

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2014 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Israel should remain on the Watch List in 2014.¹

Executive Summary: Copyright owners have long struggled to enjoy the full exercise of their rights in Israel. Israeli lawmakers have lagged behind in affording appropriate Internet rights for copyright materials and protecting technological protection measures (TPMs), including access and copy controls. Online and mobile infringements in Israel abound, and the Israeli Government needs to establish an overall approach to these problems, including effective and fair procedures to halt hosted and non-hosted infringements and encourage responsibility of ISPs and others in the copyright value chain (e.g., advertisers who support businesses built on infringement). A recently-introduced bill which would reportedly impose a surcharge on search engines (with proceeds going into a fund for creators with web presence) is not responsive to the problem. Other piracy problems, like unauthorized use of software by enterprises, cost right holders hundreds of millions of dollars per year, robbing Israel of good IT jobs, tax revenues, and contributions to economic growth.

PRIORITY ACTIONS REQUESTED IN 2014

Enforcement

- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy cases.
- Fortify Special Police IPR Units by adding staff and funding and providing them with *ex officio* raiding authority; establish a national prosecutors unit and give piracy cases priority attention.

Legislation

- Enact law to protect against unlawful circumvention of TPMs as well as trafficking in circumvention technologies, devices, components, or services.
- Support swift passage of bill endorsed by the Israeli Government that would extend the term of protection for sound recordings.
- Enact legislation to address online infringement, including the establishment of criminal liability for the unauthorized making available of copyright works, an effective and fair procedure to halt non-hosted piracy, injunctive relief, and a duty on ISPs to provide information to law enforcement agencies and right holders.
- Amend the Copyright Act to, *inter alia*, confirm criminal liability for enterprise end-user software piracy.
- Amend law to provide for minimum statutory damages.

PIRACY AND ENFORCEMENT UPDATES IN ISRAEL

Prior IIPA reports on Israel contain detailed discussions of piracy and enforcement issues (including physical piracy and the development of IP courts). This report serves only as an update to those and is not to be considered an exhaustive review of issues.²

Enterprise End-User Piracy Causes Harm to U.S. Software Companies: The level of software piracy in Israel has remained relatively low in recent years, at 31%, although the commercial value of unlicensed software

¹For more details on Israel's Special 301 history, see previous years' reports at <http://www.iipa.com/countryreports.html>. For the history of Israel's Special 301 placement, see <http://www.iipa.com/pdf/2014SPEC301HISTORICALCHART.pdf>. For a discussion of IIPA's 2014 Key Initiatives and Challenges, see IIPA, 2014 Special 301 Submission, at <http://www.iipa.com/pdf/2014SPEC301COVERLETTER.pdf>.

²See, e.g., IIPA, *Israel*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301ISRAEL.PDF>.



remains significant at US\$192 million.³ In Israel, many small companies that purchase legal software engage in under-licensing by deploying software on more computers than the license allows, and engaging in related breaches of end-user license agreements (EULAs), such as the use by commercial organizations of “original equipment manufacturer” (OEM) products or educational versions of software products. The software industry relies on self-help and civil remedies to address software piracy in Israel. Even in successful civil cases, no court has ever awarded the maximum statutory damages of NIS100,000 (US\$28,500); thus the increased maximum in the 2007 Copyright Law has not been helpful. Instead, the minimum statutory damages must be increased in order to make the civil system more effective. Awarding realistic legal expenses (including attorney’s fees) in addition to damage awards would also be a major improvement. During 2013, BSA conducted a media campaign to help businesses comply with software licenses, offering them a grace period to come forward and negotiate software licenses without risk of suit. The program was successful in getting companies to come forward, but right holders still need adequate remedies at their disposal to achieve greater reductions in piracy. Unfortunately, the Israeli Government does not consider unauthorized use of software by enterprises to be a crime, which remains a major deficiency in the law.

Internet Piracy: Israel offers exciting opportunities for legitimate services delivering copyright material via online and mobile networks. As of the end of 2012, an estimated 5.8 million Israelis use the Internet, with 1.9 million fixed broadband subscribers; Israel also had 9.2 million mobile subscriptions (114% penetration), with more than 4 million of those being broadband mobile, according to the International Telecommunications Union. Despite the availability of legitimate services iTunes and Rdio, these services face huge challenges with online and mobile (smart phone, tablet) infringing activities.⁴ The recording industry reports that online music piracy remains a major concern. In 2013, Israel, despite its small population, ranked 20th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select Entertainment Software Association (ESA) member titles on public peer-to-peer (P2P) networks.⁵ The Israeli Government has recognized the importance of Internet piracy issues at a political level, but its enforcement authorities (police, tax authorities, customs) have been relatively uninvolved in online enforcement. Civil action has been one of the only routes available to deal with infringement, but a March 2010 decision of the Supreme Court impeded that route. The decision held that Israeli courts are not empowered to issue disclosure orders against ISPs (i.e., right holders cannot obtain the details of anonymous infringers for the purpose of establishing the existence of a direct infringement to support a secondary liability claim against operators of infringing online services). The Knesset is reportedly working on data legislation which would make this possible, but until that time, right holders depend entirely on voluntary cooperation from ISPs to deal with online piracy.

Recent court decisions have set out standards on secondary liability which can be helpful in both the physical and online piracy contexts. In one case, the Supreme Court held in 2011 that a defendant can be held liable for contributory infringement if the following are proved: 1) the existence of a direct infringement; 2) actual awareness of the infringement; and 3) actual and significant contribution. In a second case, involving Internet infringement, the Israeli court held that the owners of a forum website could be held liable for providing infringing links: 1) if the forum operator actively encouraged its users to post links to infringing websites or marketed its website as a platform for doing so; or 2) if the forum was predominantly infringing and therefore was “improper,” based on evidence showing that the majority of links posted on the forum are to infringing sites/content, and that the forum operator has knowledge of the infringement.⁶

³Data on software piracy rates and commercial values are taken from the 2011 BSA Global Software Piracy Study at www.bsa.org/globalstudy. This study assesses piracy rates and the commercial value of unlicensed software installed on personal computers during 2011 in more than 100 markets. The study includes a detailed discussion of the methodology used. BSA plans to release an updated study in the second quarter of 2014.

⁴Several notorious sites (i.e., those recommended to USTR by IIPA as “notorious markets” for piracy in October 2013) are among the top sites accessed in Israel.

⁵These figures do not account for downloads that occur directly from hosted content, such as infringing games found on “one-click” hosting sites, which appear to account each year for progressively greater volumes of infringing downloads.

⁶*Appeal to the Supreme Court 5977/07 by the Hebrew University of Jerusalem vs. Yaakov Cohen, the Labour Party and Schocken Publishing House against the ruling by Y Shapira in T.A. 6306/04 from 17 May 2007*, June 20, 2011 (heard on November 15, 2010 by Deputy President Rivlin, and Justices Jubran and Danziger); *ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*, CA 567-08-09, August 8, 2011.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Prior IIPA submissions have discussed in great detail previous Israeli bills (such as the Copyright Bill, 5771-2011 – Amendment-Protection of Technological Means and of Means for Management of Rights) and remaining issues in the Copyright Law, 2007 (as amended).⁷ IIPA is hopeful that the drafters of the 2011 bill are reconsidering their approach in line with IIPA's prior comments, and will take into account IIPA's comments on the Copyright Law.

IIPA Supports Enactment of Bill to Extend Term of Protection for Sound Recordings: IIPA understands from reports that on December 25, 2013, the Government Committee of Legislation endorsed a proposal to lengthen copyright protection in sound recordings in Israel to 70 years.⁸ The Knesset Economic Affairs Committee is now to prepare a final version for consideration and hopefully passage into law. IIPA supports the immediate passage of the Bill which will put Israel in line with the clear international trend.

Addressing Internet Piracy: Israel's Knesset is reportedly beginning to consider approaches to address growing online and mobile infringements in Israel. The Israeli Government should establish an overall approach to these problems, including criminal liability for the unauthorized making available of copyright works; expeditious notice and takedown (immediately in the case of pre-release material); preservation of injunctive relief; appropriate disclosure of data to law enforcement about infringing users; liability for those whose business models are clearly built on infringement; effective and fair policies to address non-hosted infringements and repeat infringers; and measures to discourage web advertising services and payment processors from assisting infringing sites. Unfortunately, proposals considered thus far would not put into place such a system. Instead, a Knesset member has put forward a proposal to impose a seven percent (7%) royalty on "Google and other search engine companies that link to locally produced Internet content," with proceeds going into a fund for creators with web presence.⁹ This proposal is not responsive to the problem; nor is another reported proposed change to the private copy levy.¹⁰ Rather than trying to mitigate the prejudice due to unauthorized activities, the Government of Israel should focus on establishing the conditions (such as those described above) that will permit the operation of a healthy marketplace for online content.

⁷See, e.g., IIPA, *Israel*, 2013 Special 301 Report, February 8, 2013, at <http://www.iipa.com/rbc/2013/2013SPEC301ISRAEL.PDF>.

⁸See Jenny David, *Israeli Parliament Extends Copyright Protection on Recordings to 70 Years*, Bureau of National Affairs, Patent, Trademark & Copyright Law, January 16, 2014 (subscription only). Under the current Law as amended, Israel protects sound recordings and performances for only 50 years "from the date of its making."

⁹See Jenny David, *Israel Considers "Google Tax" on Search Engines for Copyrighted Web Content*, Bureau of National Affairs, Patent, Trademark & Copyright Law, January 8, 2014 (subscription only).

¹⁰Any provision that could legalize online piracy or file-sharing and immunize activities of third parties that may induce or support illegal downloading, e.g., through the provision of links to illegal infringing materials, should be rejected.