

Intellectual Property Update

Because of related content, this newsletter is also being sent to those with an interest in technology and outsourcing law.

Canadian government again proposes amendments to the *Copyright Act*

CRAIG COLLINS-WILLIAMS (ccollins-williams@stikeman.com)

On June 2, 2010, Industry Minister Tony Clement tabled Bill C-32 entitled *An Act to Amend the Copyright Act*, which may also be referred to as the *Copyright Modernization Act*. Bill C-32 represents the Conservative government's latest attempt to implement revisions to the *Copyright Act*. Potential changes to the *Copyright Act* have been the focus of intensive discussion and debate between stakeholders for a number of years. The Conservative government's previous reform attempt, Bill C-61, was introduced in the summer of 2008, but it died on the order paper (before being passed into law) when a federal election was called in the fall of 2008. The previous Liberal government's June 2005 attempt, Bill C-60, also died on the order paper when Parliament was dissolved in November 2005.

Growing pressure from the European Union and the United States, which view the Canadian *Copyright Act* as inadequate to protect copyrighted material, appears to have prompted the federal government to propose amendments to the Act once again.

While the long awaited Bill C-32 has finally been tabled, no date for second reading has yet been set, and Parliament is set to recess for the summer in a few weeks. However, it has been reported that the federal government is considering sending the bill to a legislative committee over the summer in order to fast-track its progress through the House of Commons. Given that the current Conservative government is a minority government, the bill will require the support of at least one other party to pass. Accordingly, Industry Minister Tony Clement has signalled that the government is open to suggestions for amendments from opposition parties. That said, it is not yet certain whether the complex bill will become law (either in its current form, or with amendments) prior to the next election.

Highlights of the proposed amendments include the following:

- > Protection of Digital Rights Management (DRM). Also known as "technical protection measures" or, more commonly, as "digital locks", DRM is built into digital music, DVDs, and other media and technology products to ensure that they are not subject to unauthorized copying. The proposed amendments include anti-circumvention provisions that prohibit the removal or tampering with DRM. Bill C-32 also proposes protection for Rights Management Information (RMI), which is used to identify the rights holders of an original work or to outline restrictions on use of the copyrighted work. The bill would prevent the removal of, or tampering with, RMI. These digital lock provisions remain largely unchanged from 2008's Bill C-61.
- > "Reproduction for private purposes" provisions would allow individual Canadians to make copies of music and other copyrighted material if the original copy is not an infringing copy, the individual legally obtained the



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This newsletter was prepared by members of the Intellectual Property Group at Stikeman Elliott.

For further information, please contact your Stikeman Elliott representative, the author listed above or any member of our Intellectual Property Group listed at www.stikeman.com

EDITOR: JUSTINE WHITEHEAD
jwhitehead@stikeman.com

original copy other than by borrowing it or renting it, and the individual owns or is authorized to use the medium or device onto which the copy is reproduced (such as a computer, iPod or MP3 player) as long as a digital lock is not picked in making the copy. The reproduction may only be used for private purposes and cannot be given away, sold or rented without first destroying all reproductions of the original copy. In addition, these provisions would not apply if the reproduction is made onto a medium that is governed by the private copying provisions currently found at Part VIII of the *Copyright Act*, such as CD-Rs.

- > Education exemptions would make it legal for students at schools and higher learning institutions to download copyrighted information for the purpose of study and research. Schools will also be allowed to transmit materials used in classrooms to students located off-campus to facilitate learning, as long as the material is restricted to students, and in particular, teachers and students will be allowed to use copyrighted material in lessons conducted over the Internet. This applies both to teachers and students in a physical classroom and those who may be viewing recordings of the lessons over the Internet at a later time. Teachers will also be allowed to digitally deliver course content to students, subject to fair compensation to copyright owners. The provisions currently found in the *Copyright Act* allowing parts of a work to be copied for display to students will be amended so that they are technologically neutral.
- > Time-shifting provisions allow for the making of one recording of communication signals or programs for private purposes. The time-shifting recording must be obtained from a legal source and used only for private purposes. As well, technical protection measures could not be circumvented to make the recording, and the recording cannot be kept “longer than is reasonably necessary in order to listen to or view the program at a more convenient time”.
- > A “Notice and Notice” regime for Internet Service Providers (ISPs), whereby ISPs, after being notified of infringement allegations by a rights holder, would be obligated to notify the relevant subscriber of the allegations received. ISPs would also be obliged to retain records that would enable the identification of the subscriber allegedly engaged in the infringing activity for a period of six months (or one year, if infringement proceedings are commenced in respect of the claimed infringement within six months of the initial notice from the rights holder).
- > A change to the provisions on statutory damages for non-commercial infringement from a current maximum of \$20,000.00 for infringement of each protected work, to a maximum of \$5,000.00 in respect of all infringements involved in the proceedings for all works or other subject-matter. Moreover, if a plaintiff elects statutory damages for non-commercial infringements, it will be barred from collecting statutory damages from that defendant for any other non-commercial infringements occurring before the proceeding began, and no other copyright owner may elect statutory damages against that defendant for non-commercial infringements that were done before the initiation of the proceedings in which statutory damages were elected.
- > Fair dealing exceptions, which permit use of a copyrighted work without permission of the copyright owner, have been expanded to include uses for the purposes of education, parody or satire in addition to the current reference to research or private study. While procedurally, a defendant is required to prove that his or her dealing with a work has been fair, the Supreme Court of Canada has noted that the current fair dealing exception is a user's right, and should not be interpreted restrictively.
- > An exemption from copyright infringement for using pre-existing works to create new works, defined as “user-generated content”. This exemption is only available, however, if the use of the copyrighted work is done solely for non-commercial purposes, does not have a substantial adverse effect (financial or otherwise) on the exploitation of the existing work (including that the new work isn't a substitute for the existing one), and a requirement (if it is reasonable in the circumstances) to mention the sources of the works incorporated in the new work.
- > The amendments make it clear that temporary reproductions for technological processes are not copyright infringements if the reproduction is essential to the technological process, exists only for the duration of that process, and the only purpose of the reproduction is to facilitate a use that isn't an infringement of copyright. Similarly, the amendments make clear that an Internet service provider who caches a work to make the telecommunication of the work more efficient, does not, by virtue of that act alone, infringe copyright.

The government has characterized Bill C-32 as a “balanced” approach to copyright, and that assessment will likely be critically evaluated and commented on by various stakeholders in the coming months. We will continue to review and monitor the progress of this proposed legislation, and will provide you with further updates as the bill progresses through the legislative process.