, some of the concerns may not be such a big issue. "The market has largely rejected very strict user restrictions through access controls and digital rights management," he said.

Calling the cap on statutory damages "meaningless" and "window dressing", CIPPIC's Fewer also asserted that the legislation "paves the road for U.S. style consumer file-sharing lawsuits", although he added that it is not clear if rights-holders will make the business decision to do so in Canada.

McCarthy's Sookrnan dismisses much of the criticism, particularly the focus on the impact it might have on consumers. Calling it an "unwarranted fear", he noted that the way the legislation is drafted makes it clear that the government is trying to discourage suits against consumers and is instead attempting to provide remedies against those intermediaries "that are really causing the damage." "I think the government has got the balance exactly right," said Sookman. "Nobody wants to go after consumers."

The merits of the bill aside, Hayes noted that the new amendments continue a trend which has seen the Copyright Act become increasingly complex. "It's difficult for most copyright practitioners to understand," said Hayes, adding that it will be even more so for individuals hoping to determine their rights under the Act.