LEGAL EYE

by Michael Bergman

The Maypole month brought with it two federal government initiatives which affect the arts and cultural communities of Canada amongst others, the first reading of a bill to amend the Copyright Act and the government's response to the report of the Standing Committee on Communications and Culture on taxation of artists and the arts. The former being statutory is of the most immediate impact, the latter being a report is only an indication of the government's intentions. Both these initiatives are hesitant and do not live up to the hopes generated by advanced billing.

The bill to amend the Copyright Act provides essentially for four significant changes to the current law: the recognition of moral rights, the recognition of copyright in computer programs, the improved powers for the Copyright Board to determine disputes and fix tariffs and the creation, or enhanced recognition of, performing rights societies or other entities to sell rights in artistic works and collect royalties. Missing from the bill are a substantial portion of the recommendations of the Parliamentary Sub-committee Report respecting provisions covering copyright in broadcasting, satellite retransmission, cable television and creating a copyright for every creative person that has input into an artistic endeavour, for example, the copyright of the performer in his performance. These omissions leave unanswered, significant and difficult issues particularly in the area of broadcast rights and satellite retransmission, areas of not only national but international concern. The Bill then does not address an area where technological process has superseded not only the wording of the original Copyright Act of the '20s but even of the new amendments if passed. In that context the omission can operate as a retardant on the growth of broadcasting and satellite telecasts since the problems of piracy, unauthorized use or the lawful use without reward to the creator or originator remain if not unacceptable then unpoliced and unregulated.

The inclusions in the Copyright Amendment Bill do address areas long outstanding. The recognition of moral rights which cannot be assigned although they may be waived is significant. This provision may have the effect of reordering the conceptual nature of copyright away from the American reward for the owner-who-is-not-necessarily-the-author concept to the European authors' - rights - even - when - not-owner approach. The Bill limits the definition of the infringement of moral rights to distortions, mutilations, modifications or the use of the work in association with a product, service, cause or institution which prejudices the honour or reputation of the author. As a result, there arises a distinction between the integrity of the work and the artist's honour and reputation. Since there may be cases where an author's honour and reputation are not congruent with what is done with his work, the moral rights defined are an attempt to protect the author but not the work of art. In turn this raises the question of whether or not these moral rights can be enforced by the estate of the author after his death. If they are rights which are purely personal to the author it is unlikely that they are transmissible by death. It is sometimes said that a work of art represents part of the artist's very being. If moral rights are not transmissible to the deceased's estate then something of the work also passes with the passing of the creator.

The government's response to the report of the Standing Committee on Communications and Culture concerning

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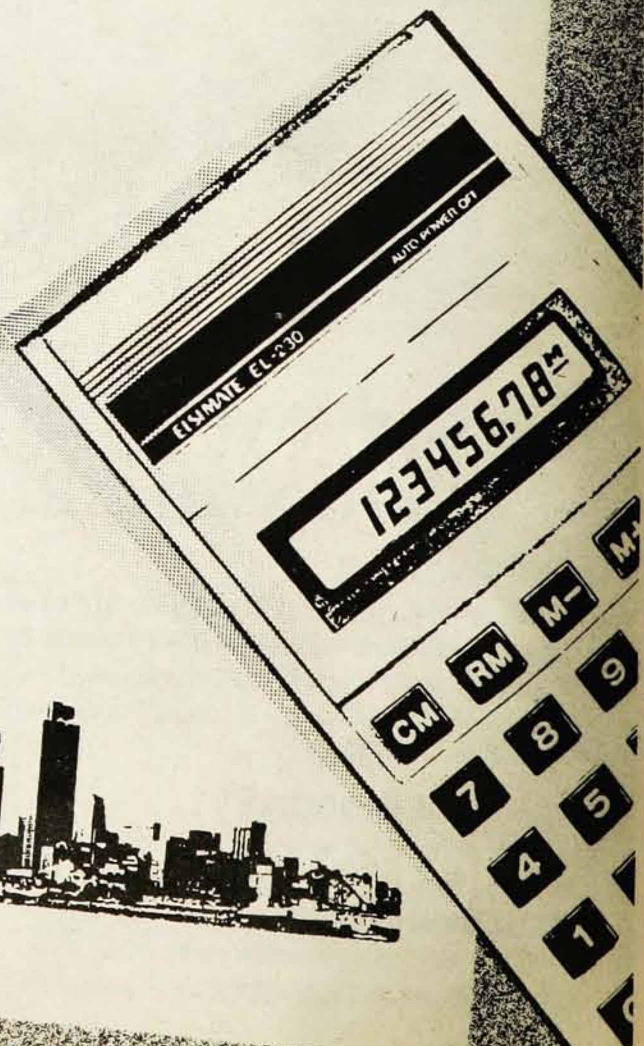

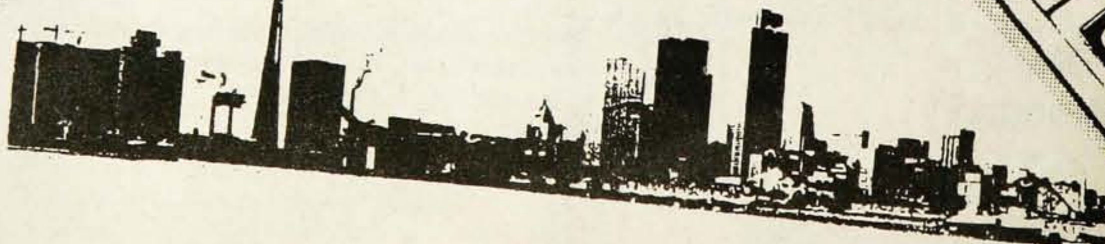

taxation of the artist is of necessity an inconclusive document since it is not a piece of legislation or proposal for income tax regulation change. Nevertheless it is significant because it indicates that the government will not adopt in substance the recommendations of the Standing Committee on this issue. One of the significant recommendations of the committee was the inclusion of a definition of professional artists in the Income Tax Act. At the moment the concept of professional artists for taxation purposes is somewhat defined in a Revenue Canada Income Tax Bulletin. These bulletins are advice to the public of the administrative policies and interpretations which Revenue Canada places on certain elements of taxation matters. The government insists that the use of an interpretation bulletin to define professional artist is a much more flexible approach than embodying the definition in a Statute since a bulletin can be adjusted easily and at will. The real advantage to the government however of declining to include a definition of professional artists in the Income Tax Act is that the inclusion would tend to create a new class of individuals for taxation purposes and therefore ultimitely give rise to a new taxation regime applicable to that class of individuals. This would tend to open the door for a number of the taxation schemes suggested in this Siren, Gelinas Report on the status of the artist.

It is evident that the government prefers to effect any tax changes to the benefit of artists in the context of the taxation system generally as it applies to all Canadians and without establishing the new concepts necessary for the unique situation of artists. Typical of this attitude is the government's response to the Standing Committee's recommendation for the use of block averaging and the modified accrual basis of accounting. The government says that block averaging is a concern of a broad class of taxpayers and not only artists and is a matter under study within the context of tax reform. This is notwithstanding that the government has created these exceptions both for farmers and fishermen. Stopgap measures such as permitting artists to show a nil inventory is no permanent solution.

The government sees the problem of deducting expenses incurred to make use of grants and allowances as a matter already dealt with under existing taxation rules and for which no substantial change is necessary.

The government's response to the subcommittee's recommendations strongly suggests that artists will not ultimitely benefit from any taxation scheme designed for their specific benefit and taking into account the unique aspect of their operations, rather artists will probably be blended into the general taxation system under tax reform. They will have to hope that tax reform changes the rules of the game sufficiently that they could take advantage by coincidence of the new taxation structure although that structure may have not been designed to address their specific needs.

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