

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Now that the Israeli government has passed a new copyright law (effective May 25, 2008), right holders wish the government's focus to return to enforcing their rights and removing barriers to entry for legitimate businesses in Israel. Unfortunately, Israeli law enforcement against copyright piracy waned somewhat in 2008, and what enforcement actions did occur were spearheaded by industry, not (for the most part) by the Special IP Units of the Israeli Police. With few exceptions, Israeli law enforcement takes little interest in enforcing copyright, is ill-equipped to help protect digital copyrights, with inadequate manpower and funding, and has placed little emphasis on training. In the meantime, pirates, many of whom are connected to organized crime, carry on in their high profit, low-risk activities. The effect on legitimate copyright business has been staggering, with an estimated 300 video libraries shut down during the last two years, legitimate sales declining for distributors, and theatrical box office declining since 2001. IIPA remains concerned about the 2007 copyright law, which does not fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, more than 12 years after those treaties were agreed to, and notwithstanding 70% Internet penetration in Israel and high levels of broadband penetration. Other recent legislation, including a troubling Electronic Commerce Bill which would have weakened protection for copyright on the Internet, and a troubling Bill which would have imposed mandatory joint-collection of royalties for different right holders and compulsory rate-setting, should be permanently shelved. Finally, IIPA is concerned about some recent case law developments, including a recent Tel Aviv District Court decision in which the Judge appears to be rewriting the Israeli law in denying copyright protection for filmed sporting events, which could set back copyright protection in Israel and complicate enforcement efforts on the Internet.

Priority Actions Requested in 2009: IIPA requests the following actions by the government of Israel, which, if taken, would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Fortify the Special Police IPR Units, by adding staff, funding, and providing them with *ex officio* raiding authority. A National Police Unit director should be assigned to coordinate districts for effective and sustained enforcement.
- Tackle burgeoning Internet piracy through pro-active Israeli Police pursuance of Internet piracy cases.
- Give copyright piracy cases priority attention, through Israeli Police and prosecutors expeditiously handling copyright piracy files, processing criminal prosecutions of pirates, and seeking substantially higher penalties.
- Apply deterrent penalties at the courts, which historically have been very lenient in copyright cases; establish links to organized crime statutes to heighten these cases.
- Establish national and independent unit specifically to prosecute piracy cases.

Legislation

- Consider copyright amendments to enhance protection, e.g., by adding prohibitions against the circumvention of technological protection measures, circumvention services, and the trafficking in circumvention devices; protecting foreign sound recordings on the basis of national treatment; and ensuring exceptions in the law meet international treaties' tests.
- Pass Bills currently being considered that would provide for closing down operations and confiscating property of those caught selling pirate materials.
- Enforce court decisions ordering Israeli cable operators to make payments for retransmissions of broadcast television signals, and scrap draft law demoting the cable and satellite retransmission right to a mere right of remuneration.
- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.



ISRAEL										
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	NA	NA	NA	50%	45.0	50%	28.0	35%	34.0	40%
Business Software	72.0	32%	57.0	32%	47.0	32%	39.0	32%	30.0	33%
Entertainment Software	NA	NA	NA	NA	11.4	84%	NA	95%	12.4	88%
Books	NA	NA	NA	NA	1.0	NA	1.0	NA	1.0	NA
Motion Pictures	NA	NA	NA	NA	NA	NA	61.0	61%	30.0	40%
TOTALS	72.0		57.0		104.4		129.0		107.4	

PIRACY CHALLENGES IN ISRAEL

Retail Piracy Decreases Slightly in 2008: Sales of pirate CD-Rs, DVD-Rs, and CD-ROMs in stores and in major commercial centers like Tel Aviv, Haifa, Jerusalem, Rishon Le-Zion, Rosh Ha-Ayin, and Herzlia decreased somewhat in 2008. However, sales of pirate disks still take place in markets and street sales stands. Most of the pirate CDs seized in raids are sourced back to local burning activity in underground laboratories throughout the country, as opposed to industrially manufactured. The burned disks are of very poor quality. Such underground laboratories 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. The business software industry also experiences hard-disk loading, by which empty computer hardware is sold for a price, but then is loaded for free (or for a charge for the service) with all the latest software, all of it illegal.

Internet Piracy: Almost 5.3 million Israelis, or 74% of the population, had Internet access as of May 2008 (according to TNS Global), with 1.4 million broadband subscribers as of September 2007 (according to the International Telecommunications Union). As such, it is not surprising that illegal P2P file sharing, sites which offer deep links to illegal downloads, bulletin boards, and direct sharing of files are prevalent in Israel.

Business Software End-User Piracy Remains Relatively Low: The Business Software Alliance reports that due to the high level of awareness in the market about software copyright, and general compliance by businesses with managing their software assets properly, the level of business software end-user piracy remains roughly stable at 32% for 2008. A study released in January 2008 by International Data Corporation demonstrated that a further 10 point reduction in software piracy by 2011 would deliver nearly 2,887 new Israeli jobs, US\$320 million in tax revenues for the Israeli governments, and US\$604 million in economic growth in Israel.² In contrast with the low piracy levels in businesses, the industry reports that piracy levels among consumers remains relatively high due to a lack of enforcement in that area.

Organized Crime and Piracy: There are organized crime elements in Israel involved in local production and distribution of pirate products in main markets such as the central bus station in Tel Aviv, the Carmel market, and Haifa's main street (Ha-Azmaut Street). Almost all the stalls in Israeli flea markets where counterfeit and pirated products are sold are controlled by organized criminal organizations. With the decrease in sales in fixed locations in 2008, the involvement of organized crime groups and street gangs in pirate sales has increased. This phenomenon hits music piracy, audiovisual works, clothing, and pharmaceuticals, and includes imported pirate goods. A serious approach to this problem is required, including the deployment of investigators familiar with organized criminal activity, and enforcement of laws aimed at organized crime (and including, where necessary, amendment of those laws to include copyright piracy as a predicate offense).

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Israel. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Israel*, January 2008, at http://www.bsa.org/~media/Files/idc_studies/bsa_idc_israel_final%20pdf.ashx.

Public Performance Piracy: Illegal public screenings of DVDs 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.

ENFORCEMENT CHALLENGES IN ISRAEL

Enforcement by IP Units Deteriorates Somewhat in 2008: Copyright owners report that in 2008, enforcement efforts waned, in part because a number of police officers assigned to the Israeli Police IP Units were reassigned to other units. As of early 2008, there were 30 officers handling all types of intellectual property infringement and spread across four separate districts and one headquarters. The units have historically been under-funded and have lacked coordination and structure, for example, they fail to define proper targets in advance. The Israeli authorities also refuse to act *ex officio*. Where enforcement efforts did succeed, it was largely due to the close involvement of industry.³ Right holders also report that conducting civil raids posed enormous complexities and are very expensive. In mid-December 2008, industry met with the police commander of a special crime unit who expressed interest in consolidating the IP officers into a bigger and stronger unit. IIPA supports such a move and looks to the Inspector General to move on this in early 2009.

Court Cases Reveal Complexities in Internet Piracy Cases: It remains the case that the Israeli authorities show little inclination to assist in the fight against increasing Internet piracy 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. Thus far, then, it has been left for courts to determine how the Israeli laws should be interpreted when faced with requests to block sites offering, promoting or facilitating pirate content, and requests for information about alleged infringers. In March 2008, the Haifa District Court ordered that Israel's three largest ISPs block access to HttpShare, a BitTorrent and deep link website.⁴ The Judge ordered the ISPs to "systematically block access to the illicit site, HttpShare, so that surfers cannot enter this site and utilize it in order to impede upon the claimants' copy rights." IIPA applauds the decision, and notes that the site, which is hosted outside of Israel (in the Netherlands), is aimed at Israelis (it is in Hebrew) and clearly was placed where it was to try to avoid liability in Israel.

In another case, in July 2008, the Tel Aviv District Court issued a preliminary "Decision" declining to order service providers to divulge identifying information of a website offering free streaming of Premier League soccer matches beamed into Israel from the United Kingdom.⁵ The judge in the July "Decision" (albeit the judge has requested the opinion of a government of Israel legal advisor) denied copyright protection to the filming of sporting events, as he considered that the originality threshold is not met in film works that consist of live sports events. If this decision is made final, it would not only reverse longstanding Israeli Supreme Court jurisprudence holding that, under the previous law, of course the copyrightable elements in the filming of the sports event are protected and cannot be appropriated by a third party without infringing copyright. IIPA hopes the court will reconsider its opinion, which could have dangerous implications regarding the existence of copyright protection for many other events which are broadcast live. By contrast, the recording industry reports a January 2009 decision, where a court ordered Google and a local service provider to disclose information on online infringers. The case sets a positive precedent for right holders, since the required showing for disclosure to be ordered is that the plaintiff can demonstrate a "real reason to suspect that an infringement of an IP right is taking place." This threshold is reasonable.

Lack of Criminal Prosecutions for Piracy, and Lack of Deterrence: Israeli courts have demonstrated a longstanding reluctance to view copyright piracy as socially harmful activity requiring a deterrent criminal remedy, and unfortunately, due in large part to the lack of seriousness of the prosecutors, most cases, criminal or civil, that are brought before the courts involve small and insignificant offenses, and result in non-deterrent sentences, usually fines and suspended sentences. IIPA believes it is critical that copyright piracy cases be taken more seriously, with prosecutors choosing higher profile cases and seeking maximum penalties allowed under the law. IIPA also believes the State Advocacy and the Israeli Police should file more criminal charges involving multiple counts, including under money

³ For example, the International Federation of the Phonographic Industry reported two successful raids in February 2008 against pirate CD-R burning labs in Israel, both carried out with the assistance of IFPI Israel, which netted dozens of CD-R burners, and because the suspect was known to the Police from previous counterfeiting activities, was expected to result in a severe indictment. International Federation of the Phonographic Industry, *Pirate CD-R burning equipment seized in Israel*, February 21, 2008, at http://www.ifpi.org/content/section_news/20080221.html.

⁴ *Court forces three largest ISPs to take action...*, March 10, 2008, at <http://www.dslreports.com/shownews/Israel-Latest-To-Force-ISPs-To-Block-Piracy-92487>.

⁵ *The Football Association Premier League Limited v. Anonymous*, District Court of Tel Aviv – Yaffo (MCA 011646/08).

laundering or other organized crime statutes, which carry with them the possibility of very serious penalties. There remains a very serious bottleneck of copyright cases at the prosecutorial level, and indictments are subject to huge delays, slowing down the entire enforcement process. IIPA requests that a national, independent unit be established specifically to prosecute piracy and counterfeiting cases.

COPYRIGHT LAW REVISION

November 2007 Copyright Order (United States), 5713-1953 Confirms National Treatment for U.S. Works and Sound Recordings: In November 2007, the Israeli government issued a revised Copyright Order, confirming that U.S. works (including sound recordings which were regarded as works until the passage of the 2007 law) receive national treatment in Israel, whether published or unpublished, and if published, regardless of whether first publication occurred in Israel or the United States. As a result, by virtue of the 1950 Bilateral agreement in force between Israel and the United States and this revised Order, U.S. sound recording producers will continue to receive national treatment in Israel.

Copyright Law 2007: A 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),⁶ and entering into force on May 25, 2008. The law made some important positive changes, which are not discussed in detail here. Some of the new provisions unfortunately resulted in weakened protection, for example, with respect to foreign phonograms. It is highly unfortunate that the Israeli government did not take the opportunity presented by this legislation to fully implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, by adding protection against the unlawful circumvention of “technological protection measures,” circumvention services, and the trafficking in circumvention devices. There are also no provisions dealing with “rights management information,” which some right holders choose to use to facilitate licensing. 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. The following is a list of shortcomings in the 2007 Law:

- **Legal Protection for Foreign Phonogram Producers is Seriously Weakened (Sections 8, 10):** 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, including public performance and broadcasting rights. Under the 2007 Law, the situation changed, such that foreign right holders in sound recordings (other than U.S. sound recordings which as noted above enjoy national treatment on the basis of bilateral arrangements) no longer enjoy equal treatment, and could be denied rights, and therefore payments, for their sound recordings in Israel. The government should immediately reinstate the protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. In addition, the principle of national treatment should once again be applied to all subject matter.
- **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 must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. While the Israeli government has considered this issue for many years, the Law failed expressly to criminalize end-user piracy, although Sections 48 and 51, dealing with “indirect” civil infringements, make it illegal to possess an infringing copy for “commercial purpose”, which we believe may cover certain end-user situations. The government should amend the law to expressly criminalize end-user piracy.
- **Civil Remedies (Statutory Damages) (Section 56):** Section 56 to the Law sets new amounts of statutory damages without need of proving damages between 0 NIS and NIS 100,000 (US\$24,800). 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 NIS20,000 (US\$4,970), the “floor” was lowered from NIS10,000 (\$2,480) to no minimum. The 2007 Law further

⁶ 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 2007 Law.

provides that multiple infringements will be deemed as a single infringement when determining statutory damages. The latter amendment means that the statute will not have a deterrent impact on virtually all piracy cases, 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 (Section 64):** Inflicting a major set-back on enforcement of rights against piracy and wide-spread infringement, the presumption available in Section 64 to the 2007 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). Presumably, since U.S. sound recordings enjoy national treatment in all respects by virtue of bilateral arrangements dating back to 1950, when sound recordings were considered works in Israel, the presumption in the 2007 law applies to U.S. recordings. This change as to other recordings, however, will impose unnecessary hardships on producers in establishing their rights in infringement cases. 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 2007 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.
- **Term of Protection for Sound Recordings:** Under the 2007 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.⁷ 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.
- **Protection for Pre-Existing Works and Rule of the Shorter Term (Section 44):** Section 44 of the 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 Berne Article 18, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.

⁷ 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.

- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” The 2007 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.
- **Exceptions and Fair Use:** In light of the long list of exceptions in the 2007 Law, 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 conflicts 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 2007 Law adopts a common law-type “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 2007 Law includes a list of factors that are similar to 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 object to 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 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: In determining whether a use made of a work is fair within the meaning of Section 19(c), 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. 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.
 - **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.
 - **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 6⁸ in order to appropriately narrow the exceptions.

⁸ 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,

- The exception must meet the Berne Convention three-step test, and, unlike the 2007 Law, the EU Directive does so expressly.
- While the 2007 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 2007 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 2007 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 2007 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) exempts from liability 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 of 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 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.~~
- **Library/Archive Exception (Section 30):** Section 30 as written fails to meet the Berne Convention and TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and the statute must provide assurance

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.

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.

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 2007 Law before it takes effect on May 25, 2008.

OTHER COPYRIGHT-RELATED LEGISLATION

Piracy Shop Closure and Property Confiscation: IIPA is in full support of Bills which would provide for closing down operations and confiscating property of those caught selling pirate materials.

Electronic Commerce Bill Needs to be Reworked: The Electronic Commerce Bill that passed first reading in the Knesset in mid-January 2008, is still pending. The Bill includes a number of problematic provisions and would fail to establish proper mechanisms to deal effectively with Internet piracy. It should be reconsidered prior to its further consideration in the Knesset.⁹

Copyright Tribunal Bill Would Have Aimed to Create Troubling Mandatory Collective Management and Compulsory Remuneration and Rate-Setting: A Copyright Tribunal Bill was put before the Knesset in July 2006. The Bill, which represents the first attempt to establish a copyright tribunal in Israel, still awaits review by a Knesset committee. The Bill includes two notable problematic changes. First, it 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. This mandatory joint collection would deprive producers of sound recordings of their basic property rights, overrule existing collection mechanisms which have been in operation in Israel for decades, disrupt existing commercial dealings with users, and likely lead to unnecessary conflicts between right owners forced to administer their rights jointly. Second, the Bill would require that the tariffs and royalty rates for broadcasting and public performance for the entire local market be set by a tribunal a pre-condition for their collection. In other words, royalties will not be collectable until after such tariffs are issued by the tribunal. This power in the tribunal would be unprecedented anywhere in the world, will be extremely expensive, and is unnecessary since, in most cases, royalties are agreed upon without legal dispute between producers and users. Both constitute a breach of the basic right to freely associate and the right to freely contract.

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. Specifically, more than eight years ago, AGICOA filed on behalf of its members a significant claim seeking compensation for the retransmission of copyright works by Israeli cable operators. This compensation is contemplated by international treaties including the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty. AGICOA's claim, filed after many years of trying to come to terms with cable operators directly, has gone unresolved. There has been delay caused by upheaval in the Israel cable industry, including bankruptcy filings by the operators, among other factors. It seems clear from the disregard of the Israeli courts and the failure to advance serious settlement discussions that there simply is no political will in Israel that will produce a fair result, namely an agreement or court order that equitable compensation must be paid to copyright owners of audiovisual works where those works are retransmitted without authorization by cable operators. It is imperative that this matter be resolved promptly with fair settlement for past failure to compensate right holders, together with a reasonable agreement with AGICOA for payment going forward.

TRAINING AND PUBLIC AWARENESS

IIPA members continued to provide periodic training in the form of seminars for Israeli Customs officials as well as members of the Special Israeli Police IP Units. IIPA staff also met with Ministry of Education international visitors to discuss copyright awareness educational efforts in the United States and to comment and critique the MOE's new Teacher's Guide designed for students on why intellectual property rights are important. Industry provided various packets and documentation our industries use in IPR outreach and public awareness. While not the focus of the MOE Guide, the main topic for discussion was ethical uses of content on the Internet, including the problems of inadvertent file-sharing.

MARKET ACCESS

Television Advertising Restriction Violates Israel's WTO Agreement: IIPA generally opposes television advertising restrictions, as they lead to a reduction in advertising-based revenue, impeding the development of the television industry. 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.