

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2004 SPECIAL 301 REPORT

# ISRAEL

## EXECUTIVE SUMMARY

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**Special 301 Recommendation:** Israel should be elevated to the Priority Watch List.

**Overview of Key Problems:** In 2003, the Israeli government, represented by the Ministry of Justice, officially launched a broad legislative process purporting to consolidate and modernize the copyright law, but which in fact seriously threatens the rights of foreign copyright holders, especially U.S. phonogram producers. The actions of the government confirm for us a government policy, which, during the last years, increasingly has targeted the legitimate interests of U.S. right holders, aiming to totally undermine the set of rights currently available to U.S. and other foreign phonogram producers under Israeli law. Essentially, the law abolishes the exclusive rights currently enjoyed by phonogram producers and replaces it with a mere right to remuneration for broadcasts of sound recordings – a remuneration which, moreover, the Ministry of Justice has opined is not to be paid to right holders in U.S. sound recordings. Such a position would squarely violate Israel's obligations under its 1950 Bilateral Treaty with the United States.

The government failed in 2002 to adopt amendments to the copyright law to criminalize the unauthorized use of business software in a business setting – so-called “corporate end-user piracy of business software.” While the draft law would create a new civil remedy against those who “possess” unauthorized copyrighted materials in a business, which would appear to cover end-user piracy of business software (and will be helpful to other industries), unfortunately, there remains no criminal exposure for end-user piracy, as required by TRIPS. In addition, the draft law disappointingly does not take into account all the requirements of the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Finally, the law contains numerous other problems and overly broad exceptions, including an incredibly broad educational exception that would decimate the market for academic books and journals, as well as place in danger a wide variety of copyrighted works.

### **Actions to be taken in 2004**

- Revise draft copyright law to criminalize end-user piracy of business software.
- Maintain full copyright protection for all U.S. right holders.
- Issue a statement that right holders of U.S. sound recordings will continue to enjoy exclusive rights in, among other things, the broadcast and public performance of their recordings, in keeping with Israel's bilateral obligations to the United States.
- Make other changes necessary to the draft copyright law to make it fully compatible with Israel's international treaty obligations, and to fully implement the WCT and WPPT.
- Fortify Special Police IPR Units with significantly more manpower, ensure that they use *ex officio* authority to bring about raids in critical mass to deter piracy, and allow the National Police Unit to coordinate districts, for more effective and sustained enforcement.
- Instruct police attorneys and prosecutors to expeditiously handle incoming copyright piracy files

as a matter of priority, proceed with criminal prosecution of pirates within shorter periods of time, and ask for substantially higher penalties.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing.<sup>1</sup> Please also see previous years' reports.<sup>2</sup>

**ISRAEL**  
**ESTIMATED TRADE LOSSES DUE TO PIRACY**  
*(in millions of U.S. dollars)*  
**and LEVELS OF PIRACY: 1999 - 2003<sup>3</sup>**

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	30.0	50%	30.0	50%	15.0	50%	15.0	50%	15.0	50%
Records & Music <sup>4</sup>	40.0	63%	34.0	50%	40.0	25%	45.0	30%	70.0	45%
Business Software <sup>5</sup>	NA	NA	29.9	37%	36.9	40%	51.3	41%	54.8	44%
Entertainment Software <sup>6</sup>	NA	75%	17.2	68%	66.5	89%	52.0	NA	30.9	54%
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
<b>TOTALS<sup>7</sup></b>	<b>NA</b>		<b>112.1</b>		<b>159.4</b>		<b>164.3</b>		<b>171.7</b>	

## COPYRIGHT PIRACY IN ISRAEL

Copyright piracy continues to hurt copyright owners trying to do legitimate business in Israel. A large portion of software used by businesses and other end-users in Israel is still pirated, affecting not only U.S. companies but also local Israeli software producers. The "burning" of pirate content onto CD-Rs and DVD-Rs has slowly become the method of choice for pirates, and stores in major marketplaces, including in Tel Aviv, Haifa, and Herzlia, engage in "in-store burning" of music, major motion picture titles,<sup>8</sup> compilations of entertainment software or business software applications onto

<sup>1</sup> <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

<sup>2</sup> <http://www.iipa.com/countryreports.html>.

<sup>3</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

<sup>4</sup> The recording industry losses and levels include domestic losses/levels as to U.S. repertoire only. The losses also refer to several millions of illegal cover versions of U.S. repertoire that have been sold in Israel in 2003. The increased loss figure also reflects a substantial weakening of the U.S. Dollar against the IL Shekel.

<sup>5</sup> BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

<sup>6</sup> ESA revised its methodology for deriving the value of pirate videogame products in-country, meaning that the decrease in the value of pirated videogame products in Israel from 2002 on is due primarily to methodological refinements which allowed ESA to more comprehensively evaluate the levels of piracy in the personal computer (PC) market.

<sup>7</sup> In IIPA's 2002 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Israel were \$82.2 million. IIPA's revised loss figures are reflected above.

<sup>8</sup> The popularity of CD-R piracy in the motion picture industry increased in 2003 because of the availability of subtitles on the Internet that can be overlaid onto a movie that has been downloaded from the Internet. Conversely, pirate DVDs are actually declining in popularity due to importation problems and the absence of Hebrew subtitles.

one disc. Flea markets also carry extensive pirated product.<sup>9</sup> Manufactured optical discs (CDs, CD-ROMs, VCDs, DVDs) made up an ever-decreasing percentage of pirate music and audiovisual works in 2003. Internet piracy of all varieties is increasing in Israel. Israel boasted approximately 2.5 million Internet users aged 13 and above in November 2003,<sup>10</sup> and dozens of websites are taking advantage of this by listing stores that will “custom burn” content onto CD-Rs or DVD-Rs. Illegal public screenings continue to be a problem in hotels, cafes and pubs. Parallel imports of Zone 1 DVDs (DVDs programmed for playback and distribution in North America only) are still widely available in Israel (and the government is now contemplating legalizing the trade in parallel imports which will only exacerbate the existing problem). Book piracy, while not a major problem in Israel, consists of photocopying and reproduction of textbooks by various educational institutions, including universities, without authorization of the right holders. Teaching staff in various institutions have been known to produce “study files” that include pirate materials. In addition, pirate reprints have been distributed in retail bookstores selling for full retail price, thereby making it difficult for consumers and enforcement officers to identify. In addition, pirate handheld console entertainment software products and components are imported into Israel from East Asia, and there is evidence of local assembly of these products.

## **COPYRIGHT ENFORCEMENT IN ISRAEL**

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Copyright enforcement efforts by the Israeli government were disappointing in 2003. Israeli law enforcement authorities and prosecutors have shown almost no inclination to undertake criminal enforcement of the existing copyright legislation against commercial pirates. In addition, the police are not actively pursuing Internet piracy cases (and only in rare instances are the police willing to assist in the raiding of Internet pirates).<sup>11</sup> Some industry groups (including the music industry and the motion picture industry) took “self-help” measures to achieve some seizures of equipment and pirate product. The recording industry group, IFPI-Israel, and the motion picture industry’s group, ALIS, focused largely on underground CD-R and DVD-R labs in 2003, with some assistance from the IPR Units, and achieved some good results.<sup>12</sup> IIPA also notes a large enforcement action in late December 2003 in the West Bank, that resulted in the seizure of plant equipment that was reportedly responsible for 40% of the discs for the entire piracy market in Israel, between 60,000 and 100,000 discs a month.<sup>13</sup>

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<sup>9</sup> Nearly 90% of the pirate music market is CD-R, with the other 10% of pirate CDs being imported into Israel from Russia and Thailand, among others; the numbers are similar for the entertainment software industry, with most pirate product being “burned” on CD-R but with some factory-produced “personal computer” games being imported from Russia. Piracy of PlayStation® console-based games continues on a massive scale.

<sup>10</sup> See Globes, at <http://www.globes.co.il>.

<sup>11</sup> IIPA notes with interest that RIAA made the decision in September 2003 to sue IMesh.com, a Tel Aviv-based company (registered in Delaware and running on a server based in Texas) that provides a peer-to-peer network for the sharing of copyrighted materials over the Internet. While the case was brought in the United States, the existence of a sophisticated Internet peer-to-peer business based in Israel raises concerns regarding the prospects for copyright protection over digital networks, and makes it imperative that the government of Israel take immediate steps to modernize its legislation to address the protection of copyright on the Internet.

<sup>12</sup> In the first five months of 2003, nine labs were raided, resulting in the seizure of 118 CD-R burners, over 16,000 pirate CD-Rs, and over 6,000 pirate DVDs

<sup>13</sup> *Israelis: Police Bust Big West Bank Copyright Pirate Lab*, Jan. 1, 2004, Dow Jones International News (noting that the special police force found scanners and recording equipment, along with hundreds of thousands of music CDs, DVDs, and entertainment software, which cost roughly 25 cents to produce, and were sold to store owners in Israel for one dollar). The motion picture industry enforcement group, ALIS, knew about this plant for 10 years and noted its transition from VHS to the digital world. Five people were arrested as a result of the raids, and the seizures netted computer equipment (including towers containing 8 DVD-R burners), inlays, boxes, and pirate DVD-Rs. The pirates were also found

Civil raids, and even the largest recent raid, are non-deterrent, as the lead pirates usually replace the vendor/producer that was caught with another who does not have a criminal record in order to minimize the possible penalties to the next offender; of course, the pirate owners of such operations escape liability altogether, leaving the consequences to their henchmen. It is partly due to these factors, but also because of the general lack of deterrent in sentencing, that Israel sustains extraordinarily high recidivism rates (more than 50% of investigated offenses in 2002). Nonetheless, some right holders were able to get some results through the civil courts; for example, the business software industry began to experience some success in civil cases in 2002 and 2003.<sup>14</sup>

The criminal courts have also finally begun to come down with some sentences that could begin to make a difference. In at least five known cases in 2001-2002, jail time was actually served.<sup>15</sup> On April 13, 2003, the Tel-Aviv Magistrate's Court sentenced convicted CD pirate Albert Salman (caught in December 2002 operating a CD "burning" laboratory, as well as on several other occasions selling infringing CDs) to 20 months of imprisonment (which we believe will not be suspended), 12 months of probation, and a fine of NIS 30,000 (US\$6,756). In January 2003, an appeals court overturned a particularly light sentence imposed on a repeat offender and instead imposed a fine of NIS 300,000 (US\$67,560). The defendant, originally sentenced in early 2001, had been convicted in 14 separate cases of distributing pirate optical discs. The first instance court imposed a sentence of six months community service and a fine of US\$12,000. The revised sentence also includes a suspended one-year imprisonment term contingent upon payment of the fine.

It is hoped that the Israeli government on the whole has begun to recognize the important role strong criminal sentencing plays in achieving reductions in piracy.<sup>16</sup> Unfortunately, most criminal cases brought in Israel today are against small-time pirate resellers at flea markets, and imprisonment is an exception as a penalty for copyright piracy, but by no means the rule. Most criminal investigations, due to police and prosecutorial bottlenecks, do not result in arrest (and most defendants are never detained for more than two days, meaning they are back on the streets and undeterred from continuing to deal in pirate copyrighted materials).

In 2002, several industry groups affected by piracy and counterfeiting in Israel assembled a work plan. The plan set out a laudable set of cooperative activities of various government ministries and enforcement agencies in the Israeli government, including calls for: increased raiding;

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to be producing pirate videocassettes.

<sup>14</sup> For example, in August, 2002, the Haifa District Court delivered a favorable civil judgment against an end-user pirate, awarding NIS210,000 (US\$47,300) in damages (the lower end of the statutory damages scale, given the number of infringements). See Civil File 554/00 in the District Court of Haifa, dated August 4, 2002. Another important decision was delivered by the Jerusalem District Court in November 2002, in which the court held that the separation of the genuine end-user license from the genuine physical software (CD) amounted to a breach of the license agreement. See *Microsoft Corporation v. Agama Ltd.* (Jerusalem District Court, Civil Case 4219/02), November 11, 2002, upheld in the Supreme Court decision of Jan. 29, 2003. The judge in the case also held, for the first time ever in Israel, that the doctrine of "contributory breach" (a tort doctrine) applies to copyright in addition to patent. In this context, the sale of a license separately from the media contradicts the terms of the license, thus the sale of that "worthless" license contributes to a tort, namely, infringement of copyright committed by the end-user who has purchased the (worthless) "license." In marketing the license separate from the medium, the defendant assisted in the "authorization" of illegal software and in doing so prejudiced the intellectual property of the claimant in the case.

<sup>15</sup> See Howard Poliner, *Criminal Enforcement of Copyright and Trademark Rights in Israel: Recent Trends*, World Intellectual Property Report, May 2002, Vol. 16, at 22-23.

<sup>16</sup> In February 2001, the Ministry of Justice published a report, *Recent Developments in Intellectual Property Rights in Israel*, in which it referred to the need to make an intensive effort against those who organize counterfeiting and "to achieve criminal sentences that will provide a deterrence to future criminal activity of this kind" (report, page 10).

allocation of resources to special IPR enforcement units; involvement by the Ministry of Finance to go after piracy on tax evasion or other independent grounds; involvement by the Ministry of Justice in bringing the Israeli law up to international standards (including criminalizing end-user piracy of business software), and working with judges to make them more aware of the severity of copyright piracy and the need for strict sentencing; and involving the Ministry of Education to include in the school curriculum a set of lessons designed to increase awareness of copyright and the importance of intellectual property rights, and to foster use of legal published materials in schools. IIPA is unaware whether or to what extent any of these measures has been carried out in Israel in 2003.

## **COPYRIGHT LAW AND RELATED ISSUES**

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The present legal regime in Israel is comprised of the Copyright Act (1911) of the United Kingdom (made applicable to Israel by an Order), the Copyright Ordinance (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).<sup>17</sup> The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).<sup>18</sup> The various laws have been amended a number of times over the years.

In 2003, the Ministry of Justice released a draft Copyright Law, 5764 – 2003, which is 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. 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. Indeed, with burgeoning Internet piracy in Israel, the high percentage of Internet usage in the country, and Israel’s penchant for high-tech industry, Israel’s delay in implementing these key treaties for the establishment of an adequate legal framework for electronic commerce and its clear tendency to undermine key elements of the existing legal system are extremely distressing.<sup>19</sup> 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.

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<sup>17</sup> Other ancillary legislation includes the Copyright Order (Berne Convention) (1953) (as amended through 1981), which implemented the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, and the Copyright Order (Universal Copyright Convention) (1955), which implemented the UCC in Israel. The Copyright Ordinance was last amended through passage in 2002 of the Act for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002).

<sup>18</sup> Detailed discussion of the merits and deficiencies of the current legal regime has been included in prior reports, and can be found at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-152.

<sup>19</sup> Also, Israel’s laws do not yet deal with the issue of service provider liability, but 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.

The Israeli government has asked for comments from the public at large regarding the draft, and IIPA will reserve the option to file more complete comments at a later time. The following bullets are intended only to identify some key issues and concerns, but by no means represent an exhaustive review of the draft legislation:<sup>20</sup>

- **Broadcasting or Public Performance Compulsory Remuneration – the Need for Equal Treatment for U.S. Sound Recordings:** Section 20 of the draft establishes a weak 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>21</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>22</sup>
- **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>23</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 (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.

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<sup>20</sup> The comments of software manufacturers and right owners as represented by the Business Software Alliance were submitted to the Ministry of Justice on December 31, 2003, and certain of these comments are incorporated herein.

<sup>21</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>22</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>23</sup> See Section 20(a) of the Draft.

- **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 may leave Israel’s law in violation of TRIPS.<sup>24</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.
- **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 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).
- **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:** 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>25</sup> The provision allows reproductions or

<sup>24</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>25</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

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.
- **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>26</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 what a

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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.
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>26</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.

“distance-learning” type exception may contemplate and remain consistent with international standards.<sup>27</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>28</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. 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 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.”

## Unauthorized Retransmissions by Cable Operators

Israeli cable operators continue to refuse to make payment for retransmissions of any broadcast television signal, despite protections accorded to retransmitted works under Israel’s copyright laws and court decisions confirming that Israeli law affords such copyright protection to cable retransmissions. (Such court decisions were on appeal as of November 2003, with rulings expected soon.) Cable operators have rejected all efforts by AGICOA, a group representing an international group of right holders including the Motion Picture Association, to negotiate retransmission licenses. AGICOA filed legal proceedings against cable operators in the District

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<sup>27</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>28</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.

Court of Tel Aviv in early 2000. Efforts to seek appropriate redress on behalf of copyright owners from Israeli courts have been hindered by the recent approval by antitrust authorities of a merger of the country's three cable operators and the court-ordered supervision and liquidation of one of these three entities.