



August 6, 2004

VIA EMAIL TO: [FR0436@ustr.gov](mailto:FR0436@ustr.gov)

Ms. Sybia Harrison  
Special Assistant to the Section 301 Committee  
Office of the United States Trade Representative  
1724 F Street, NW  
Washington, DC 20508

Re: Special 301 Out-of-Cycle Review;  
Identification of Countries Under Section 182 of the  
Trade Act of 1974: Request for Public Comment for  
countries that deny adequate and effective  
protection of intellectual property rights or deny fair  
and equitable market access to U.S. persons who  
rely on intellectual property protection in Israel, 69  
Fed. Reg. 42077 (July 13, 2004).

Dear Ms. Harrison:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Out-of-Cycle Review (OCR) of Israel's status under Special 301.

The IIPA is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. The IIPA is comprised of six trade associations: the Association of American Publishers (AAP), the Business Software Alliance (BSA), the Entertainment Software Association (ESA), Independent Television and Film Alliance (IFTA), the Motion Picture Association of America (MPAA), and the Recording Industry Association of America (RIAA). These member associations represent over 1,300 U.S. companies producing and distributing materials protected by copyright laws throughout the world – all types of computer software including business applications software and entertainment software (such as videogame CDs and cartridges, personal computer CD-ROMs and multimedia products); theatrical films, television programs, home videos and digital representations of audiovisual works; music, records, CDs, and audiocassettes; and textbooks, tradebooks, reference and professional publications and journals (in both electronic and print media). IIPA has been actively engaged in efforts to improve copyright protection and enforcement in Israel for many years.



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When Ambassador Zoellick announced, on May 3, 2004, that it would place Israel on the Watch List and conduct an OCR on Israel, he noted:

Israel is being maintained on the Watch List due to continuing serious U.S. concerns regarding ... national treatment for U.S. rights holders in sound recordings. Israel has ... offered assurances in the past that it would take no action to affect its policy of national treatment copyright protection for U.S. producers of phonograms. ... Regarding the national treatment issue with respect to copyrights in sound recordings, new provisions in Israel's draft copyright bill, coupled with Israel's failure to provide clarification on the future status of national treatment, run counter to Israel's previous assurances and have reinforced U.S. concerns that it could cease national treatment protection for U.S. rights holders. An out-of-cycle review will be held this summer to assess whether Israel has made sufficient progress in responding to U.S. concerns ... in ensuring that Israel will continue to provide national treatment for U.S. rightholders in sound recordings, and to consider whether Israel's Special 301 status should be changed.

See <http://www.ustr.gov/reports/2004-301/special301-wl.htm#israel>.

IIPA recommends that USTR place Israel on the Priority Watch List during this Out-Of-Cycle Review.

### **National Treatment for U.S. Sound Recordings in Israel**

IIPA was very pleased to learn of the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the matter of IFPI-Israel. That court, notwithstanding the Ministry of Justice's proffered opinion that U.S. sound recordings are not protected in Israel, decided in favor of IFPI-Israel, and confirmed copyright protection for U.S. and other foreign phonograms, as well as the application of the 30-day simultaneous publication principle. The judge specifically held that the U.S.-Israel Bilateral obligates Israel to provide national treatment to U.S. sound recordings.<sup>1</sup> The Court stated: "we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel."

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<sup>1</sup> The Court quoted the Israeli Ambassador in Washington's letter which was deposited with the Secretary of State in May 1950 as part of an exchange of letters, as follows:

With a view to clarifying the benefits in Israel of authors and proprietors in the United States of America since May 15, 1948, my Government has instructed me to state its assurances that under the provisions of the Israeli law all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, *including mechanical reproductions of musical compositions*, and that citizens of the United States are entitled to obtain copyright for their works in Israel on substantially the same basis as the citizens of Israel, including rights similar to those provided by section 1(e) of the aforesaid title 17. [emphasis added]



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Notwithstanding the decision of the Restraints-of-Trade Tribunal in Jerusalem, IIPA is extremely disappointed that the Government of Israel (including the Ministry of Justice) has yet to confirm that it will retain national treatment for right holders in sound recordings. Any action by the Government to remove such protection would represent an overt abrogation of Israel's bilateral obligations with the United States, as now confirmed and determined by the Israeli's own judicial system. In particular, any proposals put forward to deny national treatment to U.S. sound recordings must be rejected by the Israeli government. Now that the courts have spoken in Israel, IIPA looks forward to the Israeli Government putting this issue behind it.

### **Copyright Law Amendments in Israel Take Steps Backward**

In 2003, the Ministry of Justice released a draft Copyright Law, 5764 – 2003, which was intended to replace the older regime with an integrated, modern copyright law. The draft law shares many similarities with the current legal regime, and makes some notable improvements (e.g., term extension for most works to life of the author plus 70 years, an exclusive WIPO treaties-compatible “making available” right, an infringements/remedies section which folds in 2002 amendments, good presumption of ownership of copyrighted materials, etc.). However, it is most unfortunate that, for a draft that has evolved over seven years, the government of Israel still has not taken the opportunity in this drafting process to attempt full implementation of the WIPO “Internet” treaties, the WCT and WPPT. In particular, and most fundamentally (and not mentioned in the following), the draft does not deal at all with the use of technological protection measures through the prohibition of trafficking in circumventing devices. In addition, the draft does not address the liability of intermediaries, i.e., ISPs, in connection with the transmission of infringing materials. The Israeli law should not, for example, leave unclear the consequences (in terms of liability for infringement) for a service provider who fails to promptly take down an infringing site. An effective response to the challenge faced by the changing nature of digital copyright piracy in Israel will require both new legal tools and substantial improvements in current enforcement practices. IIPA is perplexed at the Israeli Government's decision not to deal with ISP liability at a time when Internet piracy is becoming, or has become, the single greatest threat to the viability of copyright.

Instead, the draft seems more focused on reviewing existing rights with a highly disturbing tendency to erode and undermine the protection granted to certain specific groups of right holders. We urge leaders in Israel to reconsider what a truly big mistake the Ministry of Justice is making in not preparing its laws for the world of electronic commerce. It is not only the world's copyright community that will suffer from lack of an adequate legal framework, but Israeli authors, creators, musicians, film-makers, and artists that will have to live with this legal vacuum in a rapidly changing technological marketplace. The following are some main points regarding the draft:

- **Broadcasting or Public Performance Compulsory Remuneration – the Need for Equal Treatment for U.S. Sound Recordings:** Section 20 of the draft establishes a weak



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remuneration right for the broadcasting or public performance of a record. This would replace the existing exclusive right, which is based on the Berne Convention. U.S. sound recordings were long protected and continue to be protected in Israel as works. Royalties have long been paid for these uses and they must continue to be paid to the right holders in U.S. sound recordings.<sup>2</sup> The U.S. and Israel committed to provide national treatment to each other's nationals, through the U.S.-Israel Bilateral Copyright Agreement of May 4, 1950. That Agreement consists of an exchange of notes between then U.S. Secretary of State Dean Acheson and Eliahu Elath, then Ambassador of Israel. The Agreement provides assurances from the government of Israel that “all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions.” The 1950 Bilateral has never been superseded or amended, so that the operable language is still in force. The change announced by the Ministry of Justice would, without any proper justification, after more than half a century of strong copyright protection, degrade the rights in phonograms to mere neighboring rights, covered by a seriously outdated Rome Convention of 1961, and effectively result in the abolition of any right in broadcasting and public performance for U.S. right holders.<sup>3</sup> Using the Rome Convention as an excuse to curtail existing rights of phonogram producers would be ironic and be against the spirit and objective of the Rome Convention, which was meant to enhance the level of protection and explicitly states that it cannot prejudice existing rights and protection. Taking away established exclusive rights and providing limited remuneration claims instead will significantly reduce the return from the use of recorded music, very much to the detriment of the US music sector.

- **Excessive State Intervention in Collective Management of Rights:** The draft introduces the idea of creating a joint collecting mechanism, under which royalties for public performance and broadcasting would be administered by a single “umbrella organization” which will collect for all copyright and performing rights societies. Such an umbrella organization would be authorized by the Minister of Culture and its terms of operation set by the Minister.<sup>4</sup> Mandatory collective management of this sort disregards the basic principle of freedom of association, disregards the specific characteristics and economic interests of each right holder group, and runs counter to any known established practice in the world, particularly in the United States and in Europe. Right holders are entitled to decide individually and freely about the organization that will represent their rights and with which

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<sup>2</sup> The Israelis’ argument is undoubtedly that, applying Section 9 of the draft law, they would be able to deny sound recordings payment of remuneration for broadcasts or public performances under Section 20. They will argue that this would not be a violation of the Rome Convention (and is subject to the exception to National Treatment – Article 3 of TRIPS); but non-payment would amount to a violation of Israel’s longstanding 1950 bilateral agreement with the United States, by which they expressly agree to accord national treatment to “mechanical reproductions of musical compositions.”

<sup>3</sup> It is important to note that users are currently paying for U.S. repertoire, so the replacement of the current regime and exclusive rights in sound recordings with the remuneration right will essentially change what has been the Israeli policy for more than 50 years. Once the ‘new’ points of attachment are established, and assuming the Ministry of Justice’s view is that U.S. repertoire is excluded from the new broadcast and public performance protection, users will immediately stop paying for U.S. music. This could bog down the music collecting society in court proceedings and hinder royalty collection altogether.

<sup>4</sup> See Section 20(a) of the Draft.



(other) organization their representative body may or may not cooperate in certain specific circumstances. The current initiative is another illustration of a growing government policy aimed at seriously weakening the interests of certain copyright owners.

- **Coverage of End-User Piracy:** It appears that the draft law, by changing the language in Section 60(A)(2) from “possession for commerce in [the infringing copy]” to “possession for a business purpose” may be broad enough to cover the unauthorized use of business software in a business setting (albeit with the necessity that the company be found in possession of an infringing copy). Unfortunately, the criminal provisions in Section 71(D) do not criminalize end-user piracy. This exclusion makes it legally impossible to take criminal actions against corporate end-user pirates, which most likely leaves Israel’s law in violation of TRIPS.<sup>5</sup>
- **National Treatment/Reciprocity:** Section 8 sets out that Israel will provide “point of attachment” through a Ministerial order to WTO members (i.e., to members of “convention[s]” to which Israel is a party), and then provides the equivalent of national treatment (therefore, U.S. works will be protected as if they were Israeli works, and are to be protected in line with a treaty to which both the U.S. and Israel are party, even if that goes beyond the scope of Israeli law). Unfortunately, Section 9 provides an exception to Section 8 that allows the Minister of Justice to limit protection to material reciprocity if the country “does not provide appropriate protection to the works of authors who are Israeli citizens” and “to limit by order all or some of the rights determined in this law to the works of authors that are citizens of that country.” This provision violates Berne and TRIPS to the extent its application results in the failure to accord national treatment as required under those agreements.<sup>6</sup>
- **Temporary Copy Protection:** The definition of “copying” in Section 11 includes “[s]toring the work by an electronic means or another technological means.” While this statement does not expressly protect “temporary” copies, the statement is very close to the second sentence of the Agreed Statement of Article 1(4) of the WIPO Copyright Treaty (and the analogous statement in Articles 7, 11, and 16 of the WPPT), which interprets Article 9(1) of the Berne Convention (the reproduction right). As Dr. Mihály Ficsor has noted, the “concept of reproduction under Article 9(1) of the [Berne] Convention, which extends to reproduction ‘in any manner of form,’ must not be restricted just because a reproduction is in digital form, through storage in an electronic memory, or just because a reproduction is of a temporary nature.” Therefore, it can be interpreted that the Israeli draft would protect temporary copies. Further support that this provision would suffice to cover temporary copies is the exception

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<sup>5</sup> A more detailed discussion of the lack of a criminal remedy against end-user piracy is in the 2003 Special 301 report for Israel, at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-149.

<sup>6</sup> The provisions on the qualification for copyright protection are not consistent with the obligations arising under Article 3.1(a) of the Berne Convention, to which Israel is a party. That Berne provision requires that protections of the Convention apply to “authors who are nationals of one of the countries of the Union, for their works, whether published or not.” In other words, Israel must provide full national treatment for foreign copyright owners from Berne Union countries.



in Section 31, which exempts from liability certain limited “temporary copies.” It would still be preferable for the phrase “whether temporary or permanent” to be added to Section 11(1).

- **Exceptions in General:** In light of the long list of exceptions, it is essential that the law implement expressly the well established Berne “three-step test” (incorporated into TRIPS). Some of the exceptions listed in the draft appear to be very broad and are likely to damage the interests of copyright owners, especially in the digital environment. The exception for “incidental” copies needs further limitation.
- **Overly Broad Secondary Retransmission Compulsory Remuneration:** While Section 13 of the draft provides a broad exclusive broadcast right as to wire or wireless transfers of sounds or sights to the public, that right is then severely curtailed by the establishment in Section 18(A) of a compulsory remuneration (“in the absence of consent”) that may go beyond what is permitted under the Berne Convention (to the extent that Internet transmissions and foreign satellite transmissions are subject to the compulsory license). The broad wording of Section 18(A) must be trimmed to exclude Internet broadcasts or foreign satellite broadcasts from being subject to “secondary broadcast” without permission from the copyright owner.
- **Overly Broad Exception as to Computer Programs:** Section 29(A) creates an overly broad exception for the purpose of making backup copies of computer programs. It permits the “copying of a computer program for backup purposes, by a party that possesses an authorized copy of a computer program.” This exception does not restrict the number of copies that can be made, however, nor does it limit the use of such copies. Experience demonstrates that pirates will take advantage of this lack of clarity to claim that illegal copies, offered on burnt CDs for resale, are permitted back-ups. Sections 29(B) and (C) attempt to create an exception for decompilation of a computer program, but the provisions are overly broad and, as written, violate the Berne Convention (and TRIPS).<sup>7</sup> The provision allows reproductions

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<sup>7</sup> As an example of a provision that satisfies international discipline, *see* Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, O.J. L. 122 (1991), art. 6:

Article 6 Decompilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:
  - (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;
  - (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and
  - (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
2. The provisions of paragraph 1 shall not permit the information obtained through its application:
  - (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
  - (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
  - (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.



or adaptations of a software program to be made to permit “adaptation to another software program or to another computer system, for the use thereof” or to permit “adaptation of another software program or computer systems to work with the software [being copied].” The limitations imposed in Section 29(C) do little to narrow the provision’s scope. As drafted, Section 29 would appear to permit decompilation of software for many purposes that are unrelated to achieving interoperability. The provision should be reworded to more closely reflect generally accepted standards such as those articulated in Article 6 of the EU Computer Programs Directive.

- **The Temporary Copy Exception in Draft Section 31 Should Not Apply to Software:** Consistent with the legislation on which it is based (the EU Copyright Directive), the temporary copies exception should not extend to software. There is scope for confusion and harm if overly broad drafting extends the temporary copy exception to software, inconsistent with policy in other jurisdictions.
- **Exception for “Permitted Uses in Educational Institutes” Is Overly Broad:** The proposed exception in Section 35(A) of the Israeli draft is overly broad and a violation of the Berne Convention and the TRIPS Agreement. While Israel may craft exceptions in special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder, Section 35 clearly does not pass that test.<sup>8</sup> Insofar as the exception may apply to all works (including software), this exception could lead to the unlimited copying of works under the guise of an educational exception, and goes far beyond

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3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

<sup>8</sup> The following is a non-exhaustive list of issues:

- First, the exception is seemingly boundless as to both “reproduction” and creation of “derivative” works as long as those are done in an educational context and are “justified” – a completely undefined but clearly overly broad criterion. Berne and TRIPS do not permit such broad exceptions.
- Second, the exception is in no way limited to the analog, face-to-face, educational setting, thus clearly contemplating digital copies (the explanation of the draft confirms that this exception applies to digital), or worse yet, derivative works in a digital format without the authorization of the right holder.
- Third, one of the criteria set out to determine whether the use of the work in the education setting is justified is “[t]he existence of a reasonable possibility of receiving permission for use.” We are uncertain as to the meaning of this passage. It could mean that if the use by the educational institution was one in which the user would be able to get permission from a reprographic rights organization (RRO), then the user may avail him/herself of the exception and use it for free! Or it could mean the opposite, i.e., where there is no reasonable possibility, then the exception may be invoked. In either instance, this criterion is unacceptable.
- The exception in Section 35(B) which would allow anthologizing of “passage[s] from a published work” also has some problems (for example, we are unclear as to the meaning of “not published for the purpose of teaching in educational institutes” but it appears that would apply to any publication other than textbooks).
- The exception is unacceptably broad in that it imposes no limit whatsoever on the length or substantiality of the portion of the work copied.
- Finally, it should be noted that Section 35 applies to the reproduction or creation of derivative works of all kinds, including audiovisual works, computer programs, sound recordings, as well as books.



what a “distance-learning” type exception may contemplate and remain consistent with international standards.<sup>9</sup>

- **The Exception as to Public Performances of a Work [Section 35(C)] Impinges on the Berne Article 11 Right and Must be Deleted.**
- **Term of Protection:** IIPA is heartened that the government of Israel has decided to extend term of protection to “life of the author” plus seventy years. There is no reason to afford shorter protection to the owners of audiovisual works and sound recordings.<sup>10</sup> The international trend is to provide at least seventy years for both audiovisual works and sound recordings, and the government of Israel should not do the creators of audiovisual works and sound recordings the extreme disservice of prejudicing them by providing shorter terms.
- **Parallel Importation:** Of any country, it would seem that there is no question that Israel should retain parallel import protection. Israel is a relatively developed market that receives substantial imports of unauthorized editions or works from locales like Russia, or from the Palestinian territories, or from other nations. The negative effects of lifting parallel import protection in Israel will undoubtedly be twofold: 1) increased “mixed” shipments of piratical and parallel imports “disguised” as parallel imports (IIPA has anecdotal information of such shipments in countries that newly lifted restrictions on parallel imports); and 2) destruction of local distribution networks, and resulting loss of jobs and revenue to Israelis who now participate in the market for copyrighted goods.
- **Remedies:** Section 66(c) of the draft law defines as a single infringement “a number of infringements committed as part of a single group of acts.” Under this definition, the making of countless copies of numerous titles could be a single infringement for purposes of statutory damages, a clearly unreasonable result and in violation with Israel’s commitment under Article 41 of TRIPS. Section 66(a) eliminates the current minimum statutory damages award that can be obtained. The potential for little or even no recovery where infringement has been proven seriously weakens the deterrent impact of statutory damages and is against the principles set forth in Article 41 of TRIPS. Moreover, Section 70(a)(2) of the draft law gives courts the discretion to make the transfer of infringing copies to the plaintiff contingent upon the plaintiff’s paying the defendant the value of the copies had the infringement not

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<sup>9</sup> Public Law 107-273, the Technology Education and Copyright Harmonization Act 2002 (the TEACH Act), creates exceptions for use of copyrighted materials for distance learning. By comparison with the Israeli bill, the TEACH Act creates exceptions that are appropriately narrow for the purposes it sets out to achieve. The Israeli government should, to avoid going afoul of well established international standards, including the three-part test of the Berne Convention (and Article 13 of TRIPS), rework its proposed exception so that it is narrowly tailored and can satisfy international standards.

<sup>10</sup> Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety five years from publication.



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occurred. This means rights holders in some cases must pay the infringer's costs for the infringement; the more sophisticated the infringer is and the more costly the underlying infringing copies are, the greater the cost to the rights owner. This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods "without compensation of any sort."

- **Israel Should Confirm that Infringements Are Covered Even When Not for Profit:** The references to "business aim," "commercial scale" and "commercial matter" are problematic in the digital environment. This is particularly relevant where an infringement is severely prejudicial to copyright owners, for example, uploading pre-release films on to the Internet. Often such actions are undertaken with no "business aim" but cause enormous harm to right holders. Such infringements must be covered notwithstanding that they are not done for a profit motive.
- **Definitions:** In the interest of legal certainty, IIPA recommends more specifically defining "film producer,"<sup>11</sup> and defining "creators" (in particular in the section on moral rights). IIPA recommends using the same definition ascribed to "authors" in the British law.

## Conclusion

IIPA believes that, overall, the failure of the Israeli Government to confirm that it will retain national treatment for right holders in U.S. sound recordings, and the disturbing trend demonstrated in the draft Copyright Law, 5764 – 2003 to weaken copyright protection, warrants Israel's placement back on the Priority Watch List in the Special 301 process. IIPA plans to closely monitor developments during the next several weeks to ascertain 1) whether the Israeli Government decides to take on the view that national treatment should be afforded to right holders in U.S. sound recordings, and 2) whether there is any indication that the Israelis are considering legislation which strengthens protection for copyright, including in the critical areas of e-commerce, anti-circumvention protection, and ISP liability. IIPA stands ready to offer any further information or assistance that USTR may require in making the Out-Of-Cycle Review decision.

Respectfully submitted,

Michael Schlesinger  
Vice President and Associate General Counsel

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<sup>11</sup> The current draft defines the "producer" of an audiovisual work as follows: "whoever is responsible for the performance of the actions needed for the creation of the audiovisual work of art or the record, as may be the case". We recommend revising this proposed definition and more specifically defining producer to promote legal certainty. We suggest that the definition states that the producer is the "physical person or legal entity that takes the initiative, organization and responsibility for the production and publication of the work."