

Copyright Act amendments could unduly restrict

By Robert Todd, Law Times, June 23, 2008

Intellectual property lawyers are welcoming the federal government's efforts to modernize the Copyright Act but say the proposed amendments include some possibly unforeseen consequences that unduly restrict consumers.

"The amendments, unfortunately, do end up opening the door for copyright holders to sue individuals, and I'm not sure that was what the government intended," says Susan Beaubien, a lawyer with the firm Macera & Jarzyna LLP with nearly 20 years of experience in intellectual property law.

The legislation marks the first time in over a decade for a major overhaul of the country's copyright law. Since that time, changes to internet usage and digital technologies have created concerns for copyright holders, and left many consumers unsure of how to legally use intellectual property.

The government says the proposed amendments in bill C-61 adequately balance the interests of those who use digital technology and those who create it. It includes the following:

- new rights and protections to copyright owners that are in line with internet use and international standards;
- clarification of internet service providers' liability;
- some exceptions for educational and research usage for such things as technology-enhanced learning and interlibrary loans; and
- permission for the specified, private use of some copyrighted material.

"It's a win-win approach because we're ensuring that Canadians can use digital technologies at home with their families, at work, or for educational and research purposes," said Minister of Industry Jim Prentice in a release. "We are also providing new rights and protections for Canadians who create the content and who want to better secure their work online."

Beaubien says provisions for statutory damages in the legislation make it "cost-efficient" for copyright holders to sue individual users.

While in most lawsuits damages must be proven, statutory damages of \$500 each — possibly per copyright, of which there may be more than one per song, for example — in bill C-61 make it more economical for companies to sue individuals, says Beaubien.

"In the case where somebody has downloaded a few songs, well what has been lost in terms of what the record company has lost? They have lost maybe the sale of a CD ... and it's just not cost-effective," she says.

"I think the government intended to deal with commercial piracy, or people who are engaged in copying and reselling or redistributing things," she says.

The proposed amendments also could restrict individuals from making backup or CD copies of music they have purchased online. The bill allows individuals to make copies of copyrighted material they've purchased, but not if a digital lock must be broken to do so. Beaubien suspects copyright holders will respond to the amendments, if they become law, by placing digital locks on all of their materials.

"It's a question of giving with one hand and taking away with the other," she says.

Ronald Dimock, an IP and litigation partner at Dimock Stratton LLP, says the record and publishing industries have been awaiting this type of legislation to regain some equality in the courts.

"The courts have given that balance more, some would say, to the user and to the consumer," he says. "That has been applauded in many areas because of the need for the public to be able to use and advance the arts through being able to access copyrighted work and make use of that in a fair-dealing way."

The lawyers also speculate that the new laws could lead to an influx of new work for IP practitioners.

"If this tends to spark a round of companies saying, 'OK, it's cost-effective to sue individuals,' you may see a lot more of these lawsuits happen," says Beaubien.

"Will that create an upsurge in work for lawyers? I guess it depends, because the people who are going to be sued, if it's just a Joe Blow, are they going to want to spend a lot of money defending an IP case? It's hard to know"

Arid Katz, who holds the innovation chair in electronic communication at the University of Toronto's Faculty of law, says a lack of "underlying principles" within the legislation could create more work for IP lawyers.

"There are a lot of details that will need to be figured out," says Katz. "You might see a lot of litigation on, 'What is the precise meaning of this particular term, what does this mean?'"

Many other regulatory frameworks combine a statute with a regulator that has rule-making powers, says Katz. He says that system offers flexibility for change should regulations prove faulty.

"But here, you have a piece of primary legislation that creates a very detailed arrangement, which then becomes very rigid, because it's not very easy to amend...and they are very complex and incomprehensible [regulations], but the users of them are ordinary people," says Katz. "It's not a very clever way to legislate, regardless of the merits of the amendments themselves."

Mark Hayes, an IP lawyer with Blake Cassels & Graydon LLP in Toronto, says litigators should also take note of the proposed regulations, particularly when compiling evidence.

"Lawyers who have to try to get around digital locks or access controls are obviously going to have to be much more careful than they have been in the past," says Hayes.

He also notes that many of the exemptions in the act are for personal use, and wouldn't apply to lawyers accessing material for their practice.

While the government's proposed amendments to the Copyright Act have been vigorously criticized in the media, Hayes says the greatest threat to the legislation is a pending election. He notes that an election must be called by next spring and could be called as early as this fall.

"I don't think there's any realistic chance that the legislation is going to get passed before this fall," he says, adding that parliamentary hearings on the proposed amendments would stall the process and make it unlikely for the government to push the legislation for acceptance before an election.