Cases, legislation deliver jolt to copyright law

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Copyright used to be the kinder, gentler area of IP law, where nothing much ever happened. All that has all changed.

To begin with, the Copyright Act has just been overhauled by a complex package of amendments known as Bill C-32, which mostly became law in April (some of is not yet been proclaimed). There have also been some court cases lately, which illustrate the increasing importance of copyright in the age of software and databases.

Bill C-32 is long and involved. Probably the two most important changes are the creation of "neighbouring rights" and the "blank tape levy" (the latter not yet proclaimed in force).

What both of these boil down to is that money will be extracted from one sector of the economy and transferred to another, under the watchful eye of the Copyright Board. This federal tribunal which has existed since the late eighties, but now has greatly increased, some might say excessively sweeping, powers.

In the case of neighbouring rights, cash will be paid by users of sound recordings such as broadcasters, the movie industry, discos and so on, and to performers and "makers" i.e. producers of sound recordings. This means more money for starving (and not-so-starving) musicians and record companies.

Users such as radio stations have always had to pay the authors of the words and music of a song if it's played on the air. The proceeds are collected by a "collective" called SOCAN on behalf of authors, pursuant to a tariff. Now, the same users will have to pay more, the extra going to "performers" (the singer and other musicians on the record) plus "makers" (the producer or record company that paid for the recording to be made). How much more is up to the Copyright Board.

Performers and makers will be represented by new collectives. The English language one is called the Neighbouring Rights Collective of Canada, or NRCC, which, together with its French-language counterpart, has already filed a tariff with the Copyright Board.

Hearings will take place before the Board sometime in 1998, and the Board will decide in effect how much money will change hands.

Neighbouring rights, like cappuccino and expresso, are an import from Europe, where they have existed for years. The 1961 Treaty of Rome requires all signatories to have such rights in their domestic laws, but the US never signed, and does not have any equivalent of neighbouring rights.

Bill C-32 also creates a new right known as the "blank tape levy", not yet proclaimed. Assuming it becomes law, anyone who buys a blank cassette tape, or anything capable of holding a recording, will dish up extra money at the time of purchase. The money will then find its way to performers, makers, and authors, as compensation for unlicensed home taping. The levy may become law in early 1998. It is not yet known how much the levy will be, or precisely who gets the money. Again, it's all up to the Copyright Board.

Then there are the copyright cases I mentioned. Two recent copyright cases deal respectively with compilations and software.

The compilations case is Tele-Direct Publications Inc. v. American Business Information, released by the Federal Court in late October, 1997. Tele-Direct markets Yellow Pages directories, and sued its competitor American Business, which Tele-Direct said infringed its copyright by grouping listings in its directory under the same headings used by Yellow Pages.

The Federal Court of Appeal upheld the trial court, which dismissed the claim, finding that Yellow Pages' method arrangement of the data was common in the industry, and therefore Tele-Direct had not demonstrated the necessary degree of skill, judgment or labour to make its compilation an "original" work, capable of attracting copyright protection.

"Essentially, for a compilation to be original, it must be a work that was independently created by the author and which displays at least a minimal degree of skill, judgment and labour in its overall selection or arrangement. The threshold is low, but it does exist," wrote Mr. Justice DéCary, in a decision that seems to reaffirm the existing law.

Another interesting case is Teklogix v. Wavenet International Inc. et al., an interlocutory injunction case released in September which deals with the difficult copyright issues that arise when software is similar, but not identical, to pre-existing software. It's of interest because there is a lack of Canadian caselaw on copyright as it affects software.

Former employees of Teklogix, which markets "wireless computer products" started a new company, Wavenet. Teklogix claimed Wavenet's competing software operating system infringed copyright in its operating system. There was exhaustive expert analysis of the similarities in the two operating systems. The plaintiff's expert said there had been "extensive copying". Justice Cumming of the Ontario Court (General Division) seemed

to agree, but nevertheless dismissed the interlocutory injunction application, on the grounds that irreparable harm had not been demonstrated by Teklogix. Counsel for Teklogix John Adams tells me that he expects the case will go to trial sometime in 1998. If so the decision is likely to be an interesting one.