

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY

Special 301 Recommendation: Israel should remain on the Watch List.

Overview of Key Problems: There were several developments in 2004 warranting Israel's retention on the Watch List. An Antitrust court case earlier in the year confirmed that U.S. sound recordings must be protected under "national treatment" principles pursuant to the U.S.-Israel bilateral agreement and that they are also protectable in case of simultaneous publication. Officials at the Ministry of Justice subsequently gave oral assurances that Israel will not seek to change this via legislative amendments, and we understand that such a commitment was conveyed in writing to USTR. In addition, the Supreme Court of Israel has affirmed a lower court decision concluding that works retransmitted by Israeli TV cable companies are subject to copyright protection, meaning that Israeli cable operators must obtain licenses in advance for such retransmissions. In addition, several criminal court decisions in Israel in 2004 indicate a more serious attitude among judges toward copyright piracy. Estimated losses to the U.S. copyright industries in 2004 due to copyright piracy in Israel were US\$113.4 million.

Notwithstanding these positive developments, disturbing legislative initiatives have evolved. Soon after the Supreme Court's decision on cable retransmission, the Israeli government introduced a draft law to the Knesset, bypassing the Supreme Court's decision and suggesting to demote the cable and satellite retransmission right to a mere right for remuneration. The exemption, which is proposed for an interim period (of three years) is currently pending at the Knesset's Economic Committee.

Moreover, CD piracy, especially the "burning" of content onto CD-Rs, DVD-Rs, etc., continued to cause major losses to the copyright industries. Criminal cases brought in 2004 did not have much of a deterrent effect on this activity. Further, while the decision regarding cable retransmissions was positive as to the legal rule, the ruling did not resolve the basic issue, namely, that right holders in content should enjoy a broad right in the retransmission of their programming. The court ruling neither did away with the current practice of affording a mere remuneration right/compulsory license as to retransmissions, nor dealt with the complicated implementation, including uncertainty as to the royalty rate and the cumbersome court procedure to obtain payment.

In addition, the Israeli government is considering amendments to the copyright law that would weaken protection in the crucial area of digital rights. Among the proposed changes, rights of communication to the public/broadcast would be relegated to mere rights of remuneration (there are both copyright law amendments and a recent *Bezeq* - telecommunications law amendment), and new broad exceptions would be introduced which would unduly harm right holders' ability to adequately protect their works in the digital environment. In addition, a potentially highly damaging amendment was proposed in the fall of 2004, which would broaden the scope of the private copying (fair use) exemption and create a

new private copy levy for digital carriers (CD-R, CD-RW, etc.). That draft does not expressly exclude peer-to-peer file exchange from the fair use exemption, nor does it offer legal protection of technical protection measures against digital copying.

The current law, as amended in 2002, still fails to criminalize the unauthorized use of business software in a business setting — so-called “corporate end-user piracy of business software,” in violation of TRIPS. The law also fails to meet the requirements of the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including in the areas of temporary copy protection (which is not express in the current law), providing treaties-compatible exclusive rights, including the communication to the public right which includes the “making available” right, and protections against unlawful “circumvention” (act and trafficking in devices etc.) of technological protection measures used by right holders to protect their works. For such a technologically advanced country — one that supplies a good deal of the TPM technology to the world — it is unfathomable to us that Israel would choose to fall so far behind its neighbors, Europe, and the United States in providing an adequate legal infrastructure for electronic commerce.¹

Actions to be Taken in 2005:

- Maintain full copyright protection to the retransmission of cable and satellite programs.
- Refrain from consideration/passage of draft legislation providing a digital private copying exemption/levy.
- 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 (noting slightly higher penalties in 2004).
- Employ all laws to fight piracy, e.g., the Finance Ministry should conduct selected inspections of suspect businesses for unpaid taxes/unreported revenues, and initiate criminal cases against tax evaders.
- Reconsider copyright amendment process to take into account rights in the digital age, including full implementation of the WCT and WPPT, and make other necessary changes to ensure TRIPS compliance, e.g., criminalize end-user piracy of business software.

For more details on Israel's Special 301 history, see IIPA's “History” appendix to this filing.² Please also see previous years' reports.³

¹ IIPA notes that in May 2004 The “Committee for examination of legal problems involved in electronic trade” working under the Ministry of Justice published the first part of its recommendations with regard to, among other things, service provider liability for infringing content created by third parties including infringement of copyright on the Internet (Chapter 4, Section 3), civil liability of ISPs and conditions for “safe harbor” immunity (Chapter 4, Section 4). The Committee recommended some ISP limitations on liability based on the U.S. “DMCA” and the EU “E-Commerce Directive 2000/31” models. It is not clear at the present time what the next steps are.

² <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>.

³ <http://www.iipa.com/countryreports.html>.

ISRAEL
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(IN MILLIONS OF U.S. DOLLARS)
AND LEVELS OF PIRACY: 2000-2004⁴

INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	30.0	40%	30.0	50%	30.0	50%	15.0	50%	15.0	50%
Records & Music	34.0	40%	40.0	63%	34.0	50%	40.0	25%	45.0	30%
Business Software ⁵	36.0	37%	35.0	35%	29.9	37%	36.9	40%	51.3	41%
Entertainment Software ⁶	12.4	88%	NA	75%	17.2	68%	66.5	89%	52.0	NA
Books	1.0	NA								
TOTALS	113.4		106.0		112.1		159.4		164.3	

COPYRIGHT LAW AND RELATED ISSUES

Copyright in Israel is governed under 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).⁷ The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).⁸ The various laws have been amended a number of times over the years.

The Knesset passed a Bill for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002), strengthening criminal liability in a number of ways,⁹ improving presumptions regarding copyright ownership that apply to both civil and criminal proceedings,¹⁰ imposing criminal liability on the officer of a company in which an offense is committed (unless s/he proves s/he did everything possible to prevent the offence from being

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2005 Special 301 submission at www.iipa.com/pdf/2005spec301methodology.pdf.

⁵ BSA's final 2003 figures represent the U.S. software publisher's share of software piracy losses in Israel, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the "global" figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$69 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ 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.

⁷ 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).

⁸ 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.

⁹ For example, the law increases the maximum prison sentences to five years for certain offenses ("making of infringing copies for commercial purposes" or "import of infringing copies for commercial purposes") and up to three years for other offenses ("the sale, rental or distribution of infringing copies not as a business but in a commercial volume" and the "holding an infringing copy in order to trade therein")

¹⁰ While it appears that the new presumption is very strong (in that the burden is on defendant to show proof to the contrary regarding subsistence of copyright ownership), it remained unclear in early 2005 how this provision will be interpreted in practice.

committed), and doubling fines for copyright offenses committed by companies. Nonetheless, the law and enforcement system in Israel remain largely TRIPS-deficient; among the legal issues are the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute (since the Supreme Court has ruled that statutory damages are to be ascertained on a per-title basis rather than a per-copy basis, and unlike other jurisdictions, the maximum per-title damage amount is exceedingly low).

National Treatment for U.S. Sound Recordings in Israel Confirmed

On April 30, 2004, the Restraints-of-Trade Tribunal in Jerusalem 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.¹¹ The Court stated: "we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel." The Israeli government has apparently accepted the decision and has confirmed to its U.S. counterparts that national treatment will be afforded to U.S. and foreign sound recordings. This is a highly positive development, and we commend the Israeli government for recognizing the correct ruling by Restraints-of-Trade Tribunal. This removes what had been a major concern of the US copyright industries, although we remain extremely concerned with other aspects of proposed copyright reform as outlined below.

2003 Copyright Law Amendments in Israel Would Weaken Protection

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, the most fundamental problem is the draft does not deal at all with the use of technological protection measures through the prohibition of trafficking in circumventing devices.¹² Instead, the draft

¹¹ 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]

In addition to the above, the U.S.-Israel Free Trade Agreement from 1985 addresses intellectual property and reaffirms the parties' obligations under bilateral and multilateral agreements; it explicitly provides that "nationals and companies of each Party shall continue to be accorded national and MFN treatment ... with respect to obtaining and enforcing copyrights."

¹² In addition, the draft does not address the liability of intermediaries, i.e., ISPs, in connection with the transmission of infringing materials.¹² IIPA notes that in May 2004 The "Committee for examination of legal problems involved in electronic trade" working under the Ministry of Justice published the first part of its recommendations with regard to,

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 consider how vitally important it is for the Ministry of Justice to prepare 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 2003 draft:

- **Broadcasting or Public Performance Compulsory Remuneration – the Need for Equal Treatment for U.S. Sound Recordings:** Section 20 of the draft would establish 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.¹³ 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, 1950.¹⁴ The 1950 Bilateral has never been superseded or amended, so that the operable language is still in force. The Israeli government recently confirmed that U.S. sound recordings will continue to be protected in Israel on the basis of national treatment. Any change to degrade the rights in phonograms to neighboring rights, effectively resulting in the abolition of any right in broadcasting and public performance for U.S. right holders, would be inconsistent with that recent communication.¹⁵ Recently, officials at the Ministry of Justice have indicated that they are considering suspending this initiative for the time being. If this proposal is indeed suspended (and subsequently cancelled), this will be a positive step toward maintaining adequate rights for phonogram producers.
- **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.¹⁶ Mandatory collective management of this sort disregards the basic principle

among other things, service provider liability for infringing content created by third parties including infringement of copyright on the Internet (Chapter 4, Section 3), civil liability of ISPs and conditions for “safe harbor” immunity (Chapter 4, Section 4). The Committee recommended some ISP limitations on liability based on the U.S. “DMCA” and the EU “E-Commerce Directive 2000/31” models. It is not clear at the present time what the next steps are.

¹³ 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.”

¹⁴ 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.”

¹⁵ 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.

¹⁶ See Section 20(a) of the Draft.

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. Recently, officials at the Ministry of Justice have indicated that they are also considering suspending the initiative for a joint collecting scheme for the time being. If this proposal is indeed suspended (and subsequently cancelled), this will be a positive step.

- **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.¹⁷
- **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, and its application to U.S. works (including sound recordings) would violate its bilateral obligations as well.¹⁸
- **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.

¹⁷ 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.

¹⁸ 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.

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.” Clarification is sought as to whether Section 11(1) is intended to cover temporary copies. Either way, it would 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.
- **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”). Section 18(A) would reverse the recent Supreme Court decision affirming the legitimate protection for the retransmission right under copyright. The compulsory license is also exceedingly broad; while the amendment justifies the need to solve cases where the identity of the rights owners cannot be verified prior to the retransmission, the amendment exempts any and all retransmissions, even where the rights owners are easily accessible and willing to license (e.g. through blanket licenses available through local collective societies). The amendments do not require that permitted retransmissions be unaltered and/or unabridged. The amendments also indicate that, in certain instances, the Minister could determine that reduced royalties or no royalties might be payable to copyright owners. The amendments arguably undercut the right of communication to the public, in a way that is not consistent with Berne’s 11*bis*(1) and/or (2), and would impose an undue burden on right holders who would have to “fight” for equitable remuneration. The broad wording of Section 18(A) must be trimmed to exclude Internet and cellular phone transmissions, as well as broadcasts from being subject to “secondary broadcast” without permission from the copyright owner.¹⁹
- **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).²⁰ The provision allows

¹⁹ In addition, any proposed replacement of copyright in re-broadcasts with equitable remuneration should 1) exclude re-broadcasts of musical recordings and video-clips, i.e., leaving the present law in force in respect thereof; 2) confine such re-broadcasts subject to compulsory remuneration to the rare cases where the re-broadcaster is unable to ascertain and obtain authorization from the copyright owners for the re-broadcast; and 3) expressly exclude Internet and cellular phone re-transmissions.

²⁰ 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:

reproductions 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.²¹ This exception could lead to the unlimited copying of works, and goes far beyond the

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- (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.

²¹ 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.

permissible bounds of a typical “distance-learning” exception under international standards.²²

- **Absolute Exemption for Rental by Public Libraries and Libraries of Educational Institutions is Overly Broad:** Section 16(2) provides an absolute exemption to rentals covering even rentals for commercial purposes (e.g. by a library held by a private educational institution). Such institutions should be exempted only if they meet the same requirements for exemption as for other entities²³ (i.e., non-commercial rental only).
- **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.²⁴ The international trend is to provide at least seventy years for both audiovisual works and sound recordings, and the United States provides protection of 95 years for works of corporate authorship. The government of Israel should not do the creators of audiovisual works and sound recordings the 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 overseas source countries such as Russia, the Ukraine, or the Palestinian territories. 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. In any event, the parallel importation clause is overly broad and goes beyond common “parallel importation” clauses; It legitimizes importation of copyright works produced by the copyright owner abroad, even if that entity is not the copyright owner in Israel, thereby disregarding any territorial division that might exist in ownership of copyright, counter to the exclusive right provided by the Berne Convention and TRIPS. It further legitimizes imported copies on the basis of being in the public domain abroad, even if they are subject to copyright protection in Israel.
- **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

²² 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.

²³ The exemption for non-commercial rental exists only where it is for non-commercial purposes – Section 16(2) of the Draft.

²⁴ 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.

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 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." In addition, Section 70(c) curtails the right of copyright owners for conversion against honest third parties (not end-consumer) who are in possession of infringing copies. This limitation is inconsistent with the TRIPS obligations relating to the right for seizure, removal and destruction of infringing copies whenever they are not in the possession of an end-consumer.

- **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,"²⁵ and defining "creators" (in particular in the section on moral rights). IIPA recommends using the same definition ascribed to "authors" in the British law.

Some Potentially Troubling Developments in 2004

Proposed Private Copy Levy: In 2004, discussion emerged of a possible private copy levy for copies of musical works. On October 19, 2004, the Ministry of Justice released proposed amendments, "Copyright law (private copying), 5765-2004" ("the Private Copying Bill"), which would introduce a private copy levy for music.²⁶ The current Copyright Ordinance of Israel has a private copying exemption applying to analog reproduction for private use and foresees levies for audio-cassettes in Sections 3C-3F. There is no need whatsoever to extend this exemption into the digital domain. IIPA considers this proposal to be an overly broad exemption to the reproduction right which seriously threatens the development of a legitimate on-line market for

²⁵ 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."

²⁶ This bill reportedly provides that "private copying of music from a disc" does not infringe upon copyright so long as copyright owners, artists-performers and producers are remunerated by a levy (imposed at the manufacturing and import level). The levy would be collected through and governed by the Excise Law mechanisms. The Ministry would determine (based on consultations with a specially appointed committee) which copying devices would be subject to the levy (CD-RW, DAT, and the like). The Ministry would determine the levy's rate, which is not to exceed 5% of the consumer's price of the device.

recorded music in Israel. Broadband connectivity in Israel is wide-spread and increasing. U.S. copyright owners, including the recording industry, will need strong digital rights in order to enjoy a legal context within which legitimate on-line delivery can reach its full potential. IIPA urges the Israeli government to immediately withdraw this potentially very damaging private copying bill.

Cable/Satellite Retransmission Licensing: As noted, the 2003 amendments proposed an article for an interim exemption (for three years), exempting secondary broadcasting from being an infringement if “appropriate royalties” were paid by the secondary broadcaster. There is language in draft Communications Act amendments that suggests that the obligation to pay royalties for both cable and satellite retransmissions could be suspended by the Minister for a three-year period.²⁷ It is unclear how these amendments would interact with the proposed Copyright Act amendments.

COPYRIGHT PIRACY IN ISRAEL

Copyright piracy continues to hurt copyright owners trying to do legitimate business in Israel. The trend in 2004 is toward CD-R and DVD-R burning of films, music, software, and other copyrighted content downloaded from the Internet and importation of software and multimedia especially from countries like Ukraine.²⁸ This system of burning has led to an increase in the number of pirate CD-R and DVD-R labs, which poses a major problem, as these labs are difficult to locate and can be set up in small rooms in domestic premises. These activities, which fill stores in major marketplaces including in Tel Aviv, Haifa, and Herzlia,²⁹ negatively impact both the home entertainment market and the theatrical market for the motion picture industry, and disturb new and popular releases for other industries. A number of “parallel markets” exist in areas with large Russian populations, selling all forms of illegally copied copyrighted content partly due to a lack of Russian language products.

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. Flea markets also carry extensive pirated product.³⁰ Manufactured and imported (from the Far East, Russia, and Ukraine) optical discs (CDs, CD-ROMs, VCDs, DVDs) once again made up a decreasing percentage of pirate music and audiovisual works in 2004. The music industry reports that the overwhelming majority of pirated optical discs for sale in the Israeli market are locally burned CD-Rs. Illegal public screenings continue to be a problem in hotels, cafes and pubs; this problem has grown in 2004 because of increasing numbers of pirate DVDs and new sophisticated performance equipment. Parallel imports of Zone 1 DVDs (DVDs programmed for

²⁷ The Explanatory Memorandum to these amendments states: “It is made clear that the proposed arrangement is subject to the provisions of Section 6(xxi) (b) and 6(xlix) of the Law that determines an exemption from the obligation to pay royalties in the matter of a secondary broadcast of specific broadcasts in Israel.”

²⁸ The popularity of disc burning is increasing in part because of the availability of subtitles on the Internet that can be overlaid onto downloaded films. Internet piracy of all varieties is increasing in Israel. Israel boasted approximately 2.5 million Internet users aged 13 and above in November 2003. See Globes, at <http://www.globes.co.il>. Dozens of websites are taking advantage of this by listing stores that will “custom burn” content onto CD-Rs or DVD-Rs.

²⁹ 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.

³⁰ Nearly 90% of the pirate music market is CD-R, with the other 10% of pirate CDs being imported into Israel from Russia, Ukraine and Thailand (at present most illegal products appear to originate from Ukraine, as recent customs seizures in November and December 2004 show over 30,000 counterfeit CD-Rs/DV-Rs) 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.

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 for U.S. publishers in Israel, consists of photocopying and reproduction of textbooks by various educational institutions, including universities, without authorization of the right holders.³¹ In addition, pirated and counterfeit cartridge-based games continue to be imported from Asia and Ukraine, while pirated games on optical disc media are imported from Ukraine and Russia. Downloading infringing entertainment software from the Internet has also increased.

COPYRIGHT ENFORCEMENT IN ISRAEL

Copyright enforcement efforts by the Israeli government were not overwhelming in 2004. 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).³² The Special IPR Police Units remain under-staffed and under-funded.³³ In addition, a reorganization of the police departments is under way. It is planned to integrate the IPR Unit with the National Unit for Fraud Investigation. This merger is expected to negatively affect the availability of the already understaffed unit for IPR cases. This lack of initiative on the part of Israeli enforcement agencies means the copyright industries must resort to “self-help.” The recording industry group, IFPI-Israel, and the motion picture industry’s group, ALIS, focused largely on underground CD-R and DVD-R labs again in 2004, with some assistance from the Special IPR Police, and achieved some good results.³⁴

³¹ Teaching staff in various institutions have been known to produce “study files” that include illegally copied materials. In addition, pirate reprints have been distributed in retail bookstores selling for full retail price, thereby making them difficult for consumers and enforcement officers to identify.

³² 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. The Business Software Alliance notes that steps are being taken to create the legal frame work that will eventually bring cases to tackle Internet piracy.

³³ There is reportedly a commander and two to three officers within each unit. A unit covers an entire region (e.g., South, North, Central, and Tel Aviv areas).

³⁴ Aggregate statistics indicate that motion picture industry’s local anti-piracy organization, ALIS, raided 16 CD-R “burning” labs, seizing 49,216 pirate CD-Rs, 1,182 pirate DVD-Rs 219 CD-R burners and 14 DVD-R burners in the first half of 2004. For example:

- On March 16, 2004, IFPI-Israel exposed a CD burning lab, seizing 5 tower burners containing 7 burners each, 4 color printers, a shrinkwrap machine, 50 VCRs and a large quantity of raw material. Two suspects were arrested and detained.
- In April 2004 customs officials at Ben Gurion International Airport seized 6,000 multimedia CD-R/DV-R coming from Ukraine burnt with various illegal products including business software.
- On October 18, 2004, ALIS conducted a raid in Ramat-Gan City, in cooperation with the Special IP Police of Tel-Aviv, against a pirate DVD-R lab, seizing 25 DVD-R burners, 1 photocopier, 1 scanner, 1 paper cutter, 5,270 pirate DVD-Rs (all U.S. motion pictures), approx. 150,000 pirate inlays and 1,685 blank DVD-Rs. The owner of the lab, Yaron Ha-Cohen (a recidivist), was arrested and taken into custody. Also present were many multimedia games, approximately 1,518, and various business software products.
- On December 28, 2004, ALIS in cooperation with the local IFPI group and the southern IP Special Police Unit Israel raided a pirate CD-R “burning” lab in Ashkelon City, seizing 12 CD-R burners and hundreds of pirate CD-Rs.

One of the main problems affecting enforcement in Israel is the incapacity of the State Attorneys and police prosecutors to deal with the number of piracy cases presented to them. The recording industry reports having carried out approximately 500 raids in 2004, most of which in conjunction with the IPR Unit. It is estimated that a mere 15% of those raids were followed by prosecutorial follow-up and charges filed. Such is the bottleneck at prosecutorial level that magistrates increasingly revert to pleading deals that do not reflect the gravity of the offense.

Israel suffers from exceedingly high recidivism rates, as head pirates usually replace the vendor/producer caught in a previous raid with another who does not have a criminal record. It is telling that, while the Israeli Government is well aware of this phenomenon, they do little or nothing to change the system, and never go after the piracy kingpins. One positive development in 2004, continuing a trend from 2003 and before, was the criminal courts' willingness to take on piracy cases,³⁵ and the prosecutors' willingness to appeal lenient judgments.³⁶ Unfortunately, most criminal cases brought in Israel are still against small-time pirates, and imprisonment is an exception as a penalty for copyright piracy, not the rule.³⁷ 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). One exception to this rule involved the case against a recidivist, who was ordered detained until completion of trial.³⁸ The entertainment software industry reports that the Customs authorities have been particularly helpful.³⁹

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- On July 11-12, 2004, IFPI's Israel group raided a home in the city of Givatayim (close to Tel-Aviv), a "burning" lab and a printing house, seizing 6 CD-R tower burners containing 7 burners each, thousands of CD inlay cards, approximately 7,000 pirate CD-Rs, 5,000 blank CD-Rs and raw materials.

³⁵ For example, on August 4, ALIS seized 1,362 pirate discs, 13 CD-R burners, and hundreds of blank discs and inlays in a raid on a lab in Jerusalem. Two suspects were detained by the Police and were held under "house arrest" from August 12 until they were sentenced. The suspects were sentenced to four and a half months of community service, 4 months of suspended imprisonment and a fine of NIS 70,000, or 8 months of actual imprisonment. In previous reports, IIPA has noted an increasing number of cases resulting in actual imprisonment (one in 2003 resulted in a sentence of 20 months imprisonment). In at least five known cases in 2001-2002, jail time was actually served. 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.

³⁶ In January 2003, an appeals court overturned a particularly light sentence imposed on a repeat offender and imposed a fine of US\$51,000 (up from 6 months of community service and a US\$12,000 fine). The defendant, originally sentenced in early 2001, had been convicted in 14 separate cases of distributing pirate optical discs. Upon ALIS' urging, the prosecutor appealed the sentence and requested a more deterrent fine and/or imprisonment. The revised sentence also included a suspended one-year term of imprisonment contingent upon payment of the fine.

³⁷ An ESA member company reports that in one case, the owner of a warehouse where infringing material was found was merely fined \$450.00 and had a three month suspended (conditional) sentence.

³⁸ In mid-2004, IFPI-Israel, in conjunction with the Police, ran a raid against a recidivist, Denis Ben Gregory Neiman, seizing over 1,000 pirate music, movie discs, and multimedia games. On July 14, 2004, the Haifa District Court reversed a lower court decision and ordered the respondent, Denis Ben Gregory Neiman, to be held in jail until the conclusion of criminal infringement proceedings. The defendant had claimed that he should be held on house arrest, and the Haifa Magistrates Court agreed (Order 3019/04), but was overruled by the District Court, noting:

These offences attributed to the respondent are not foreseen as precarious offences, whether as a result of a broad social phenomenon of copying programs and CDs by means of home computer systems or whether as a result of other social reasons. However this image does not rightly reflect the damage such offenders cause the public. CD counterfeiters and distributors harm firstly and primarily the artists who invest their energy and talent in their artistic work, the performers and distributors, who do not enjoy the fruits of their labor. I do not see a difference between the theft of an artistic piece and its distribution and any other Intellectual Property theft from its owner. As a bank robbery is regarded as a severe crime or auto theft from car agencies, such we need to see Intellectual Property theft and its trade. It had been said: 'The phenomenon of IP offences reached a wide dimension that results in severe damage to local and international trade, obliging enforcement authorities and the justice system to make sure an effective deterrent is implemented against such offences.' This type of delinquency lying in the case before me is not foreseen in the

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; 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. Some measures were conducted in 2004 but on a smaller scale than previously, under the umbrella of the "Roof Organization for the Protection of Copyright" backed by the United Commerce Chamber.

worldview as a property offence in the conventional meaning of the word. However, one must see it as such. The intrusion into a digital database, its duplication and distribution is not, economically speaking, different from any other intrusion into a private domain stealing its content. The economic damage caused as a result of such offences is that the life work of many is stolen and sold to the mass public. The society does not always severely address these types of offences; however, it is my opinion that it is time to change the policy and the legal assumption as far as this type of offences are concerned. *The State of Israel v. Denis Ben Gregory Neiman* (4587/04).

³⁹ In 2004, Customs agents seized 6,500 pirated video games (being shipped from Ukraine) at the airport.