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Copyright

Israel

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Law and Practice

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1. General Information

1.1 Governing Copyright Statute

The bulk of Israeli copyright legislation is governed by the Israeli Copyright Law of 2007, alongside four sections of the Copyright Ordinance of 1924, which remain in effect, covering private copying exception and a compensation mechanism for right-holders through an obsolete blank media levy (all other sections of the Copyright Ordinance of 1924 were cancelled with the enactment of the Israeli Copyright Law of 2007). Neighbouring rights are governed by the Israeli Performers' and Broadcasters' Rights Law of 1984.

A Hebrew version of the Israeli Copyright Law of 2007 is freely accessible online through a simple search engine query and through various legal databases (subscription fees are usually required). There does not appear to be an official updated English translation of the Copyright Law currently available online.

1.2 Berne Convention

Israel is a contracting party to:

- the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971);
- the Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms;
- the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961);
- the Marrakesh VIP Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled;
- the WIPO Copyright Treaty (1996) (signed but not ratified by Israel);
- the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS);
- the WIPO Performances and Phonograms Treaty (1996) (signed but not ratified by Israel); and
- the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (signed but not ratified by Israel).

1.3 Foreign Copyright Holders

Foreign copyright holders do not have to follow any special steps to secure copyright protection in Israel. In a nutshell, a work that was not first published in Israel, and whose author is not domiciled in Israel and is not an Israeli citizen, is nevertheless protected in Israel if it was first published in a country that is a party to the Berne Convention, the WIPO Copyright Treaty, or the TRIPS agreement, or if its author is domiciled in or a citizen of such country. Such foreign works are protected

in a manner substantially similar to the way works of Israeli origin are protected.

Generally, the duration of Israeli copyright protection of foreign works is either the duration under the Israeli Copyright Law as applied to works of Israeli origin, or the duration under the local law in the work's country of origin – whichever is shorter.

2. Copyrighted Works

2.1 Copyright Protection: Essential Elements

Under the Israeli Copyright Law, there are four essential elements for copyright protection which apply to all works of authorship:

- the work must fall within one of the categories of works benefiting from copyrightability (namely, literary work, artistic work, dramatic work, musical work or phonorecord);
- the work must be original;
- the work must be sufficiently fixed; and
- the work must not be of the kind for which copyright protection is excluded (namely, statutory texts, regulations, minutes of Israeli parliamentary hearings, Israeli court decisions, and decisions of administrative agencies exercising quasi-judicial powers).

2.2 Copyright Protection: Special Notice and Registration of Works

There are no registration requirements or other formalities (such as a special notice) as prerequisites to copyright protection in Israel. There is no formal register for copyrighted works in Israel.

2.3 Categories of Copyrightable Works

Israeli Copyright Law recognises the following categories of works in which copyright may subsist: literary work, artistic work, dramatic work, musical work and phonorecords (Section 4 of the Copyright Law). The statute provides a non-exhaustive (and thus, open-ended and non-comprehensive) list of examples of literary, artistic and dramatic works, yet does not define a musical work. Phonorecords are also categorised separately as works subject to copyright protection, and "phonorecord" is a well-defined term in the statute.

The Israeli Copyright Law does not recognise protection for non-categorised works. Fixation is one of the essential elements required for a work to benefit from copyright protection in Israel. Such a work must be sufficiently fixed, although the statute leaves "fixation" as an undefined term. Israeli Supreme Court case law provides that in order to benefit from copyright

protection, the work must “wear a true appearance” and “materialise in reality”.

2.4 Copyright Protection: Software

Software benefits from copyright protection under the Israeli Copyright Law as a literary work (Section 1 of the Copyright Law, definition of “literary work” includes “works expressed in writing, lectures, tables, compilations, and also computer programs”).

The requirements for copyright protection of software are similar to other works: mostly originality and fixation (Section 4 of the Copyright Law). Under certain restrictions, a patentable invention that is reduced to practice in software can benefit from patent protection, and the software is thus dually and cumulatively protected, albeit from different angles: its underlying invention is protectable in patent law, and its expression as a work of authorship is protectable in copyright law.

2.5 Copyright Protection: Databases

Compilations are copyright protectable as literary works under the Israeli Copyright Law (Section 1 of the Copyright Law, definition of “literary work” includes “works expressed in writing, lectures, tables, compilations, and also computer programs”).

A “compilation” is defined in the statute as “a compilation of works including an encyclopaedia or an anthology as well as a compilation of data including a database” (Section 1 of the Copyright Law, definition of “compilation”).

Pursuant to Section 4(b) of the Copyright Law, copyright protection of databases extends to the originality of the selection and arrangement of the data within the database, not to the discrete data items. Thus, in order to obtain copyright protection, the author of the compilation (ie, the database) must prove originality in the compilation’s assembly and arrangement.

Israeli law does not recognise a sui generis right for databases, but a database may arguably be protected as a trade secret if it satisfies the essential requirements for trade secret protection. Pursuant to Section 5 of the Israeli Commercial Torts Law of 1999, subject matter eligible for trade secret protection is any business information which is not in the public domain and which is not readily and lawfully discoverable by others, the confidentiality of which gives its owner a business advantage over competitors, provided that its owner takes reasonable steps to protect its confidentiality. Subject matter may be concurrently (and cumulatively) protectable in copyright and in trade secret.

2.6 Copyright Protection: Industrial Design

Section 7 of the Israeli Copyright Law excludes industrial designs from copyright protection unless the design in ques-

tion is not industrially manufactured and is not intended to be industrially manufactured.

An Israeli Supreme Court judgment ratified this rule and expounded that to the extent a particular work of authorship (eg, an image) is affixed on the object in which the industrial design subsists, that work of authorship may be copyright-protected independently from the industrial design, subject to the traditional prerequisites for copyright protection in works of authorship.

In August 2018 a new Israeli Design Law came into force, replacing the former Designs Ordinance, which dated back to 1924. This legislation governs the protection of industrial designs in Israel.

2.7 Copyright Protection: Distinct Categories

Applicable Categories

Fictional characters

Israeli case law has held that fictional characters are copyright protectable, if the character is sufficiently developed to be readily identifiable outside the context of the work of authorship in which it was originally presented.

Television formats

The Israeli Copyright Law does not address television formats, and Israeli case law has yet to determine definitively whether copyright protection subsists in television formats. Under current Israeli case law, a television format will benefit from copyright protection as long as it is not merely an idea, and where such format has materialised sufficiently to be considered as a protected work. Israeli Supreme Court case law has also held that copyright subsists in televised/production aspects of sporting events.

Advertisements

As a general rule, advertising materials are usually protectable as literary, dramatic or artistic works, or a combination of such works, depending on the nature of the advertisement and provided that such materials satisfy the originality and fixation requirements to be eligible for copyright protection.

Product labels

Product labels will mostly be protected as literary works (but not any facts and data included therein), whereas the visual design and images used on the label will usually benefit from copyright protection as artistic works.

Websites

Likewise, a website’s underlying computer scripts and software (HTML, JavaScript, etc) are copyright protectable as computer programs (a form of literary work under the Israeli Copyright

Law). Other aspects of the website, such as the visual design and images used, are usually copyright-protected as artistic works.

Recipes

Recipes, in and of themselves, have been held by Israeli case law to be unprotectable by copyright. However, the particular expression of recipes in a cookbook, for instance, which contains a sufficient amount of original subject matter (such as a detailed textual description), is copyright protectable as a literary work.

Perfumes

Perfumes are not protectable by copyright, given that their subject matter does not fit into any of the categories of work eligible for copyright protection under the Israeli Copyright Law, although it appears that no Israeli case law decision has addressed this precise question.

Maps

Maps are expressly enumerated in the open-ended list of examples constituting an artistic work in Section 1 of the Israeli Copyright Law. Maps are thus copyright protectable, to the extent that they have sufficient original subject matter.

Museum exhibitions

Museum exhibitions as a whole are not usually subject to copyright protection. However, certain elements in an exhibition, such as the exhibited works or the compilation of the exhibited works, may be subject to copyright.

3. Authorship and Copyright Ownership

3.1 Authorship

The author of a work is often identified by indicating his or her name in the customary fashion on the work. Pseudonyms may also be used, and the law expressly recognises such use.

Section 64(1) of the Israeli Copyright Law provides that: "Where the name of a person appears on the work in the usual manner as the author of the work, there is a presumption that such person is the author of the work; the said presumption shall also apply in respect of the pseudonym of any person, provided that the identity of the owner of the pseudonym is publicly known."

Section 64(2) of the Israeli Copyright Law goes on to provide that: "Where the name of a person as the author of the work does not appear on the work and its author is not known, or the pseudonym of a person whose identity is not publicly known appears thereon, there is a presumption that the person whose

name appears on the work in the usual manner as the publisher of the work is the owner of the copyright therein."

3.2 Joint Authorship

The Israeli Copyright Law treats works that are produced as a collaboration of more than one author differently only with regard to the duration of copyright protection. Section 39 of the Copyright Law provides that: "Copyright in a joint work shall subsist for the duration of the life of its longest surviving joint author and for 70 years after his [or her] death." The term "joint work" is defined in the statute as "a work created jointly by several authors, wherein it is not possible to discern each author's contribution to the work".

A joint work must be authored and created by the joint authors. A mere collaboration between two or more persons does not transform a work into a joint work. Each one of the joint authors is considered an owner of the work if no other arrangement was made with respect to ownership. Each of the joint authors has moral rights in and to the joint work.

The Copyright Law does not define the rights and duties of joint authors. Such rights and duties are regulated by general Israeli legislation dealing with joint ownership of properties. Each of the joint authors can assign their whole interest in such work without limitation. Each of the joint authors will generally have the right to make reasonable use of the work, provided such author does not prevent such use by the other joint authors. A joint author will not be able to grant an exclusive licence in a joint work without the consent of the other authors.

3.3 Copyright Protection: Anonymous or Pseudonymous Works

Under the Israeli Copyright Law, anonymous, pseudonymous and orphan works are recognised as entitled to copyright protection. The regulation of such works mostly differs with respect to the duration of copyright protection.

Section 40 of the Israeli Copyright Law provides that: "If no name of a person appears on a work as the author of such work, nor is the author of such work commonly known to the public, or [there] appears on such work a pseudonym of a person not commonly known to the public, then copyright in such a work shall subsist for a period of 70 years from the date such work was first published; If such a work was not published until the end of 70 years from the date of its creation, the copyright therein shall subsist for a period of 70 years from the date of its creation; however where the author's identity becomes publicly known during the period of copyright, then the provisions of Sections 38 or 39, respectively, shall apply." Sections 38 and 39 prescribe the ordinary rule for the duration of copyright protec-

tion, namely 70 years after the death of the author (or the longest surviving co-author).

Section 27A of the Copyright Law provides that use of a work, where the copyright owner is unknown or has not been located, is allowed under the following conditions:

- the user of the work acted reasonably to identify or locate the copyright owner prior to using the work;
- the user provided clear notice that use of the work was being made under Section 27A of the Copyright Law, including the provision of the user's contact details to allow the copyright owner to ask the user to refrain from any further use of the work; and
- the user stopped making use of the work, or received a licence for any future use, after he or she was approached by the copyright owner.

Where the use of an orphan work is for commercial purposes, further limitations will apply. The Copyright Law also grants protection for possible claims of moral right infringements while using an orphan work in accordance with Section 27A of the Copyright Law.

3.4 Collective Works

Collective works are named "compilations" under the Israeli Copyright Law, which defines this term to be "a compilation of works including an encyclopaedia or an anthology as well as a compilation of data including a database". A compilation is a form of literary work. It is treated slightly differently with respect to the originality requirement applicable to it. Under Section 4(b) of the statute, "originality of a compilation means the originality in the selection and arrangement of the works or of the data embodied therein".

3.5 Corporate Authorship

The Israeli Copyright Law distinguishes between the author of a copyrightable work, who is always the individual (or individuals) who authored the work, and the initial owner of the work, who may or may not be the author, depending on the circumstances.

Work Created by an Employee

A corporate entity may not be an author of a work, but it may be the initial owner of a copyrightable work. This is the case, for instance, if a corporate entity is the employer of the work's author and the work was created for the purpose of, and during, that author's employment.

The Israeli Copyright Law prescribes a "work for hire" doctrine. Section 34 of the Israeli Copyright Law provides that the "employer is the first owner of copyright in a work made

by an employee in the course of his [or her] service and during the period of his [or her] service, unless otherwise agreed". Employers and employees are thus free to contract otherwise in an agreement. There are no specified standards for such an agreement.

Commissioned Works

Private commissions

Section 35(a) of the Copyright Law deals with commissioned works and provides that in "a work made pursuant to a commission, the first owner of the copyright therein, wholly or partially, shall be the author, unless otherwise agreed between the commissioning party and the author, expressly or impliedly". Section 35(b) of the Copyright Law provides an exception to this rule, prescribing that in "a work which is a portrait or a photograph of a family event or other private event, made pursuant to a commission, the first owner of the copyright therein shall be the commissioning party".

State commissions

When the state or any of its organs are involved, somewhat different rules apply under Section 36 of the law, which provides that: "The state shall be the first owner of a work made by, or commissioned for, the state or by an employee of the state in consequence of his [or her] service and during the period of his [or her] service." A "state employee" is defined to include "soldiers, policemen and any other person who holds a position according to a statute in a state entity or institution".

Universities are not generally considered state entities in Israel and are therefore governed by the rules of Sections 34 and 35 of the Copyright Law.

4. Scope of Copyright Protection

4.1 Economic Rights of the Copyright Owner

Section 11 of the Israeli Copyright Law enumerates the list of economic rights granted to the copyright owner: "Copyright in a work means the exclusive right to do with the work, or a material part thereof, one or more of the following acts, in accordance with the kind of work: reproduction... publication... publicperformance... broadcasting... making the work available to the public... making a derivative work... renting the work." This is a closed list because, as Section 3 of the law provides: "Copyright shall not subsist in a work other than in accordance with the provisions of this Law."

Section 38 of the Israeli Copyright Law provides the general rule for the duration of copyrights: "copyright in a work subsists during the life of the author and for 70 years following his [or her] death". Section 41 of the Copyright Law provides that

“copyright in a sound recording shall subsist for a period of 50 years from the date of its making”. Section 42 provides that “copyright in a work in which the state is the first owner of the copyright in accordance with the provisions of Chapter 5 shall last for a period of 50 years from the date of its making”. See also the responses in **3. Authorship and Copyright Ownership** for copyright duration in anonymous, pseudonymous and orphan works, and for copyright duration in foreign works and joint works.

4.2 Alienable Rights

Economic rights in copyright are alienable, as Section 37(a) of the Israeli Copyright Law provides: “Copyright may be assigned by contract or by operation of law and the owner of a copyright may grant an exclusive licence or non-exclusive licence with respect to the copyright.”

Section 37(b) further explains that: “Assignment of the copyright or the granting of a licence, as stated in sub-section (a), may refer to the copyright in whole or in part, and it can be limited to a certain territory, period of time, or to specific acts with respect to the work.”

Section 37(c) sets forth the written document requirements for assignment of copyright or for granting an exclusive licence: “A contract for the assignment of copyright or the granting of an exclusive licence therein shall require a written document.”

4.3 Transmissible Rights

Economic rights in copyright are transmissible upon death under Israeli law. Such a bequest is considered an “operation of law” (whether by testament or intestacy), which is regulated by Section 37(a) of the Israeli Copyright Law: “Copyright may be assigned by contract or by operation of law...”

4.4 Transfer of Rights

Israeli law does not prescribe minimum age or competency requirements for the exercise of the rights and/or for the validity of the transfer/licence/sale of copyrights. These are all activities with legal consequences that are subject to the general rules under the Israeli Legal Capacity and Guardianship Law, 1962. The general rules under this law require a parent’s or legal guardian’s consent to any activity having legal consequences that is undertaken by a minor under the age of 18, or by a person of incompetent capacity.

With respect to the transfer, sale or exclusive licensing grant, the Israeli Copyright Law, Section 37(c), only requires that these be effectuated by a written instrument. The Copyright Law does not prescribe the specific substance or wording for such a contract and general Israeli contract law principles will apply. A signature is not a prerequisite for the validity of such a contract.

A non-exclusive licence is not subject to the written instrument requirement.

4.5 Copyright Exhaustion Doctrine

Israeli case law recognises the exhaustion doctrine with respect to copyright, in at least two aspects – the substantive aspect and the territorial aspect.

Firstly, once a copyrighted work has been lawfully reproduced in a material object (eg, a book), downstream dealings in that material object itself are free from any copyright law restrictions (although they may be subject to contractual covenants restricting such dealings from a contractual perspective). Case law holds that this substantive exhaustion doctrine does not apply to copies of works that are licensed, rather than sold – such as software programs – where the licensor may impose copyright conditions on the downstream “resale” of the licence.

Secondly, the Israeli copyright statute explicitly recognises the territorial exhaustion doctrine, whereby if a copy is produced in another jurisdiction under the permission of the copyright owner, and that copy is imported to Israel, such copy will not be deemed an infringing copy under the Israeli Copyright Law, even if it would have been deemed so had that same copy been produced in Israel. This rule is codified in the definition of “infringing copy” in Section 1 of the Copyright Law: “A copy imported into Israel, which, had it been made in Israel its making would have constituted an infringement of the copyright as stated in Section 11(1); however, a copy which has been made outside of Israel, with the consent of the copyright owner in the country in which it was made, shall not be deemed an infringing copy.”

4.6 Moral Rights of the Copyright Owner

Section 46 of the Israeli Copyright Law prescribes that “in relation to a work [the moral right] is the right of the author: (1) to have his [or her] name identified with his [or her] work to the extent and in the manner suitable in the circumstances; and (2) that no distortion shall be made of his [or her] work, nor mutilation or other modification, or any other derogatory act in relation to the work, where any aforesaid act would be prejudicial to his [or her] honour or reputation”.

Section 45(a) of the Israeli Copyright Law prescribes the types of works in which a moral right subsists and the duration thereof: the “author of an artistic work, a dramatic work, a musical work or a literary work, excepting computer programs, in which copyright subsists, shall have moral rights in relation to his [or her] work, during the entire period of copyright in that work”.

Under the Israeli Copyright Law, moral rights are not alienable, as Section 45(b) of the Copyright Law provides: “The moral

right is personal and not transferable and shall be available to the author even if said author does not have copyright in the work or if he [or she] has assigned the copyright in the work, partly or wholly, to another person.” However, moral rights are waivable, in whole or in part, by the author.

Under Israeli law, moral rights under the Copyright Law are not transmissible (upon death of the author or otherwise), but pursuant to Section 55 of the Copyright Law, following the author’s death, the author’s spouse, sibling, parent or descendants may assert a claim for infringement of the author’s moral right.

5. Copyright Management Systems

5.1 Anti-circumvention Right

Israel has signed but not ratified the WIPO Copyright Treaty. The Israeli Copyright Law does not implement an anti-circumvention right. In a notable case from 2013, the Israeli Supreme Court held that the sale of devices that circumvent technological measures which control access to copyright-protected works, neither constitutes copyright infringement in itself nor contributes to an infringement. Such an action does not exploit any of the exclusive rights of the copyright owner.

5.2 Legal Remedies for Copyright Management Information

As mentioned in **5.1 Anti-circumvention Right**, Israel has signed but not ratified the WIPO Copyright Treaty. The Israeli Copyright Law does not implement specific legal remedies with respect to removal or alteration of any electronic rights management information without authority.

6. Collectives

6.1 Collective Rights Management

There are several organisations for collective management of copyrights operating in Israel. Such organisations are not generally regulated by a specific legal regime or legislation, but rather under general Israeli legislation and the articles of association of each of these organisations. Nothing in Israeli law precludes the existence of numerous collective management organisations and the law does not assign a role exclusively to a specific copyright collecting society, other than in respect of the right to receive remuneration under the blank media levy (see **7.2 Private Copying**). However, since some of these organisations were declared a monopoly in the Israeli market by the Israeli Competition Authority, certain aspects of their activity have been governed by conditions prescribed by the Competition Authority, to prevent abuse of their monopolistic power.

Some Collective Management Organisations

ACUM

Organisations for collective management of copyrights are most common in the music industry. For example, ACUM Ltd is the Israeli society of authors, composers and music publishers. As such, ACUM incorporates the vast majority of Israeli composers, lyricists and publishers in Israel.

Upon joining ACUM, such authors assign copyright in their musical and literary works to ACUM, which thus becomes the lawful copyright owner of the authors’ copyrighted works. Furthermore, through reciprocal representation agreements with similar affiliated collective copyright societies all over the world, ACUM administers, in Israel, rights to the worldwide musical repertoire on behalf of hundreds of thousands of authors – the members of these affiliated collective societies. Thus, anyone who wishes to use ACUM’s repertoire must obtain ACUM’s permission and licence prior to this.

IFPI, PIL and TALI

Another such organisation is the Israeli Federation of Phonographs and Cassettes Limited – the Israeli chapter of the International Federation of the Phonographic Industry (IFPI). This organisation mostly represents record labels and publishers with respect to the licensing of master recordings (phonorecords). Another collective rights management organisation for the licensing of master recordings is “PIL” – the Israeli Federation of Independent Record Producers. As for cinematographic works, “TALI”, the Collecting Society of Film and Television Creators in Israel Ltd, is the Israeli copyright collective society for Israeli screenwriters and directors.

6.2 Collecting Society

The main functions and scope of activity of Israeli organisations for collective management of copyrights are:

- the granting of licences (blanket licences and specific licences) to use the represented copyrighted repertoire;
- the collection of royalties and distribution of such royalties to the members of each organisation; and
- the protection and promotion of members’ rights and enforcement of such rights.

Since some of these organisations were declared a monopoly in the Israeli market by the Israeli Competition Authority, certain aspects of their activities have been governed by conditions prescribed by the authority, to prevent abuse of their monopolistic power (eg, a collecting society cannot discriminate between licensees who offer similar services).

6.3 Synchronisation Rights

The Israeli Copyright Law does not define a separate right for synchronisation as part of the economic rights granted to the copyright owner in Section 11 of the Copyright Law. The synchronisation right (common in the context of synchronising a musical work as part of another audio-visual work) is considered to be part of the copyright owner's reproduction right. As such, it can be licensed by the copyright owner, or through publishers and other third parties that have obtained such right from the author of the work.

7. Exceptions to Copyright

7.1 Fair Use Doctrine/Fair Dealing

Chapter 4 of the Israeli Copyright Law is titled "permitted uses". It prescribes numerous rules for permissible uses of copyrightable works despite the absence of permission from the copyright owner for such uses, such as incidental use of a work (Section 22 of the Copyright Law), temporary reproduction (Section 26 of the Copyright Law), public performance in an educational institution (Section 29 of the Copyright Law) and more. The most prominent of these is the "fair use" doctrine, adopted into the Israeli Copyright Law from US copyright law, and codified in Section 19 of the Israeli Copyright Law.

Section 19 follows the blueprint of the US Copyright Act in enumerating a non-exhaustive list of fair use examples: "private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution", followed by a non-exhaustive list of factors courts should consider in analysing fair use: "the purpose and character of the use; the character of the work used; the scope of the use, quantitatively and qualitatively, in relation to the work as a whole; the impact of the use on the value of the work and its potential market".

7.2 Private Copying

Four sections of the Copyright Ordinance of 1924 remain in effect under the new Israeli copyright regime to cover the private copying exception and compensation for this to right-holders through an obsolete blank media levy.

Section 3C of the Copyright Ordinance provides that: "Recording or copying a work on recordable media for private and domestic, but not commercial, uses shall not be a violation of copyright and performers' rights."

Section 3D goes on to provide that the Israeli "government shall compensate the copyright owners and the owners of performers' rights for the loss of income and violation of rights caused

to them by the recording and copying for private and domestic use under Section 3C".

Under the ordinance, a government committee is entrusted with the administration of the compensation regime. The committee has historically interpreted the compensation regime to apply only to analog blank media, which interpretation has rendered the compensation regime obsolete and wholly ineffective since the dawn of the digital era in the 1990s.

7.3 Reproductions of Cultural Goods/Buildings

Israeli Copyright Law establishes an explicit exception to copyright in the case of reproductions of cultural goods/buildings in public places. Section 23 of the Israeli Copyright Law provides that "broadcasting, or copying by way of photography, drawing, sketch or similar visual description, of an architectural work, a work of sculpture or work of applied art, are permitted where the aforesaid work is permanently situated in a public place".

7.4 Activities Carried Out by Intermediaries

Section 26 of the Israeli Copyright Law provides an exception for transitory and incidental copying by intermediaries such as internet service providers in the process of digitally transmitting a work between two end points. Section 26 and its exception are to some degree based on Article 5(1) of the EU Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Society Information.

Section 26 provides that the "transient copying, including incidental copying, of a work, is permitted if such is an integral part of a technological process whose only purpose is to enable transmission of a work as between two parties, through a communications network, by an intermediary entity, or to enable any other lawful use of the work, provided the said copy does not have significant economic value in itself".

7.5 Satire and Parody

Satire and parody per se are not explicitly mentioned in the Israeli Copyright Law, but they may give rise to an exception to copyright pursuant to the general "fair use" doctrine in the Israeli Copyright Law Section 19. This is particularly true where they are a form of "criticism" as enumerated in the Israeli Copyright Law's non-exhaustive list of examples that may constitute fair use. Israeli case law has specifically recognised that a parody and satire may benefit from the exceptions to copyright protection under the fair use doctrine.

7.6 Copyright: Freedom of Speech/Right of Information

As the explanatory notes to the Israeli Copyright Bill state, "The objective of the copyright law is to create a regime whose purpose is protection of works of authorship, while balancing other

public interests. The balancing act is required mostly between the need to incentivise authorships by granting exclusive economic rights to works and allowing the public to use works to promote culture and knowledge, while preserving freedom of speech and freedom of creation, and ensuring free and fair competition.”

Notably, freedom of speech and protection of property (including intellectual property such as copyright) are both constitutional rights in Israeli law. Therefore, where Israeli courts are faced with a question inviting purposive interpretation of copyright law, the courts will likely weigh, among other considerations, the constitutional right to freedom of speech versus the constitutional right to property protection in copyright.

8. Neighbouring/Entrepreneurial/Copyright-Related Rights

8.1 Neighbouring Rights

Neighbouring rights to copyright are established in the Israeli Performers' and Broadcasters' Rights Law of 1984. The law grants certain rights to “performers”, defined in the law as “a person who performs a literary, artistic, dramatic or musical work by acting, singing, playing an instrument, dancing or in some other manner”, and to “broadcasters”, defined in the law as “a person who makes a radio or television broadcast by lawful agreement”.

Performers' Rights

Subject to certain exceptions, performers are granted the economic right to prevent unconsented use of their “recordings” (defined as “the preservation of a performance by any means that allow the performance to be seen, heard or copied”) and of their performances. They are also granted moral rights in their recordings and performances, which entitle them to attribution “in the scope and degree acceptable under the circumstances” and to prevent “falsification, damage or other change made to a performance in which he [or she] participated or on a copy of said performance, or that no other act be performed that denigrates the performance in a manner liable to injure the performer’s honour or reputation”. The law also grants performers the right to royalties for playing or presenting their performances. The duration of performers’ rights is 70 years following the original performance.

Broadcasters' Rights

Subject to certain exceptions, broadcasters are granted the economic right to prevent use of their broadcasts (defined as “transmission or distribution to the public – by wire, wireless or any other means – of sounds and images or of a combination

of sounds and images”). The duration of broadcasters’ rights is 25 years following the original broadcast.

8.2 Transferring/Licensing/Sale of Neighbouring Rights

The Israeli Performers' and Broadcasters' Rights Law does not regulate any specific form for a contract regarding the transfer, licence or sale of neighbouring rights. An implicit, oral agreement may therefore suffice to effectuate the transfer, licence or sale of neighbouring rights, albeit such oral agreement may have evidentiary disadvantages. However, pursuant to Section 3 of the Israeli Performers' and Broadcasters' Rights Law, where performers' permission under the law is given by a representative (eg, a collecting society or one member of a performing group/band), the performers' delegation of their representation to that representative must be memorialised in writing.

8.3 Copyright Exceptions Applicable to Neighbouring Rights

Sections 4 and 4C of the Israeli Performers' and Broadcasters' Rights Law prescribe the fair use doctrine as an exception to neighbouring rights, although its wording may suggest a narrower approach to fair use than under the Israeli Copyright Law: “The provisions... shall not apply when the said acts constitute fair distribution or use, for purposes of private study or non-profit instruction, or for research, criticism, survey or a journalistic precis.”

9. Copyright Infringement and Litigation

9.1 Types of Copyright Infringement

The Israeli Copyright Law grants a copyright owner exclusive control to prevent others from dealing with his or her copyrighted work (or a substantial part of it), regarding any one of the bundle of rights specified in Section 11 of the Copyright Law: reproduction, publication, public performance, broadcasting, making a work available to the public, making of a derivative work, and rental rights.

Under Section 47 of the Copyright Law, a copyrighted work will be considered infringed where a person (or any legal entity) carries out any of the above seven acts, in relation to such work, without the consent of the copyright owner (unless such use is permitted pursuant to the provisions of Chapter 4 of the law under “permitted uses”). It should also be noted that the Copyright Law also includes specific sections dealing with indirect infringement of copyrighted works and the infringement of moral rights (where no attribution was granted to the author with respect to his or her work, or where the work was distorted,

mutilated, modified, etc in a manner prejudicial to the honour of the author).

Notably, the Israeli Supreme Court has also recognised the contributory copyright infringement doctrine as a basis for liability in Israeli law.

9.2 Defences against Copyright Infringement

When a claim for copyright infringement is asserted, the alleged infringer can raise a variety of defence arguments, according to the specific circumstances and factual background of each case.

The most common defence arguments in Israeli copyright cases are:

- the work is not entitled to copyright protection, because it is not an original work, or because it was not fixed in any form (Section 4 of the Copyright Law);
- there is no basis for an infringement claim, because copyright in a work does not extend to any underlying ideas, procedure and method of operation; mathematical concept; fact or data; or news of the day (Section 5 of the Copyright Law);
- the work is in the public domain;
- the alleged infringer was granted an express or implied licence to use the work by the copyright owner;
- the plaintiff is not the copyright owner or exclusive licensee;
- use of the work is permitted under Chapter 4 of the Copyright Law (“permitted uses”), such as in cases of:
 - (a) fair use (Section 19 of the Copyright Law);
 - (b) incidental use of a work (Section 22 of the Copyright Law);
 - (c) temporary reproduction (Section 26 of the Copyright Law);
 - (d) the copyright owner is unknown or was not located (Section 27A of the Copyright Law); and
 - (e) public performance in an educational institution (Section 29 of the Copyright Law) and more; and
- the infringement was committed innocently, because the infringer did not know, or could not have known, at the time of the infringement, that copyright subsisted in the work (Section 58 of the Copyright Law).

9.3 Proceedings Available to the Copyright Holder

Injunctive Relief

The most common legal proceeding available to copyright owners in order to pursue infringement is a request for injunctive relief to enjoin the infringement and any use of the copyrighted work(s) (Section 53 of the Copyright Law).

The copyright owner may ask the court for a permanent injunction and/or for a temporary injunction for the duration of the proceedings. In addition, because copyright infringement is a civil tort (Section 52 of the Copyright Law), the copyright owner may also sue the infringer for damages. In such cases, the copyright owner may try to prove his or her actual damages or ask the court to award statutory damages, without having to prove the scope of the injury or damage (Section 56 of the Copyright Law).

The copyright owner may also ask the court to order the defendant to provide the copyright owner with a detailed report of the infringement (Section 57 of the Copyright Law).

Criminal Charges

Given that the Copyright Law provides that certain uses of a copyrighted work, usually in a commercial context, are a criminal offence (Sections 61–62 of the Copyright Law) – punishable by up to five years’ imprisonment, or a fine – the copyright owner may also press charges with Israeli law enforcement authorities and ask for criminal enforcement of the copyright.

Treatment of Infringing Copies

Upon the completion of court proceedings in an action for copyright infringement, Section 60 of the Copyright Law empowers the court to order the destruction of infringing copies, or to order the transfer of ownership in such infringing copies to the plaintiff. In addition, Section 65 of the Copyright Law enables the copyright owner to provide a written notice to the director of customs requesting to suspend the release of goods alleged to be infringing copies of a work and to treat them as goods whose importation is prohibited under the Israeli Customs Ordinance.

Online Infringement

In 2019, the Knesset (the Israeli legislature) approved a major amendment to the Israeli Copyright Law. The amendment was aimed at enhancing the rights of copyright holders due to the difficulties they face in enforcing their copyright against infringements committed on or through the internet, especially with regard to online piracy.

Rights owners can initiate court proceedings for the removal of copyright-infringing content from the internet if it is hosted in Israel. Israeli courts can now also order Israeli internet access providers (IAPs) to block and restrict access to copyright-infringing websites (Section 53A of the Copyright Law). The Copyright Law lays down the procedure and factors the court must weigh when issuing such orders, including the necessity of the order, the severity of the alleged infringement, the privacy of internet users, and whether an order will affect other online sources.

This amendment also introduced John Doe subpoenas which, for the first time in Israeli statutory law, enable copyright holders to seek a district court order compelling disclosure of the identity of anonymous infringers (Section 60A of the Copyright Law).

Formalities Prior to Court Proceedings

There are no formalities required before initiating court proceedings in Israel, although it is customary, but not mandatory, to send the alleged infringer a cease-and-desist letter, or a demand letter, before initiating court proceedings. Engaging in mediation before court proceedings is also voluntary, although it is not uncommon for parties to commercial contracts to include pre-mediation contractual obligations within such contracts.

9.4 Jurisdiction for Copyright Proceedings

Subject matter jurisdiction in copyright proceedings is governed by the provisions of the Israeli Courts Law (Consolidated Version), 1984, and is determined by the nature of the proceedings and the sum of the claim.

If the plaintiff asserts only a claim for damages, for a sum of up to ILS2.5 million then such proceedings will be heard before a magistrate's court as a court of first instance (Section 51(a)(2) of the Courts Law). If the plaintiff asserts a claim for damages only, for a sum exceeding ILS2.5 million then the proceeding will be heard before a district court as a court of first instance (Section 40(1) of the Courts Law).

If the plaintiff seeks only an injunction or a declaratory relief, the action will usually be heard before a district court as a court of first instance, unless it is estimated that such proceedings fall within the scope of the magistrate's court as a court of first instance, because the claim is worth less than ILS2.5 million.

The Israeli judiciary does not have any courts which specialise in copyrights or any other intellectual property rights.

9.5 Necessary Parties to Copyright Infringement Proceedings

The necessary parties to copyright infringement proceedings are commonly the copyright owner and, with respect to infringement claims regarding the author's moral rights, the author of the relevant copyrighted work. The alleged infringer is obviously also a necessary party (a person or a corporation). If the alleged infringer is a corporation, the copyright owner may also try to assert its claims against the directors of the corporation and claim they were directly involved in the infringement. Licensees are entitled to file infringement proceedings only if they are exclusive licensees. In such a case, the copyright owner

must also be a party to the proceedings (Sections 54–55 of the Copyright Law).

9.6 Third Parties to Copyright Proceedings

A defendant (the alleged infringer) in copyright infringement proceedings will usually commence third-party impleader proceedings against third parties who are also involved in the alleged infringement, or where it believes that it has a valid claim against such third parties.

Such proceedings usually begin with a defendant filing a third-party impleader notice together with its statement of defence (or, subject to leave of the court, this may occur at a later stage).

The Civil Procedure Regulations currently provide that third-party proceedings may be commended in the following circumstances:

- the defendant alleges that it is entitled to reimbursement from the third party for any sanction that may be imposed on it in the main proceedings;
- the defendant alleges that it is entitled to relief from the third party, and such relief is intertwined with the main proceedings, and the main element of such relief is the relief requested by the plaintiff; and
- a question or disagreement between the defendant and the third party, which is intertwined with the main proceedings, is essentially the same issue disputed between the plaintiff and the defendant, and it is proper that it be resolved between the defendant and third party as well.

The court will hear the main proceedings together with the third-party notice. Submission of a third-party impleader notice is subject to payment of a filing fee. Common examples of cases where a defendant might bring third-party impleader proceedings are where a defendant claims it received a licence from the third party to use the copyrighted work claimed to be infringed, or where the defendant hired the third party to provide it with an original work of authorship, and it was later alleged that such work infringed upon the copyrights of the plaintiff.

9.7 Urgent Measures

There are a variety of urgent measures available to a party to court proceedings. These are filed in the form of interim proceedings as a written motion for urgent interim relief.

Urgent measures may be filed with the court before filing infringement proceedings on the merits. A court may award such interim relief before a statement of claim is filed by the plaintiff, if the court is convinced that the granting of such an order is justified under the circumstances. The validity of such an order is conditional upon the filing of a statement of claim

within seven days from the date such an order was granted, or within a different timeframe determined by the court. The most common of such urgent measures are:

- a mandatory injunction;
- a restraining order;
- an attachment order;
- an order barring travel outside the country;
- the appointment of a receiver for the respondent's property; and
- an Anton Piller order (ie, a court order that provides the right to search premises and seize evidence without prior warning); and more.

The request for such an interim relief may be requested *ex parte* or *inter partes*.

The Civil Procedure Regulations set forth the relevant considerations for granting interim relief. The court may grant the requested relief if it is convinced, on the basis of credible *prima facie* evidence, of the existence of a cause of action and the existence of the conditions specified in the special provisions of the regulations pertaining to the requested interim relief.

In its decision pertaining to the granting of an interim relief, the type of relief, its scope and its conditions, including with regard to the guarantee that the applicant must provide, the court shall take into account, *inter alia*, the following considerations:

- the harm that may be suffered by the applicant if the interim relief is not granted, balanced against the harm that may be suffered by the respondent if the interim relief is granted, as well as the harm that may be caused to a possessor (a person who is not the respondent, who holds property for which an interim relief was granted or requested) or to another person; and
- whether the motion was filed in good faith and the granting of relief is just and proper under the given circumstances, and does not cause greater harm than necessary.

9.8 Role of Experts in Copyright Proceedings

Copyright litigation in Israel generally follows the basic civil procedure and rules of evidence of general civil litigation in Israel.

To prove their claims, the parties rely on testimony given by witnesses in the form of affidavits and documents submitted to the court by the witnesses. There is no obligation to provide testimony from expert witnesses. However, where it is not within the court's capacity to take judicial notice of a fact or a claim by a party and this requires a certain degree of expertise (due to the inherent technical aspects of some copyright proceedings and

claims, eg, when a copyright owner tries to prove the alleged infringement, or the similarity between an original work and an infringing one), it is common to have expert witnesses in copyright cases.

In a similar manner, if a party to the proceedings wishes to prove foreign law, then expert opinion of such foreign law must be provided to the court. Usually, the parties retain the experts and submit their opinions in the form of written affidavits.

The court also has the authority to appoint an expert on its own behalf for any matter in dispute between the parties, in which case, the court-appointed expert's opinion will usually carry greater weight than those of the parties' experts. Any expert, whether appointed by the court or the parties, may be cross-examined on behalf of the other party as to his or her opinion, and a court-appointed expert may be cross-examined by both parties.

An expert who is not a medical expert does not require any formal qualifications to provide an expert opinion.

9.9 Counterfeits and Parallel Imports

Israel is a party to the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights) and Israeli legislation (Section 200A of the Customs Ordinance, Section 69A of the Trademarks Ordinance and Section 65 of the Copyright Law) has been amended to incorporate the border measure provisions provided in TRIPS.

Counterfeits

Seizure

The Israeli Customs Authority is authorised to seize goods suspected to be counterfeits (whether resulting from a complaint submitted by the rights owner or as a result of a random examination of shipments arriving in Israel). Once such goods are seized, the Israeli Customs Authority must send appropriate notice to the copyright owners and the importer.

Destruction of goods

In most cases, the Israeli Customs Authority initiates a short procedure whereby it agrees to destroy the goods based on a written opinion submitted by the copyright owner. The copyright owner's opinion indicates the reasoning behind its belief that the goods are infringing on its copyright and provides that the copyright owner will compensate the importer for any financial damage that may be suffered as a result of the seizure. In the written opinion, the copyright owner also undertakes to join the Israeli Customs Authority as a defendant in any lawsuit asserted by the importer. In some cases where the shipment includes a large number of goods or goods of higher value, Israeli Customs will initiate the standard procedure (in accordance with

the TRIPS Agreement), under which the copyright owner is obliged to file a lawsuit.

Treatment of the importer

As an initial step, the copyright owner must submit a bank guarantee to the Israeli Customs Authority in order to compensate the importer for any financial damage that may be suffered as a result of the seizure or the lawsuit. Whether a standard or short procedure is initiated, upon receiving the custom's notification, the copyright owner has three working days to respond. It may submit the required bank guarantee and relevant documents to complete the short procedure. Only after the bank guarantee is submitted will the Israeli Customs Authority advise the copyright owner of the importer's information and allow it to obtain a sample of the seized goods. Upon filing the bank guarantee, the copyright owner can either settle the matter amicably with the importer or file a lawsuit against it within 10 working days of the notice. Should the copyright owner choose to take no further action, the goods will be released.

Parallel Imports

As for parallel imports, the current legal atmosphere in Israel encourages parallel imports in order to reduce the price of commodities for the benefit of the public. Even though the issue of parallel imports is not anchored in Israeli legislation, in a landmark judgment of the Israeli Supreme Court, the practice of parallel imports was held permissible in and by itself (from an IP perspective) as a legitimate practice which benefits the public.

9.10 Remedies and Sanctions

The most common remedies and other sanctions in Israeli court proceedings dealing with copyright infringement are payment of damages to the copyright owners – whether actual (proven) damages, or statutory damages without any proof of injury.

Damages

The court can award statutory damages of up to ILS100,000 for each infringement (copyright infringement or infringement of the author's moral right). When awarding statutory damages and determining their amount, the court will consider various factors enumerated in Section 56(b) of the Copyright Law, such as:

- the scope of the infringement;
- its duration;
- its severity;
- the actual injury to the plaintiff according to the court's assessment;
- the benefit that flowed to the defendant according to the court's assessment;
- the character of the defendant's activity;
- the nature of the relationship between the parties; and

- whether the defendant acted in good faith.

During the proceedings the plaintiff must decide whether to try to prove its actual damages or ask the court to award statutory damages.

Other Sanctions

Other common sanctions include:

- a permanent injunction prohibiting the defendant from making any further use of the copyrighted work, deleting it from any media, etc;
- ordering the defendant to provide the copyright owner with a detailed report of the infringement (an order to account); and
- an order for the destruction of infringing copies, or an order to transfer ownership in such infringing copies to the plaintiff.

Following a 2019 amendment to the Copyright Law, see **9.3 Proceedings Available to the Copyright Holder**, rights owners can now initiate court proceedings for the removal of copyright-infringing content on the internet if it is hosted in Israel. Israeli courts can also order Israeli internet access providers to block and restrict access to copyright-infringing websites. This amendment also introduced John Doe subpoenas which enable copyright holders to seek a district court order compelling disclosure of the identity of anonymous infringers.

Copyright infringement may give rise to a criminal offence, in which case, the sanctions include a criminal conviction that can carry a sentence of up to three or five years in prison, or a criminal fine.

9.11 Copyright Infringement as Administrative or Criminal Offences

Copyright infringement is not an administrative offence in Israel and cannot be enforced through administrative proceedings. As for criminal proceedings, Section 61 of the Copyright Law enumerates eight criminal offences with respect to copyright infringement in a commercial context, such as making an infringing copy of a work for the purpose of trading; importing an infringing copy of a work into Israel for the purpose of trading; the sale, rental or distribution of an infringing copy of a work, and more.

Online Infringements

As mentioned in **9.3 Proceedings Available to the Copyright Holder** and **9.10 Remedies and Sanctions**, in 2019, the Knesset approved an amendment to the Israeli Copyright Law. The amendment was aimed at enhancing the rights of copyright holders due to the difficulties they face in preventing infringe-

ments committed on or through the internet, especially with regard to online piracy. This amendment extended the prohibitions on vicarious (indirect) infringements. It provided that commercially facilitating online access to, or use of, existing infringing content shall be actionable both civilly and criminally, if the person doing so knew or had reason to know that the content posted online (to which they have facilitated access) infringes copyrights.

Criminal Proceedings

Such criminal offences carry sentences of up to three or five years in prison, or a criminal fine (Section 62 of the Copyright Law). In order to initiate criminal proceedings with respect to copyright infringement, the copyright owners must press charges with the Israeli police and let it investigate the complaint. Some of the criminal offences enumerated in Section 61 of the Copyright Law may also be the subject of private criminal proceedings (initiated by an individual or a corporation and not by the State of Israel). Such proceedings are governed by Sections 68–73 of the Criminal Procedure Law (Consolidated Version), 1982.

9.12 Appellate Procedure for Copyright Proceedings

There are no special provisions concerning an appellate procedure for copyright proceedings. The general practice for filing an appeal, regulated by the Civil Procedure Regulations, also governs appeals concerning copyright disputes. The Israeli judiciary does not have any courts of second (or third) instances which specialise in copyrights or any other intellectual property rights.

9.13 Costs of Copyright Litigation

Typically, each of the parties to litigation proceedings will bear its own costs, fees and expenses during the proceedings.

The Civil Procedure Regulations authorise the court to award any party to the proceedings, at the conclusion of the proceedings (including motions and interim proceedings filed during litigation), with attorney's fees and reimbursement of expenses to be paid by any other party to the proceedings.

Commonly, the court will award such fees and expenses to the prevailing party, to be paid by the losing party. The amount of such fees and expenses is determined at the discretion of the court and will not necessarily cover the actual costs incurred by the relevant party.

The court will also consider the parties' conduct during the proceedings when awarding fees and expenses and, if it finds that a party unnecessarily prolonged the proceedings by filing frivolous claims or unnecessary motions, it may award expenses,

regardless of the outcome of the proceedings, in favour of any party and/or to the state treasury.

In a hearing held before a court of first instance, the parties will be allowed to present their pleadings regarding their expenses. The court is guided, but not bound, by the Israeli Bar Association Rules (Recommended Minimum Tariff), 2000, when deciding the amount granted to a party with respect to attorney's fees.

9.14 Alternative Dispute Resolution

As litigation is often the most expensive course of action to enforce a copyright, alternative dispute resolution, although not compulsory, is commonly used to resolve copyright disputes. Non-judicial alternatives are usually less expensive and substantially quicker. However, in many cases it is still common practice to initiate court proceedings in order to induce the counterparty to negotiate a settlement. Israeli courts often try to persuade the parties to settle the dispute prior to trial, in order to reduce the courts' heavy workload, and usually delay the commencement of the trial in order to allow sufficient time for settlement negotiations.

The following alternatives to litigation are available in Israel with respect to copyright proceedings:

Arbitration

Israeli courts often recommend arbitration and are authorised by law to assign a case for arbitration if the parties to the proceedings agree to it (Section 79B of the Courts Law (Consolidated Version), 1984). The arbitration process is also applicable where the parties have entered into a written arbitration agreement. The decision of the arbitrator is final and binding on the parties, but an appeal process is available in some cases, if the parties have agreed to it within an arbitration agreement. The arbitrator's decision requires and usually receives court approval, which renders the decision a binding judicial ruling. Arbitration is commonly conducted in accordance with the provisions of the Israeli Arbitration Law, 1968.

Mediation

Mediation proceedings are usually mandated by the court where the parties have expressed willingness to negotiate and settle. Unlike arbitration, mediation is non-binding and statements and offers made in mediation are not admissible in court if the parties failed to reach a settlement agreement. A party may withdraw its acceptance to participate in mediation at any time (Section 79C of the Courts Law (Consolidated Version), 1984). Although mediation is a voluntary process, the Civil Procedure Regulations, 1984, empower the court to refer the parties to a mandatory preliminary mediation session prior to the pretrial hearing, in order to explore using mediation as a means to reach a settlement.

Out-of-Court Settlement

An out-of-court settlement is usually the quickest and least expensive way to resolve copyright infringement claims. The settlement generally involves agreement on a certain compensatory amount, royalties, cross-licensing arrangements, an injunction against further use of the protected work/s, etc.

Contributed by: Haim Ravia, Tal Kaplan and Dotan Hammer, Pearl Cohen Zedek Latzer Baratz

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