

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

ISRAEL

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

EXECUTIVE SUMMARY

The Israeli government's legislative body, the Knesset, has passed the Copyright Amendment Bill 2005 on first reading. The Bill was returned to the Knesset Economics Committee for review before it proceeds to the second and third readings. The Bill, if passed in its current language, would discriminate against foreign producers of sound recordings specifically, and potentially violate Israel's bilateral obligations to the United States. The government of Israel should refrain from taking any steps that would weaken copyright protection, particularly for foreign sound recordings, at a time when copyright protection is increasingly fragile in Israel. In other respects, the Bill fails to address key WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) issues (e.g., there are no provisions in the Bill to protect technological protection measures from unlawful circumvention or trafficking in circumvention tools) and the Bill contains other problematic provisions.

ACTIONS TO BE TAKEN IN 2007

- **The Knesset should reject attempts by the government to pass copyright legislation that is hostile to right holders and may violate Israel's bilateral obligations to the U.S.:** The Knesset should send the Copyright Bill, 2005 back to the Executive for reconsideration in light of the many points made in this submission and previous submissions to the Israeli government. For example, notably, the draft does not include provisions to protect against circumvention of technological protection measures used by creators to protect their works in the online and digital ages or against trafficking in circumvention devices. Rather than moving backward on copyright, as this Bill proposes to do, the Israeli Government should move forward, including fully implementing the WCT and WPPT. Other attempts to change the copyright legislation include a Bill on the establishment of a new copyright tribunal which also proposes to substantially reduce a right holder's ability to decide how and within which structure to exploit their public performance and broadcasting rights, seriously undermining their negotiating position with respect to users of recorded music.
- **Fortify Special Police IPR Units:** The Special Police Units are understaffed, under-funded, uncoordinated, and refuse to take actions *ex officio*. The National Police Unit should have the authority to coordinate districts for more effective and sustained enforcement.
- **Tackle Burgeoning Internet Piracy Problem:** The police are not actively pursuing Internet piracy cases and are not willing to assist in the raiding of Internet pirates.
- **Give Copyright Piracy Cases Priority Attention:** Police attorneys and prosecutors have shown little inclination to undertake criminal enforcement against commercial pirates. Police

attorneys and prosecutors should expeditiously handle incoming copyright piracy files, proceed with criminal prosecutions of pirates within shorter periods of time, and ask for substantially higher penalties.

- **Apply Deterrent Penalties:** The courts are very lenient when imposing sentences on defendants in criminal copyright infringement cases in Israel. The sentences are very short and are suspended, and fines imposed are non-deterrent.
- **Introduce and Implement Optical Disc Legislation:** Israel should urgently introduce effective optical disc plant control measures including: (a) the registration and licensing of manufacturers of optical discs; (b) compulsory use of source identification (SID) codes; (c) provisions allowing for unannounced inspections/raids on plants to determine if they are operating outside the scope of the license and/or producing unauthorized product; (d) the seizure of infringing copies and machinery; and (e) the possibility of imposition of criminal penalties to deter the manufacturing and distribution of pirate optical media.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

ISRAEL										
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY										
(IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2002-2006¹										
INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	45.0	50%	28.0	35%	34.0	40%	40.0	63%	34.0	50%
Business Software²	41.0	32%	39.0	32%	30.0	33%	35.0	35%	29.9	37%
Entertainment Software³	11.4	84%	NA	95%	12.4	88%	NA	75%	17.2	68%
Books	1.0	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures⁴	NA	NA	61.0	61%	30.0	40%	30.0	50%	30.0	50%
TOTALS	98.4		129.0		107.4		106.0		112.1	

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Israel under Special 301 review, see Appendix D at <http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf> and Appendix E at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf> of this submission.

² BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. Piracy at the retail level remains problematic, though it appears to now be largely domestically burned hard goods. There has also been a substantial increase in Internet piracy, specifically the downloading of pirated materials.

⁴ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

COPYRIGHT LAW REVISION

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).⁵ The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).⁶ The various laws have been amended a number of times over the years, including an amendment in 2002 which strengthened criminal remedies and was helpful in other ways.⁷ Nonetheless, there are a few TRIPS deficiencies in practice, including the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute.⁸

Copyright Bill – 2005: As noted, the Israeli government’s legislative body, the Knesset, has passed the Copyright Amendment Bill 2005⁹ on first reading, and it is now under deliberation at the Economics Committee before proceeding to the second and third readings. As also noted, the Bill, if passed, would set back protection in Israel, discriminate against foreign producers of sound recordings, and potentially violate Israel’s bilateral obligations to the United States. The government of Israel should refrain from taking any steps that would weaken copyright protection at a time when copyright protection is increasingly fragile in Israel. The following recounts the major issues in the Copyright Bill 2005, prior to its revision in the Economics Committee.¹⁰

⁵ 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).

⁶ Detailed discussion of the merits and deficiencies of the current legal regime has been included in prior reports, and can be found, e.g., at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-152.

⁷ 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. 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”). The amendment also improves presumptions regarding copyright ownership that apply to both civil and criminal proceedings, although it remains unclear how this provision is being interpreted in practice. The amendment also imposes 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 offense from being committed), and doubles fines for copyright offenses committed by companies.

⁸ 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.

⁹ The “Copyright Bill – 2005” (published by the Government of Israel on July 20, 2005), according to the government, aims to modernize Israel’s protection of copyright and to implement the key international agreements with respect to copyright, including the Berne Convention, Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979), which is incorporated into the WTO TRIPS Agreement, Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994), as well as aiming to adhere to Israel’s current bilateral obligations. Bilateral commitments include the U.S.-Israel bilateral copyright agreement reached on May 4, 1950, and consisting of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, 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.” This has been confirmed by the Israeli government as meaning that U.S. sound recordings will be protected on the basis of the principal of national treatment. The Draft also included at least some issues addressed in the WIPO “Internet” Treaties, the WCT and WPPT.

¹⁰ While the changes in the Economics Committee have not been made transparent to IIPA, we understand several changes are positive (e.g., on protection of temporary copies), but that some of the changes, particularly with respect to exceptions (temporary copies) and computer program exceptions may not fully comport with international

Summary Comments

The Copyright Bill, 2005 (hereinafter Draft), if passed without change,¹¹ would result in weakened protection (e.g., with respect to phonograms), or in violations of Israel's international and/or bilateral commitments, and would result in other areas not being covered (e.g., protection against circumvention of "technological protection measures" used by creators to protect their creations).¹²

- By proposing Section 10 on "mutuality" (material reciprocity), the Draft could, if passed without change and if implemented through an Order, result in an **abrogation of Israel's TRIPS obligations** to provide national treatment for works. We assume that this is not the intent of retaining this provision (from the old U.K. statute), but TRIPS-compatible national treatment for works should be confirmed.
- The application of "material reciprocity" would mean that foreign sound recordings would lose important rights provided under the current law, and would **violate Israel's bilateral commitments to protect U.S. sound recordings on the basis of national treatment**.
- Draft Section 45 **fails to provide Berne- or TRIPS-compatible retroactive protection** for works and phonograms.
- The **legal protection of foreign phonogram producers is seriously weakened** under this draft, which is an unwarranted discrimination with respect to other right holders.
- **End-user piracy appears not to be considered a crime** in the Draft.
- The Draft appeared to **require proof of "trading purpose"** or an actual sale for all criminal violations, which **would not satisfy Israel's TRIPS obligation** to criminalize piracy on a commercial scale (but we believe this may be the subject of positive revisions in Committee).¹³
- There are **no provisions to protect against circumvention of technological protection measures (TPMs)** used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services. Israel should **implement this key WIPO Treaties requirement** (as nearly 90 countries have now done) and join the WIPO Treaties.

standards, and do not fully resolve the issues addressed in this report. In other respects, the changes do not address the issues raised in the report at all and these comments remain valid.

¹¹ As noted, some of the changes proposed by the Economics Committee would make positive improvements in some areas.

¹² There are also many other positive aspects of the Bill, and we do not list those aspects here.

¹³ A major shortcoming in the Draft's criminal provisions was the apparent necessity to prove "trading purposes" for criminal liability to attach. Such proof requirements are problematic in the digital environment, and run afoul of Israel's obligation under TRIPS to criminalize at least piracy on a commercial scale. "Commercial scale" piracy may cause significant "commercial scale" harm to a right holder notwithstanding that there is no purpose to trade in infringing materials. Examples would include uploading pre-release films onto 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 "trading purpose."

- **The reproduction right** in the Draft, read with the exception in Section 26 for certain indispensable transient reproductions, **appears now to protect temporary copies** (i.e., we believe it is one of the areas successfully addressed in Committee).
- Since the law provides **no automatic or express point of attachment** for foreign creations (including phonograms) in accordance with Section 9, appropriate **“Orders” that have been issued** in the past referring to the Berne Convention, TRIPS Agreement, Rome Convention, the U.S. Bilateral Agreements and other bilateral and international agreements to which Israel is a party, should be updated and amended before the transition period for the Draft has elapsed in order to ensure that there is no lapse in continuous protection.
- The **Draft’s rental right** in Section 11(7) as modified by Section 17 **violates TRIPS** and must be amended to ensure it complies with Israel’s TRIPS obligations.
- Several **exceptions to protection run afoul of the Berne Convention and the TRIPS Agreement**. There are concerns with Israel’s proposed adoption of the four “fair use” factors from U.S. law, with the possible overbreadth of exceptions as to computer programs, temporary copies, public performances, and libraries/archives. (While we understand some changes were made with respect to exceptions, we do not believe they resolved potential TRIPS issues of overbreadth).
- The definition of “infringing copy” in Section 1 would **exclude from protection** any import for which distribution in Israel is not authorized, i.e., so-called **“parallel imports.”**
- **Term of protection for phonograms should be extended** to the same level as for other creations.

Detailed Comments

National Treatment Can Be Denied Under Draft: Section 10 of the Draft proposes,

The minister is allowed, upon the approval of the government, if discovered that a certain country does not grant proper protection to creations of a creator who is an Israeli national, to restrict by order the rights prescribed by this law, wholly or partly, in relation to creations of creators who are nationals of that country; had the Minister prescribed so, the order shall be valid as to creations created after its entering into validity.

This provision permits the minister to deny rights to foreign right holders that are provided to Israeli nationals, if the foreign right holders’ countries deny such rights to Israeli nationals – so called “material reciprocity.” Imposition of material reciprocity would violate the principal of “national treatment” whereby countries treat foreign and domestic right holders alike. National treatment is a core principle of the TRIPS Agreement (Article 3) (as well as the Berne Convention), and by passing Section 10, Israel would put itself in a position of violating TRIPS (and Berne) if it ever issued such an order. Foreign copyright owners would be negatively prejudiced by such a change, and foreign right holders may have no recourse but to seek an international remedy under TRIPS if Israel effectuates such a drastic change. Section 10 of the Draft should be deleted and the principle of national treatment should be applied to all subject matter; at least, the Israeli government should acknowledge that its treaty (multilateral and bilateral) obligations are controlling, and that the government will therefore never apply (i.e.,

never issue an order to apply) material reciprocity to copyright protected works subject to treaty obligations.

Application of “Material Reciprocity”: Section 8(c) and 10 could also violate Israel’s commitments as to sound recordings. Under the 1911 U.K. Act, adopted by the Order, 1924, as amended, in Israel, Israel has long protected sound recordings as if they were “musical compositions,” i.e., as “works.” Up until now, Israeli sound recordings and foreign sound recordings published in Israel received equal treatment (“national treatment”) in Israel, and also received the same treatment as other works, including the full panoply of exclusive rights, which include public performance and broadcasting. Section 10 would allow Israel to single out those foreign countries which do not provide such exclusivity, and deny these important rights to legitimate right owners in sound recordings solely on the basis of their nationality. In other words, while Israeli right holders would receive full rights, foreign right holders could be discriminated against. Discrimination through the application of “material reciprocity” is exacerbated by the fact that the copyright point of attachment is not even apparently provided for foreign sound recordings except as to the rights of reproduction, making available and rental. See Draft Section 8(c), which in effect provides that only phonograms created by Israelis enjoy the full set of exclusive rights. Other phonograms are protected if they were first or simultaneously published in the territory of Israel, but are not granted the important exclusive rights of broadcasting and public performance.¹⁴ Such discrimination is unprecedented in Israel’s copyright history and, at least with respect to U.S. sound recordings, violates Israel’s obligations.

Israel’s obligation to afford full national treatment to sound recordings was established by the 1950 U.S.-Israel Bilateral Copyright Agreement. That Agreement, reached on May 4, 1950, consisted of an exchange of notes between U.S. Secretary of State Dean Acheson and Eliahu Elath, Ambassador of Israel, providing 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.” Works “published in Israel” receive full rights, including public performance and broadcasting, and works includes sound recordings in Israel to the present day, thus, sound recordings first published in the United States or in Israel must receive the same exclusive rights.

The requirement for Israel to provide equal treatment in Israel for U.S. sound recordings as for Israeli sound recordings was confirmed in Israel in 2004, through an important court decision (the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the matter of IFPI-Israel) and another exchange of letters between the United States and Israel. The court, notwithstanding the Israeli Ministry of Justice’s proffered opinion that U.S. sound recordings are not protected in Israel, decided in favor of IFPI-Israel, and confirmed copyright protection for U.S. and other foreign phonograms, as well as the application of the 30-day simultaneous publication principle. The judge specifically held that the U.S.-Israel Bilateral obligates Israel to provide national treatment to U.S. sound recordings (it was a given and not in

¹⁴ While Section 9 provides that the government of Israel may achieve point of attachment through an Order granting protection to right holders from countries belonging to international treaties to which Israel is a party, the Orders that have been issued do not seem to appropriately implement these obligations. The implementing regulations with regard to Israel’s accession to the Rome Convention in 2002 indicate, in Section 3, that protection is provided to “phonograms the producer of which ... is a national of a Member State or (the phonogram) was first published in a member state – in respect of reproduction [or] is a national of a Member State that grants similar rights to Israeli phonogram producers or Israeli performers and listed in the appendix – in respect of the direct use for broadcasting and public performance.” Thus, the intent is clear to discriminate against foreign right holders in sound recordings.

dispute that Israel must provide national treatment for works).¹⁵ The Court stated: “we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel.”

In late 2004, the United States Trade Representative exchanged letters with the government of Israel, in which the Israeli government confirmed that it had instructed the Ministry of Justice staff to follow the court’s interpretation of the 1950 Bilateral Agreement, namely, that Israel will continue providing national treatment for U.S. right holders in sound recordings. The government should now issue in writing an assurance that the meaning of its commitment is that material reciprocity will never be applied in Israel. As noted, we recommend that Section 8c be amended so as to grant all foreign phonogram producers the full set of rights granted to Israeli nationals and section 10 be deleted and that the principle of national treatment be applied as to all subject matter.

Retroactivity and Rule of the Shorter Term (Draft Section 45): Draft Section 45 intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Draft Section 45 provides, “The period of a creation copyright as detailed shall not be longer than the period of copyright that this creation has in its original country.” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term that the creation “has” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Draft Section 45 is revealed to be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under the Berne Article 18 retroactivity principle, must be protected in Israel. Draft Section 45 must be amended to ensure that it meets its international obligations.

Still No Clear Coverage of End-User Piracy as a Crime: The unauthorized use of business software and other copyright materials in a commercial setting causes grave harm to legitimate right holders. To the extent that such illegal uses result in significant unjust enrichment (i.e., on a commercial scale), such activities must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. Unfortunately, while the Israeli government has considered this issue for many years, with some within the government advocating criminalizing end-user piracy, the Draft apparently fails to do so. Section

¹⁵ The Court quoted more of the 1950 exchange of letters between the Israeli Ambassador in Washington and the U.S. Secretary of State in May 1950, 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]

50 dealing with “indirect” civil infringements does make it illegal to “hold” (possess) for “commercial purposes” which we believe may cover many end-user situations. However, Section 63 dealing with criminal infringements only covers “Holding [an] infringing copy of a creation, in order to trade it.” Since end-user piracy does not normally involve a “trade” (monetary exchange), it appears this form of piracy is left out of the criminal statute, in violation of TRIPS.¹⁶

No Provisions to Protect Technological Protection Measures from Circumvention:

There are no provisions to protect against circumvention of technological protection measures (TPMs) used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services.¹⁷ TPMs are key enabling technologies for healthy electronic commerce, and protection of TPMs is a key feature of the WCT and WPPT. Israel should implement this key WIPO Treaties protection (as nearly 90 countries have now done) and join the WIPO Treaties. There are also no provisions dealing with “rights management information” (RMI), which right holders may use to facilitate licensing. RMI protection is another feature of the WCT and WPPT that the government of Israel should take the opportunity presented by the current amendments to implement.

Reproduction Right (Temporary Copy Protection): The reproduction right in Paragraph 12(1) of the Bill as first proposed, along with the exception in Paragraph 26, apparently confirms that Israel protects temporary copies. We understand changes in the text that will be considered for second reading will confirm that temporary copies are

¹⁶ 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.

¹⁷ Below is an example of specific implementation language that we believe adequately addresses the WCT/WPPT requirement on TPMs:

- (1) Any person who
 - (a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that (a) controls access to a protected work, or other subject matter, or that (b) restricts the exercise of an exclusive right provided in this Law; or
 - (b) manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, which:
 - (i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - (iii) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;shall be liable, upon the suit of any injured party, to civil relief by way of damages, injunction, accounts or as otherwise provided in this Law. Any person, other than a nonprofit library, archive, or educational institution, that is found to have engaged willfully in such activities and either (a) for purposes of commercial advantage or private financial gain, or (b), in the case of a violation of (1)(b), on a scale which inflicts commercial injury on any party, shall be guilty of a criminal offense as provided in Section 62 of this Law.
- (2) ‘effective technological measure’ means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, or other subject matter, or protects any copyright or any rights related to copyright as provided by this Law.
- (3) The prohibition in this Section prohibits circumvention of technological measures and does not require an affirmative response to such measures. This Section does not require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure. This subsection does not provide a defense to a claim of violation of Section (1), so long as such product does not otherwise violate Section (1).
- (4) A violation of this Section is independent of any infringement that might occur under this Law.

covered under the reproduction right, but that the exception still may fall short of meeting the Berne three part test for exceptions,

Point of Attachment – Need Issuance of Order to Ensure Protection: Draft Section 9 provides that foreign works/phonograms that do not otherwise qualify for protection (e.g., by first publication in Israel) will be protected on the basis of international treaties pursuant to a Ministry of Justice “order.” Since, therefore, this confirms that there is no express point of attachment for foreign creations provided in the Draft, an appropriate “Order” would have to be issued referring to the Berne Convention, TRIPS Agreement and other bilateral and international agreements, before the transition period for the Draft has elapsed in order to ensure continuous protection. Preferably, the Draft should be amended to expressly provide a point of attachment, such as:

The provisions of this Law shall also apply to works, phonograms that are eligible for protection in Israel by virtue of and in accordance with any international convention or other bilateral or international agreement to which Israel is party.

Draft Rental Right Violates TRIPS: The Draft rental right in Section 11(7) as modified by Section 17 violates TRIPS and must be fixed. First, Article 11 of TRIPS refers to the rental of “originals or copies” of their works (applied *mutatis mutandis* to sound recordings in Article 14.4 of TRIPS). Section 17(1) of the Draft only refers to copies and must be amended. Second, and more importantly, Section 17(b), which exempts from copyright protection renting out creations by “a public library or a library of an educational institute,” apparently does not carve out computer programs and phonograms. To the extent that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision probably violates TRIPS; rental even under the terms of Section 17(b) would certainly impinge on the exclusive right, would conflict with a normal exploitation of the work and would unreasonably prejudice the legitimate interests of the right holder. Other laws contain minor allowances of lending a computer program for a nonprofit purpose by a nonprofit library, but only on condition that the library affix a notice regarding the rights involved to the package.

Exceptions: In light of the long list of exceptions, it is essential that the law implement expressly the well established Berne “three-part test” (incorporated into TRIPS), preferably by adding the test in Section 18 and making it applicable to Sections 19-32. In other words, it should be codified in Section 18 that no exception in Israel’s law (whether fair dealing, “fair use,” or a specific exception) may be applied: in other than special cases; in a way that conflicts with a normal exploitation of the work; or in a way that unreasonably prejudices the legitimate interests of the right holder. Such a provision would provide needed guidance to the courts that they must respect international norms in their interpretation of fair dealing (and other exceptions). We note that some of the exceptions listed in Sections 19-32 of the Draft run afoul of the Berne three-part test, especially if applied in the digital environment. We note the following as among the specific problems/issues that must be addressed in the exceptions sections:

- **Proposed Application of U.S.-Type “Fair Use” Factors:** At the outset, we note that Section 19(a) attempts to adopt the U.S. “fair use” test by stating that “fair dealing with the creation is allowed, among others, for the following purposes: self study, research...” Section 19(b) includes a list of factors that are similar to those in place in the United States and the explanatory notes clarify the intention to enact a non-exhaustive list of purposes, which would allow enough flexibility to the courts in determining whether a particular use is “fair.” We understand there may already be agreement to adopt the draft, and we register our concern that the result of this change could result in considerable case law interpretation

in Israel on “fair dealing” being thrown out in favor of as yet undeveloped factors in Section 19(b). By contrast, in markets like the U.S., which employ very similar factors to those set out in proposed Section 19(b), many years of jurisprudence have provided society with considerable clarity on the boundaries of “fair use.” There is a significant risk that in Israel the adoption of these factors at this time might be viewed by the community as a free ticket to copy. This would have disastrous consequences, and thus we urge the Israeli government to re-examine the introduction of these factors, rather than relying on Section 19(a), which sets out the long-established “fair dealing” principle, followed by specific exceptions dealing with certain special cases (Sections 19-32, but see comments below). Finally, if the factors in Section 18(b) are to be ultimately adopted, Section 19(b)(1) especially needs to be amended to properly narrow the scope of the “fair use” inquiry:

(b) In order to examine the fairness of a use of the creation for the purposes of this paragraph, the following shall be considered:

(1) The aim of the use and its type, ***including whether the use is of a commercial nature or is for non-profit educational purposes;***

- **Computer Program Exceptions (Backup and Interoperability) (Draft Section 24):** The Draft exceptions as to computer programs run afoul of international standards and must be more narrowly tailored. While IIPA has not reviewed the latest draft in Committee, we understand that there have been certain improvements to the scope of the exceptions (for example, we understand the back-up copy exception may be limited to a single copy, subject to destruction once its back-up purpose is no longer needed). Nonetheless, the exceptions apparently still go beyond what can pass muster under international standards, since they apparently allow for reproduction or adaptation for purposes of interoperability and for purposes that go beyond interoperability, and do not contain the safeguards to ensure that the copying is limited to the portion of the work needed for purposes of achieving interoperability, etc. Assuming the purpose in the latest draft remains to enact a provision that allows lawful users to achieve interoperability, but keeping in mind the three-part test for exceptions, the drafters must ensure that the exception can meet the Berne three-part test, and it is suggested they should review and take into consideration the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6,¹⁸ and appropriately narrow the exception.
- **Temporary Copy Exception (Section 26):** As noted above, Sections 11(1), 12, and the exception in Section 26 confirm that the drafters intend that there be protection for temporary copies in Israel. We have suggested above how the drafters can expressly provide for this in Section 12. The Draft exception language is vague enough to cause great concern, e.g., “for other legal use of the creation” is overly broad, and this language must be narrowed in order to meet the Berne and TRIPS standards. We also suggest other changes which are needed to ensure that the exception for certain temporary reproductions comports with the Berne Convention’s well established three-part test as follows:

26. A temporary duplication of a creation ***is allowed if it:***

(a) is merely incidental, and ~~as~~ an integral part of a technological process aiming only to allow the transmission of the creation between the sides in a communication network by a mediator, or ***is*** a temporary duplication of

¹⁸ 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

- a creation *that is within an operation that makes a digitally stored ~~for~~ other-legal copy of a work accessible; and*
- (b) *the reproduction use of the creation is made by a person allowed authorized by the right holder or by law; and*
- (c) *the reproduction is undertaken within an incidental, technologically inevitable step for performing an authorized act consequential to the transmission or to rendering the work accessible, is within the normal operation of the apparatus used, and is carried out in a manner which ensures that the copy is automatically erased and cannot be retrieved for any purpose other than that provided for in the preceding sub-sections, on condition that the temporary copy does not have an pecuniary value in itself.*

- **Inappropriate Expansion of Artistic Work Exception (Draft Section 27):** Draft Section 27 as currently crafted violates Berne and TRIPS. The explanation describes this Section as adopting from the U.K. Act the exception in Section 2(1)(ii) of that Act whereby a visual artist could re-use a mold, so long as the “main design” of the work was not repeated or imitated. In this case, Paragraph 27 refers to not repeating the “essence” of a work; essentially, this invites the author of any work (including sound recording) to create adaptations or derivative works, regardless of whether the author has already transferred rights in the work/phonogram. This in essence grants a new moral right to continue to exploit a work, and thus not only impinges upon several exclusive rights, but imposes a severe restriction on the ability to freely contract. This Section must be curtailed to the original purpose of the U.K. Act or deleted.
- **Public Performance Exception (Section 29):** Draft Section 29 creates an exception for certain public performances of plays, but also possible phonograms or motion pictures, mainly in school settings. The exception must be further limited in order to meet international standards; most importantly, it should be limited to a face-to-face educational setting, and to a performance where no profit is made, *cf.* 17 U.S.C. § 110 (U.S. Copyright Act) (“without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if there is no direct or indirect admission charge or if the proceeds are used exclusively for educational purpose and not for private financial gain”). Also, if a copy is involved, the copy used must have been lawfully made.
- **Library/Archive Exception (Draft Section 30):** Draft Section 30 as written fails to meet the Berne/TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and since the explanation makes clear that this would allow a “digital” copy to be made, the statute must provide assurance that the reproduction in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the physical premises of the library or archives. Otherwise, it violates Berne and TRIPS. Section 30(b) as drafted is too open-ended to comport with international standards. By contrast, 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) allows for limited inter-library transfer of a single copy of one article from a compilation or periodical, in limited circumstances, or of an entire work, but only where the work cannot be obtained at a fair price. The drafters should reexamine provisions such as Section 108 of the U.S. Copyright Act to ensure that the Berne/TRIPS standard is met in the Israeli draft.

Term of Protection for Audiovisual Works and Sound Recordings: 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.¹⁹ 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: The definition of “infringing copy” in Paragraph 1 would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” Parallel imports of copyright material ultimately harm local distributorships, and increase the likelihood that piratical product will be “mixed” in with shipments of parallel imports, making piracy harder to detect and enforcement more difficult. The government should reconsider.

Civil Remedies (Statutory Damages): Section 58(a) proposes statutory damages in the amount of NIS100,000 (US\$23,630). These statutory damages are awarded at the discretion of the court (“the court is allowed, at the claimant’s request”) rather than at the election of the claimant, which is a major weakness. However, we commend the drafters for increasing the maximum, while noting that abolishing the minimum may make claimants reluctant to request statutory damages. We continue to be concerned that, even with the higher maximum, the failure to consider a “per-copy” damage award decreases the likelihood, especially in a case causing countless infringing copies of numerous titles, that the statute will have a deterrent impact on piracy. Further, Draft Article 60 makes it even more unlikely that civil cases can ever be deterrent in Israel, since no compensation will be awarded when “the offender did not know or could not have known, at the time of the violation, that there is a copyright on the creation.”

Destruction/Forfeiture Not Adequately Provided (Draft Section 62): Draft Section 62 provides for the possibility of destruction of infringing goods, but also gives courts the ability to order the “transfer of the ownership of the infringing copies to the claimant, if he had asked for, in exchange of payment their value as if the copyright was not breached or in exchange of any other payment as the court shall see fit.” The explanation given as to why this latter provision is necessary is that “the ownership of infringing copies by the claimant might be unreasonable, especially when the infringing copies, being physical objects, have a pecuniary value much higher than what is implied from the violation of the creation copyright (for example, the copy of a sculpture poured in gold, the pecuniary value of the raw material might be higher or equal to the pecuniary value of the creation).” This example seems far-fetched, and it is highly unfair to force right holders in mass-market copyright materials to pay the infringer’s costs for the infringement, e.g., for the polycarbonate used to make the pirate CDs and the glass or metal used to make the masters of the disc. This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort.”

Injunctive Relief: Nowhere in the draft is injunctive relief provided for.

¹⁹ 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.

OTHER COPYRIGHT-RELATED LEGISLATION

Copyright and Performers Rights (Royalties Tribunal) Bill 2006: This Bill was published on July 10, 2006, has also passed first reading and is now pending before the Economics Committee. No date has reportedly been set for discussions on this Bill although it may be dealt with in conjunction with the 2005 Bill. Most of the provisions deal with dispute resolution procedures. The main problems with this Bill are: (a) it obliges the collection of broadcasting and public performance royalties for works recorded on phonograms to take place under one umbrella organization, for all right holders involved (authors, producers, performers), which must be approved by the Minister of Commerce; (b) broadcasting and public performance royalties will need to be pre-approved by the tribunal before any collection takes place. This means that all existing royalties will have to be reviewed by the tribunal.

Optical Disc Legislation: With a number of optical disc plants operating in Israel, IIPA recommends that the government of Israel introduce effective optical disc plant control measures, including: (a) the establishment of a competent licensing authority to grant licenses to optical disc production facilities as well as to deny, suspend, or revoke a license if that should become necessary; (b) the requirement to use source identification (SID) Codes to trace pirate discs to their source of production; (c) the establishment of licensee record-keeping requirements and an exemplar program; (d) the ability to inspect plants, including nighttime inspections; (e) government record-keeping of all plants/facilities and all actions taken; (f) the establishment of adequate penalties for violations of a license (or burning without registering) including criminal penalties and possibility of plant/burning facility closure; (g) the registration of commercial CD-R/DVD-R "burning" operations; and (h) to put into place controls to track the export of discs, and export and import of equipment and raw materials, including the masters or stampers which are the key components for producing pre-recorded content.

COPYRIGHT PIRACY AND ENFORCEMENT UPDATES

Piracy Issues: The most significant piracy problem in Israel for the motion picture industry is increasing CD-R and DVD-R burning of films downloaded from the Internet.²⁰ There are also: 1) pirate CD-R and DVD-R labs, which are difficult to locate as they can be set up in small rooms in domestic premises; 2) stores in major marketplaces, including in Tel Aviv, Haifa, Jerusalem, Rishon Le-Zion, Rosh Ha-Ayin, and Herzlia, which engage in in-store burning of major motion picture titles; and 3) flea markets which also carry extensive pirated product. These activities not only negatively impact the home entertainment market, but the theatrical market as well. The motion picture industry group, ALIS, reports that 200 legitimate video libraries have had to close down because of piracy. They also report that legitimate sales of the local distributors are declining. Theatrical box office has also been declining since 2001. There are organized crime factors in Israel in local production and distribution of pirate products in main markets such as central bus station in Tel Aviv, the Carmel market, Haifa's main street (Ha-Azmaut st). Illegal public screenings continue to be a problem in hotels, cafes and pubs, one that has grown since the introduction of pirate DVDs and new sophisticated performance equipment. Parallel imports of Zone 1 DVDs of U.S. motion pictures (DVDs programmed for playback and distribution in North America only) also remain widely available.

Enforcement Issues: Despite the law enforcement authorities' lack of resources dedicated to IP enforcement, industry reports good relations in anti-piracy efforts. The motion

²⁰ Dozens of websites are taking advantage of the approximately 3.5 million Internet users aged 13 and above.

picture industry enforcement group, ALIS, reported 227 criminal raids and 50 civil raids. Moreover, a number of pirate labs have been dismantled (since the beginning of the year until the end of November, ALIS raided 23 such labs seizing 208 CD-R burners and 183 DVD-R burners).²¹

Given the level of piracy in Israel, few raids have been conducted (84 raids during the first half of 2006 at Rosh-Ha-Ayyin market, Rishon-Le Zion market, Ha-Carmel market, Big market, and Yavne) and the level of piracy in those markets has not really decreased. This is because the owners of piracy operations are finding ways to ensure that their sellers are only caught once (the first time offense is usually penalized only with imposition of a non-deterrent fine, which is perceived as a cost of doing business). This is one symptom in a system characterized otherwise by a lack of deterrent sentencing by the courts.

Problems remain with the Special Intellectual Property Police Units created by the Israeli government in 2002, notwithstanding some good cooperation as noted. First, these units are understaffed: there are 29 officers handling all types of intellectual property infringement and these officers are spread across four separate districts and one headquarters. Second, the units are under-funded. Finally, they are lack in coordination and structure. They are not (nor is anyone else) actively pursuing Internet piracy cases and are not willing to assist in the raiding of Internet pirates. The Israeli authorities also refuse to act *ex officio*.

TRAINING

The motion picture industry group in Israel, ALIS, provides training seminars for police and prosecutors each year in the area of IP. In addition, ALIS also participated in an annual IP conference held in Tel Aviv on November 20, 2006.

SECTORIAL ISSUES/MARKET ACCESS

Collections for Retransmissions of Broadcast Television Signals: Notwithstanding protections accorded to retransmitted works under Israel's copyright laws and an Israel Supreme Court decision confirming that Israeli law affords such copyright protection to cable retransmissions, Israeli cable operators continue to refuse to make payment for retransmissions of any broadcast television signal. Collective management organization AGICOA filed lawsuits on behalf of its international members, including U.S. right holders, against cable operators in the District Court of Tel Aviv in 2000 only after the latter had rejected the years of efforts by

²¹ For example, the June 2006 IFPI Bulletin reported that For over two months IFPI Israel has been conducting investigations and gathering information against several persons suspected to be involved in the production, distribution and sale of pirate music products on CDR. As the result of investigations involving surveillance and careful analysis of information, premises were raided on 12 January and a clandestine laboratory operated by two suspects, closed down. In the premises were found 12 CDR towers each containing between 7 and 12 burners, 30,000 recorded CD-Rs containing music, 100,000 blank CD-Rs and approximately 500,000 printed inlay cards. Two suspects were arrested and subsequently remanded by the courts charged with copyright offences. On 16 March, IFPI Israel cooperating with a special crime task force raided several premises suspected to be used in counterfeiting music products. One house, controlled by members of a gang also suspected to control two markets in the towns of Ashdod and Askelon and known for the availability of counterfeit product, was subject to a thorough search including the employment of specially trained dogs. During the search 6 burning towers, thousands of counterfeit CDs and blank media were found in the property. A hand gun together with a silencer and quantity of drugs were found by the police dogs, hidden in a yard. The suspects some of whom have previous convictions for IPR offences, drug trafficking, robbery and other offences have been remanded pending a court appearance and forensic examination of the firearm. See June 2006 IFPI Enforcement Bulletin, at <http://www.ifpi.org/site-content/library/enforcement-bulletin-30.pdf>.

AGICOA to negotiate retransmission licenses.²² These efforts to seek redress from Israeli courts have been hindered by bankruptcy filings of certain of the cable operators from which AGICOA sought remuneration.²³

Television Advertising Restriction Violates Israel's WTO Agreement:²⁴ On May 9, 2002, Israel's Council for Cable and Satellite Broadcasting adopted a new provision to the existing Bezeq Law that regulates the pay television industry. The provision prohibits foreign television channels from carrying advertising aimed at the Israeli market, with the exception of foreign broadcasters transmitting to at least eight million households outside of Israel. This provision violates Israel's commitments in the World Trade Organization (WTO) Services Agreement to provide full market access and national treatment for advertising services. In addition, such restrictions impede the healthy development of the television industry in Israel.

²² Starting in the late 1990s, and for a number of years, Israeli cable operators had been retransmitting U.S., European and Russian content without the authorization of right holders.

²³ Subsequently, AGICOA claims were rejected by the bankruptcy trustee (Special Manager). These objections necessitated direct intervention by U.S. producers in the case as well as the filing of mandates for AGICOA intervention by its right holders. These claims remain pending in an endless protraction of the proceedings, lending the appearance that the courts will not enforce legitimate claims arising under copyright law, as confirmed by the Supreme Court, and that Israel rejects the obligations of relevant international treaties.

²⁴ IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry.