

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Israel should be on the Watch List.¹ In IIPA's November 2009 filing in the Out-Of-Cycle Review of Israel's Special 301 status, IIPA recommended keeping Israel on the Special 301 list. In that filing, IIPA noted that, in addition to the priorities for 2009 in IIPA's February Special 301 report, Israel should "enforce[e] court decisions ordering Israeli cable operators to make payments for retransmissions of broadcast television signals and acced[e] to and implement[t] the WIPO Internet Treaties, in order to provide an appropriately high level of IP protection consistent with that of members of the OECD."

Executive Summary: The government of Israel desires to join the Organization of Economic Co-operation and Development (OECD),² and on May 16, 2007, the OECD Ministerial Council Meeting approved a decision to open accession discussions with Israel.³ Soon thereafter, the Israeli government passed a new copyright law (effective May 25, 2008), which did not, like almost all other OECD members have already done,⁴ implement key provisions of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT) which provide the basic minimum framework for protection of copyright in the online environment. Also, unlike most OECD members, Israel has not yet joined the WCT and WPPT.⁵ Israel should be encouraged to fully implement and join the WCT and WPPT.

Piracy in Israel grew slightly worse in 2009. For example, despite good cooperation with the authorities on issuing audit letters and investigating claims of unauthorized use of software in businesses, the business software end-user piracy level increased from 32% in 2008 to 34% in 2009, and losses increased for the fifth straight year, from US\$72 million in 2008 to US\$84 million in 2009. The recording and music industry reported losses of US\$55 million and a piracy level of 55%.⁶ Israel's new copyright law also contains no minimum statutory damages amount, which also results in less effective enforcement. Israel's Internet usage continued to increase in 2009, and along with it, so did infringing activities online. Israel ranks fifth of all countries of all countries surveyed by the entertainment software industry in terms of per capita downloading.⁷

To reduce piracy, some important improvements would include confirming criminal liability against end-user piracy, providing minimum statutory damages, and establishing an effective structure for enforcement in the online environment.⁸ One major and longstanding issue for the audiovisual industry remains the resistance of Israeli cable

¹ In IIPA's 2009 Special 301 submission, IIPA recommended that Israel be placed on the Watch List, but USTR decided to place Israel on the Priority Watch List, with an out-of-cycle review "in order to continue positive discussions with Israel regarding potential amendments to Israel's laws that affect IPR protection for pharmaceutical products." For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² See Organization of Economic Co-operation and Development Home Page, at http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1_1,00.html.

³ Israeli Ministry of Foreign Affairs, *Israel to Join OECD*, May 16, 2007, at <http://www.mfa.gov.il/MFA/Government/Communiques/2007/Israel+to+join+OECD+16-May-2007.htm>.

⁴ Among OECD members, only Canada has not implemented any key aspects of the WCT and WPPT.

⁵ The following OECD members are members of the WCT and WPPT: Australia, Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherland, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. Only Canada, Iceland, New Zealand, and Norway have not, and of those, only Canada has not implemented either Treaty.

⁶ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Israel. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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.

⁷ The survey was conducted by the Knesset's research institute, on the occasion of its 61st anniversary. The survey shows that today, about 4.4 million people are surfing the internet. 95% of students have a computer that is connected to the internet. About 45% of the students surf the internet for approximately 6-12 hours a week, compared with about 20% who surf the internet for over 13 hours a week. About 45% of the surfers, use file sharing programs.

⁸ See, e.g., Government of Israel, *2009 Submission Of The Government Of Israel To The United States Trade Representative With Respect To The 2009 "Special 301 Review"*, March 2009 (on file with IIPA) (*2009 Israel Submission*). In that *2009 Israel Submission*, the government noted,



operators to compensate copyright owners for unauthorized uses of their works through retransmissions of broadcast television signals, despite court decisions confirming remuneration for unauthorized retransmissions. The number of police officers in the IPR Units has declined and today there are only about 16 police officers dealing with IPR infringements. Internal prosecutors have yet to be assigned to the Units, resulting in long delays in indictment submissions and in lower quality cases being filed due to lack of experience.

The United States and Israel have longstanding bilateral copyright relations, dating back to the May 4, 1950 bilateral copyright agreement and to the 1985 bilateral Free Trade Agreement (FTA).⁹ IIPA appreciates that through bilateral consultations and the Special 301 process, the Israeli government has had a chance to consider and hopefully resolve these issues.¹⁰

Priority Actions Requested in 2010: IIPA requests that the government of Israel take the following actions which would result in the most significant near-term commercial benefits to the copyright industries:

Enforcement

- Enforce court decisions ordering Israeli cable operators compensate copyright owners for unauthorized retransmissions of television broadcast signals containing their works, and establish fair remuneration structure going forward.
- 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 proactive Israeli Police pursuance of Internet piracy cases.
- Give copyright piracy cases priority attention, through Israeli Police and prosecutors expeditiously handling copyright piracy files, processing of criminal prosecutions of pirates, and seeking deterrent penalties.
- Establish national and independent unit specifically to prosecute piracy cases.

Legislation

- Enact copyright amendments to enhance protection, e.g., by adding prohibitions against the circumvention of technological protection measures, circumvention services, and the trafficking in circumvention.
- Clarify the scope of ISP liability for authorizing infringements and provide incentives for them to help right holders tackle online infringement, e.g., including takedowns and assistance with repeat infringers in the online space.
- Enact Bill that would provide for closing down operations and confiscating property of those caught selling pirate materials.
- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

PIRACY AND ENFORCEMENT CHALLENGES IN ISRAEL

Previous reports and filings (such as the Out-Of-Cycle Review) have included discussions of the many piracy and enforcement challenges faced in Israel.¹¹ The following section provides brief updates only to the situation

"[i]n July and August of 2008 [a bill on ISP liability] was debated before a Knesset committee on several occasions. Shortly thereafter the Knesset went into recess and the Knesset was later dissolved pending new elections. It is unclear at this time whether the Bill will be continued in the coming Knesset and if so in what format. In the meantime a growing body of case law continues to provide guidance with respect to ISP copyright liability issues."

⁹ The U.S. and Israel concluded FTA Joint Committee meetings in December 2009 at which issues of mutual concern were raised, including intellectual property rights. See United States Trade Representative, *USTR and Israel Hold FTA Joint Committee Meeting*, December 15, 2009, at <http://www.ustr.gov/about-us/press-office/press-releases/2009/december/ustr-and-israel-hold-fta-joint-committee-meeting>.

¹⁰ See *2009 Israel Submission*.

¹¹ See International Intellectual Property Alliance, *Israel*, at <http://www.iipa.com/rbc/2009/2009SPEC301ISRAEL.pdf>. See *infra* discussion of the GSP Petition involving Lebanon and IP rights. See also International Intellectual Property Alliance, *Docket: USTR-2009-0001, Israel: Special 301 Out-Of-Cycle Review, IIPA Comments on the Status of Copyright Protection and Enforcement*, 74 Fed. Reg. 51215 (October 5, 2009), at <http://www.iipa.com/pdf/IIPAIraelOCRsubmissionFINAL110909.pdf>.

on the ground in Israel. Failure to mention any specific issue should not be taken as an indication that the problem has been resolved.

Collections for Retransmissions of Broadcast Television Signals: Notwithstanding protections afforded 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 resist making payments for retransmissions of any broadcast television signal. Specifically, more than ten 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 and the TRIPS Agreement (as well as the WIPO Copyright Treaty). AGICOA's claims, filed after many years of trying to come to terms with cable operators directly, have gone unresolved, though some of their claims have now been paid thanks to a favorable outcome in a bankruptcy case filed by certain cable operators that were part of the original suit. It seems clear from the disregard of the Israeli courts and the failure to advance serious settlement discussions that there is little will in Israel to ensure 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 by cable operators without authorization. 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 payments going forward.

In the Israeli government's 2009 Submission to USTR in the Special 301 process, the government indicated, "[r]etransmissions are subject to copyright exclusive rights," and "[w]ith respect to the referred to court case brought by AGICOA that case is still pending in the court system and its outcome will depend, inter alia, on the ability of AGICOA to prove their case." We appreciate the Israeli government's statement confirming the exclusive rights of our copyright owners, but respectfully suggest that local government officials have it within their power to support and motivate constructive settlement discussions both for past violations of copyright laws by cable operators and for fair payments going forward.

Business Software End-User Piracy Remains Relatively Low: The Business Software Alliance reports that due to the increasing levels 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 has remained relatively low in the past few years.¹² There can be no doubt that protecting copyright in Israel and reducing piracy brings resulting positive gains to the Israeli economy. For example, a study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy by 2011 (which was 32% at the time) 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.¹³

While still low by comparison with other markets in the region, software piracy in Israel did worsen slightly in 2009, as the piracy level increased from 32% in 2008 to 34% in 2009, as a result in part of market growth in Israel, and losses increased from \$72 million in 2008 to \$84 million in 2009. Also, 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.

There are a couple of areas in which improvements are sought. The first involves statutory damages, which provide a very important remedy in software end-user cases since they can provide a certainty to damage awards in cases where it may be difficult to prove actual damages. Currently, under Section 56 of the Copyright Law, 2007, the statutory damages range between no damages and NIS200,000 (US\$53,500), replacing the old minimum of NIS10,000 (US\$2,675) and maximum of NIS20,000 (US\$5,350). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has negatively affected the BSA's ability to effectuate its

¹² The Business Software Alliance reports that in 2009, as in previous years, they offered seminars and training courses and classes regarding software protection at various events open to different members of the public, such as hi-tech companies and the Israeli Bar Association.

¹³ 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.

program through warnings and the elimination of illegal uses. Also, 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. One further issue involves whether pre-established damages are to be awarded on a per-copy basis or a per-work basis. The recent judgments regarding software copyright infringements have resulted in one statutory damage award per software title infringed, regardless of how many copies were infringed.

In addition, BSA has had to exclusively rely on bringing civil cases to enforce against end-user piracy of business software, since the Israeli government's position has long been that unauthorized use of software in a business setting does not constitute a crime in Israel. This situation makes deterrence very difficult as to end-user piracy, since, as just mentioned, the statutory damages awards are limited per software title, and yet, there have been as of yet no criminal cases brought regarding end-user piracy of software. The Israeli government, in the 2009 Submission in the Special 301 process indicated,

"Business Software End user liability is addressed by Israeli copyright law. Perhaps not in the manner sought by the IIPA, but clearly in a manner that leads to some of the world's lowest rates of business software piracy. Criminal liability may also inure provided that the software has been distributed on a commercial scale. Distribution on a smaller scale will be remedied by actual damages or statutory damages and permanent injunctions."

Since software in a business setting is distributed throughout a company without authorization, albeit there is no monetary exchange, IIPA is interested in exploring this theory for criminal liability in Israel under the new Law. 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 and we believe the government should ensure the law criminalizes end-user piracy.

Book Piracy: In 2009, publishers became aware of a growing problem of illegal photocopying occurring at copy shops in at least two university campuses. In both instances, the unauthorized copying appeared to be facilitated by the university student union, which was producing the illegal copies of textbooks and selling them to students. The publisher's source believes that university administrators are aware of the illicit activity but have not acted against the ongoing pirate activity. It is not known at this time how widespread illegal photocopying is but publishers are continuing to investigate this problem.

Internet Piracy: Almost 5.3 million Israelis, or 74% of the population, used the Internet as of May 2008 (according to TNS Global), with almost 1.7 million broadband subscribers as of December 2008 (according to the International Telecommunications Union). As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P file sharing services, BitTorrent, deep linking sites, web bulletin boards, cyberlockers, and direct sharing of files becoming more prevalent. The Entertainment Software Association (ESA) estimates there to have been approximately 134,935 infringing downloads¹⁴ made of select ESA members' computer and video games through P2P file sharing by ISP subscribers in Israel during December 2009. This comprises approximately 1.40% of the total number of illegal copies made by P2P users globally during this period. These figures place Israel thirteenth among the countries surveyed in overall volume of P2P game downloads, and fifth among countries surveyed in volume of P2P game downloads per capita during the study period. Breakdowns by ISP show that subscribers of Golden Lines, Bezeq International, and NetVision were responsible for approximately 77% of this activity occurring in Israel, amounting to more than 105,000 downloads during the one-month period. These figures do not account for downloads that occur directly from hosted content, such as games found on "cyberlockers" or "one-click" hosting sites which continue to account each year for progressively greater volumes of infringing downloads.

¹⁴ This figure represents the number of downloads of a small selection of game titles only. Consequently, this figure is under-representative of the overall number of infringing downloads of entertainment software made during the period.

The industry reports generally good cooperation as to Internet investigations and prosecutions in Israel, and reports indicate that local ISPs are cooperating with copyright holders in regard to Internet activities at least in the hosted environment. Some recent court cases are encouraging. In March 2008, the Haifa District Court ordered that Israel's three largest ISPs block access to HttpShare, a BitTorrent and deep link website.¹⁵ 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." In 2009, the local branch of the International Federation of Phonographic Industries (IFPI) reported reaching major legal settlements with ten copyright infringing online services.¹⁶ IFPI Israel had filed court proceedings against the services which illegally provided links to unlicensed local and international repertoire hosted on cyberlockers. The settlement reached with the operators of the sites was unprecedented in its scope, with Israeli courts issuing broad permanent injunctions prohibiting the individuals involved from copying, distributing, linking or ripping onto MP3 or other formats any copyright infringing repertoire. The settlement also involves the payment of around US\$50,000 in compensation. In both cases, the infringing content and websites were hosted outside the country, predominantly in the Netherlands but the sites were aimed at Israelis.

In one other case, the local recording industry group also reports a January 2009 decision in which 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. By contrast, in another case, *The Football Association Premier League Ltd. v. John Doe*, the Tel Aviv District court, in a preliminary order issued in July 2008, refused to order service providers to divulge identifying information of a website offering free onward streaming of Premier League soccer matches first beamed into Israel from the United Kingdom.¹⁷

The Israeli government has indicated in its 2009 Submission to USTR in the Special 301 process that "[p]iracy carried out through the internet is ... receiving attention," and noted, "like in many countries, where the servers are located outside of the jurisdiction enforcement is impeded," while when "activities are carried out from Israel enforcement is easier." The government's point regarding the potential complexities of enforcement when multiple jurisdictions are involved in an infringement is well taken, although the IFPI cases indicate that it is quite possible, and indeed, in the years ahead, will be necessary for enforcement authorities to deal with cases in which activities occur both domestically and extraterritorially.

COPYRIGHT LAW AND RELATED ISSUES

While many of the legislative developments discussed in previous reports are now moot due to the dissolution of the previous Knesset, and while analysis of the 2007 Copyright Law has been undertaken in previous reports,¹⁸ the following provides a brief listing of issues which IIPA would like to see addressed in Israel in the coming year.

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),¹⁹ and entering into force on May 25, 2008. The law resulted in some important positive changes. Some of

¹⁵ *Court forces three largest ISPs to take action...*, March 10, 2008, at <http://www.dsireports.com/shownews/Israel-Latest-To-Force-ISPs-To-Block-Piracy-92487>.

¹⁶ International Federation of Phonographic Industries, *10 Illegal Cyberlocker Services Settle with IFPI Israel*, December 10, 2009, at http://www.ifpi.org/content/section_news/20091210.html.

¹⁷ *The Football Association Premier League Limited v. Anonymous*, District Court of Tel Aviv – Yaffo (MCA 011646/08). IIPA appreciates the fact that the Attorney General issued a copyright advisory opinion in November 2008, affirming that copyright protection subsists in the filming of sporting events under Israel's new copyright law in the same manner as it did under the former legislation.

¹⁸ See International Intellectual Property Alliance, *Israel*, at <http://www.iipa.com/rbc/2008/2008SPEC301ISRAEL.pdf>.

¹⁹ 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

the provisions, however, resulted in weakened protection. The legislation also does not add protection against the unlawful circumvention of “technological protection measures,” circumvention services, and the trafficking in circumvention devices, which would have gone far to implement the WCT and WPPT.²⁰ There are also no provisions dealing with “rights management information.” The Knesset also rejected other modernizing elements of copyright protection into this law such as an extended term of protection for sound recordings. The following is a non-exhaustive list of some issues IIPA believes should be addressed:

- **Legal Protection for Foreign Phonogram Producers (Sections 8, 10):** Israel has until the 2007 Law 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 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 not settle for this weakening of protection, and should reinstate protection for foreign sound recordings enjoyed under the previous law, granting all foreign phonogram producers the full set of rights granted to Israeli nationals. The 2009 Israel Submission indicates, among other things, that “[t]he treatment of sound recordings under the new Copyright Law is fully conformant with Israel’s bilateral and multilateral obligations,” a statement with which we agree. However, the Submission fails to address the justification for the weakening of protection, i.e., the failure to maintain protection under the previous law, and the move from providing equal national treatment to discriminatory treatment for non-U.S. foreign recordings.
- **Presumption of Ownership for Non-U.S. Foreign Sound Recordings Omitted (Section 64):** The presumption of ownership available in Section 64 of the 2007 Law does not expressly cover sound recordings. As a result, a new discrimination now exists, since creators of works get the presumption while sound recordings producers apparently no longer do. 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 non-U.S. recordings, however,

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.

²⁰ In the 2009 Israel Submission in the Special 301 process, the Israeli government addressed the issue of omission of protection against circumvention of TPMs, noting:

“Israel is not a member of either the WIPO Copyright Treaty (WCT) or the WIPO Performances and Phonogram Treaty (WPPT), the only multilateral instruments which obligate implementation of Technical Protection Measures and Digital Rights Management ... [h]ence, Israel is under no obligation to introduce TPM.... [S]everal large authors’ groups vehemently oppose TPM.”

To the contrary, there is no debate that content providers worldwide rely on an array of TPMs to set up workable commercial approaches to content creation and distribution. Varying TPMs allow for varying distribution models, from pay-per-use models to free-and-clear distributions, and even, as the government indicated, some models which would include unencrypted access to content. Also, it should be noted that such unencrypted access does not indicate a non-use of TPMs or DRM; therefore, protection against circumvention of TPMs remains a vital part of such distribution models. WIPO has been clear, from the earliest days of consideration of the WCT and WPPT that

“it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection.... There was agreement that the application of such measures... should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures.”

Lastly, the government notes “lack of uniform implementation worldwide.” This is inaccurate. First of all, there are now 88 members of the WCT and 87 members of the WPPT. This constitutes a strong global consensus, making Israel the outlier. Second, with respect to implementation into domestic laws, even more countries have implemented into domestic law the obligations of the WCT and WPPT than have acceded or ratified them. As of February 2010, over 100 countries/territories had fully or partially implemented the anti-circumvention obligations, had already committed to, or had draft legislation which would provide such protection. At least two-thirds of these countries/territories cover all or some access controls, are committed to do so, or have draft legislation which would provide such protection.

will impose unnecessary hardships on producers in establishing their rights in infringement cases. The former version of Section 64 should be reinstated.

- **Limited Right to Injunctions:** Section 53 could limit the ability of copyright owners to enjoin infringements 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 limitation appears to undermine 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. This amendment raises questions about Israel’s compliance 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 appears to violate Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort,” since 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.²¹ 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 “prescribed for such work” 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.
- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law excludes from protection copies imported into Israel the making of which was made with the consent of the owner of rights in the country of manufacture. This means that goods which are considered genuine in their country of origin may not 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

²¹ 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.

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.

- **Limitations and Exceptions:** IIPA points to several exceptions in the 2007 Law which could, if not properly interpreted, run afoul of the well-established Berne “three-step test” (incorporated into TRIPS), especially if applied in the digital environment. IIPA appreciates the Israeli government’s reaffirmation that “[t]he Berne “three step test’ ... sets forth a binding international standard that is embodied in the new Copyright Law, and in particular in its ‘fair use’ section ... and exceptions sections.” At least one decision has created concerns about how Israeli courts will interpret the new fair use provisions of their law, and we suggest that USTR, in conjunction with experts from the Copyright Office and PTO, begin a dialogue with the government of Israel, to ensure that the government of Israel acts in a manner conducive with achieving interpretations consistent with Israel’s international obligations under the three step test.
 - **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.
 - **Computer Program Exceptions (Backup and Interoperability) (Section 24):** The 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 6²² in order to appropriately narrow the exceptions.
 - 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.”

²² 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.

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.

- 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.
- **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, however, to cause 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.” IIPA respectfully suggests the following changes to make the exception more palatable:

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.~~

The 2009 Israel Submission notes, “Section 26 ... tracks very closely the European Directive and jurisprudence on temporary copies and deals with copying incidental to transmission of works, or as part of a legal use of the work. As the new law specifies that temporary copies are ‘copies’, this exemption became essential in order to enable the smooth and legal use of computers and networks.” IIPA appreciates the Israeli government’s response confirming the protection of temporary copies, but maintains the exception as drafted is overly broad and subject to misinterpretation (e.g., the source copy must be legal and the reasons for the transient reproduction must be sufficiently spelled out in the statute).

- **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 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.

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.

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.