

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY¹

IIPA recommends that USTR make no determination on Israel at this time, and therefore, leave Israel on the Priority Watch List.

Until the outbreak of violence in September 2000, IIPA continued to focus its concern on Israel's failure to devote needed police and prosecutorial resources to the fight against pirate production and retail piracy, both for domestic consumption and for export. In addition, Israel has not enacted and implemented comprehensive optical media regulations, notwithstanding that such a set of regulations would be relatively easy to pass and implement (requiring far fewer resources than are now required to chase pirates distributing the product of those plants), and would go a long way to eradicating the chief concern of the copyright industries. Notwithstanding the current crisis, IIPA calls upon Israel to do what other countries and territories have done to defeat their optical media pirate production problems, namely, enact and implement a full slate of optical media regulations, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes; then, Israeli authorities must, when conditions permit, conduct raids on plants producing unauthorized product, seize infringing copies and machinery, and impose criminal penalties to deter the organized manufacturing and distribution of pirate product. These are not difficult or complicated measures (indeed, they make enforcement easier, by reducing proof burdens associated with copyright infringement); they merely require government will on the part of the Israelis. While IIPA recognizes that the current situation does not make it possible to fairly consider Israel's status, as soon as conditions permit, the situation in Israel should be reevaluated.

Estimated trade losses to the U.S. copyright-based industries (reporting losses for 2000) due to copyright piracy were well over \$113.0 million in Israel in 2000.

¹ For more details on Israel's Special 301 history, see IIPA's "History" Appendix to filing.

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	50%	15.0	50%	11.0	40%	10.0	40%	10.0	30%	10.0	30%
Sound Recordings / Musical Compositions	45.0	30% ²	70.0	45%	60.0	40%	67.0	30%	92.0	15%	1.3 ³	13%
Business Software Applications ⁴	NA	NA	54.8	44%	47.8	48%	45.0	54%	58.0	71%	38.9	75%
Entertainment Software ⁵	52.0	NA	30.9	54%	28.5	55%	25.6	52%	NA	NA	21.0	40%
Books	1.0	NA	1.0	NA	0.7	NA	NA	NA	NA	NA	0.7	NA
TOTALS	113.0		171.7		148.0		147.6		160.0		71.9	

COPYRIGHT PIRACY IN ISRAEL

Retail Piracy Threatens Israel's Legitimate Market for Copyrighted Goods

The situation for much of 2000 with respect to retail piracy in the Israeli market can be summed up in a sentence uttered recently by a chief industry representative, who said, "[w]henver a newspaper publicizes the release of a new CD likely to be a hit, it's pirated the next day. It takes 24 hours from release to counterfeit. Every successful recording is a candidate." Retail piracy did wane with the onset of violence in the latter part of 2000, but piracy remains one of IIPA's greatest priorities in 2001, as it continues to threaten the domestic market and cause losses due to exports of pirated products transshipped through Israel's borders. There is a very short window (a few days sometimes) for legitimate product to be sold, and on the day pirate product is launched, the legitimate sales spike downward (the same is true for entertainment software, even the games for which enforcement raids are being carried out). The following piracy problems plague Israel:

- **Internet Piracy:** Dozens of Internet sites based in Israel, including one 'community' site, that list which stores have which titles, will custom burn CD-Rs and deliver them anywhere in the world.

² Piracy levels for music in 2000 were around 25% for CDs and a little over 35% for audiocassettes.

³ For 1995, IIPA did not report an estimate for pirate exports as part of the overall losses, which explains the lower figure for 1995 losses due to sound recording/music piracy.

⁴ BSA piracy loss and level estimates for 2000 are unavailable.

⁵ IDSA estimates for 2000 are preliminary.

- **Russian Language Pirated Goods:** Most pirate retail copies of games in Israel are Russian language (and many of the games copied are ones that IDSA members localize into the Russian language). A transshipment network exists where products (including CDs of all kinds, videocassettes, audiocassettes and the like) are either produced in Israel, or produced elsewhere and brought to Israel, possibly involving Russia, the CIS, Ukraine, Turkey, Thailand, Czech Republic, Poland and Hungary. The result is the flooding of the Israeli market by illegal Russian-language software products. Approximately 270 of the 300 Russian-language video libraries throughout Israel are pirate and sourced primarily from the CIS with Russian dubbing.
- **Government Use of Illegal Software:** Although a limited number of government offices have legalized the software they are using, many have not. Furthermore, government software management in Israeli has been implemented in a haphazard way. Israel needs to put into place a formal process or methodology to ensure future purchases of legal software, including making legal use of software a part of the annual audits of government activities.
- **Illegal Public Performances:** Illegal public screenings have become a growing problem in cafes and pubs since the introduction of DVDs, VCDs and new, sophisticated performance equipment.
- **Book Piracy:** Wholesale copyright piracy by otherwise law-abiding institutions such as schools and universities, and wholesale counterfeiting of published books are proliferating problems in Israel.
- **Cable Piracy:** Cable operators in Israel continue to retransmit signals without the authorization of the copyright owners, although broadcast and cable piracy has been minimal since the entrance of new cable companies in the Israeli market.
- **Video Piracy:** Although obviously affected by the current violent unrest (and the sealing of the Palestinian border), prior to September, 4,000 to 5,000 pirate videocassettes poured into Israel from the areas controlled by the Palestinian Authority each day. The problem in retail piracy has become more serious as the number of legitimate stores and libraries (now 120) has decreased (and it is now known that 10% of the "legitimate" stores contain illegal product, often of new releases not yet available on videocassette). Illegal videocassettes are copied over originals and their bar codes are forged to a point where the difference can only be identified by a professional eye. Earlier in 2000, discussions between the Ministry of Trade and Industry and the Palestinian Territories' commercial representatives occurred, and the motion picture industry made presentations about the problem of imported tapes. The industry also gave information to an Israeli Army coordinator who had been charged with coordinating joint security with the Palestinian Authority, including specific information regarding video duplication labs in Ramallah, Betunia, and Tul Karem. When conditions permit, the situation will need to be revisited in part to reassess the risk from the then existing plants.
- **Videomat Piracy:** There are about 240 Videomat machines in Israel, containing approximately 400 cassettes each. To increase their return, Videomat owners have begun to use pirate cassettes of new and pre-video releases in their machines. It is unknown how the current instability has affected sales in these machines, particularly of pirate product.

Optical Media Piracy Threatens Israel's Domestic Market

There are now five known CD plants in Israel, with a capacity of at least 70 million discs (and a legitimate domestic demand of only 6 million music CDs and 14 million units in other media). Pirate product is available on practically every street corner, in every kiosk and at many small town stores. Increasingly, hundreds of stores in major marketplaces, including in Tel Aviv and Herzlia, engage in "in-store burning" of their own CD-R compilations of music, games and business software, putting possibly hundreds of software titles onto a single CD-R. Customers can regularly enter a store asking for a software program or a music album, at which time retailers retreat to a back room and illegally copy the requested software from their computer onto a CD-R. The price for such "custom-made" pirated CD-Rs is a fraction of the retail price. While importation from the Palestinian Territories has largely ceased during the recent unrest, importation into Israel of pirate CDs and CD-Rs, mainly from Eastern Europe, continues largely unabated.

MARKET ACCESS IN ISRAEL

Proposal to Curtail U.S. Programmers' Freedom to Sell Advertising Violates WTO Services Agreement

Israel's Council for Cable and Satellite Broadcasting has proposed a new amendment to the existing Bezeq Law that regulates the pay-TV industry. The amendment would prohibit foreign television programmers from carrying advertising aimed at the Israeli market. The Chair of the Council has indicated that the purpose of the new regulation is to protect six new Israeli cable and satellite channels to be launched within a year from competition for ad revenue. Prohibiting U.S. programmers from selling advertising time would violate Israel's commitments in the WTO Services Agreement to provide full market access and national treatment for advertising services.

COPYRIGHT ENFORCEMENT PRIORITIES IN ISRAEL

The Israeli Government Should Immediately Enact Comprehensive Optical Media Regulations and Cease Subsidizing Known Pirates

As noted above, Israel now has five optical media plants, with a capacity of at least 70 million discs. Israel must recognize its international obligations to ensure that plants operating within its territory with such over-capacity do not produce pirated product that saturates the Israeli market and provides markets outside of Israel with pirated optical media product. In order to ensure that these and future plants do not engage in commercial piracy, the Israeli government should enact and implement a full slate of optical media regulations, including the ability to track the movement of optical media production equipment, as well as the raw materials (including optical grade polycarbonate), and also including the compulsory use of Source Identification (SID) codes; then, Israeli authorities must, when conditions permit, conduct raids on plants producing unauthorized product, seize infringing copies and machinery, and impose criminal penalties to deter the organized manufacturing and distribution of pirate product. As noted above, these are not difficult or complicated measures; they merely require

government will on the part of the Israelis. Again, when conditions permit, Israeli Customs and, where applicable, the Israeli Army, must take swift actions to stop imports and exports of pirated optical disks, with the aim of addressing the problem of illegal CDs and CD-ROMs being imported from areas under the control of the Palestinian Authority.

Of the five known plants, most seem to be compliant with the use of SID code, but one plant refuses to use the SID code altogether. A SID code requirement (in conjunction with a comprehensive optical media regulation) would assist the government and the industry in identifying where particular CDs were manufactured. While IIPA understands that in mid-1999, the Ministry of Industry and Trade agreed in principle that SID codes should be made compulsory in Israel in order to press CDs, the Ministry is apparently waiting unnecessarily for the copyright law to be amended to cover this point. There need be no delay in enacting and implementing such a requirement.

The Israeli Government Must Provide Necessary Police Resources to Raid, then Prepare Evidence to Prosecute Known Pirates

Several years ago, in the face of growing domestic piracy and a lack of adequate resources and expertise to combat it, the copyright industries began calling for the establishment of a special police force, trained in the ways of piracy and able to build cases for prosecutors to bring against commercial pirates. IIPA is pleased to see that this enforcement unit has been expanded, and we look forward to its further strengthening. Two special police units, each comprised of six officers (one in Haifa in northern Israel and one in Tel Aviv in the central area) were established in July 1999, however, given the piracy situation in Israel, this force of 12 officers had little chance against the growing problem on the ground. By 2000 (and before the outbreak of violence between Israel and the Palestinian territories), four special police units had been established with a total of 26 officers. These units appeared to operate relatively efficiently in the Haifa area in the north and in Tel Aviv, but had trouble providing the kind of support necessary to deter piratical activities in most of Israel. The Israeli government had promised that 60 officers would be assigned to these units by the end of 2000, so the units are still dramatically understaffed.

We call upon the Government of Israel to finish the job that it has commenced. Most of the pirates, whether pirate producers, pirate distributors, or pirate retailers, are well known to the police, such as the stalls in Haifa next to the police station, which were finally raided in January 2000. Anecdotes abound of known pirates selling their wares with police onlookers doing nothing (and there have even been reports of some police purchasing pirated goods from the pirate retailers). Further, because of political and security concerns, the year 2000 witnessed a drop-off in police cooperation with the motion picture industry in enforcement efforts, while for the business software industry, the police routinely have failed to pursue the many targets referred to them by the industry. As a result, prior to the outbreak of violence in September, industry noted a marked increase in the number of peddlers selling pirate product, moving from one market to the next on local market days, keeping their stocks hidden in nearby homes or warehouses. All of this piratical activity requires extensive surveillance and investigation to locate the highly mobile businesses and raid them.

When conditions permit, the special police units must be reinvigorated, with proper funding and organization (e.g., with clear powers to seize infringing copies and equipment). Keys to these special police units' success are: 1) creating deterrence in the market through seizures, closures (where

warranted) and administrative penalties (where authorized); and 2) swift prosecutions leading to jail time and fines, based on evidence gathered by the units. In addition, the coordinators of the effort in Israel must locate and identify deficiencies in resources or training within the special police units, as well as within other departments (like the Fraud Investigation Department, which we understand has been merged into a new Intellectual Property Department), and must be creative in finding ways to best utilize the special police units to catch and stop commercial pirates (e.g., police could assist the Finance Ministry in conducting selected inspections of suspect businesses for unpaid taxes/unreported revenues arising from the use of pirated products, initiating criminal cases against such tax evaders).

Additional training may be needed in the area of Internet piracy. For example, in March 2000, the police, in coordination with industry, conducted the first-ever raid against a website. While many unauthorized copies of software were seized, and the website was taken down, the preparation for this raid required a significant amount of unique investigation; training as to this brand of piracy may decrease the amount of resources needed to attack it.

Finally, the police units and others involved in enforcement must come to understand the nature of the illegal products involved, for example, different copyrighted goods have different shelf lives, so for some industries (like the videogame industry) the main object of the raid is to remove pirate and counterfeit versions from the shelves immediately, while for others the main object might be different. For the business software industry, publicizing an end-user raid against a business would be important to deter others from engaging in pirate end-use of software, and to correct the perception that there is nothing wrong with end-user piracy. This goes for police as well as for government officials, such as those at the Ministry of Justice who have questioned the illegality of end-user infringement.

IIPA is heartened by the rechecking and, in many instances, reopening of criminal files previously closed, and understands based on information reported that of 214 files rechecked, that 6 have led to convictions, 23 have led to charges being filed by the courts, 27 have led to charges being filed by prosecutors, 93 are still under open investigation, 31 were closed for "lack of public interest," 12 involve cases in which the offender remains unknown, and 6 are still awaiting for the decision of the police officer. The Israeli government is to be commended for cooperating in ferreting out worthy cases to bring forward criminally, and industry will continue to assist in this regard. IIPA also wishes to acknowledge cooperation from Israeli Customs in the fight against the pirate trade, which has been exemplary and effective.

The following are partial criminal enforcement statistics illustrating the problems in Israel.

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS			
2000			
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE
Number of Raids conducted	NA	91	76
Number of cases commenced	215	NA	76
Number of defendants convicted (including guilty pleas)	40	3	0
Acquittals and Dismissals	NA	NA	NA
Number of Cases Pending	301	NA	76
Total number of cases resulting in jail time	NA	NA	0
Suspended Prison Terms	NA	NA	
Maximum 6 months	NA	NA	0
Over 6 months	NA	NA	0
Over 1 year	NA	NA	0
Total Suspended Prison Terms	NA	NA	0
Prison Terms Served (not suspended)	NA	NA	
Maximum 6 months	NA	NA	0
Over 6 months	NA	NA	0
Over 1 year	NA	NA	0
Total Prison Terms Served (not suspended)	NA	NA	0
Number of cases resulting in criminal fines	NA	NA	
Up to \$1,000	NA	NA	0
\$1,000 to \$5,000	NA	NA	0
Over \$5,000	NA	NA	0
Total amount of fines levied	NA	NA	0

The Ministry of Justice Needs to Devote Adequate Resources to Prosecution of Piracy Cases

During consultations with Israeli government officials (including the Justice Minister) after the 2000 IIPA filing, many in the government openly made statements about several "test cases". The gist of the statements was that the results of those test cases (expected to be decided in mid-2000) would speak for themselves as to the seriousness with which Israel takes the problem of copyright piracy. The fact that there have been no results from these cases (hand-picked by the government, not by industry) is particularly telling. In addition, no software piracy case has ever been prosecuted against an end-user pirate, and only in the rarest of cases have any cases been pursued against illegal resellers (conducted with inadequate staffing and support). As noted above, the Ministry of Justice does not seem to regard end-user piracy as a crime.

In fact, contrary to bold statements about expected convictions to come from the test cases prosecuted, officials behind the scenes have admitted that there would probably be no imprisonments for copyright infringement during the next several years, as judges tend to sentence lightly in Israel (noting that a recent rape conviction only yielded an eighteen month sentence), except in cases like tax evasion. With this type of attitude toward commercial piracy being expressed at the top echelons of the Israeli government, it is no wonder that pirates do not fear being caught. It should also be noted that the excessive requirements in the field of proof of ownership, chain of title and obligations for rightholder representatives to come and testify in person, as well as the systematic failure to mete out

criminal penalties for at least wilful acts of commercial piracy would place Israel squarely in violation of its TRIPS obligations.

Courts Do Not Mete Out Deterrent Penalties

The lack of understanding of the serious nature of piracy extends to the Israeli courts. A private criminal complaint brought in 2000 by a motion picture company against a known repeat offender is quite telling. The defendant in the case had agreed to serve 10 days in jail, but upon the company's going to the court to get a court ruling and seek to enforce the judgment, the judge in the case refused to grant the ruling, eventually setting a fine instead of 16,000NIS (U.S.\$4,000) in eight monthly installments, which will be converted into four days in jail for every installment not paid. The defendant argued vehemently with the judge to send him to jail instead for ten days (the privately agreed-upon term), as he had no money, but the judge refused, making the points that 'no one had ever gone to jail on such a charge,' that 'if it was an important issue, the public prosecutor would have joined the case, but since he didn't, this case should be settled in more of a civil matter,' that 'ten days in jail will not create deterrence anyway and is just a waste of government resources,' and that 'if this really is a serious issue, the government should deal with it, not private companies.'

The above-mentioned case is symptomatic of the problem, namely, prosecutors have shown almost no inclination to undertake criminal enforcement against commercial pirates, and when private criminal complaints are filed, the courts do not take them seriously. Systematic prosecutions resulting from raids and seizures fail to materialize and do not figure in the list of priorities for prosecutors. Prosecutors are notorious for delays – it takes approximately six months for a case prepared for the prosecutors to even proceed to court for the first time. In 2000, defendants received suspended prison sentences of three to nine months and/or fines usually around 12,000 NIS (approximately \$3,000), a totally non-deterrent penalty that in most cases does not even amount to a significant cost of doing business. The number of cases outstanding is still too large (300, some of which date back to 1993).

For the business software industry, only four resellers have ever received prison sentences for copyright infringement, and all four sentences were suspended. To the best of our knowledge, no person in Israel has ever gone to jail for software piracy, despite the initiation of dozens of private criminal actions each year. In the field of music piracy, criminal prosecutions of pirate salesmen, including repeat offenders that have been caught more than 20 times selling hundreds of illegal cassettes and CDs, and of CD manufacturers, are making virtually no progress.

New Committee to Deal with Copyright Enforcement Shows Promise

One positive development in 2000 was the establishment of a forum to work with companies and associations involved with intellectual property under the Ministry of Trade and Industry, including the Ministry of Justice, Customs, Police and the Ministry of Finance. The staff-level Director General is relatively new to copyright enforcement issues, but is eager to put together initiatives that will be effective in fighting piracy in Israel. IIPA understands that this forum is tasked with 1) appointing ministerial managers to work below them on this committee; 2) starting a public relations campaign, to be paid for by the Israeli government, to educate businesses, government and individual consumers about the need to use legal copyrighted goods; 3) issuing a letter to the rest of the government on use of legitimate business software (which IIPA understands has already been done); 4) carrying out training

initiatives for police officers and prosecutors, and carrying out judicial training on adequate sentencing (which, from the anecdotes above, is apparently sorely needed); and 5) arranging for the addition of more special police unit personnel and funding. Through this forum it is hoped that all of the issues in this filing, including the need for comprehensive optical media regulations, imported pirate videos, and other enforcement-related issues, can be raised. IIPA hopes that this forum will also tackle the problem of unclear sentencing guidelines, by including in new guidelines increased fines and prison sentences (without the possibility of suspension). In addition, the forum should work with the Attorney General to issue a directive to prosecutors on the importance of requesting deterrent levels of sentencing in copyright cases.

Following are partial civil enforcement statistics for 2000:

CIVIL COPYRIGHT ENFORCEMENT STATISTICS 2000		
ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	332	11
Post Search Action	275	
Cases Pending		NA
Cases Dropped		0
Cases Settled/Adjudicated	57	4 / 5
Value of loss as determined by Rightholder (\$USD)		less than settle amt
Settlement/Judgment Amount (\$USD)		\$28,900 / NA

Some Gains in Government Software Management

A couple of positive steps have been taken toward legalizing software usage within the Israeli government during 2000. Ministry of Industry and Trade officials informed IIPA that they assisted the Israeli Defense Force in legalizing software usage in 2000, procuring 50 Million NIS (about U.S.\$12.5 million) for legalized software on thousands of computers. It is our understanding that the government has been working on a decree that will mandate that only legally acquired software can be used in all government offices (including the military). In addition to the decree, we believe that the Israeli government is establishing procedures to institute a government-wide audit to determine the extent of illegal software use (Israeli government officials have admitted that an internal government study has found significant piracy in the government's own ranks) and to ensure that the entire government becomes and remains fully licensed. What is needed is not a short-term fix, but a comprehensive methodology for managing legal software usage within the government, so that this problem can be solved for the long term. IIPA has also recently heard that the Israeli government is now requiring all government contractors or businesses receiving government funds to declare that they are not infringing intellectual property rights. If true, this would be a very positive step and IIPA urges the Israeli government immediately to implement this policy.

Burdensome And Costly Procedures

The Israeli judicial system is marred by procedural hurdles, including high burdens and costs to legitimate right holders trying to assert their rights against blatant pirates. The level and complexity of proof required for an Anton Piller search order (i.e., a civil order to search and seize pirated product that is granted without notice to the search target) remains unduly burdensome, as judges have not given clear guidance. There have been some improvements, in 2000, however, as courts have been setting more reasonable guarantee terms on Anton Piller orders (between \$5,000 and \$7500 per case) since the passage of the 1999 Commercial Torts Law.

For other industries that rely on the seizure of massive amounts of pirated product found in raids, Israel's failure to follow accepted international practice of "sampling" goods (forensic testing on one copy of each work pirated or counterfeited) seized in a raid continues to hinder copyright owners' efforts to effectively exercise their rights. Key Ministry of Justice officials have indicated that the laws in Israel may need to be changed to permit sampling. In cases in which seizure of thousands upon thousands of illegal copies of a single work are common, the copyright industries as a whole cannot live with a rule that goes against international practice by rejecting sampling.

Moreover, the burdensome and excessive requirements in terms of evidence, proof of ownership and chain of title are such that local industry groups have great difficulty in following up considering the number of criminal cases involved.

COPYRIGHT LAW AND RELATED ISSUES

Israeli Copyright Laws Still TRIPS-Deficient

Israel's copyright laws (last amended by the passage in December 1999, effective January 1, 2000, of Bill 2819, "Bills for the amendment of Intellectual Property Laws – Adjustment to the TRIPS Agreement Instructions 1999") include a modified version of the Copyright Act (1911) of the United Kingdom, which was adopted in the Copyright Order (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an employer of a performer). The Copyright Order (Berne Convention) (1953) (as amended through 1981) implements the provisions of the Berne Convention (Brussels Act (1948)) in Israel, while the Copyright Order (Universal Copyright Convention) (1955) implements the UCC in Israel.

The 1999 amendments attempted to bring Israel's laws into compliance with the TRIPS Agreement. Though a number of TRIPS deficiencies were corrected by the Amendments, some provisions remain TRIPS-incompatible:

Substantive Deficiencies

- An exception is made to the sound recording rental right if the sound recording is not the “principal object” of the rental. This is at least a technical violation of TRIPS Article 14.4. TRIPS permits the exception with respect to computer programs but there is no analogous exception for sound recordings. It is unclear whether this added provision has any practical impact that would render the provision incompatible with TRIPS.
- There is a “rule of the shorter term” for sound recordings in violation of TRIPS. Nothing in Article 14 of TRIPS covering sound recordings permits the application of this Berne exception to national treatment to sound recordings.
- The amendments also do not appear to provide for an exclusive right in sound recordings against their “direct or indirect reproduction” as required by TRIPS Article 14.2. In these respects, the amendments and Law are TRIPS-incompatible.
- Copies of software acquired prior to January 1, 2000 do not carry a rental right in violation of TRIPS Article 11. In Chapter 8, the transitional provisions of the new Amendments, Section 12(a) provides that copies of computer software acquired prior to the effective date of the law do not carry a rental right. This would appear to be TRIPS-incompatible since Berne Article 18 permits no such exception.

Enforcement Deficiencies (On Their Face)

- Arguably the most serious and damaging facial TRIPS violation is that end-user software piracy is not defined clearly in the law as a criminal offense, in violation of Article 61 of TRIPS. Article 3(c) of the Copyright Ordinance criminalizes the “distribut(ion) [of] infringing copies of such a work for business purposes or to an extent damaging to the owner of the copyright.” There was a recent Supreme Court case imposing criminal liability on a business end-user, however, the facts of this case are unique and are regarded as not clearly “criminalizing” end-user piracy. It is therefore critical that the Israeli government amend the Copyright Law to clarify that end-user piracy is a crime. While there has been support from influential figures in Israel to provide protection against pirate end-users, it is unfortunate that the Knesset decided, in its deliberations leading up to the passage of the TRIPS Omnibus legislation, not to amend the law to explicitly criminalize end-user piracy, arguably leaving Israel’s law in violation of TRIPS. Over the past several years, the Israeli government has not taken a consistent position regarding whether Article 3 provides for criminal procedures and penalties in cases of willful copyright piracy on a commercial scale.
- Civil damages are too low to compensate the rightholder and statutory damages are applied per title, not per copy and/or per infringing act, and are therefore too low, in violation of Articles 41 and 45 of TRIPS. Israel should consider “per copy” and “per infringing act” pre-established damages. Israeli officials have indicated that they plan to have 200 to 100,000 NIS “per copy” pre-established damages in the new copyright law, with the plaintiff electing proved damages or statutory damages. The problems with this proposal are two-fold: they do not encompass “per infringing act” damages and the minimum is far too low to deter piracy.

Enforcement Deficiencies (In Practice)

- Effective action to deter infringements is not present in either civil or criminal cases in violation of TRIPS Article 41. Criminal penalties, as imposed, are too low in violations of TRIPS Articles 41 and 61.
- In Section 7C of the Copyright Ordinance, the court may only order the destruction of the manufactured objects so long as the party filing the motion notifies the police and the police are present to hear the motion. The requirement for police presence seems unreasonable, in light of the fact that the police are already understaffed and under-supported. If, in practice, this requirement results in the failure of courts to order destruction of manufactured objects, such a failure may defeat the effectiveness of the provision and render it inconsistent with Article 61 of TRIPS.
- Israel must provide adequate protections for witnesses who seek to report copyright infringement, and it must dedicate adequate police, prosecutorial, and judicial resources to the problem. It also must simplify and expedite enforcement procedures and process a greater volume of cases, with greater results, through its judicial machinery.

Civil Remedies in Israel are Inadequate and Ineffective

Israel must reform its copyright law to provide adequate compensatory and deterrent civil damages. At present, unless a right holder is willing to endure substantial burdens, delays and risks, it can only recover a specified statutory sum that is artificially and unreasonably low (i.e., NIS 10,000 -NIS 20,000, or roughly \$2,450 - \$ 4,900), calculated per infringed title rather than infringed copy and infringing act (i.e., so the damages are the same, whether there is one illegal copy or one million, or whether there is one illegal download, for example, or one million). As noted above, without the option to sue for meaningful statutory damages measured per copy and/or per infringing act (in addition to the existing per infringed title option), illegal resellers and end-users can regard these minimal penalties as merely a cost of doing business, and infringement becomes a rational business choice. The current draft overhaul of the copyright law proposes a minimum per-copy damage award of NIS 200 (approximately \$49). This amount is far too low to serve as a deterrent.

Not surprisingly, illegal resellers that have been subject to private criminal prosecution or civil actions in Israel often return to their illegal activities, as the profits substantially outweigh the costs, even after court-ordered injunctions. As previously noted, IIPA is aware of at least six instances where an infringer has been caught, admitted culpability, settled and returned to piratical activities. IIPA and its members have asked the Israeli government to increase statutory damages and provide deterrent penalties (as required under TRIPS).

Israel Should Move Forward with Modernization of Copyright Law

Since 1989, the Israeli authorities have planned to overhaul and modernize the copyright system. While the Ministry of Justice (in charge of drafting) had intended to put the comprehensive overhaul forward in 1999, in part because they received an overwhelming number of comments, the overhaul was put aside in favor of stop-gap legislation to attempt to address the immediate TRIPS-deficiencies.

Apparently, a new draft copyright law may be available as early as late 2001. IIPA will be interested in reviewing the draft, which will take into account the latest technological developments, including the provisions of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), to which Israel is a signatory. It would send an important signal for Israel to become a charter member of the WCT and WPPT, as it would demonstrate that Israel is prepared to establish and uphold an adequate legal framework for the protection of copyright in the digital environment. Israel should certainly take the opportunity in the current round of drafting to address the deficiencies noted above, but in addition, to address new technologies, specifically providing adequate protection to copyright owners for technological protection measures they use to aid in the exercise of their rights.

Unauthorized Retransmissions By Cable Operators

For a number of years, Israeli cable operators have been retransmitting U.S., European and Russian content without the authorization of right holders. As a consequence, the motion picture industry and concerned right holders have filed a legal action under the auspices of the international producers' collection society, AGICOA, against cable operators for royalties that should have been paid to the right holders. Israeli cable operators continue to insist that they can steal these signals without payment. IIPA believes that the law grants an exclusive retransmission right. In addition, the Israeli Government has reportedly considered draft amendments to the Telecommunications Law (although the latest we have heard from the Ministry of Justice is that they have rejected this draft) that would authorize cable operators to retransmit un-encrypted satellite services (of original programming) by means of a compulsory license mechanism. If this draft were to make it forward to the Knesset, that body should reject this totally unacceptable compulsory license as completely out of line with international practice. Copyright owners of content over hertzian and satellite signal programming should retain the ability to license programming as market forces dictate and not be subject to government-imposed compulsory licenses.