

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### ISRAEL

**Special 301 Recommendation:** Israel should be on the Watch List.

#### **EXECUTIVE SUMMARY**

The Israeli government has passed a new copyright law (published November 25, 2007; in effect May 25, 2008). While introducing several positive changes, the law dramatically weakened protection in some areas (e.g., with respect to sound recordings) and may violate Israel's international commitments in other ways. It is highly unfortunate that the new law does not fully implement the WIPO Internet treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, especially since Internet penetration is more than 70% in the country, and broadband penetration is quite high, meaning Internet piracy in Israel is here to stay and having a significant impact on legitimate right holders.

Even more disturbing are some proposed pieces of legislation or memoranda which would seriously threaten to undermine the entire copyright system if not seriously tilt the balance away from authors and right holders. Such steps as imposing mandatory joint-collection of royalties for different right holders and compulsory rate-setting under a pending Copyright Tribunal Bill are firsts for Israel. They reveal in a rather transparent manner the Israeli government's attempt (really the attempt of the often anti-proprietor Ministry of Justice) to convert the default copyright system of exclusive rights into a system comprised of mere rights of remuneration. If they succeed in this attack on copyright, it is no exaggeration to imagine an already-shrinking copyright industry in Israel becoming a shadow of itself.

Also extremely disturbing is an Electronic Commerce Bill which passed on first reading in the Knesset in mid-January 2008. Rather than creating a framework that provides incentives to Internet service providers to cooperate with right holders against abuse of their networks, this Bill – if passed in its current form – would encourage ISPs to turn a blind eye to infringements and would raise serious obstacles to anti-piracy efforts in Israel. The Bill would not provide proper mechanisms to deal effectively with Internet piracy or to stop Internet infringements, since it establishes a notice plus notice mechanism, a blanket immunity to service providers for activities such as caching or hosting content except under extremely limited circumstances, and an ISP duty of confidentiality towards its users. IIPA hopes this Bill will be reconsidered in light of the important legitimate interests at stake for authors and other right holders operating in the Internet space.

These legislative developments are all the more difficult to swallow as law enforcement in Israel, which already takes little interest in enforcing copyright, is ill-equipped to help protect digital copyrights, with inadequate manpower and funding, and little emphasis on training for those few who are assigned the copyright beat. In the meantime, pirates – many of whom are known to be part of organized criminals – carry on in their high profit, low-risk enterprise.

#### **ACTIONS TO BE TAKEN IN 2007**

- **Remove from Consideration and Revise the Draft Copyright Tribunal Law That Would Create Troubling and Unprecedented Mandatory Collective Management and Would Impose Compulsory Pre-approval of Remuneration Rates.**
- **Reconsider Memorandum on Electronic Commerce Law, So That Service Providers Have Proper Incentives to Cooperate with Right Holders to Protect Their Legitimate Rights.**

- **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.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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: 2003-2007 <sup>1</sup>										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	50%	45.0	50%	28.0	35%	34.0	40%	40.0	63%
Business Software <sup>2</sup>	52.0	32%	47.0	32%	39.0	32%	30.0	33%	35.0	35%
Entertainment Software <sup>3</sup>	NA	NA	11.4	84%	NA	95%	12.4	88%	NA	75%
Books	NA	NA	1.0	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures <sup>4</sup>	NA	NA	NA	NA	61.0	61%	30.0	40%	30.0	50%
<b>TOTALS</b>	<b>52.0</b>		<b>104.4</b>		<b>129.0</b>		<b>107.4</b>		<b>106.0</b>	

## COPYRIGHT LAW REVISION

A new comprehensive Copyright Law was enacted by the Knesset on November 19, 2007, replacing the old set of Orders and Ordinances (which were largely based on the 1911 Copyright Act of the United Kingdom).<sup>5</sup> The Law reportedly was published in the Official Gazette on November 25, 2007,

<sup>1</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf).

<sup>2</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>3</sup> 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.

<sup>4</sup> MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical "hard goods" and Internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

<sup>5</sup> Copyright in Israel was previously 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). Other ancillary legislation included 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. IIPA has not reviewed in all aspects the extent to which any or all of these are abolished by virtue of passage of the new law.

and will go into force on May 25, 2008. While introducing several positive changes,<sup>12</sup> some of the new provisions result in dramatically weakened protection (e.g., with respect to phonograms) and steps must be taken or assurances given to avoid violations of international and bilateral commitments. It is highly unfortunate that the Israeli government did not take the opportunity presented by this legislation to fully implement the WIPO Internet Treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, by adding protection against the act of circumvention of “technological protection measures” used by creators to protect their creations, and trafficking in circumvention devices or providing circumvention services.<sup>6</sup> Regrettably the Knesset also rejected other attempts to introduce modern elements of copyright protection into this law such as an extended term of protection for sound recordings.

- **Legal Protection of Foreign Phonogram Producers is Seriously Weakened:** Israel has until now protected sound recordings as if they were “musical compositions,” i.e., as “works.” In addition, 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 rights. Under the new Law, the situation will change, such that, while U.S. right holders may continue to enjoy rights that Israelis enjoy, under national treatment (and by virtue of Israel’s bilateral obligations to the U.S.),<sup>7</sup> other foreign right holders in sound recordings will apparently no longer enjoy equal treatment, and will be denied rights (and therefore payments) for their sound recordings in Israel. Specifically, Section 8(c) of the new Law 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, unless protection is granted pursuant to a treaty. In addition, Section 10 allows Israel to single out those foreign countries which do not provide such exclusivity, and deny the rights provided to Israelis to legitimate foreign right owners in sound recordings solely on the basis of their nationality.<sup>8</sup> Section 8c should be amended so as to reinstate the protection under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. In addition, Section 10 should be deleted and the principle of national treatment should be applied to all subject matter.

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<sup>12</sup> There are many other positive aspects of the new Law and we do not list those aspects here.

<sup>6</sup> 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.

<sup>7</sup> Israel’s obligation to afford full national treatment to sound recordings was established by the 1950 U.S.-Israel Bilateral Copyright Agreement, May 4, 1950. This exchange of notes between U.S. Secretary of State Dean Acheson and Eliahu Elath, Ambassador of Israel, provided 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.” By virtue of a Decree to implement this bilateral agreement, which has been recently amended in 29 October 2007, works first published in the United States are “protected in Israel as if they were first published in Israel” and works created by United States nationals, whether published or unpublished are “protected in Israel as if they were created by an Israeli national”. 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 the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the Matter of IFPI-Israel, and through another exchange of letters between the United States and Israel. The court 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. The Court quoted the 1950 Bilateral exchange of letters, and 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.

<sup>8</sup> 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. Moreover, the omission of protection for public performance and broadcasting of foreign sound recordings has a retroactive effect, because it applies not only to future recordings, but also to existing recordings, which at the time of their creation had enjoyed the public performance and broadcasting right in Israel. These recordings were produced by their owners on the basis of the rights existing at that time, i.e. the public performance and broadcasting rights for Israel. These rights have now been omitted with respect to these existing recordings without justification.

- **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. Sections 48 and 51 dealing with “indirect” civil infringements do make it illegal to possess an infringing copy for “commercial purpose”, which we believe may cover certain end-user situations. However, Section 61 dealing with criminal infringements only covers possession of infringing copies of a work “for purposes of trading therein.” 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.<sup>9</sup>
- **Civil Remedies (Statutory Damages):** Section 56 to the Law sets new amounts of statutory damages without need of proving damages between 0 NIS and NIS 100,000 (US\$27,400). 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 regrettable. Also regrettable is that while the “ceiling” for maximum damages was raised from 20,000 NIS, the “floor” was lowered from 10,000 NIS to 0 NIS. The new Law further provides that multiple infringements will be deemed as a single infringement when determining statutory damages. The latter amendment decreases the likelihood that the statute will have a deterrent impact on piracy, especially in the most damaging cases, i.e., those involving many infringing copies of numerous titles. Moreover, the lack of any floor on minimum damages seriously undermines the deterrent aspect of the damages, at the expense of the copyright owners.
- **Presumption of Ownership for Sound Recordings Omitted:** Inflicting a major set-back on enforcement of rights against piracy and wide-spread infringement, the presumption available in Section 64 to the new Law for creators in enforcement proceedings regarding their title in the works in cases where their name appears on the work in the normal manner was amended to exclude sound recordings. Thereby, a new troubling discrimination was created between creators of all other works (for which the presumption will continue to apply) and sound recordings (for which the presumption was omitted). This change will impose unnecessary hardships on producers of sound recordings in establishing their rights in infringement cases for no apparent reason. This totally unwarranted change in the law should immediately be revoked and the former version of Section 64 should be reinstated.
- **Limited Right to Injunctions:** Section 53 seriously limits the ability of copyright owners to enjoin infringement of their rights, by providing that the right to an injunction in copyright infringement cases exists “unless the Court has grounds for not ordering so”. This amendment not only limits the existing wide availability of injunctions in case of infringements, but also undermines the well-rooted view under Israeli case-law that the right for an injunction in infringement of IP matters (copyright included) is not subject to exceptions and that it is the primary relief for the IP owner. This amendment raises questions about Israel’s compliance in spirit with TRIPS Article 44.
- **Destruction/Forfeiture Not Adequately Provided (Section 60):** Section 60 of the new Law 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 has so requested, and the court may, if it finds that the claimant is likely to make use of those infringing copies, order the complainant to make payment to the defendant in the manner which it shall prescribe.” This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” in that the court may order the transfer and require payment.

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<sup>9</sup> A more detailed discussion of the lack of a criminal remedy against end-user piracy is in the 2003 Special 301 report for Israel, at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-149.

- **Term of Protection for Sound Recordings:** Under the new Law, Israel protects sound recordings for only 50 years “from the date of its making.” There is no reason not to afford at least 70 years to the owners of sound recordings.<sup>10</sup> The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide longer term to producers of sound recordings in Israel.
- **Retroactivity and Rule of the Shorter Term (Section 44):** Section 44 of the new Law 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, Section 44 provides, “The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin...” 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 Section 44 may 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. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.
- **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.” The new Law goes further and provides that goods which are considered genuine in their country of origin cannot be prevented from importation to Israel even where the copyright owner in Israel is not the copyright owner of the work in its country of origin and has not authorized the import. 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. This new provision discriminates against the holders of the local copyright to prevent such imports, as they would have been considered illegal if manufactured in Israel.
- **Exceptions and Fair Use:** In light of the long list of exceptions, the Law should expressly implement the well-established Berne “three-step test” (incorporated into TRIPS), preferably by adding the test in Section 19 and making it applicable to Sections 18-32. 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: other than in special cases; in a way that does not conflict with a normal exploitation of the work or unreasonably prejudices the legitimate interests of the right holder. Such a provision would provide the necessary guidance to the courts obliging judges to respect international norms in their interpretation of fair dealing (and other exceptions). Some of the exceptions listed in Sections 19-32 of the Law run afoul of the Berne three-step test, especially if applied in the digital environment.
  - **New “Fair Use” Exception Without Common Law Interpretation; Unlimited Ministerial Discretion:** Section 19(a) of the new Law attempts to adopt something similar to a common law “fair use” test by stating that “Fair use of a work is permitted for purposes such as: private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.” Section 19(b) of the new Law includes a list of factors that are similar to

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

those in place in the United States. Section 19(c) then provides, “[t]he Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.” While IIPA would by no means disagree with the adoption of fair use as understood in the U.S., and as interpreted through decades of jurisprudence, Israel does not have that carefully-honed jurisprudence and the adoption of the “fair use” standards without it risks creating gaps in protection that would not be justified in countries having such a “fair use” tradition. Also, it is unclear whether, by virtue of this change in Israel, the many years of jurisprudence on “fair dealing” may have been thrown out. At least the provision should be amended as follows:

(b) In determining whether a use made of a work is fair within the meaning of this paragraph the factors to be considered shall include, inter alia:

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

IIPA further expresses concern over the Knesset granting the Minister of Justice discretion in Section 19(c) to “make regulations prescribing conditions under which a use shall be deemed a fair use.” Fair use is a case-by-case fact-based inquiry. “Regulations prescribing conditions” by the Minister would not be. This discretion seemingly without standard on the part of the Minister potentially opens the door for even broader exceptions to be introduced in Israel. IIPA seeks clarification as to what the possible checks are to this seemingly unlimited discretion may be.

- **Public Performance Exception in Educational Institutions (Section 29):** This Section provides an exception for certain public performances of plays, phonograms and motion pictures, mainly in educational institutions. Although the exception was limited in the legislative process to public performances taking place in the institution in the course of its educational activities only, it is still overly broad with respect to sound recordings. As far as sound recordings are concerned, the exception should further be limited as was done with respect to motion pictures, i.e. for teaching or examination purposes only. Equally important, the Minister of Justice has been empowered in Section 31 to define which public institutions are eligible for the exception. It is important that the Minister will confine the exception to public institutions that are official schools only and not to general educational-related establishments as a whole, in order to prevent unlimited use by the public.
- **Computer Program Exceptions (Backup and Interoperability) (Section 24):** The Draft exceptions as to computer programs should be more narrowly tailored. For example, it is not clear from the language that the back-up copy exception is limited to a single copy. More potentially concerning is the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes. IIPA previously commented that a useful comparison should be made with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6<sup>11</sup> in order to appropriately narrow the exceptions.

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<sup>11</sup> 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs. Specifically, Article 6 of the Directive on “Decompilation” provides,

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form ... are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

- The exception must meet the Berne Convention three-step test, and, unlike the new Law, the EU Directive does so expressly.
  - While the new Law limits the copying or adaptation to “the extent necessary to achieve” said purposes (approximating the “indispensable” language in the chapeau of Article 6 of the Directive), the new Law’s excepted copying or adaptation is not “confined to the parts of the original program which are necessary to achieve interoperability,” as in the Directive.
  - The exception in the new Law goes not only to interoperability, but also to a general security exception, i.e., copying or adaptation is permitted for the “[e]xamination of the information security in the program, correction of security breaches and protection from such breaches.”
  - Under the EU Directive, it is not permitted to invoke the exception “for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright,” while the new Law prohibits invoking the exception where “said information is used to make a different computer program which infringes copyright in the said computer program.” The words “development” and “marketing” should be added to narrow this exception at least.
- **Rental or Lending Right Exception:** Section 17(b), which exempts from copyright protection renting out works by “a public library or a library of an educational institute.” IIPA seeks clarification on whether this is intended to be a “lending” exception. To the extent it is rental and that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision would violate 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.
  - **Temporary Copy Exception (Section 26):** Sections 11(1) and 12(4) confirm that the temporary copies are protected in Israel. The exception in Section 26 is vague enough to cause great concern, e.g., “to enable any other lawful use of the work,” is overly broad, and is not tempered much by the language “provided the said copy does not have significant economic value in itself.” It is unfortunate that such a vague and potentially overbroad exception was adopted notwithstanding industry comments specifically directed to properly narrow the exception to avoid a clash with the Berne Convention and TRIPS standards. Here would be one way to amend the exception to make it more acceptable:

The transient copying, including such copying which is incidental, of a work, is permitted if such is an integral part of a technological process whose only purpose is to enable transmission of a work as between two parties, through a communications network, by an intermediary entity, or **and such is made by a person authorized to enable any other by lawful use of the work, provided 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** said copy does not have significant economic value in itself.

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

- **Library/Archive Exception (Section 30):** Section 30 as written fails to meet the Berne/TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and 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 would risk violating the Berne Convention 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.
- **Point of Attachment – Need Issuance of Order to Ensure Protection:** 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.” This confirms that there is no express point of attachment for foreign creations provided in the Law. Existing Orders implementing the Berne Convention, TRIPS Agreement, Rome Convention and other international treaties signed by Israel, which correspond to provisions in the old law, will have to be amended to comply with the new law before it takes effect on May 25, 2008

## **OTHER COPYRIGHT-RELATED LEGISLATION**

**Draft Copyright Tribunal Law Would Create Troubling Mandatory Collective Management and Would Impose Compulsory Remuneration Rates:** A new draft Copyright Tribunal Law was put before the Knesset in July 2006. The draft has now been allocated to the Economics Committee of the Knesset for review, and deliberations have already started. This draft represents the first attempt to establish a copyright tribunal in Israel. Although copyright tribunals have proved to be beneficial to the enforcement and administration of copyright, the new draft, substituting the 2001 draft, includes two notable problematic changes which threaten to stall royalties’ collection for broadcasting and public performance of phonograms in Israel.

First, the draft introduces a mandatory joint-royalty collecting system for public performances and broadcasting by a single umbrella organization to be selected by the Minister of Trade and Commerce. The mandatory joint collection would cover phonogram producers and all other right holders whose works are embodied in phonograms, authors, and performers. Other common law countries (e.g. the UK, Canada, Australia and Singapore) with a copyright tribunal in their copyright laws do not oblige right holders to jointly collect broadcasting and public performance royalties. In fact, this is virtually unheard of anywhere in the world (other than in very specific and limited circumstances, such as the collection of private copying levies). The restriction on independent administration will deprive producers of sound recordings of their basic property rights and stands in stark contrast to the exclusive nature of broadcasting and public performance rights granted to local and foreign creators under the new Copyright Law. The mandatory joint-collection would also overrule existing collection mechanisms which have been in operation in Israel for decades. It would disrupt existing commercial dealings with users and will likely lead to unnecessary conflicts between right owners forced to administer their rights jointly. It also constitutes a breach of the basic right to freely associate and the right to freely contract. It is difficult to see how such joint collective administration imposed by law could be of any benefit to either right holders or users.

Another major problem with the draft is a requirement for pre-approval of all tariffs collected by the joint-collection body. The draft requires that the tariffs and royalty rates for broadcasting and public performance for the entire local market be set by the tribunal as a pre-condition for their collection. In other words, royalties will not be collectable until after such tariffs are issued by the tribunal. Such task is unprecedented in other countries. It will be extremely expensive and pose an insurmountable task on the new Tribunal, when in fact such intervention is not needed in most cases because the royalties are agreed upon without legal dispute between the producers and users. In fact, there are no countries where copyright tribunals are subjected to such a task (not even in countries with established veteran copyright tribunals). Again, the amendment blatantly disregards the basic principle of freedom of association and of

the right of collecting societies to determine the economic return for their rights. It further disregards the specific characteristics of the various economic rights holder groups and runs counter the established practice in the world, particularly in the U.S. and in Europe. Israel should not adopt these highly detrimental and totally unwarranted provisions.

The combination of the two new elements the draft seeks to implement – the joint-collection and pre-approval of public performance and broadcasting tariffs – would create a serious hindrance to royalties collection in Israel. They would disrupt existing market conditions and establish a framework that threatens royalties collection altogether.

**Memorandum on Electronic Commerce Law:** A new E-Commerce Bill in Israel passed a first reading in the Knesset in mid-January 2008, and will now be allocated to a committee (most likely the Economics Committee). While there is no date set for deliberations, there are some major flaws in this bill which must be addressed. The local record industry group provided detailed comments on a previous version of this Bill (when it was a Memorandum) but there have been some major changes to the text since then.

Unfortunately, it is feared that the Bill would fail to properly address copyright holders' interests in cases where providers of online services are involved in illegal transactions dealing with materials protected by copyright and neighboring rights laws. If passed in its current form, it would create a completely unworkable environment for dealing with online piracy. It would prevent any possibility to remove infringing content from the internet on a prompt basis and would likely encourage service providers to turn a blind eye to infringements occurring over their networks. The following are the main problems with the Bill:

- **Unworkable and Ineffective 'Notice + Notice':** As opposed to putting into place an effective and expeditious remedy of takedown – an essential element when dealing with Internet infringement which can be propagated and cause enormous damage within short periods of time – the Israeli Bill would not obligate the service provider to expeditiously remove content. Instead, it would obligate the service provider to simply notify the user that the content will be removed within three working days unless the user challenges the notice and is willing to litigate. Such a notice + notice system is unworkable in practice and prejudices legitimate interests of right holders in effectuating protection of their rights.
- **No Possibility for Right Holders to Insist that Content be Removed:** Even more troublesome is the absence of any possibility for right holders to require ISPs to remove or block access to infringing content despite the users' willingness to litigate the issue. This creates a dangerous situation where users have a "final say" on whether allegedly infringing content remains online.
- **Provide Service Providers With Blanket Immunity:** The safe harbors built into the Bill are drafted to provide blanket immunity from civil liability to those who qualify (Sections 8-10).
- **Injunctive Relief Unclear:** While Section 12 provides for injunctive relief, it is unclear when it can be invoked. As the Bill currently reads ("in cases where the content of the information constitutes a civil wrong or where the distribution of that information infringes intellectual property rights") it appears it may apply only as a final remedy. The provision should be broadened to ensure injunctive relief is available in preliminary proceedings as well as a final remedy.
- **No Constructive Knowledge:** As drafted, it appears the Bill would only require takedown of cached material only if there is actual knowledge of an infringement (or in the case of hosting, only if there is a notice). The language "is aware of facts or circumstances from which infringing activity is apparent" or something similar, which would impose a reasonable constructive knowledge standard should be inserted.

- **Takedown Not Required in Case Alleged Infringer Cannot be Located:** Amazingly, Section 10(3)(c) of the draft provides that if the user whose content has been hosted cannot be located having taken "reasonable steps," the ISP may not take down the notified material but instead must simply notify the right holder that the ISP was unable to contact the other party.
- **No Requirement (or Possibility) of Suspension or Termination of Account of Repeat Infringers.**
- **Bill Would Preclude Voluntary Disclosure of Allegedly Infringing Users, and Would Only Require Disclosure Upon a Court Order:** The bill establishes a general duty of confidentiality that the ISP has towards its users which would prevent any possibility of voluntary disclosure. In addition, disclosure is an exception to the general confidentiality obligation and is conditioned on obtaining a court order, which may be issued where there is a "real reason to suspect" that infringement is taking place. This requirement is impractical in view of the enormous number of infringements on the internet. This should be substituted by a more flexible and simple process.

**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 AGICOA to negotiate retransmission licenses.<sup>12</sup> 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 and the reluctance of the courts to provide any protection of retransmission rights.<sup>13</sup> IIPA notes that the Ministry of Justice has yet to withdraw a draft law which has been pending before the Knesset since 2004, which would demote the cable and satellite retransmission right to a mere right of remuneration. The exemption, which was proposed for an interim period (of three years) has been pending at the Knesset's Economic Committee since 2004. This draft should be scrapped.

## **COPYRIGHT PIRACY AND ENFORCEMENT UPDATES**

Piracy levels are the same or getting worse in Israel. As a result, legitimate copyright owners are being driven out of business. According to the motion picture industry's enforcement group ALIS, 300 video libraries had to shut down during the last two years, as huge damage was caused to the local theater owners and distributors. They also report that legitimate sales of the local distributors are declining. Theatrical box office has also been declining since 2001.

**Retail Piracy:** The main format of pirated disc found in the markets in Israel is burned CD-Rs and DVD-Rs which are made in underground laboratories which are difficult to locate as they can be set up in small rooms in domestic premises. The extent of the burning problem is increasing with time, due to increasingly easy and inexpensive access to burning equipment. Only a small percentage of pirated discs are imported from the Palestinian Authority. Many of the pirate DVD-Rs are of films downloaded from the Internet.<sup>14</sup> Piracy is also found in fixed 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. 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.

<sup>12</sup> Starting in the late 1990s, Israeli cable operators have been retransmitting U.S., European and Russian content without the authorization of right holders.

<sup>13</sup> 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.

<sup>14</sup> Dozens of websites are taking advantage of the approximately 3.5 million Internet users aged 13 and above.

**Public Performances:** 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 viewing and display equipment.

**Internet Piracy:** Israel now boasts at least 3.7 million Internet users, for a penetration rate of over 70%, including 671,000 separate Internet hosts. Broadband penetration is also growing rapidly.<sup>15</sup> Along with increasing broadband penetration, it is not surprising that P2P file sharing, bulletin boards, and direct sharing of files is more prevalent in Israel. The industries report that their capability to operate against Internet piracy is constrained by the lack of appropriate Internet legislative framework and by the lack of the Police's willingness to pursue Internet pirates.

**Organized Crime and Piracy:** There are organized crime elements 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). Almost all the stalls in Israeli flea markets where counterfeit and pirated products are sold are controlled by organized criminal organizations.

**Enforcement Issues:** Despite the law enforcement authorities' lack of resources dedicated to IP enforcement, industry reports good relations in anti-piracy efforts. The motion picture industry enforcement group, ALIS, has reported some good results in obtaining criminal raids and civil raids, and in dismantling CD-R/DVD-R labs. In all, ALIS carried out 246 criminal cases and 77 civil cases.<sup>16</sup> ALIS notes good cooperation with the Ministry of Home Office, Ministry of Justice, Ministry of Commerce and Employment, Ministry of Treasury, and Customs.

The record industry also continues to note some good raiding in 2007, but notes that the Special Intellectual Property Police Units created by the Israeli government in 2002 suffers from a depletion in the number of officers. There are 30 officers handling all types of intellectual property infringement and spread across four separate districts and one headquarters. The units are under-funded and they unfortunately lack coordination and structure, for example, they fail to define proper targets in advance. They do not actively pursue Internet piracy cases and are not willing to assist in the raiding of Internet pirates. The Israeli authorities also refuse to act *ex officio*.

**Lack of Criminal Prosecutions for Piracy:** There is still a very serious bottle neck of copyright cases at the prosecutorial level, even in the face of a growing tide of piracy, as Israeli law enforcement authorities and prosecutors have shown little inclination to undertake criminal enforcement against commercial pirates. As a result, indictments are subject to huge delays. This slows down the entire enforcement process. It is recommended that a national and independent unit be established to fight copyright and trademark infringements. This unit would be run independently and would include a

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<sup>15</sup> While not entirely up-to-date, see The World Factbook, Israel, at <https://www.cia.gov/library/publications/the-world-factbook/geos/le.html>. See also Internet World Stats, at <http://www.internetworldstats.com/stats5.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Israel, at <http://www.internetworldstats.com/middle.htm#il> (reporting that there were 3.7 million Internet users as of July 2006, representing a 51.1% penetration rate, according to TIM, and 1,421,000 broadband Internet connections as of September 2007, according to the International Telecommunications Union; IIPA views these number as extremely conservative).

<sup>16</sup> For example, in 2006, ALIS reports running, in conjunction with the authorities, 227 criminal raids and 50 civil raids. Moreover, ALIS reported that as of the end of November 2006, it raided 23 such labs seizing 208 CD-R burners and 183 DVD-R burners). The record industry reports a January 2006 raid on a clandestine laboratory operated by two suspects, leading to seizures of 12 CD-R towers containing between 7 and 12 burners each, 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 charged with copyright offenses. On March 16, 2006, the recording industry group IFPI Israel cooperating with a special crime task force raided several premises suspected to be used in pirating 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 CD-R burning towers, thousands of pirate CDs and blank media were found on 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 had previous convictions for IPR offences, drug trafficking, robbery and other offences were arrested 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>.

prosecutor who should concentrate mainly on cases against factories and illegal burning operations. Cases still languish too long in courts, with decisions usually taking 2 years.

## **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.

## **MARKET ACCESS**

**Television Advertising Restriction Violates Israel's WTO Agreement:**<sup>17</sup> 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.

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<sup>17</sup> IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry.