

NEW COPYRIGHT LAW IN ISRAEL

INTRODUCTION

In May 2008 the new Israeli Copyright Law¹ will come into force, replacing the English Copyright Act of 1911, which has governed the Israeli law of copyrights since the British mandate over Palestine, as well as most of the provisions of the mandatory Copyright Ordinance of 1924. While both statutes have been amended over the years to address various legal and technological developments and Israel's international undertakings, a comprehensive reform has long been awaited, and is welcomed.

The new Law, while preserving many principles existing under the prior law, introduces several important changes, mainly to address conceptual changes in technologies that affect the use of copyrighted material.

In a nutshell: the Law redefines the rights that come within the scope of copyright, including the Internet-inspired right to make a work available to the public, and the permitted exemptions to the prerogative of a copyright owner, notably exemptions necessitated by technological needs. The fair use exception, while existent under the prior law, has been redefined to become an open-ended, non-exhaustive list of permitted uses. The ownership of a commissioned work may now be determined based on the parties' implied intention. The Law significantly changes the remedy of statutory damages, providing for a different scale of compensation awardable without proof of actual damage. Statutory damages are no longer mandatory even if copyright infringement has been proven; at the same time, the maximum award has been increased fivefold. The Law sets the criteria for judicial discretion in awarding the statutory damages, in granting the injunctive relief to stop the infringement and in permitting "reasonable" infringement of an author's moral right.

REVIEW

Copyrighted Subject Matter

Similarly to the prior state of law, under the new Law copyright subsists in an original literary, artistic, dramatic or musical work possessing some form of fixation.² A phonogram (sound recording), which formerly enjoyed protection as if it were a musical work, under the new Law is protected as a separate category.³ Copyright does not cover ideas, processes, implementation methods, data or mathematical concepts.⁴ Literary works for the purpose of copyright protection include, as formerly, computer programs and compilations.⁵ Artistic works include photographs (formerly in a sub-category by themselves with shorter protection period) and works of architecture (which no longer require an artistic element in order to enjoy copyright protection).⁶ Designs remain excluded unless they are neither used, nor intended for use, in industrial manufacturing.⁷ Maps and drawings, formerly protected as

literary works, are now within the scope of artistic works.⁸ Cinematic and television works are protected as dramatic works.⁹

Entitlement to Copyright Protection in Israel

Copyright under Israeli law protects works first published in Israel¹⁰ or created by an Israeli national or resident, whether published or not.¹¹ Publication in Israel includes simultaneous publication in Israel and other countries; publication is considered simultaneous if occurring within 30 days of first publication.¹² In addition, a work of architecture or an artistic work incorporated in a building is also protected by Israeli copyright law if located in Israel;¹³ a cinematic work – if its producer at the time of its making has its business headquarters or residence in Israel.¹⁴

The distinction introduced by the new Law between phonograms (sound recordings) and other copyrighted works allows for qualifying the protection of foreign phonograms in Israel. Israeli copyright extends to a phonogram if its producer at the time of its making was an Israeli national or resident or, if a corporate entity, had business headquarters in Israel. However, copyright will also subsist in a phonogram as to copying, rental, and making available to the public, if the phonogram was first published in Israel.¹⁵ As under the prior law, for considerations of reciprocity, the Minister of Justice may, by administrative order, limit copyright protection accorded to foreign works emanating from a country that does not accord proper protection to Israeli works, thus deviating from the principle of national treatment for foreign works.¹⁶

Exclusive Rights Comprising Copyright

The copyright owner has exclusive right to copy¹⁷ and to broadcast¹⁸ the copyrighted work and to publish the previously unpublished work.¹⁹ A right previously not codified by statute is the right to make a work available to the public, that is, accessible to users at the time and place of their choice.²⁰ Recognition of such right, in compliance with the WIPO Copyright Treaty of 1996, has become essential given the mode of public access in the age of the Internet. The other rights are the right to publicly perform a work (which applies to all but artistic works),²¹ to make derivative works (which does not apply to phonograms),²² and, for phonograms, cinematic works and computer programs, the right of commercial rental of copies to the public.²³ A potentially problematic exception excludes rental by public libraries or by the libraries of educational institutions from the definition of commercial rental.²⁴

Term of Protection

The new Law extends the duration of copyright protection – 70 years following the death of the author,²⁵ or the last surviving author among co-authors²⁶ – to photographs, formerly protected for 50 years following the creation of the negative. It should be noted that photographic works created before the entry of the new Law into effect do not benefit from the enhanced protection of the new Law and remain protected only to the extent provided by the prior law.²⁷ Phonograms, as well as state-owned works, are protected for 50 years following their making.²⁸ However, for works entitled to protection due to their simultaneous publication in Israel or by force of the orders implementing international treaties, the duration of copyright shall not exceed the copyright term in the country of origin.²⁹

Permitted Uses

Under the prior law, a limited use of the copyrighted material for certain enumerated purposes (such as research and criticism) has been permitted, without need for authorization from the copyright owner, in line with the UK fair dealing exception; the scope of the exception has, however, been expanded by case law so as to accommodate the U.S. "fair use" concept. The new Law, importantly, has set forth an open-ended fair use exemption, which lists the permitted purposes by way of example only, leaving the determination of further permitted uses to judicial discretion,³⁰ in similarity to the law in the US. Should the courts be willing to give a liberal interpretation to the scope of fair use, the fair use defense may be significantly broader than it is at present, which raises some concern for the rights owners in Israel and abroad.

Furthermore, the Law has significantly supplemented specific exemptions existing to the monopoly rights of the copyright owner under the prior law. A number of these royalty-free permitted uses in fact codify or clarify the customary practice, such as the right to use a work in administrative or judicial proceedings³¹ or incidental use in a photograph, cinematic work or phonogram.³² Several more exemptions have been dictated by technological advancements, such as copying (and making derivative works of) software for backup, maintenance, data security and interoperability,³³ recording for broadcast purposes,³⁴ and temporary copying for network communication transmission.³⁵

In addition, similar to the prior state of law, copying of previously recorded musical works is permitted subject to prescribed royalties, by way of compulsory license.³⁶ Recording or copying a work on recordable media (other than media intended for computer use) for private non-commercial use remains permitted in accordance with the surviving provisions of the Copyright Ordinance of 1924, royalties being payable to the collective rights management organizations on sales of recordable media.³⁷

Author's Moral Rights

While preserving the moral right of the author – to have the work attributed to the author and to have the work protected from derogatory treatment³⁸ – as separate and distinct from the ownership of the copyright,³⁹ the new Law gives the court substantial discretion to allow exceptions if reasonable.⁴⁰ The moral right is available to the authors of artistic, dramatic, musical and literary works, but does not cover computer programs or phonograms.⁴¹ The moral right is non-assignable,⁴² but may be waived.

Determining Ownership

Under the new Law, the author is the first owner of the copyright in a work;⁴³ a photograph also belongs to the author rather than, as formerly, to the owner of the film or the plate. It should be noted that photographic works created before the new Law goes into effect remain owned in accordance with the prior legal regime and do not revert to the author.⁴⁴ With regard to portraits and family photographs, ownership is presumed to vest in whoever commissioned the work, unless otherwise agreed.⁴⁵

The presumption of initial ownership of a commissioned work has undergone a change. Differently from the Act, which presumed the ownership of the author unless a written signed assignment has been made,⁴⁶ the ownership of a commissioned work may under the new Law be determined not only through written contract but also through implied contract.

This change makes it even more advisable for the parties to reach express agreement on the ownership of a commissioned work beforehand.

The new Law follows the prior law in providing that copyright in works produced by an employee belong to the employer unless otherwise agreed, if made in the course of the employee's work and (as clarified by the Law) for the purpose of such work.⁴⁷

A heavier presumption exists in favor of state ownership; the State owns copyright in works created or commissioned by governmental employees due to and in the course of their work, unless otherwise agreed.⁴⁸

Copyright Infringement and Sanctions

It is infringement of copyright to do, or permit another to do, any of the acts exclusive to the rights owner without the latter's permission.⁴⁹ Furthermore, sale or lease (including offering for sale or lease) of infringing copies, possessing them for a business purpose, distributing them on a commercial scale, displaying them to the public by way of trade or importing them other than for personal use, are indirect infringement of copyright.⁵⁰ Such acts (except for importation) in respect of copies infringing the author's moral right constitute indirect infringement thereof.⁵¹ It is a condition of indirect infringement that the infringer knew or should have known that the copies are infringing. With regard to parallel importation, the new Law specifically excluded copies lawfully made outside Israel with the authorization of the copyright owner, from the definition of infringing copies.⁵² It is also indirect infringement to make a place of public entertainment available for unauthorized performance of a work.⁵³

Infringement of copyright or moral right incurs liability in tort.⁵⁴ Criminal liability is imposed for making, importing or possessing infringing copies for trade, for engaging in sale, lease or distribution of infringing copies, and for manufacturing or possessing equipment for making infringing copies for trade.⁵⁵ With regard to end-user liability, possessing infringing copies will not constitute a tort unless done for a business purpose and will not be a criminal offense unless done for the purpose of trading in them.

The right to sue for copyright infringement vests in the rights owner or, with regard to a right exclusively licensed to another, the owner of an exclusive license.⁵⁶ A claim for infringement of a moral right can be brought by the author or, upon his death, by his family.⁵⁷

In light of the changes introduced under the new statutory regime, the Law specifically provides that there is no right of action for what constituted infringement under the prior law but is no longer deemed an infringement under the new Law.⁵⁸

Monetary Remedies – Statutory Damages

With regard to remedies available to the aggrieved copyright owner, the new Law has introduced a change in statutory damages awardable without proof of actual damage, under the prior regime confined within a narrow range between the minimum award of NIS 10,000 and the maximum of NIS 20,000. Under the new statutory regime, there is no minimum award of damages, while the maximum has been increased to NIS 100,000.⁵⁹ This broader range leaves the court considerable flexibility in dealing with copyright infringement, having regard to such considerations as the scope, duration and gravity of the infringement, the harm caused to the plaintiff and the profit reaped by the defendant, the type of the defendant's activity and the relationship between the parties, as well as the defendant's good

faith.⁶⁰ While the rights owners are no longer assured of compensation, the damages, if awarded, may be significantly higher than previously.

Furthermore, in line with the existing case law, the new Law provides that, for the purpose of calculating statutory damages, infringing acts carried out as part of one single set of activities will be deemed to constitute a single infringement.⁶¹

Similarly to the prior state of law, only an injunction, but no damages, may be available against an innocent infringer, i.e. a person who at the time of infringing the copyright or moral right had no actual or constructive knowledge that the work was subject to copyright.⁶²

Injunctions

The new Law gives the courts broad discretion in granting the injunctions and is the only statute in Israel that expressly states that an injunction may be denied due to the balance of convenience notwithstanding a showing of the plaintiff's *prima facie* right.⁶³ Furthermore, neither an injunction against the construction of a building involving copyright infringement, nor a demolition order, may be granted if its construction has already commenced.⁶⁴

Infringing copies may be ordered to be destroyed or otherwise disposed of or transferred to the plaintiff.⁶⁵ In case the plaintiff is likely to use the infringing copies, the court may order that the plaintiff compensate the defendant for the copies received;⁶⁶ by contrast, under the prior law the plaintiff would have been regarded the owner of the infringing copies and no compensation was due. In the event an infringing item is in the possession of a non-infringing party, the new Law, although stating that such party will enjoy the protection of market overt if applicable, limits such protection to non-commercial use only.⁶⁷ The rights owner may also give notice to the Customs Authority of actual or suspected infringement, requesting it to detain infringing goods.⁶⁸

Miscellaneous

The new Law leaves the issue of private copying on recordable media (excepting media for computer use) to continue to be governed by the Copyright Ordinance. Furthermore, the new Law does not provide remedies against the circumvention of technological protection measures for copyrighted works, required by the WIPO Copyright Treaty; anti-circumvention protection, if resolved upon, will be the subject of future legislation. The liability of various Internet service providers for copyright infringement is to be addressed in the forthcoming legislation on electronic commerce, which has been approved by the Israeli legislature in the first hearing.

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- ¹ Copyright Law, 5768 – 2007 (the "Law").
 - ² Section 4(a)(1) of the Law.
 - ³ Section 4(a)(2) of the Law.
 - ⁴ Section 5 of the Law.
 - ⁵ Section 1 of the Law.
 - ⁶ Section 1 of the Law.
 - ⁷ Section 7 of the Law.
 - ⁸ Section 1 of the Law.
 - ⁹ Section 1 of the Law.
 - ¹⁰ Section 8(a)(1) of the Law.
 - ¹¹ Section 8(a)(2) of the Law.
 - ¹² Section 2 of the Law.
 - ¹³ Section 8(b)(2) of the Law.
 - ¹⁴ Section 8(b)(1) of the Law.
 - ¹⁵ Section 8(c) of the Law.
 - ¹⁶ Section 10 of the Law.
 - ¹⁷ Sections 11(1) and 12 of the Law.
 - ¹⁸ Sections 11(4) and 14 of the Law.
 - ¹⁹ Sections 11(2) and 1 of the Law.
 - ²⁰ Sections 11(5) and 15 of the Law.
 - ²¹ Sections 11(3) and 13 of the Law.
 - ²² Sections 11(6) and 16 of the Law.
 - ²³ Sections 11(7) and 17 of the Law.
 - ²⁴ Section 17(b) of the Law.
 - ²⁵ Section 38 of the Law.
 - ²⁶ Section 39 of the Law.
 - ²⁷ Section 78 (i) of the Law.
 - ²⁸ Sections 41 and 42 of the Law, respectively.
 - ²⁹ Section 44 of the Law; formerly addressed in the Orders of the Minister of Justice.
 - ³⁰ Section 19 of the Law.
 - ³¹ Section 20 of the Law.
 - ³² Section 22 of the Law.
 - ³³ Section 24 of the Law.
 - ³⁴ Section 25 of the Law.
 - ³⁵ Section 26 of the Law.
 - ³⁶ Section 32 of the Law.
 - ³⁷ Sections 3B through 3E of the Ordinance and section 69 of the Law.
 - ³⁸ Section 46 of the Law.
 - ³⁹ Section 45(b) of the Law.
 - ⁴⁰ Section 50 (b) of the Law.
 - ⁴¹ Section 45(a) of the Law.
 - ⁴² Section 45(b) of the Law.
 - ⁴³ Section 33(1) of the Law.
 - ⁴⁴ Section 78 (i) of the Law.
 - ⁴⁵ Section 35(b) of the Law.
 - ⁴⁶ Section 5(2) of the Act.
 - ⁴⁷ Section 34 of the Law.
 - ⁴⁸ Section 36 of the Law.
 - ⁴⁹ Section 47 of the Law.
 - ⁵⁰ Section 48 of the Law.
 - ⁵¹ Section 51 of the Law
 - ⁵² Section 1 of the Law.
 - ⁵³ Section 49 of the Law.
 - ⁵⁴ Section 52 of the Law.
 - ⁵⁵ Section 61 of the Law.
 - ⁵⁶ Section 54 of the Law.
 - ⁵⁷ Section 55 of the Law.
 - ⁵⁸ Section 78(c) of the Law.
 - ⁵⁹ Section 56(a) of the Law.
 - ⁶⁰ Section 56(b) of the Law.
 - ⁶¹ Section 56(c) of the Law.
 - ⁶² Section 58 of the Law.
 - ⁶³ Section 53 of the Law.
 - ⁶⁴ Section 59 of the Law.
 - ⁶⁵ Section 60(a) of the Law.
 - ⁶⁶ Section 60(a)(2) of the Law.
 - ⁶⁷ Section 60(c) of the Law.
 - ⁶⁸ Section 65 of the Law.