

ISRAEL

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2012 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Israel, which on September 7, 2010 became the 33rd member of the Organization of Economic Co-operation and Development (OECD),² and whose economic power matches that of the likes of South Korea and the European Union in terms of per capita GDP, has lagged behind in terms of protecting creative output of Israelis and foreign creators. Israel remains one of only two OECD members that has not implemented key provisions of, or joined, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT), which provide the basic minimum framework for protection of copyright in the online environment.³ Piracy remains an issue in Israel, including Internet piracy, enterprise end-user piracy of business software, book piracy, and continued physical piracy in form of mostly burned recordable optical discs (CDs, DVDs, etc.). In 2011, Israel ranked 12th in the world in terms of number of detections of peers participating in unauthorized file sharing of select entertainment software titles. End-user software piracy is not subject to criminal liability as required by TRIPS.

Right holders' ability to take action to stop online infringement has been 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 The situation is not helped by new draft legislation which would essentially codify a duty of confidentiality for ISPs and provides safeguards for online infringers to remain anonymous and thereby evade detection. Israel has yet to introduce much-needed legislation to clarify the responsibilities of online service providers to address infringement, including a notice and takedown procedure for hosted content, and effective and fair mechanisms to deal with non-hosted infringements and repeat infringers. One major and 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.

PRIORITY ACTIONS REQUESTED IN 2012

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 the Special Police IPR Units, by adding staff and funding, and by providing them with *ex officio* raiding authority. A National Police Unit director should be assigned to coordinate districts for effective and sustained enforcement.
- Tackle burgeoning Internet piracy through proactive Israeli Police pursuance of Internet piracy cases.

¹For more details on Israel's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2012SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

²See 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. Only Canada, Iceland, New Zealand, and Norway have not, and of those, only Canada has not even partially implemented either of the treaties.

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

- 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 takedown procedure to address non-hosted piracy, and injunctive relief and a duty on ISPs to provide information to law enforcement agencies and rights holders.
- Amend the Copyright Act to, *inter alia*, confirm criminal liability against enterprise end-user software piracy, provide minimum statutory damages, and prohibit circumvention of technological protection measures and the trafficking in (or the service of providing) circumvention technologies, devices, or components.

Market Access

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

PIRACY AND ENFORCEMENT UPDATES IN ISRAEL

Previous reports and filings include discussions of piracy and enforcement challenges faced in Israel. The following section provides brief updates on piracy and enforcement issues 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 12 year old claim, filed on behalf of its international members a significant claim seeking 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, filed after many years of trying to come to terms with cable operators directly, have gone unresolved, though some of their claims have now been paid thanks to a favorable outcome in a bankruptcy case filed by certain cable operators that were part of the original suit. Most recently, in 2011, the District Court of Tel Aviv issued an order requiring cable operator defendants in AGICOA's lawsuit to pay damages for unauthorized retransmissions. AGICOA at the same time has actively sought an agreement to establish a structure going forward for compensation from cable operators. Cable operators have made clear their intention to abide by this court decision, but we remain concerned since they have avoided justice for more than a decade through skillful manipulation of the court system. It seems clear from the disregard of the Israeli courts and the failure by Israeli cable operators to advance serious settlement discussions that there is little will in Israel to ensure a fair result, namely an agreement or court order that equitable compensation must be paid to copyright owners of audiovisual works where those works are retransmitted by cable operators without authorization.

It is imperative that this matter be resolved promptly with fair settlement for past failure to compensate right holders, together with a reasonable agreement with AGICOA for payments going forward. In 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.

Business Software End-User Piracy Causes Harm to U.S. Software Companies: The level of business software end-user piracy in Israel has remained relatively low in recent years.⁵ In Israel, many small companies that purchase legal software engage in under-licensing by which they load computers beyond the scope of the license. Protecting copyright in Israel and reducing piracy would bring positive gains to the Israeli economy. For example, a study released in 2010 by International Data Corporation for the Business Software Alliance (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

Enforcement activities in Israel are chiefly aimed at pirate end-users. The software industry submitted two civil actions in 2011, in addition to many administrative actions and cease and desist letters. Unfortunately, end-user software piracy is not criminalized in Israel, a major deficiency in the law, and 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, 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 is dead letter. 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 End User License Agreement (EULA), have forfeited their authorization to use the software.⁷ 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.

Industry representatives participate regularly in forums and lectures, and engages in public awareness over software issues and statistics (such as the BSA annual global software study). 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.

Book Piracy: Illegal photocopying at copy shops limits the legitimate market on university campuses. In some cases, unauthorized copying is facilitated by students, who produce the illegal copies of textbooks and sell them to other students. University administrators are apparently aware of the illicit activity but have not acted against the ongoing illegal activity. Certain universities also offer print-on-demand services where a student can request that a customized course pack be printed, for a fee, and likewise post excerpts taken from U.S. books on the institution's intranet for student use; in these cases, publishers' permission was not obtained and no royalties for such uses have been paid. In June 2011, in the case of *Hebrew University of Jerusalem vs. Yaakov Cohen*, the Supreme Court of Israel clarified the doctrine of contributory copyright infringement under Israeli law, holding that in order to find a defendant liable for contributory infringement, a plaintiff had 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.⁸ This case sets an

⁵BSA's 2011 software piracy statistics will not be available until after the filing deadline for this submission, but will be released in May 2012, at which time piracy rates and U.S. software publishers' share of commercial value of pirated software will be available at www.iipa.com. In 2010, the software piracy rate in Israel was 31% (down from 33% in 2009), representing a commercial value of unlicensed software attributable to U.S. vendors of US\$80 million. These statistics follow the methodology compiled in the Eighth Annual BSA and IDC Global Software Piracy Study (May 2011), <http://portal.bsa.org/globalpiracy2010/index.html>. These figures cover packaged PC software, including operating systems, business applications, and consumer applications such as PC gaming, personal finance, and reference software – including freeware and open source software. They do not cover software that runs on servers or mainframes, or routine device drivers and free downloadable utilities such as screen savers. The methodology used to calculate this and other piracy numbers are described in IIPA's 2012 Special 301 submission at <http://www.iipa.com/pdf/2012spec301methodology.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.

⁷The 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.

⁸*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

important legal principle under which those who, while not directly infringing, can nevertheless be held contributorily liable for copyright infringement of others.

Internet Piracy: A recent study showed Israelis use the Internet for an average of 2,300 minutes per month, second in the world only to Canada.⁹ More than 5.3 million Israelis used the Internet according with almost 1.7 million broadband subscribers as of 2008 (according to ITU). As such, it is not surprising that Internet infringements have increased in Israel, with illegal P2P filesharing, BitTorrent, deeplinking; illegal use of web bulletin boards and cyberlockers, and direct sharing of files becoming more prevalent.¹⁰ The recording industry estimates that over 90% of all music transmitted over the Internet in Israel is infringing. The Entertainment Software Association (ESA) reports that during 2011, Israel was 12th in the world in the number of connections by peers participating in the unauthorized file sharing of select ESA member titles on public P2P networks, up from 14th in 2010.¹¹

The Israeli Government has recognized the importance of Internet piracy issues, as detailed in previous filings in the Special 301 process.¹² 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 infringement. The ability to bring effective civil actions has now 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 to legislators to rectify the problem and pass legislation explicitly granting courts the powers to order disclosure. As detailed below, the Knesset is working on legislation, but the current draft is flawed. 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 recent case (*ALIS – Association for the Protection of Cinematic Works v. Rotter.net Ltd.*),¹³ 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

Danziger). The Israel 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 which sells for NIS89. Shocken sued the publisher-distributor, Yaakov Cohen, the Labour Party, and Hebrew University.

⁹Sharon Bauder, *Canada, Israel Rank Highest in Internet Usage*, VJ Virtual Jerusalem, January 11, 2011, at <http://www.ynetnews.com/articles/0,7340,L-4007770,00.html>.

¹⁰The 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.

¹¹These 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.

¹²The 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.

¹³*ALIS, the Israeli Anti-Piracy Organization v. Rotter.net*, CA 567-08-09, August 8, 2011 (on file with IIPA).

infringing and is 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.¹⁴

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 95% are infringing CD-Rs burned in small burn-to-order labs. While the 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.

COPYRIGHT LAW UPDATES AND RELATED ISSUES

Need to Amend Pending Disclosure Bill So It Does Not Shield Infringers: A recent Disclosure Bill¹⁵ would essentially codify a duty of confidentiality for ISPs and provide safeguards for online infringers to evade detection while remaining anonymous. The existing text, which passed first reading, establishes a general duty of confidentiality for service providers and denies right holders the possibility of obtaining infringing user details on an expeditious basis (i.e., without getting a court order), and allows alleged infringers to remain anonymous when opposing a disclosure application (unless the court is convinced that the applicant's ability to challenge the opposition is undermined by the inability to cross-examine the subscriber). The proposal should be amended, so that right holders are in a position to obtain disclosure orders without delay, and avoid situations in which alleged infringers can oppose disclosure applications while maintaining their anonymity.

Draft E-Commerce Bill Should Move Forward: Reports indicate that the Ministry of Justice is considering the possibility of new legislation to address online infringement. 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, that 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, Including the Lack of WCT/WPPT-Level Protection for TPMs: Copyright law in Israel is governed by the 2007 Copyright Law. 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 including bringing it into compliance with the WCT and WPPT.¹⁶ The following are some remaining areas of concern for the copyright industries in Israel that should be addressed.

¹⁴ See discussion of case at David Mirchin, Adv., *IT Update: Are Websites Liable for Links to Infringing Materials?* January 2012 (on file with IIPA).

¹⁵ Bill on the Disclosure of Details Relating to Electronic Network Subscribers, published 22 November 2011, Bills – Rashmote, No. 421, available at http://www.tazkirim.gov.il/Tazkirim/Attachments/40952_x_AttachFile.doc (in Hebrew).

¹⁶ The U.S. Trade Representatives National Trade Estimate 2011 indicated, “Israel has signaled a new willingness to make progress on other IPR issues of concern, such as implementing the core requirements of World Intellectual Property Organization (WIPO) “Internet Treaties,” (i.e., the WIPO Copyright Treaty

- **No Protection Against Circumvention of Technological Protection Measures:** Israel is one of the only OECD members that has not protected technological protection measures from unlawful circumvention, trafficking in circumvention technologies or devices, or providing circumvention services. The Israeli Government points out in written filings that Israel is not a member of either the WCT or WPPT so it is under no obligation to introduce protections of TPMs. This is true, but the Government is incorrect to suggest that authors oppose or do not rely on TPMs to make content available in the digital environment. Protection against circumvention of TPMs remains a vital part of development new distribution models for the digital and online environments. WIPO advocates such protection, noting, “it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet ... no [digital] rights may be applied efficiently without the support of technological measures of protection There was agreement that ... appropriate legal provisions were needed to protect the use of such measures.” The Israeli Government is also incorrect to assert there is a “lack of uniform implementation worldwide,” as there are over 100 countries/territories as of February 2012 that had fully or partially implemented the anti-circumvention obligations, had already committed to, or had draft legislation which would provide such protection.
- **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 business 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 a business setting 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 business software and other copyright materials in a commercial setting must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. 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\$2,675) and maximum of NIS20,000 (US\$5,350). While the higher maximum is very helpful, the fact that there are no longer minimum statutory damages has 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 maximum. 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. Recent judgments regarding software copyright infringements have 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.

and the WIPO Performances and Phonograms Treaty). The United States welcomes this step, and encourages Israel to proceed with full accession to, and implementation of, the WIPO Internet Treaties.” United States Trade Representative, *2011 National Trade Estimate Report on Foreign Trade Barriers: Israel*, March 2011, at http://www.ustr.gov/webfm_send/2751.

- **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.¹⁷
- **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 recordings.¹⁸ The international trend is for more countries to amend their laws to provide at least 70 years for sound recordings, and the government of Israel should agree to follow this trend and provide longer term to producers of sound recordings in Israel.
- **Protection for Pre-Existing Works and Rule of the Shorter Term (Section 44):** Section 44 of the Law intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Section 44 provides, “The period of copyright in a work listed below shall not be longer than the period of copyright prescribed for such work in the law of its country of origin...” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term “prescribed for such work” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Section 44 may be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under Berne Article 18, must be protected in Israel. Israel must confirm that Section 44 meets the international obligation, or must amend it so that it does so.
- **Parallel Importation:** The definition of “infringing copy” in Paragraph 1 of the 2007 Law excludes from protection copies made with the consent of the owner of rights in the country of manufacture and imported into

¹⁷ The 2009 Israel Submission indicates, among other things, that “[t]he treatment of sound recordings under the new Copyright Law is fully conformant with Israel’s bilateral and multilateral obligations,” a statement with which we agree. However, the Submission fails to address the justification for the weakening of protection, i.e., the failure to maintain protection under the previous law, and the move from providing equal national treatment to discriminatory treatment for non-U.S. foreign recordings.

¹⁸ Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety-five years from publication.

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 PTO, 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).
 - The **temporary copy exception** (Sections 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

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.¹⁹ The provision prohibits foreign television channels from carrying advertising aimed at the Israeli market, with the exception of foreign broadcasters transmitting to at least eight million households outside of Israel. This provision violates Israel’s commitments in the World Trade Organization (WTO) Services Agreement to provide full market access and national treatment for advertising services. In addition, such restrictions impede the healthy development of the television industry in Israel.

¹⁹ 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 16.