

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: Israel should remain on the Watch List.¹

Executive Summary: The Israeli government has the opportunity to take a major step forward in 2013, having prepared draft legislation to prohibit the circumvention of technological protection measures (TPMs), however, that legislation falls well short of the standards of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT). Those treaties, which the government should be encouraged to join, provide the basic legal framework for protection of copyright in the online environment; almost all the members of the Organization of Economic Co-operation and Development (OECD)² other than Israel have implemented and joined the WIPO treaties.³

One major longstanding issue for the audiovisual industry remains the refusal of Israeli cable operators to compensate copyright owners for the persistent unauthorized uses of their audiovisual works through their retransmissions (despite court judgments ordering them to do so), in violation of their international copyright obligations with respect to broadcast television signals. This problem needs a final favorable resolution. Piracy problems in Israel include enterprise end-user piracy of software, Internet piracy, book piracy, and physical piracy consisting mostly of burned recordable optical discs (CDs, DVDs, etc.). End-user software piracy is not subject to criminal liability as required by TRIPS, so enforcement in 2012 against end-user piracy consisted of industry self-help and seeking civil remedies. Right holders' abilities to halt online infringements were limited by a 2010 Supreme Court ruling, which held that courts are not empowered under Israel's existing legal framework to order Internet service providers (ISPs) to disclose the details of their users.⁴ Israel has yet to introduce legislation to foster cooperation of ISPs to address infringement, including notice and takedown for hosted content and effective and fair mechanisms to deal with non-hosted infringements and repeat infringers.

PRIORITY ACTIONS REQUESTED IN 2013

Enforcement

- Enforce court decisions ordering Israeli cable operators to compensate copyright owners for unauthorized retransmissions of television broadcast signals, and establish a fair remuneration structure going forward.
- Ensure courts impose higher damages that create a deterrent to further infringements.
- Fortify Special Police IPR Units by adding staff and funding and providing them with *ex officio* raiding authority; assign a National Police Unit director to coordinate districts for effective and sustained enforcement.

¹For more details on Israel's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>. Israel was on the Priority Watch List in April 2012, but on September 24, 2012, United States Trade Representative Ron Kirk announced that Israel was being moved to the Watch List based on its introduction of three laws to the Knesset to improve the country's pharmaceutical patent regime.

²On September 7, 2010, Israel became the 33rd member of the Organization of Economic Co-operation and Development (OECD). See Organization of Economic Co-operation and Development, *List of OECD Member Countries - Ratification of the Convention on the OECD*, at http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html.

³The 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, Netherlands, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. As of the end of 2012, with the passage of legislation in Canada, Israel and Chile remained the only OECD countries not to provide TPMs protections. The U.S. Trade Representatives National Trade Estimate 2012 indicated, "Israel has signaled a new willingness to make progress on other IPR matters, such as implementing the core requirements of World Intellectual Property Organization (WIPO) Internet Treaties. The United States welcomes that willingness, and encourages Israel to proceed with full accession to, and implementation of, the WIPO Internet Treaties." United States Trade Representative, *2012 National Trade Estimate Report on Foreign Trade Barriers: Israel*, March 2011, at http://www.ustr.gov/sites/default/files/Israel_0.pdf.

⁴Civil Leave to Appeal 4447/07 *Rami Mor v Barak* (Supreme Court, 25 March 2010). The case dealt with online defamation, but IIPA is concerned since the ruling is not limited to defamation cases.



- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy cases.
- Establish a national and independent prosecutors unit specifically to prosecute piracy cases, and give such cases priority attention for expeditious handling and processing in the courts.

Legislation

- Enact law to protect against unlawful circumvention of TPMs as well as trafficking in (or the service of providing) circumvention technologies, devices, or components; amend Israeli proposal with changes in line with recommendations in this report.
- Amend November 2011 data disclosure bill, which currently establishes a general duty of confidentiality for service providers, proposes a burdensome and lengthy court procedure which would deny right holders the possibility of obtaining infringing user details on an expeditious basis, and allows alleged infringers to remain anonymous when opposing a disclosure application.
- 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 against enterprise end-user software piracy and provide minimum statutory damages.

Market Access

- Scrap regulation prohibiting foreign television channels from carrying some advertising aimed at the Israeli market.

PIRACY UPDATES IN ISRAEL

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 remains significant at US\$192 million.⁵ 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 of OEM products or educational versions of software products in commercial organizations). In 2012, BSA in Israel discovered that counterfeit Adobe software products were being shipped into Israel from Germany (bought on a popular auction site at a significantly lower price than the original). Protecting copyright in Israel and reducing piracy would bring positive gains to the Israeli economy. For example, a study released in 2010 by IDC and BSA demonstrated that reducing the PC software piracy rate in Israel by 10 percentage points in four years (from 33% to 23%) would deliver US\$799 million in new economic activity, 3,207 new IT jobs, and US\$430 million in additional tax revenues by 2013.⁶

Internet Piracy: A recent study showed that Israelis use the Internet for an average of 2,300 minutes per month, second in the world only to Canada.⁷ More than 5.3 million Israelis used the Internet according with 1.8 million

⁵BSA | The Software Alliance's 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Israel was 31%, representing a commercial value of unlicensed software of US\$192 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA's 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

⁶ Business Software Alliance and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Israel*, 2010, at http://portal.bsa.org/piracyimpact2010/cps/cp_israel_english.pdf.

⁷Sharon Bauder, *Canada, Israel Rank Highest in Internet Usage*, VJ Virtual Jerusalem, January 11, 2011, at <http://www.vnetnews.com/articles/0.7340.L-4007770.00.html>.

fixed broadband subscribers as of the end of 2012.⁸ As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P file sharing, BitTorrent, deep linking; illegal use of web bulletin boards and cyberlockers; and direct sharing of infringing files becoming more prevalent.⁹ The recording industry has estimated in recent years that over 90% of all music transmitted over the Internet in Israel was infringing. The Entertainment Software Association (ESA) reports that during 2012, Israel, despite its relatively small population, was ranked 18th in the world in terms of the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks.¹⁰

Physical Piracy: Commercial piracy of music product remains a major problem in Israel, and with an estimated three million pirated/counterfeit CDs sold annually in Israel, the industry reports that the vast majority are infringing CD-Rs burned in small burn-to-order labs. While the Israeli Police IP Unit has taken some steps to deal with this problem, more action is needed. The Unit is understaffed and does not have the required resources and manpower to address the problem effectively. As a result, even where the Unit investigates a case, the process is slow and it often takes months until charges are filed. There is an urgent need for specialized IP prosecutors at the police and attorney general's office to deal with infringement cases.

ENFORCEMENT UPDATES IN ISRAEL

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 copyright content retransmitted by cable, Israeli cable operators continue to refuse to make payments for their use of content contained in the broadcast television signal they retransmit. Specifically, AGICOA's now 14-year-old claim, filed on behalf of its international members, sought compensation for the unauthorized 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 WCT). AGICOA's claims were filed after many years of trying to come to terms with cable operators directly. Courts have been somewhat supportive, with monetary damages awarded by District Courts. Nevertheless, efforts by AGICOA to establish a structure going forward for compensation from cable operators have continued to meet resistance. Cable operators have avoided payments for well over a decade through skillful manipulation of the court system. It seems clear that cable operators intend to resist from serious settlement discussions and further recourse to the courts is of problematic value owing to the time and expense required for continuous court battles.

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 a previous Israeli government 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.

⁸ International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

⁹The independent segment of the film and television industry (IFTA) reports that online and physical piracy remain a significant export constraint in Israel for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Israel and leaves little confidence for investment in intellectual property. Independent producers are especially concerned about Internet piracy because of its harm to legitimate online distribution services – harming consumers and rights holders alike. Revenue from these services, which is licensed country-by-country, is critical to financing the development of new creative works worldwide.

¹⁰These 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.

Software Piracy Currently Addressed by Civil Remedies Which Are Often Inadequate: The software industry relies on self-help and civil remedies to address enterprise end-user piracy and other forms of software piracy in Israel. Enforcement activities in Israel are chiefly aimed at unlicensed software use by enterprise end-users. In 2012, the courts in Israel provided 113 judgments based on the Israeli Copyright Act of 2007. Five of those judgments were provided by the Supreme Court. The software industry also worked on many administrative actions and cease and desist letters. Unfortunately, as discussed in this report, the Israeli government does not consider unauthorized use of software by enterprises to be a crime in Israel, a major deficiency in the law. Therefore, the Police and Customs do not get involved in such procedures. For deterrence, the industry must rely on the possibility of compensatory or statutory damages. However, to IIPA's knowledge, no court has ever awarded the maximum statutory damage award (NIS100,000) (US\$27,000) and thus the increased maximum in the 2007 Copyright Law has not been helpful. A major improvement would be in the area of awarding adequate damages at least equivalent to the market value of the infringed software products, and realistic expenses (legal expenses such as attorney's fees) to copyright owners prevailing in their cases. As things stand, copyright owners tend to settle cases with infringers in order to avoid the courts since winning a case at court costs more than the judgment at the end of a successful case. In addition, court decisions have created uncertainty about whether right holders can pursue copyright remedies against parties who, by virtue of their violation of the terms of an EULA, have forfeited their authorization to use the software.¹¹ The industry reports that in some districts where the courts are busier than others (such as the Tel Aviv district court), end-user piracy cases move very slowly, sometimes taking up to six months to obtain a first hearing.

Software industry representatives participate regularly in forums and lectures, and engage in public awareness over issues such as protection of software and, for example, announcing BSA's global software piracy study in 2012. They also participate in IP forums, give lectures, participate in meetings with parliamentary committees, the Chamber of Commerce, and local police to further understanding of software-specific issues.

Important 2011 Case Involving Piracy of Textbooks Establishes Criteria for Contributory Liability in Israel: In a case involving copying of textbooks, *Hebrew University of Jerusalem vs. Yaakov Cohen*, the Supreme Court of Israel in 2011 clarified the doctrine of contributory copyright infringement under Israeli law. The facts of the case are that the Israeli Labour Party subsidized a student club called "Teh Ofek" (Horizon Cell) at the Mt. Scopus Campus of Hebrew University. As an incentive to get students involved, they provided cheap versions (NIS10) of a course textbook entitled "Traditional Japan," the copyright for which is owned by the publisher, Shocken, and the original of which sells for NIS89. Shocken sued the publisher-distributor, Yaakov Cohen, the Labour Party, and Hebrew University. The Court held that in order to find the defendant liable for contributory infringement, a plaintiff has to prove: 1) the existence of a direct infringement; 2) actual awareness of the infringement; and 3) actual and significant contribution. If those factors are present, then in the interest of efficiency, the Court ruled it would be proper to sue the conduits of the copying.¹² This case sets an important legal principle under which those who, while not directly infringing, can nevertheless be held contributorily liable for copyright infringement of others.

Israeli Government Recognizes Importance and Complexity of Addressing Internet Piracy Problem: The Israeli government has recognized the importance of Internet piracy issues, as detailed in previous filings in the Special 301 process.¹³ Unfortunately, Israeli government enforcement authorities (police, tax authorities, customs) have been relatively uninvolved in online enforcement, and the criminal liability of online infringers under existing law remains unclear. As a result, civil action remains the only course of action available to right holders to deal with

¹¹The terms and conditions which are in the EULA should be seriously considered such as territorial restrictions for the use of the software products in other countries, Student and Educational versions which cannot be used by businesses, and OEM licenses which are valid only subject to the purchase of new hardware along with that specific software product.

¹²*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).

¹³The 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.

infringement. The ability to bring effective civil actions has been hampered by a March 2010 decision of the Supreme Court, where it was held that Israeli courts are not empowered to issue disclosure orders against ISPs. Although the court's ruling rests on procedure (that existing court rules do not provide a basis for disclosure orders), the ruling means that right holders cannot obtain the details of anonymous infringers for the purpose of bringing litigation against them. The Supreme Court, in its ruling, called upon legislators to rectify the problem and pass legislation explicitly granting courts the powers to order disclosure. The Knesset is reportedly working on legislation. With no criminal enforcement and limited ability to bring civil action, local industry depends on voluntary cooperation from ISPs to deal with online piracy, and reports a generally satisfactory level of cooperation.

One case from 2011 (*ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*),¹⁴ following only two months after the *Hebrew University* case, resulted in a finding of no infringement for a deep linking forum site. However, the case may provide helpful guidance in terms of secondary liability for websites or services predicated on infringement of others. The Central District Court held that the owners of the website forum *rotter.net* which contained many user-posted links to infringing movie downloads, could not be held liable for these links, and were not required to monitor the site for infringement as long as they were operating a notice-and-takedown procedure. However, the court set out two circumstances under which the site could have been 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 posting links to infringing websites; or 2) if the forum was predominantly infringing and therefore was “improper”; this would be established on the basis of 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. The court stated as an example that a site would be “predominantly infringing” and “improper” if a paid site had more than 10 infringing links constituting more than 25% of the total links in the forum. If more than 50% of links on a free site are to infringing websites, the site would also be improper according to the court. Had the site been found to be improper, a presumption of knowledge of the extent of infringement on the site for purposes of a finding of contributory liability would result. While the owners/operators of *Rotter.net* site were not found secondarily liable in this instance, the case sets forth some important guidelines to other sites which may be providing links to infringing materials or otherwise are forums for such links, whether they are commercial or not.¹⁵

Establishment of Special IP Court Could be Helpful: In 2012, there were no practical steps in establishing IP courts. In some of the “regular” courts, there are judges who are more experienced in intellectual property issues, and cases are usually channeled to those judges. However, it would be helpful if the Israeli government proceeded to establish specialized courts, particularly in conjunction with further copyright law modernizations being explored, including those related to Internet-based issues, the intersection with privacy interests, and TPMs.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Copyright (Amendment - Protection of Technological Means and of Means for Management of Rights) Bill, 5771-2011: In 2012, the Israeli Ministry of Justice released the Copyright (Amendment – Protection of Technological Means and of Means for Management of Rights) Bill, 5771-2011. IIPA commented on the Bill to the Minister of Justice and understands from the Ministry that they are preparing a substantive response.

IIPA appreciates the drafters' acknowledgement that the ease of dissemination of digitized materials via the Internet “creates a problem with respect to the protection of works in which there is copyright.” As the drafters further note, “these challenges have led, *inter alia*, to the development of technological means of protection of works and the implementation of electronic information regarding the management of copyright in works, with the aim of protecting the rights of copyright holders as far as possible.” The drafters then note that the Bill was drafted with a view to “suit the requirements of” the WCT and WPPT. The following observations and comments are intended to provide input as

¹⁴*ALIS, the Israeli Anti-Piracy Organization v. Rotter.net*, CA 567-08-09, August 8, 2011 (on file with IIPA).

¹⁵See discussion of case at David Mirchin, Adv., *IT Update: Are Websites Liable for Links to Infringing Materials?* January 2012 (on file with IIPA).

to the improvement of those important provisions. In the present day, TPMs serve to enable access to more copyright materials, in more diverse ways, by more consumers, and at more affordable price points, than ever before. In this way, TPMs serve the fundamental goals of the copyright system, not only fostering more creation of copyright materials, but encouraging dissemination and access to such materials, through healthy and legal e-commerce transactions. The drafters have placed focus on one effect of TPMs, which is to restrict the unauthorized uses of copyright materials, but have not acknowledged in their draft documentation the very important correlative purpose of TPMs – to enable access to legal content and legal content distribution models. By referring to TPMs as “locks” the drafters have missed a key point, which is that TPMs are enabling technologies for digital dissemination. Unfortunately, what follows from this basic misunderstanding is a draft Bill that fails to provide adequate protections required by the WCT and WPPT, and that adopts an approach that will discourage rather than encourage legitimate distribution models to flourish in Israel.

- **Coverage of Both Act and Trafficking:** First, it is acknowledged in virtually all countries that have implemented TPMs protections that the coverage of merely the act of circumvention of TPMs would be inadequate. Virtually all countries having implemented the WCT and WPPT consider prohibiting trafficking in circumvention tools (manufacture and distribution of devices, components and technologies), and the provision of circumvention services, necessary to provide “adequate legal protection” as required by both the WCT and WPPT. Unfortunately, the draft (Draft Section 46B) fails to prohibit trafficking in circumvention tools or the provision of circumvention services. The draft, in the section on “limitations” (Draft Section 46D), even appears to legitimize those who “create a device for the bypassing of technological means of protection in order to make permitted use of a locked work.” Under the Israeli draft Bill approach, right holders would have no choice but to sue and seek prosecution principally of individuals using circumvention tools, rather than targeting those whose business models are built on circumvention for unlawful access to, or exercise of, rights in copyright materials. Surely such a policy outcome could not have been intended by the drafters.
- **Coverage of Both Access and Copy Controls:** The definition of “Technological means of protection” (Draft Section 46A) does not include those TPMs which prevent access to copyright materials, leaving only a TPM that “is intended for use and is efficiently used in order to prevent, restrict or impede the breach of copyright in a work.” The prohibition in Draft Section 46B further imposes a requirement that the person circumventing the TPM must have known or had constructive knowledge that “such bypassing would lead to a breach of copyright in a locked work.” The language of the WIPO treaties, “in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works [or phonograms/performances fixed in phonograms], which are not authorized by the authors concerned or permitted by law” means that not only copy controls but also access controls must be covered, and the majority of countries having implemented TPMs protections agree. The drafters should ensure that the definition of “Technological means of protection” includes those which restrict, prevent or impede access to copyright materials, and should remove the requirement that there be a showing of knowledge (at least for civil liability) that the circumvention resulted in a “breach of copyright.” Further, the definition of “Technological means of protection” (Draft Section 46A) should relax the requirements, i.e., it should cover as TPMs “any technology, device, or component that, in the normal course of its operation, controls access to, or the exercise of rights in” copyright materials. The purpose test (“is intended for”) and the subjective test of the level of a TPM’s effectiveness (“is efficiently used in order to”) should be removed.
- **Broad Exceptions Defeat the Adequacy of Protection Against Unlawful Circumvention:** Draft Section 46D(a) provides, “The provisions of this Chapter shall not derogate from the right of any person, alone or via others, to bypass technological means of protection or to create a device for the bypassing of technological means of protection in order to make permitted use of a locked work.” This exception essentially stands TPMs protections on their head, since it protects those who engage in circumvention, but worse, protects not only those who assist the act of circumvention, but even those who traffic by manufacturing circumvention devices. The problems with this Draft Section include the following:

- First, any exceptions to the prohibition on circumvention must be narrowly tailored to serve important societal goals. Simply allowing circumvention for any “permitted use” will essentially eviscerate protection of TPMs, since anyone circumventing can claim they are doing so for a permitted purpose.
- Second, the inclusion of the ability to circumvent “via others” essentially would legitimize circumvention businesses, as long as they claim they are circumventing for their customers to “make permitted use.” The law should be designed to encourage copyright owners to disseminate their works in digitized formats with the security that they will not be stolen. This express acquiescence to circumvention services would create a monumental disincentive to creators releasing their works in Israel.
- Third, the exclusion from coverage of those who “create a device for the bypassing of technological means of protection in order to make permitted use of a locked work,” when read with the definition of “Device for bypassing technological means of protection” in Draft Section 46A (“a device, product, technology, computer software, component or any other means the purpose of which is to bypass technological means of protection or to assist in the bypass thereof, provided that such does not have any other use”), results in lack of coverage of traffickers, explicitly, to those who manufacture circumvention devices, but also to all those downstream who then use those devices or assist their use.

There remain other issues that should be addressed, for example, whether the remedies for violating the law are effective, but since so many of the problems relate to the lack of coverage for trafficking (and services) and for access controls, as well as the gaping exceptions that plague the Draft Bill, those should take precedence in terms of rethinking the approach to this issue.

E-Commerce Bill to Address Online Infringement Would be Helpful: The *Hebrew University and Rotter.net* cases demonstrate that secondary liability principles generally apply in Israel, but the contours of how these will be codified remains to be seen. It is critical that, whatever the approach, service providers do not receive blanket immunity for infringements of others occurring on or through their services, but rather, ISPs should as a default comply with notices expeditiously to take down infringing materials (immediately in the case of pre-release material), have in place effective and fair policies to address non-hosted infringements and repeat infringers, and have provisions to discourage web advertising and payment processors in association with infringing sites. Legislative amendments should establish a clear obligation on ISPs to expeditiously cooperate with right holders when they know or have red flag knowledge (i.e., they are aware of facts and circumstances from which infringement is apparent).

Other Issues in the Copyright Law: Copyright law in Israel is governed by the Copyright Law, 2007. The Law creates a basic structure for protection of U.S. copyright in Israel, but still may not be fully compatible with Israel’s international obligations and should be modernized. The following are some remaining areas of concern for the copyright industries in Israel that should be addressed.

- **Need to Criminalize Enterprise End-User Software Piracy:** 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 it means BSA has to exclusively rely on bringing civil cases against enterprise end-user software piracy. In those cases there is invariably a lack of deterrence. The Israeli government has in previous submissions excused its failure to criminalize this commercial form of piracy, indicating that business software end user liability is addressed by Israeli copyright law and asserting that Israel has some of the world’s lowest rates of software piracy. They have helpfully indicated that “[c]riminal liability may also inure provided that the software has been distributed on a commercial scale,” and IIPA contends that the dissemination of software within an enterprise constitutes such commercial scale distribution. IIPA is interested in exploring this theory for criminal liability in Israel under the new Law (and the Israeli government’s interpretation in its filings). The unauthorized use of 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. To the extent the current law does not criminalize unlicensed use of software, the government should amend the law.

- **Minimum Statutory Damages Needed:** Currently, under Section 56 of the Copyright Law, 2007, the statutory damages range between no damages and NIS100,000 (US\$27,000), replacing the old minimum of NIS10,000 (US\$2,700) and maximum of NIS20,000 (US\$5,400). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has harmed enforcement. To illustrate, while some courts have awarded zero damages against some infringers, no court has ever awarded any amount approaching the NIS100,000 (US\$27,000) maximum. The courts do not tend to rule over NIS20,000 (US\$5,400) per infringement and in many cases, the court rules a much lower sum than NIS10,000 (US\$2,700) in the court's discretion. This absence of a certain deterrent outcome for infringers has negatively affected copyright owners' ability to seek redress effectively. For example, BSA, which operates its program through warnings and the elimination of illegal uses, has been stymied in its efforts due to the lack of an effective statutory damage remedy. The lack of such a remedy has also had a negative impact on enforcement against resellers (who are also subject to the same civil damages regime). It should further be noted that 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. Finally, the question arises whether pre-established damages should be available on a per-copy basis, or only on a per-work basis. Judgments regarding software copyright infringements have sometimes resulted in one statutory damage award per software title infringed, regardless of how many copies were infringed, though the number of infringing copies may be considered in the court's determination of the amount of the award. A major weakness of the Israeli Copyright Act is the lack of minimum statutory damages for copyright infringements.
- **Protection for Foreign Phonogram Producers on Basis of National Treatment Desired (Sections 8, 10):** Under the 2007 Law, foreign right holders in sound recordings (other than U.S. sound recordings which enjoy national treatment on the basis of bilateral arrangements) were denied equal treatment and could be denied rights, and therefore payments, for their sound recordings in Israel. The government 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.¹⁶
- **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 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 Section appears to create a default rule allowing the transfer with 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

¹⁶The 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.

recordings.¹⁷ 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 a 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 made with the consent of the owner of rights in the country of manufacture and imported into Israel. 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 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 has in previous submissions discussed 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 the Patent and Trademark Office, begin a dialogue with the government, to ensure that it acts in a manner conducive with achieving interpretations consistent with Israel's international obligations under the three step test. Exceptions raising cause for concern include:
 - The **public performance exception in educational institutions** (Section 29) (e.g., where sound recordings are concerned, the exception should be limited to teaching or examination purposes only).
 - The **computer program exceptions (backup and interoperability)** (Section 24) (e.g., the exception allowing for reproduction or adaptation for purposes of interoperability and for other purposes should be made consistent with the European Directive on the Legal Protection of Computer Programs, Articles 5 and 6 in order to appropriately narrow the exceptions).

¹⁷Indeed, 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.

- The **temporary copy exception** (Section 26) (while Sections 11(1) and 12(4) confirm that 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).
- The **library/archive exception** (Section 30) which as written fails to meet the Berne Convention and TRIPS standard for exceptions; *cf.* 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) which 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.

MARKET ACCESS ISSUE

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, creating many restrictions on the ability to provide advertising in the Israeli market.¹⁸ 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 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.

¹⁸ The U.S. Trade Representative’s NTE report in March 2011 indicated,

“Only selected private Israeli broadcast television channels are allowed to carry advertising. These channels received broadcast licenses and the advertising privilege in exchange for certain local investment commitments. Israeli law largely prohibits other broadcast channels, both public and private, from carrying advertisements. Foreign channels that air through the country’s cable and satellite networks are permitted to carry a limited amount of advertising aimed at a domestic Israeli audience. Currently, the regulations allow foreign channels no more than 25 percent of their total advertising time to target the Israeli market.”

USTR, *2011 National Trade Estimate Report on Foreign Trade Barriers: Israel*, *supra* note 3.