

Limitations and Exceptions to Copyright in Israel

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This overview of copyright flexibilities in Israel consists of two parts. First, answers to a questionnaire on the state of copyright law, copyright flexibilities, and the current political context of copyright, which were provided by Michael Birnhack and Niva Elkin-Koren. The questionnaire was given to participants at a meeting on Limitations and Exceptions to Copyright hosted by IViR and PIJIP last December. The authors have been given a chance to review the answers before this was uploaded. Second, an overview of the limitations and exceptions to copyright in Israel's laws, conducted by PIJIP fellow Marcela Palacio Puerta is presented. It is part of a larger project to map flexibilities in copyright law, and input is appreciated. Please send comments, corrections, or suggestions to pjip@wcl.american.edu.

I. Questionnaire on Copyright Flexibilities Answers by Michael Birnhack and Niva Elkin-Koren

1. Please provide a short (e.g. 250 word) description of your country or region's copyright legal framework and current statutory provisions and judicial doctrines providing for copyright limitations and flexibilities. You may include a general categorization (e.g. - closed list only, list plus fair use, list plus fair dealing) as well as a description of any notable or novel aspects to the law (e.g. a flexible quotation right, any open-ended exceptions, provisions for equitable remuneration, etc.). Please include a copy or link to your law.

General Copyright Scheme: Israel's Copyright Act 2007¹ [English translation [here](#)] replaced the British Copyright Act, 1911² and a local Copyright Ordinance, 1924³ [for legislative history, see [here](#)]. The 2007 Act provides comprehensive protection and is TRIPs compliant. Israel is not bound by the WCT. The 2007 Act is a mix-and-match of various sources: English basis, US influence⁴ (e.g., fair use, statutory damages), moral rights⁵ (per the Berne Convention), which are subject to reasonability (an idea borrowed from Australian law), and a making available right⁶ (along the lines of the WCT). The Act does not include anti-circumvention rules. As a Common Law system, courts have developed copyright law along the years, and continue to do so under the new Act in a rather "activist" way, e.g., interpreting fair use, and recently, a judicial recognition of contributory infringement.⁷

Exceptions: The 2007 Act shifted Israeli copyright law from a British *Fair Dealing* framework to an American *Fair Use* framework, accompanied by an additional list of exceptions. Under the 2007 Act it is necessary to show that a use falls under one of the purposes listed by the law and that it is fair. The law provides that uses "such as" those listed by in section 19 of the Act may qualify for the defense (i.e., if the list is an open, illustrative list). The illustrative list includes the fair dealing situations

¹ Copyright Act, 5768-2007, 2007 LSI 34 (2007).

² Copyright Act, 1911, 1 & 2 Geo. 5, c. 46 (Eng.), as extended to Palestine, in Copyright Act, 1911 (Extension to Palestine) Order, 1924, 114 Official Gazette 643.

³ Copyright Ordinance, 1924, 117 Official Gazette 711 (June 5, 1924) (promulgating the draft, which was published in 114 Official Gazette 623 (May 1, 1924).

⁴ Copyright Act, 5768-2007, 2007 LSI 34 §19 (2007).

⁵ Copyright Act, 5768-2007, 2007 LSI 34 § 45-6 (2007).

⁶ Copyright Act, 5768-2007, 2007 LSI 34 § 15 (2007).

⁷ More on Israeli Copyright law, see Michael Birnhack, *Israel*, in INTERNATIONAL COPYRIGHT LAW AND PRACTICE (Paul Edward Geller ed., Matthew Bender / LexisNexis, 2012).

(private study, research, criticism, review, journalistic reporting),⁸ but also "quotation" and "instruction and examination by an educational institution."⁹ The fairness is examined by the four factors of U.S. Fair Use doctrine (which were already applied by the courts prior to the 2007 Act).

The courts further added another prerequisite: attribution. Some courts found this to be a firm condition, while others view it as another consideration.

Other exceptions include private use (under the Copyright Ordinance, 1924); use in judicial proceedings; reproduction of a work for public inspection; incidental use of a work in a photograph, a film or a sound recording; broadcast or copying of works in public places; reproduction for software backup, maintenance, interoperability, or reverse engineering for data security purposes or interoperability; temporary copies that are an integral part of a transmission, technological process, or necessary for a legal use of the work; recording for the purpose of broadcast; additional artistic work made by the author; the use of the architectural work and drawings for renovation and reconstruction of buildings; public performance for educational purpose in educational institutions; and copying for preservation or maintenance by libraries and archives.

2.a. How might your copyright law apply to use of illustrative (rather than critical) excerpts from a copyrighted fiction film in a commercial documentary?

If the use is truly incidental – it could be exempted under specific exception (s. 22). Otherwise, under a fair use analysis: the illustrative purpose will have to fit under one of the rubrics listed in the fair use defense (s. 19). So, if it is considered "quotation" or "journalistic reporting", we can tick this box in the analysis and if it is less so, there is an open question of whether the use is "such as" the illustrative list. Quite likely, the answer will be positive, with the court then considering the four fair use factors. The commercial aspect will be taken into account, but not in a dichotomous way, as courts have recognized that the commercial/non-commercial distinction is not rigid. The use will be subjected to a prerequisite of attribution. In addition, other moral rights (attribution, as a separate right; integrity) are also relevant. Note that moral rights are now subject to a standard of reasonability (s. 50(b)).

2.b. How might your copyright law apply to digitization of a library's special collection for the purpose of providing some level of online access to the general public?

There is a distinction under the 2007 Copyright Act between making digital copies for the purpose of preservation and providing access to digital copies.

Under s. 30(c), the copying (in any format, including digitization) for the purpose of preservation is permitted by Public Libraries or Archives. The Minister of Justice, subject to approval by the Minister of Education (s. 67(b)), is authorized to prescribe the conditions for the execution of this type of copying and the conditions for granting the public access to such copies, but so far, no regulation has been issued.

Public Libraries or Archives may also digitize works which are already in their permanent collection to replace a copy that has been damaged or lost. Such copying is permitted provided that it is not possible to purchase an additional copy of the work within a reasonable time and on reasonable terms.

⁸ Copyright Act, 5768-2007, 2007 LSI 34 § 19(a) (2007).

⁹ Copyright Act, 5768-2007, 2007 LSI 34 § 19(b) (2007).

Public Libraries or Archives may further copy works that are already in their permanent collection upon the request of a patron, provided that the person requesting such copy, is permitted to do so "if he had made the copy himself (s. 30(b))." This would include any digital copies which are required for the lawful use of the work (s. 26).

These rules apply to all public libraries and archives and also to libraries prescribed by the Minister of Justice (by special regulation). Special rules apply to the Israeli National Library (NL) under the National Library Act, 2007. Under s. 4(2), it is the *duty* of the NL to enable the public, in Israel and abroad, an "appropriate and reasonable access to the library's collection, including via advanced technological means." This provision suggests that the NL digitization privileges might be wider than those granted to other public libraries.

As of today, there is no court holding as to whether enabling access to snippets of works digitized by the libraries would constitute fair use. A class action against Google Books was dismissed for procedural reasons (Nov. 2011).¹⁰

2.c. How might your copyright law apply to the following example of user-generated content that transforms a copyrighted work in a manner that is a spoof, but which lacks any criticism or comment on the copyrighted work itself: bit.ly/jrLT9h (Guitar Baby).

The use could be framed as (1) making a derivative work; (2) a public performance of the work (3) broadcasting or making the work available (via uploading); (4) moral right of integrity.

The (unauthorized) direct uses (1, 2) can be examined under the incidental use (s. 22) or considered *de minimis* (judicial interpretation). The uploading (3) will be examined under a fair use analysis. Transformative use was broadly defined by Israeli courts, to include putting a work to a new use or context.¹¹ In this spirit, some lower courts held that the posting of copyrighted photographs in an online newsletter of high school students in a media class was fair use.¹² Given the non-commercial nature of the use, its family context, the lack of impact on the value of the work or its potential market, it is likely to pass (no cases directly on point). The issue of moral right of integrity will be subject to a reasonability test.

In interpreting the above, courts might take into account the Unjust Enrichment Act, 1979,¹³ – but in this case, only to conclude that the use does not enrich the user at the expense of the copyright owner, and might be inspired by free speech considerations, as some courts indicated. One district court described

¹⁰ <http://blog.ipfactor.co.il/category/israel-court-ruling/>

¹¹ CA 2687/92 Geva v. Disney, Inc. 48(1) PD 251 (1994).

¹² See CC 8211-09 (Jerusalem, Magistrate) *Forgas v. Beit Hinuch High School, Western Galilee* (2011) (available in Nevo database).

¹³ Unjust Enrichment Act, 5739-1979, 1979 LSI 42 (1979). The Supreme Court held that the Unjust Enrichment Act can apply in certain cases where intellectual property laws do not provide legal protection. See PLA 5768/94 A.S.Y.R. v. Forum Avizarim Umutzarey Tzericha Ltd., 50(4) P.D. 289 (1999) (holding that unjust enrichment law can coexist with intellectual property law, and may provide a supplementary remedy even in the absence of IP protection, whenever enrichment is unjustly obtained). More on the unjust enrichment under Israeli law see Niva Elkin-Koren and Eli M. Salzberger, *Towards an Economic Theory of Unjust Enrichment Law*, 20 INT'L REV. L. & ECON. 551–573 553 (2000), available at

<http://weblaw.haifa.ac.il/he/Faculty/ElkinKoren/Publications/economic%20analysis%20of%20unjust%20enrichment.pdf>

the US Lenz case as an example of a chilling effect on permitted uses, tilting the decision towards non-exposure of user's identifying data.¹⁴

3. Please provide a short (e.g. 250 words) description of the current political context around copyright law in your country. Please indicate, where relevant, whether any reform has been planned, the timeline for reform proposals, a description of any current or potential proposals or campaigns for expanding limitations and exceptions and any use cases that are prominent in the political conversation.

The 2007 Copyright Act (which came into force in May 2008) is relatively new, and therefore, as of today, there were no bills for revising the current law (one amendment added a presumption in favor of producers of sound recordings). An initiative to legislate anti-circumvention provisions into the new Act was abandoned by the Government and the Knesset during the legislative process, and the Ministry of Justice was assigned the task of exploring future legislation. Such exploration is under way.

Israel is listed by the USTR's 301 Annual Report¹⁵ (per s. 301 of the US Trade Act, 1974) in the Priority Watch List. Although most of the U.S. pressure is focused on data exclusivity and providing stronger protection to the pharmaceutical industry, the latest report also urged Israel to implement DMCA-like legislation, to provide statutory damages for copyright infringements (which already exist), to confirm that enterprises are criminally liable for end-user software piracy, and to enforce judicial decisions requiring cable operators to compensate copyright holders for the unauthorized retransmissions of television broadcast signals containing their works.

At the same time, however, there are several regulatory initiatives, still in preliminary stages, applying to the Minister of Justice to use its regulatory authority under the 2007 Act:

1. Regulation of Fair Use Guidelines for Higher Education: [A Code of Fair Use Best Practices](#)¹⁶ for the use of copyrighted materials was drafted by a coalition of Higher Education Institutions in Israel. The purpose of these guidelines is to resolve the high degree of uncertainty related to the implementation of the fair use doctrine in higher education institutions, which creates a chilling effect on educational and research related uses. The coalition applied to the Minister of Justice who is authorized under the fair use section (s. 19(c)) to "make regulations prescribing conditions under which a use shall be deemed a fair use." The request was forwarded for further work by the Advisory and Legislative Department at the Ministry of Justice but so far no regulation has been enacted. More on this initiative see here.
2. An initiative by the [IP Clinic at the University of Haifa Faculty of Law](#)¹⁷ to apply to the Minister of Justice and the Minister of Education to exercise their authority under section 30(c) to set the conditions for making digital copies made for preservation accessible to the public.

¹⁴ See OCR (Tel Aviv) 11646/08 Premier League v. John Doe (unpublished) (July 16, 2008).

¹⁵ United States Trade Representative, Special 301 Report on Intellectual Property Rights (2011), *available at* http://www.ustr.gov/webfm_send/2849.

¹⁶ Forum of Accessible Education: Code of Best Practices for Use of Works in Teaching and Research, <http://weblaw.haifa.ac.il/he/AcademyInCommunity/ClinicList/tech/Documents/Code%20of%20Best%20Practices%20%5bEnglish%20Translation%5d.pdf>

¹⁷ <http://weblaw.haifa.ac.il/he/AcademyInCommunity/ClinicList/tech/Pages/LegalActivity.aspx>

Additionally, a few bills now discussed in the Knesset may affect copyright enforcement, such as requiring ISP's to reveal the names of users suspected in online piracy.

II. Overview of Limitations and Exceptions in Israel

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Exceptions framework: Exception Framework: fair use plus list.

[Copyright Act 2007- Copyright Limitations and Exceptions.](#) | [Articles 18 – 37](#)

- Fair use for purposes of: Research and private study, criticism, review and news reporting, quotation, instructions and examination by educational institutions, as well as uses which are "such as" the above. (s. 19)
- Use of works in juridical or administrative procedures. (s. 20)
- Reproduction of a work deposited for a public inspection. (s. 21)
- Incidental use of a work. (s. 22)
- Broadcast or copying of a work placed in a public place: such as architectural work, a work of sculpture or work of applied art. (s. 23)
- Computer programs: copying for purposes of back up, for purposes of maintenance or purposes of providing service to a person in possession of an authorized copy; copying of a computer program or making a derivative work to achieve some purposes. (s. 24)
- Recording for purposes of broadcast. (s. 25)
- Temporary copies. (s.26)
- Additional artistic work made by the author, even when the author is not the owner of the copyright in the earlier artistic work. (s. 27)
- Renovation and reconstruction of buildings. (s. 28)
- Public performance in educational Institution. (s. 29)
- Permitted uses in libraries and archives: make a reserve copy, copy to replace a lost work, copy for preservation, copy requested for a person requesting for such reproduction. (s.30)
- Manufacture of sound recording as against royalty payment. (s. 32)
- Private, home-based, non-commercial copying of "tapes" (s. 3C of the Copyright Ordinance, 1924)