

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY¹

IIPA recommends that USTR retain Israel on the Priority Watch List at this time.

Recognizing that the ongoing security problems and violence in 2001 have diverted resources away from enforcement against even the most serious crimes in Israel, four strong reasons predicate keeping Israel on the Priority Watch List this year. First, Israel has witnessed an increase in the scale of pirated CD-Rs and Internet piracy during 2001.² Second, the enforcement system in Israel – from initial raid to opening of a case to court judgment – remains very difficult to use, in large part because of procedural hurdles, and continued problems at the prosecutorial level. Third, the Israeli government continues to concoct legal roadblocks to the adequate protection of copyright, and most recently, has, to our astonishment, taken the position in an Israeli court against payment for the broadcasting and public performance of U.S. sound recordings, which conflicts with Israel's bilateral undertaking to accord national treatment to U.S. record producers in their sound recordings. Fourth, Israel's law is still TRIPS deficient in a number of crucial ways, including its failure to adequately address end-user piracy, in line with Article 61 of TRIPS.

While noting continuing problems, as identified in this report, the recording industry would like to note its appreciation for the efforts undertaken by the government of Israel over the course of the past year. The record industry in Israel has been rocked by piracy over recent years, and has been very dismayed by the lack of responsiveness of the part of Israeli authorities. 2001 was a year in which this situation has finally begun to turn around, and the recording industry thanks the government for its efforts, and calls upon the government to continue the good work commenced in 2001.

In 2002, IIPA looks to the Israeli government once again to clamp down on piracy. At least the chief IP Prosecutor, as well as other prosecutors assigned to assist him, can move the straightforward "test cases" that have been sitting dormant since 1999 to successful closure. The Ministry of Justice must engage in meaningful reform of procedures that make judicial enforcement nearly impossible for right holders. Further, resolution of the many remaining legal questions, including criminalization of unauthorized use of copyrighted goods (including software) in a business setting (end-user piracy), and affirming that Israel is bound by its bilateral agreements to uphold past practice with respect to payment

¹ For more details on Israel's Special 301 history, see IIPA's "History" Appendix to this filing.

² Possible movement of optical media production from the Palestinian territories to Israel (although we understand that of the Israeli plants which we have commented on in prior years, only one remains of concern), lower prices of recordable CD-Rs manufactured in Israel, and some reports of increased import of some pirate optical media (not including music) from Asia are three contributing factors.

for broadcasting and public performance of U.S. sound recordings, will send positive signals to foreign right holders that Israel is open for legitimate business.

The Ministry of Justice proposal for a bill strengthening criminal penalties is commendable, and it hopefully ensures that Israel will meet its TRIPS obligations. IIPA is very pleased about recent reports that the draft of this law may have been approved by the Ministry of Justice, and that it may shortly be delivered to the Knesset. We hope that the Knesset moves quickly in adopting provisions that will greatly enhance the ability of Israel to combat copyright piracy.

Estimated trade losses to the U.S. copyright-based industries due to copyright piracy in Israel during 2001 were \$162.5 million.

ISRAEL ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	15.0	50%	15.0	50%	15.0	50%	11.0	40%	10.0	40%	10.0	30%
Sound Recordings / Musical Compositions ³	40.0	25%	45.0	30%	70.0	45%	60.0	40%	67.0	30%	92.0	15%
Business Software Applications ⁴	40.0	39%	51.3	41%	54.8	44%	47.8	48%	45.0	54%	58.0	71%
Entertainment Software	66.5	89%	52.0	NA	30.9	54%	28.5	55%	25.6	52%	NA	NA
Books	1.0	NA	1.0	NA	1.0	NA	0.7	NA	NA	NA	NA	NA
TOTALS⁵	162.5		164.3		171.7		148.0		147.6		160.0	

⁴ BSA piracy loss and level estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures for Israel were not available. Those numbers were made available in mid-2001, and are reflected above.

⁵ In IIPA's 2001 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Israel were \$113.0 million, not including losses due to the business software industry. Because BSA's numbers were made available in mid-2001 (see footnote 4), estimated total losses to the U.S. copyright-based industries in Israel in 2000 are increased to \$164.3 million.

COPYRIGHT PIRACY IN ISRAEL

Increased Retail Piracy Threatens Israel's Legitimate Market for Copyrighted Goods

The copyright situation in Israel continues to cause harm to U.S. right holders.⁶ Retail piracy waned with the onset of violence in the latter part of 2000, but once again caused steady losses in 2001, in part because of the onset of massive production of CD-Rs, as well as increased Internet piracy.

There remains a very short sales window (a few days sometimes) for most legitimate product, and on the day pirate product is launched, legitimate sales spike downward. The following piracy problems continue to hurt copyright owners in Israel:

- **CD-R Piracy of Software.** The method of burning music CDs using computers has taken over 95% of the pirate music market, while 5% of the pirate market remains manufactured CDs arriving from abroad, mainly Russia and Thailand.⁷ Stores in major marketplaces, including in Tel Aviv and Herzlia, engage in "in-store burning" of their own CD-R compilations of games and business software, putting possibly hundreds of software titles onto a single CD-R.
- **Retail Piracy.** "Outlets" (flea markets, kiosks, etc.) are overrun with older format console-based videogames, due to the dumping of huge quantities by pirate producers in Asia, milking what they can out of those older formats as they transition to newer formats. In addition, the majority of pirated music sales take place in outdoor markets throughout the country (Rosh Ha'ayin, Tzomet Sgula, Hakarmel and mobile markets like Ramla-Lod Market). Most of the sales are carried out on Saturdays (e.g., at Kfar Vitkin, Shfayim etc.). Haatzmaut Street in Haifa is still the most concentrated area of pirated points of sale in the North (totaling 15). About 280 points of sale exist throughout Israel. Pirated business software is also sold in these markets, with most of the units originating from Thailand, Russia, Turkey, and the Palestinian Authority.
- **End-User Piracy.** Close to 40% of software used by businesses and other end-users in Israel is still pirated. Corporate end-user piracy is the single greatest barrier to the development of the software industry in Israel.
- **Import Piracy of Optical Media, Especially DVDs.** Illegal imports of audiovisual works in optical media formats, especially VCDs and DVDs, from Asia, Russia, the former CIS, Ukraine, Turkey, Thailand, Czech Republic, Poland and Hungary, are reportedly still flooding the market in Israel

⁶ In 2000, a chief industry representative noted regarding retail piracy in Israel, "[w]henver a newspaper publicizes the release of a new CD likely to be a hit, it's pirated the next day. It takes 24 hours from release to counterfeit. Every successful recording is a candidate."

⁷ There are now six known CD plants in Israel, and two in the Palestinian territories. Of the six plants in Israel, three currently operate legally, one is barely in operation, one is the subject of current legal proceedings against it, and one is in negotiations with the industry to establish legal operations. Of the two in the Palestinian territories, one plant is closed, and one plant does not to IIPA's knowledge manufacture U.S. recorded music. The theoretical production capacity of these eight plants is 100 million discs per annum, with a practical annual production capacity of 54 million discs per annum. Israel retains a legitimate domestic demand of only 6 million music CDs and 14 million units in other media.

through airports and seaports (as VCD and DVD player penetration grows, so does the demand for new releases in those formats). There are no pirate Hebrew-version VCDs and DVDs available, but pirate English and Russian-language versions abound. Russian-language business software products also remain in plentiful supply. Meanwhile, most pirate retail copies of games in Israel are Russian language (and many of the games copied are ones that entertainment software companies have already localized into Russian-language versions), although some companies report that, due to the armed conflict in the region, silver CD exports of game from Russia have largely waned.

- **Internet Piracy.** Dozens of Internet sites based in Israel that list which stores have which titles, including one 'community' site, will custom burn CD-Rs and deliver them anywhere in the world. Israel now boasts 1 million Internet users, and the Internet can now be found in at least 600,000 households.⁸ Teenagers are becoming increasingly active in the pirating market using the latest technology to assist them. Sites hosted in Israel contain illegal downloads, "cracks," "serial numbers" and other information to circumvent copy protection. The business software industry successfully raided three Internet pirates and closed over 20 sites during 2001. The police are not actively pursuing Internet piracy cases, however, and only in rare instances are the police willing to assist in the raiding of Internet pirates. Since late 1999, the recording industry has located roughly 600 infringing websites in Israel, closing down 400 of them. During the course of the year 2001, the recording industry has focused more attention on "Napster" clone websites (i.e., peer-to-peer networks of pirated music, usually in MP3 format) in Israel.
- **Illegal Public Performances of Motion Pictures.** Illegal public screenings in Israel have become a growing problem in cafés and pubs since the introduction of DVDs, VCDs and new, sophisticated performance equipment.
- **Book Piracy.** Wholesale copyright piracy by otherwise law-abiding institutions such as schools and universities, and wholesale counterfeiting of published books, are proliferating problems in Israel.
- **Cable Piracy.** Cable operators in Israel continue to retransmit signals without the authorization of the copyright owners, although broadcast and cable piracy has been minimal since the entrance of new cable companies in the Israeli market.
- **Video Piracy.** For the motion picture industry, the main piracy concern remains the sale of pirate videocassettes. The situation changed in 2000 due to security concerns in the region: whereas the Palestine Authority territories were long sites for the production of illegal copies of videocassettes, as the borders with the territories have been closed off, the transfer of product from the territories has slowed (to roughly 1,000 pirate videocassettes per day). In addition, people are avoiding open street markets, the area traditionally having the highest volume of illegal copies, so fewer pirated cassettes are being sold. Perhaps to be expected, more Russian-language product is entering Israel to fill the void. Approximately 270 of the 300 Russian-language 'video libraries' throughout Israel engage in pirate sales. Each shop owner has five to ten VCRs and duplicates his own product. A transshipment network also still exists whereby pirated products (including CDs of all kinds, videocassettes, audiocassettes and the like) are produced elsewhere and brought to Israel. The

⁸ The World Factbook reports that there were 21 Internet service providers in Israel as of 2000, with 1 million users. See <http://www.odci.gov/cia/publications/factbook/index.html>.

level of video piracy decreased in 2001 (30% for retail establishments versus 70% for open markets).⁹

COPYRIGHT ENFORCEMENT IN ISRAEL

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	MOTION PICTURES	ENTERTAINMENT SOFTWARE
Number of raids conducted		28
Number of cases commenced	126	28
Number of defendants convicted (including guilty pleas)		2
Acquittals and dismissals		Unknown
Number of cases Pending	126	26
Total number of cases resulting in jail time		0
Suspended prison terms		
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total suspended prison terms		0
Prison terms served (not suspended)		
Maximum 6 months		0
Over 6 months		0
Over 1 year		0
Total prison terms served (not suspended)		0
Number of cases resulting in criminal fines		
Up to \$1,000		0
\$1,000 to \$5,000		0
Over \$5,000		0
Total amount of fines levied		0

⁹ The motion picture industry's anti-piracy operation in Israel continues to encounter difficulties in obtaining significant police enforcement assistance due to the ongoing security situation, but notes that the situation has improved in recent years. Nevertheless, the program still encounters difficulties with the numbers of street peddlers selling pirate product. These peddlers move from one market to the next on local market days. They keep their stocks hidden in nearby homes or warehouses, requiring extensive surveillance and investigation to locate and raid. Most peddlers have turned to video piracy because it is more profitable and less risky than selling drugs or pursuing other criminal activities.

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE	ENTERTAINMENT SOFTWARE
Number of raids conducted		91	76
Number of cases commenced	215		76
Number of defendants convicted (including guilty pleas)	40	3	0
Acquittals and dismissals			Unknown
Number of cases pending	301		76
Total number of cases resulting in jail time			0
Suspended prison terms			
Maximum 6 months			0
Over 6 months			0
Over 1 year			0
Total suspended prison terms			0
Prison terms served (not suspended)			
Maximum 6 months			0
Over 6 months			0
Over 1 year			0
Total prison terms served (not suspended)			0
Number of cases resulting in criminal fines			
Up to \$1,000			0
\$1,000 to \$5,000			0
Over \$5,000			0
Total amount of fines levied			0

ISRAEL CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of raids conducted		126
Number of cases commenced	209	126
Number of defendants convicted (including guilty pleas)	122	16
Acquittals and dismissals		
Number of cases pending	301	258
Total number of cases resulting in jail time		1
Suspended prison terms		
Maximum 6 months		1
Over 6 months		
Over 1 year		
Total suspended prison terms		1
Prison terms served (not suspended)		
Maximum 6 months		
Over 6 months		
Over 1 year		
Total prison terms served (not suspended)		
Number of cases resulting in criminal fines		
Up to \$1,000		
\$1,000 to \$5,000		
Over \$5,000		
Total amount of fines levied		
Total amount of compensation paid to private prosecutor		75,000 USD

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 1999

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	319	12
Post-search action	338	
Cases pending		6
Cases dropped		1
Cases settled or adjudicated	66	8
Value of loss as determined by right holder (\$USD)		
Settlement/judgment amount (\$USD)		81,000 USD

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2000

ACTIONS	MOTION PICTURES	BUSINESS APPLICATIONS SOFTWARE
Number of civil raids conducted	332	11
Post-search action	275	
Cases pending		NA
Cases dropped		0
Cases settled/adjudicated	57	4 / 5
Value of loss as determined by right holder (\$USD)		less than settle amt
Settlement/judgment amount (\$USD)		\$28,900 / NA

ISRAEL CIVIL COPYRIGHT ENFORCEMENT STATISTICS FOR 2001

ACTIONS	MOTION PICTURES
Number of civil raids conducted	280
Post-search action	254
Cases pending	
Cases dropped	
Cases settled or adjudicated	89
Value of loss as determined by right holder (\$USD)	
Settlement/judgment amount (\$USD)	

IP Special Police Units Answer Call to Action in 2001

There were some major breakthroughs in copyright enforcement, particularly for the recording industry, in 2001. In particular, the specialized Intellectual Property Unit under the police (which now has four regional units, one national unit, and totals 32 officers),¹⁰ became more efficient and professionalized, and for the first time began initiating actions without the prodding of the copyright industries. As of 2001, it can be said that the private industry campaign against sound recording piracy

¹⁰ The Special IP Unit of the Police is made up of four sub-units, in Tel Aviv (five officers), the North (five officers), the Centre (five officers), and the South (five officers), and one National unit (six officers). Altogether the Special IP Units have 32 officers assigned to them (still 28 less than the repeatedly promised 60 officers). The headquarter force is comprised of the chief of the task force, who supervises the task force, the chief intelligence officer, a legal advisor, and three general assignment officers. There are no special task force officers in the Judea or Samaria districts.

in Israel, waged since 1997, has resulted in decreased piracy activities, since the piracy level for U.S. repertoire finally retreated to 25% in 2001. The recording industry saw increased raiding in 2001 by the Special IP Units, with a total of 672 raids, resulting in seizures of 270,259 CDs, 24,689 audiocassettes, roughly 7,000 pirate DVDs, and 9,500 VCDs. Out of those raids, 632 criminal complaints were filed in 2001 against manufacturers, importers, distributors and different sales points around the country. Meanwhile, the motion picture industry obtained a total of 280 raids in 2001, in which 35,804 videocassettes, 5,507 VCDs and 8,409 DVDs were seized.¹¹ A total of 254 civil actions and 209 public criminal actions were initiated in 2001. In 2001, 89 civil cases and 122 criminal cases were favorably decided or settled, and as of December 2001, 541 civil and 301 criminal cases were pending. For the first time, in 2001, a video pirate in Israel was sentenced to prison (not a suspended sentence) for 13 months, for being found guilty of selling 673 counterfeit videocassettes in Bat-Yam over a period of five years. The sentence included seven months of a suspended imprisonment given in a previous case against the pirate in 1996.¹²

The deterrent effect of raids on retail establishments dealing in pirated motion pictures is high (as the majority of video stores raided by the industry's anti-piracy group or the local police either cease distributing pirate product or close their operations), while a minority of video stores, including some in the central bus station in Tel-Aviv and the notorious Ha-Azmout Street store in Haifa, still traffic in pirate product. However, the deterrent effect of raids on open-air markets is much lower, as pirate operations replace one vendor who has been caught with another without a criminal record in order to minimize the penalties to the offender. Also, pirate operations keep limited product on-hand so that even successful raids yield fewer pirated goods. Although the industry tries to focus its anti-piracy activities on sources of production (i.e., duplication labs and distribution centers), it has been largely unable to raid large pirate labs and distribution centers because the vast majority of these are in the Palestinian territories and are thus inaccessible. As a result, the primary focus of anti-piracy activity tends to be on retail stores and markets to gather intelligence on suppliers and major distributors. It is rare that convicted pirates are jailed for their offenses, as only offenders who have been convicted many times are eligible for incarceration; even in these exceptional circumstances, the maximum sentence imposed is generally only six months (the case mentioned above is the exception to the rule).

Serious enforcement actions also began to be taken by the recording industry, in conjunction with the Israeli government, against CD-R manufacturers in 2001. Specifically, actions were taken against 30 burning manufacturers, including raids against 21 burning plants, resulting in seizures of seven CD-R burning machines (four "X32 burners" in each banked machine), twelve color scanners, printers, tens of thousands of blank and recorded CDs, case inserts and empty jewel cases. Criminal files were opened against the persons involved. Some inroads have also been made against Internet piracy in 2001. Since November 1999, about 600 infringing sites have been located, with 400

¹¹ Out of all raids run in recent years, the total quantity of CDs and audiocassettes stored by the recording industry as evidence for eventual prosecution is 2.1 million units.

¹² Other results for the motion picture industry have been less promising, as only a few of the thousands of raids carried out by the motion picture industry's anti-piracy group have resulted in criminal prosecution. Although the copyright laws authorize significant fines and prison sentences, the few cases that have been prosecuted criminally have resulted in extremely light sentences. As a result, the recidivism rate has been steadily climbing, reaching more than 50% (of investigated offenses) in 2000.

'shutdowns' and one lawsuit filed against a major Internet pirate. Sites not removed (roughly 200) are under close observation.

IIPA has long been aware of the connection between mass piracy in Israel and larger criminal, often internationally networked, organizations, engaging in commercial piracy throughout Israel. In 2001, the IP Police Units began seriously cracking down on many of these gangs (including one major "bust" on eight serious pirate organizations in July 2001), and many criminal files have been opened against them, employing all possible legal avenues against them (including tax evasion laws).¹³ This is welcomed news.¹⁴

The situation has not been as promising for other sectors of the copyright industry. For example, the entertainment software industry has found it more difficult to bring private criminal cases in the current political climate, so its members have been concentrating on civil cases. The business software industry has similarly had trouble bringing its cases to successful closure, in part because of unreasonable, overly burdensome and costly procedures.

In addition, several serious procedural hurdles at the police level during investigations continue to hinder right holders from getting optimal results from enforcement raids. First, the copyright industries still largely pay for investigations themselves, which is very costly. Second, after all the evidence about a raid target has been gathered and supplied to the police, it can take as long as one month to obtain the raid. Third, due to budgetary constraints among police in Israel, no depots have been allocated to store seized pirate product, and therefore, 2.1 million pirate music units (CDs and audiocassettes) continue to be stored at industry sites, thus creating a potentially dangerous situation for the chain of evidence, in that pirates may claim in a criminal prosecution case that the evidence of the alleged crime has been under the continued control of one of the interested parties.¹⁵

More Criminal Cases Being Brought to Prosecutors, But Courts Fail to Meted Out Deterrent Penalties

Where the enforcement system tends to break is after the raid. While some arrested suspects have served time while awaiting trial (the recording industry reports, for example, that 231 out of 876 files have been processed in all, with six persons having served in jail while awaiting trial for periods of between six and thirteen months, while another twelve persons carried out community services for periods of between three and six months), most cases linger in the court system, without the defendant

¹³ Regarding more stringent enforcement of the tax laws, in 2001, industry held several meetings with Israeli Inland Revenue service, and out of 731 suspects who were reported to the service, three cases have been processed. Customs has a specialized intellectual property unit located in the airport, and for several years, IIPA has reported good cooperation between industry and Israeli Customs. In 2001, the Ministry of Industry and Trade has not been active in the field of anti-piracy, and the "Inter-Ministerial Committee" to coordinate intellectual property policy, that showed some promise several years ago, was practically defunct in 2001.

¹⁴ To give an indication of the scope of the problem, it should be noted that 100 police officers were needed to carry out the raids in July 2001. Apparently, most of those arrested have previous criminal records. In addition to the arrests the police also raided warehouses all over the country and seized pirated and stolen material that was ready for distribution.

¹⁵ It should be noted, however, that the warehouse is guarded by the police at all times.

spending a single moment in jail. Further, while more prosecutors are now devoted to copyright piracy cases in Israel,¹⁶ their numbers are still small (eleven for all of Israel), meaning they cannot adequately serve the copyright industry's full caseload. There remains an unacceptable bottleneck at the prosecutorial level, as more than 500 cases for which the preparatory work has been done, including expert's reports and affidavits, linger at the prosecutor's office and are not taken forward. Another serious problem is the fact that repeat-offenders are often only prosecuted after they have been caught many times (sometimes more than 15 times) selling pirate product. Court procedures are then often delayed as to such multiple offenders, because all the cases against that one defendant have to be joined upon request of the defendant. This leads to massive court files, a huge workload in terms of expert's reports and affidavits and, as a result, enormous delays, during which the pirate salesmen often continue their illegal businesses.¹⁷ The motion picture industry reports similar frustrations with low sentencing by the Israeli courts, calling it the most important reason piracy rates remain unacceptably high.¹⁸ The prosecutors and courts must work harder in 2002 to impose meaningful prison sentences and monetary fines on copyright pirates, so that Israel can make significant strides towards reducing its current piracy levels. Just as disappointing is that the "test cases" from 1999 have still moved no closer to successful resolution.¹⁹ It also remains the case that no end-user pirate has ever been prosecuted, and only in the rarest of cases have any cases been pursued against illegal resellers of software.

¹⁶ There are now eleven prosecutors in total working copyright cases in Israel, four from the Justice Department, two specialized prosecutors from the Central District State Attorney's Office, and two police prosecutors from the Tel Aviv District, and two advocates from the Southern District. There are no specialized prosecutors in the Northern District, so those files are managed by advocates who are not experts in copyrights.

¹⁷ For example, one well-known repeat offender who owns a shop in the Tel Aviv Central Bus Station, serving a prison term after being caught nearly 20 times selling illegal sound recordings, is able to have his shop remain open and filled with pirate CDs, both "home-made" and imported from Russia and Ukraine. This very fact should be an embarrassment to the Israeli system, that it cannot close this blatantly pirate enterprise, even when its owner is in jail for copyright violations.

¹⁸ In one case brought in 2000 by a motion picture company against a known repeat offender, the defendant in the case had agreed to serve 10 days in jail, but upon the company's going to the court to get a court ruling and seek to enforce the judgment, the judge in the case refused to grant the ruling, eventually setting a fine instead of NIS16,000 (approximately US\$3,837) in eight monthly installments, to be converted into four days in jail for every installment not paid. The defendant argued vehemently with the judge to send him to jail instead for ten days (the agreed-upon term by the victim in the case), as the defendant had no money, but the judge refused, making the points that 'no one had ever gone to jail on such a charge,' that 'if it was an important issue, the public prosecutor would have joined the case, but since he didn't, this case should be settled in more of a civil matter,' that 'ten days in jail will not create deterrence anyway and is just a waste of government resources,' and that 'if this really is a serious issue, the government should deal with it, not private companies.'

¹⁹ Only one case we know of, a criminal test case against a notorious pirate, is currently pending in a court in Eilat. The matter is reportedly scheduled to follow "expedited procedures," which, theoretically, should expedite the progress of the case. The prosecutors have failed to carry forward at least one other case referred to it involving counterfeit computer mice. Due to a two-year delay in filing charges, a court has ordered the State of Israel to return to a dealer a batch of counterfeit mice seized by the police. The prosecutor finally settled the case on terms that allow the mice to remain with the government, but that do not require any admission of guilt by the perpetrators. This settlement is an example of the prosecutor appearing to go through the motions to enforce the law, but exercising no political will to ensure a good result. In another case against an optical media plant, the prosecutor has asked for an inordinate amount of documentation, imposing great burdens on the right holders in that case.

Several Procedural Hurdles Remain, Although Some Progress on “Sampling”

One abiding procedural problem involves the difficulty right holders have in obtaining *ex parte* civil search (Anton Piller) orders (i.e., a civil order to search and seize pirated product that is granted by a court without giving notice to the suspected pirate). This procedure has become even more burdensome over the past year because of a change to the Rules of Civil Procedure prohibiting plaintiffs’ lawyers from acting as receivers. August 2001 amendments to the Rules of Civil Procedure prohibit any person who has a “personal or professional relationship” with any of the parties to be appointed as receiver (the person who executes the Anton Pillar order), unless the parties agree or the court is of the opinion that deviating from the rule is required and would not harm efficient and equitable performance of the order for special reasons that the court must specify. In practice, right holders must now hire lawyers and separate receivers in order to carry out civil raids. This is more costly, adds an additional layer, and therefore makes the Anton Piller order procedure even more burdensome than it was previously. The only improvement in recent years occurred when courts began setting more reasonable guarantee terms on Anton Piller orders (between \$5,000 and \$7500 per case) following the passage of the 1999 Commercial Torts Law.

Another issue that has plagued right holders has been the inability in a raid to rely upon “sample affidavits” in order to commence a criminal action. In 2001, the sampling procedure for initiation of prosecution improved based upon an agreement signed by the chief economic crime prosecutor, by which he now accepts sample affidavits of 10 out of 200 seized CDs (200 CDs being the number of CDs that fit into a standard carton box for optical discs), if all the titles are different, and 5 out of 200 CDs if all the titles are the same). If a pirate contests the samples and affidavits of the experts, there is still a risk that senior executives of the international companies will be called to testify in Israel, imposing an unreasonable and costly burden on the right holder. However, this has not occurred in practice to date.²⁰ Exacerbating this problem is the fact that, under the existing Israeli copyright laws, there is a presumption of ownership, but the Ministry of Justice prosecutors do not accept this interpretation, and still have not introduced legislation to change their view of the law (although IIPA understands that such legislation may now be under consideration).²¹

Some Gains in Government Software Management

While the “Inter-Ministerial Committee” on intellectual property policy was not very active in 2001, the forum did carry forward some work on the legal use of business software, providing guidance to each of the government ministries. They have established government targets potentially making

²⁰ Because of the excessive paperwork burdens for proof of a copyright case and to obtain assistance from police and prosecutors alike, one entertainment software company has had to resort to trademark cases to exercise its rights in Israel. This company’s experience is a concrete example of how Israel’s enforcement system does not comply with the TRIPS Agreement, particularly, as it imposes overly burdensome and costly requirements on right holders, and fails to result in effective action against piracy (in practice) (*cf.* TRIPS Articles 41.2, 41.1).

²¹ The business software industry has been burdened in its cases with similar requests for executives of large business software companies to fly to Israel to testify as to ownership of copyright (thus, the necessary presumptions for Israel to comply with its international obligations simply are not being applied in practice).

infringing uses of business software and have conducted investigations of many of some of these targets in 2001. The compliance rate of local municipalities with these guidelines has not matched that of the central government.²²

MARKET ACCESS ISSUES IN ISRAEL

Proposal to Curtail U.S. Programmers' Freedom to Sell Advertising Violates WTO Services Agreement

Israel's Council for Cable and Satellite Broadcasting has proposed a new amendment to the existing Communications Law (Telecommunications and Broadcasting) that regulates the pay-TV industry. The amendment would prohibit foreign television programmers from carrying advertising aimed at the Israeli market. The Chair of the Council has indicated that the purpose of the new regulation is to protect six new Israeli cable and satellite channels to be launched within a year from competition for ad revenue. Prohibiting U.S. programmers from selling advertising time would violate Israel's commitments in the WTO Services Agreement to provide full market access and national treatment for advertising services.

COPYRIGHT LAW AND RELATED ISSUES

Ministry of Justice Position on Payment for the Broadcasting and Public Performance of U.S. Repertoire Would Violate Bilateral Obligations to the United States

The Israeli government astonished the recording industry in 2001 by issuing a legal opinion to an Israeli court, opining that payment for the broadcasting and public performance of U.S. sound recordings is no longer necessary. This opinion, elaborately drafted by the Ministry of Justice, conflicts with Israel's bilateral undertaking to accord national treatment to U.S. record producers in their sound recordings.²³ If this opinion is followed in Israel, would amount to a reversal of current practices in

²² The Committee is now operated under the supervision of the Ministry of Justice (Shlomo Gour, General Manager of the Ministry of Justice), and also includes Arie Cal (Ministry of Trade and Industry). The Committee held seminars, conferences and lectures for police, attorneys, and judges during 2001, and such educational programs continue to be offered to members of the enforcement and legal communities.

²³ Israel protects sound recordings as "works" under the Berne Convention and should be bound under that Convention to extend national treatment. More important, the U.S. and Israel committed to provide national treatment to each other's nationals, under the U.S.-Israel Bilateral Copyright Agreement, reached on May 4, 1950. That agreement consists of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. According to the note from Secretary Acheson,

The Government of the United States of America accordingly considers your Excellency's note and the present note as constituting an agreement between the Government of the United States of America and the Government of Israel, which shall be considered effective on and after May 15, 1948.

The Agreement provides assurances from the government of Israel that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical

which U.S. repertoire is compensated.

The U.S. and Israel indeed have committed to provide national treatment to each other's nationals. The U.S.-Israel bilateral copyright agreement was reached on May 4, 1950, and consists of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. The Agreement provides assurances from the government of Israel that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions." Therefore, the Israeli government must immediately declare that it has abandoned its position, and will abide by its agreement with the United States.

New Piecemeal Legislation in 2001

The following bills began making their way through the parliamentary process in 2001:

Amendment of Copyright Laws (Criminal Liability) Law, 5761-2001

In the first half of 2001, the Ministry of Justice circulated a memorandum proposing the enactment of the Amendment of Copyright Laws (Criminal Liabilities) Law, 5761-2001. This bill, which IIPA has seen in memorandum form, aims to provide for Berne-compatible presumptions of ownership (amending the antiquated formulation in the 1911 UK Copyright Act, which is incorporated into Israel's copyright regime),²⁴ as well as provide for stronger criminal penalties in cases of copyright offences (up to five years' imprisonment and increased fines). The increase in criminal penalties are welcomed changes, although the amendment does not, but should, clarify that Section 3(c) clearly covers the case

compositions."

²⁴ While IIPA hopes that introduction of the Berne-compatible presumption is a positive development in Israel, given difficulties in proving ownership in case proceedings (both criminal and civil), the "Explanations" section of the legislative memorandum of the Ministry of Justice have some concerns that this modernizing of the presumption may not assist right holders:

According to the suggested section, the presumption exists only in favor of the author himself, and not in favor of the other person who states his name on the edition of the work as being the copyright owner. The only case in which someone other than the author will benefit from the presumption, is the case of a work which is published anonymously. In such a case, according to paragraph (3) of the suggested section, the publisher (and in this matter, see the provisions in the matter of "publication" in the Copyright Law and in the Copyright Ordinance) is presumed to be the owner of the rights, in order to be able to enforce the rights of the author who wishes to maintain anonymity.

of “end-user” piracy of business software as a crime (as required by TRIPS Article 61).²⁵ By adding the word “business” to Section 3(c) (given the explanation that the term “distribute” need not refer to a distribution in which any money changes hands), end-user piracy could be covered. The draft amendments also provide several options to amend the prohibition on infringing importations, all of which would remove protection that currently exists against unauthorized “parallel” importation; the current law should be adapted in a way to preserve protections against importation of goods the sale of which in Israel would be unauthorized by the right holder.²⁶ It is expected that this bill must now proceed to approval by the Constitutional Law and Justice Committee, whereupon it will proceed to the Knesset for a vote.

Copyright and Performers Right (Adjudication in Matters of Royalties) Draft Law, 5761-2001

This draft law purports to organize the activities of collective management organizations, and deal with any disputes that arise between those organizations and users of works which require licenses from the organization, as well as disputed between the collection society and its members (regarding the terms of management of the rights and including refusal to manage a person's copyright). IIPA is concerned that this legislation may restrict the private sector from freely negotiating arrangements over public performance royalties and broadcasting.

Israeli Copyright Laws Still TRIPS-Deficient

Israel's copyright laws (last amended by the passage in December 1999, effective January 1, 2000, of Bill 2819, “Bills for the amendment of Intellectual Property Laws – Adjustment to the TRIPS Agreement Instructions 1999”) include a modified version of the Copyright Act (1911) of the United Kingdom, which was adopted in the Copyright Order (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an

²⁵ Specifically, the memorandum provides, without answering the question of whether unauthorized use of software in a business setting, is covered under Section 3(c):

The expression “by way of trade” is intended to distinguish between a single or random act or one of a private nature, and between actual commerce. Into this framework will enter, for example, the owner of a record store, or a peddler in the market who sells an infringing copy of a CD, the owner of a video rental library who rents an infringing copy of a movie, a computer company which sells computers to its clients, including unauthorized copies of computer software, etc. It must be noted that “by way of trade” is not necessarily “during the course of business” of a distributor. It is possible that the commercial distributor is legally engaged in another business, and the distribution of the infringing copies was done outside the framework of his business. It must also be noted that the commercial distribution does not require consideration: even distribution free of charge, which is intended to promote other commercial interests such as advertisement for a distributor or the encouragement to purchase another product, is likely, according to that suggested, to formulate criminal liability.

²⁶ Protection against parallel importation in Israel has been the law for nearly 90 years, and there is no reason to depart from the norm now. Protection against parallel importation in Israel helps keep all unauthorized product out of Israel – including pirated copies of works (which are often shipped with parallel imports in order to hide them), counterfeits, as well as copies of works that are not authorized to be imported into Israel. Parallel import protection also allows for quality control, helping to assure consumers that products purchased in Israel can be trusted as to quality and source.

employer of a performer). The Copyright Order (Berne Convention) (1953) (as amended through 1981) implements the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, while the Copyright Order (Universal Copyright Convention) (1955) implements the UCC in Israel. The United States and Israel entered into a bilateral copyright agreement on May 4, 1950, agreeing that "all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions."

The 1999 amendments attempted to bring Israel's laws into compliance with the TRIPS Agreement. Though a number of TRIPS deficiencies were corrected by the Amendments, some provisions remain TRIPS-incompatible:

Substantive Deficiencies

- An exception is made to the sound recording rental right if the sound recording is not the "principal object" of the rental. This is at least a technical violation of TRIPS Article 14.4. TRIPS permits the exception with respect to computer programs, but there is no analogous exception for sound recordings. It is unclear whether this added provision has any practical impact that would render the provision incompatible with TRIPS.
- There is a "rule of the shorter term" for sound recordings in violation of TRIPS. Nothing in Article 14 of TRIPS covering sound recordings permits the application of this Berne exception to national treatment to sound recordings.
- The amendments also do not appear to provide for an exclusive right in sound recordings against their "direct or indirect reproduction" as required by TRIPS Article 14.2. In these respects, the amendments and Law are TRIPS-incompatible.
- Copies of software acquired prior to January 1, 2000 do not carry a rental right in violation of TRIPS Article 11. In Chapter 8, the transitional provisions of the new Amendments, Section 12(a) provides that copies of computer software acquired prior to the effective date of the law do not carry a rental right. This would appear to be TRIPS-incompatible, since Berne Article 18 permits no such exception.

Enforcement Deficiencies (On Their Face)

- Arguably the most serious and damaging facial TRIPS violation is that end-user software piracy is not defined clearly in the law as a criminal offense (as required by Article 61 of TRIPS). Section 3(c) of the Copyright Ordinance criminalizes the "distribut(ion) [of] infringing copies of such a work for business purposes or to an extent damaging to the owner of the copyright." A recent Supreme Court case imposed criminal liability on a business end-user; however, the facts of that case were unique and the case is not regarded as clearly "criminalizing" end-user piracy. It is therefore critical that the Israeli government amend the Copyright Law to clarify that end-user piracy is a crime. While there has been support from influential figures in Israel to provide protection against pirate end-users, it is unfortunate that the Knesset decided, in its deliberations leading up to the passage of the TRIPS Omnibus legislation, not to amend the law to explicitly criminalize end-user piracy, arguably leaving Israel's law in violation of TRIPS.

Over the past several years, the Israeli government has not taken a consistent position regarding whether Article 3 provides for criminal procedures and penalties in cases of willful copyright piracy on a commercial scale.²⁷ As noted, the current legislative vehicle, the Amendment of Copyright Laws (Criminal Liabilities) Law, 5761-2001, and the noted Explanations, may leave some room for a simple amendment or a broad interpretation that Section 3(c) does cover unauthorized use of software in a business setting (e.g., the Ministry of Justice commentary has already opined that the phrase “commercial distribution” does not require consideration, such that a boss giving out unauthorized software to employees might fall into the category of “commercial distribution” if an “other commercial interest[]” can be demonstrated). IIPA urges the Israeli government to take this opportunity presented by this legislation to clarify once and for all that Israel provides a criminal remedy for the damaging form of piracy involving willful unauthorized uses of software in a business setting.

- Civil damages on the books in Israel are too low to compensate the right holder, while statutory damages are applied per title, not per copy and/or per infringing act, and are therefore also too low, in violation of Articles 41 and 45 of TRIPS. Israel should consider “per copy” and “per infringing act” pre-established damages. Israeli officials have indicated that they plan to have 200 to 100,000 NIS “per copy” pre-established damages in the new copyright law, with the plaintiff electing proved damages or statutory damages. The problems with this proposal are two-fold: they do not encompass “per infringing act” damages and the minimum is far too low to deter piracy.

Enforcement Deficiencies (In Practice)

- Effective action to deter infringements is not present in either civil or criminal cases in violation of TRIPS Article 41. Criminal penalties, as imposed, are too low in violations of TRIPS Articles 41 and 61.
- In Section 7C of the Copyright Ordinance, the court may only order the destruction of the manufactured objects so long as the party filing the motion notifies the police and the police are present to hear the motion. The requirement for police presence seems unreasonable, in light of the fact that the police are already understaffed and under-supported. If, in practice, this requirement results in the failure of courts to order destruction of manufactured objects, such a failure may defeat the effectiveness of the provision and render it inconsistent with Article 61 of TRIPS.
- Israel must provide adequate protections for witnesses who seek to report copyright infringement, and it must dedicate adequate police, prosecutorial, and judicial resources to the problem. It also must simplify and expedite enforcement procedures and process a greater

²⁷ At the time the “TRIPS Omnibus” legislation was passed, the Israeli government’s position was that there was no need to amend the law to explicitly criminalize corporate end-user piracy of software. For many years prior to and since the passage of the omnibus legislation, the Israeli government’s position has wavered. The current position is that Israeli law does not criminalize end-user piracy. Without a clear statement from the government or a clear provision in the law, the chances of a prosecutor being authorized to file a case against an end-user pirate are slim, and the chances a judge will convict someone of end-user piracy are even slimmer. Indeed, the Israeli government has never filed a criminal action against an end-user pirate despite many years of verbal commitments to do so.

volume of cases, with greater results, through its judicial machinery.

- Procedures to obtain an *ex parte* civil search are too burdensome. The recent amendments to the Civil Procedure Regulations requiring the attorney who executes the search order to be an attorney different from the one who obtained the order adds even more expense and complexity to an already overly burdensome and costly procedure.

Civil Remedies in Israel are Inadequate and Ineffective

Israel must reform its copyright law to provide adequate compensatory and deterrent civil damages. At present, unless a right holder is willing to endure substantial burdens, delays and risks, it can only recover a specified statutory sum that is artificially and unreasonably low (i.e., NIS 10,000 - NIS20,000, or roughly US\$2,175 - \$ 4,350), calculated per infringed title rather than infringed copy and infringing act (i.e., so the damages are the same, whether there is one illegal copy or one million, or whether there is one illegal download, for example, or one million). As noted above, without the option to sue for meaningful statutory damages measured per copy and/or per infringing act (in addition to the existing per infringed title option), illegal resellers and end-users can regard these minimal penalties as merely a cost of doing business, and infringement becomes a rational business choice. The current draft overhaul of the copyright law proposes a minimum per-copy damage award of NIS 200 (approximately \$45). This amount is far too low to serve as a deterrent.

Not surprisingly, given non-deterrent civil changes in Israel's law, illegal resellers that have been subject to private criminal prosecution or civil actions in Israel often return to their illegal activities, as the profits of piracy substantially outweigh the costs, even after court-ordered injunctions. As previously noted, IIPA is aware of at least six instances where an infringer has been caught, admitted culpability, settled and returned to piratical activities

Israel Should Move Forward to Adopt WIPO Treaties, the WCT and WPPT

Since 1989, the Israeli authorities have planned to overhaul and modernize the copyright system. While the Ministry of Justice (in charge of drafting) had intended to put the comprehensive overhaul forward in 1999, in part because they received an overwhelming number of comments, the overhaul was put aside in favor of stop-gap legislation to attempt to address the immediate TRIPS deficiencies. Apparently, a new draft copyright law may be available in early 2002.²⁸ IIPA will be interested in reviewing the draft, which will take into account the latest technological developments, including the provisions of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), to which Israel is a signatory. It would send an important signal for Israel to become a member of the WCT and WPPT, as it would demonstrate that Israel is prepared to establish and uphold an adequate legal framework for the protection of copyright in the digital environment. Israel should certainly take the opportunity in the current round of drafting to address the deficiencies noted above, but in addition, to address new technologies, specifically

²⁸ IIPA has heard that the Ministry of Justice is drafting other piecemeal bills, including one that would expressly permit the technique of "sampling" to provide greater efficiency in enforcement, and another that would introduce a special intellectual property court, which could be a very positive development.

providing adequate protection to copyright owners for technological protection measures they use to aid in the exercise of their rights.

Unauthorized Retransmissions by Cable Operators

For a number of years, Israeli cable operators have been retransmitting U.S., European and Russian content without the authorization of right holders. As a consequence, the motion picture industry and concerned right holders filed a legal action in early 2000 under the auspices of the international producers' collection society, AGICOA, against cable operators for royalties that should have been paid to the right holders. Israeli cable operators continue to insist that they can take these signals without payment. The case is now pending, with simultaneous mediation efforts ongoing. These efforts may be facilitated by a recent, unrelated decision by the Supreme Court holding that cable retransmissions are subject to copyright protection. In addition, the Israeli government has reportedly considered draft amendments to the Telecommunications Law that would authorize cable operators to retransmit unencrypted satellite services (of original programming) by means of a compulsory license mechanism. If this draft were to make it forward to the Knesset, that body should reject this totally unacceptable compulsory license as completely out of line with international practice. Copyright owners of content over Hertzian and satellite signal programming should retain the ability to license programming as market forces dictate and not be subject to government-imposed compulsory licenses.