

I. Copyright Protection of Software in Israel

A. Scope of the Right

702 The basic form of protection for computer software in Israel is provided by copyright law. The pertinent legislation is the Copyright Act 1911 (“the Act”) and the Copyright Ordinance 1924 (“the Ordinance”) which both have remained from the British Mandate.

703 Copyrights exist in Israel in every original literary, dramatic, musical and artistic work, as long as:

- In the case of a published work, it was first published in Israel; and
- in the case of an unpublished work, the author was an Israeli national or resident at the time he or she created the work.¹

In regard to citizens of other states, it should be noted that in 2001 a new statute was enacted in Israel titled “The Intellectual Property Amendment Act – Adaptation to the Trips Agreement”. This Act harmonizes Israeli law with the principles of the TRIPS Agreement. It does not, however, introduce the concept of extending copyright protection to works created by someone who is merely a resident but not a citizen of the respective member state.

704 Copyright exists in the works from the time of their creation on throughout the author’s life and for a period of 70 years after his death.² Under Sec. 5(1) of the Act, the author of a work is the first owner of the copyright in the work.

705 In July 1998, the Israeli Parliament (“Knesset”) amended the Ordinance to include protection for computer software. Amendment no. 5 states: “For the purposes of copyright, computer software shall be treated in the same way as a literary work within the meaning thereof contained in the Copyright Act, 1911.”

706 In addition, a copyright owner of computer software also enjoys the protection contained in international treaties to which Israel is a signatory and the protection as expressed in the extensive case law on copyright which exists in Israel. The Intellectual Property Amendment Act mentioned above defines the scope of the copyright in accordance with the TRIPS Agreement as protecting both source code and object code.

707 Another major development in this regard was the adoption, as a response to the TRIPS agreement, of the Intellectual Property Amendment Act (the Amendment), which entered into effect on 1.1.2000. The Amendment amended the Act, the Ordinance, and other intellectual property laws in or-

¹ S. 1 of the Act and S. 4 of the Ordinance.

² Sec. 5(4) of the Ordinance.

der to harmonize them with the TRIPS Agreement. The Amendment amended the definition of “computer software” so that it shall include both source code and object code.³ The Ordinance was also amended in the issue of license to use: renting computer software is defined as a copyright in the software.

B. Copyright Infringement

According to the Act, copyright can be violated by a direct or an indirect act of infringement. Direct infringement occurs “... when any person who, without the consent of the owner of the copyright, does anything the sole right to do is by this Act conferred on the owner of the copyright”.⁴ Indirect infringement occurs when “a person sells or lets for hire or by way of trade exposes or offers for sale or hire, or ... distributes for the purposes of trade, or ... imports for sale or hire ... any work which to his knowledge infringes copyright or would infringe copyright if it had been made in Israel”. 708

Works created by foreigners are, as explained above, excluded from that definition. Moreover, infringing is defined by the Act as “any copy including any colorable imitation made or imported in contravention of the Act”.⁵ 709

One of the most important court rulings with regard to Computer Software Copyright protection is *civil appeal 139/89, Harpaz v. Ahitov*. The Supreme Court examined the nature of the right and embraced a comprehensive and broad approach, following the American court ruling in the matter of *Whelan*. 710

The Supreme Court held that Computer Software Copyright exists on each and every stage of the software development process (software requirements definitions stage, the software design stage, the programming stage) and also with regard to the finished product. In *Harpaz v. Ahitov* the court ruled that: “In computer software, due to the programming of concealed options, previous stages in the software development can be copied, without being able to detect it visually.” 711

The Supreme Court accepted the broad approach adopted by the United States courts and determined that “Computer Software Copyright extends beyond the software textual code and also applies on the artwork, the structure, the user input, the sequence and the organization of the software”. Thus, when there is a significant similarity in the organization, sequence and structure of one software to another, this will be considered as a real, 712

³ Sec. 2(2) of the Amendment, Sec. 2a. of the Ordinance.

⁴ Sec. 2(1) of the Act.

⁵ Sec. 2(2) of the Act.

fundamental infringement of the work, even if the audio and visuals of the computer software are different.

- 713** In civil case 598/92 (*Tel-Aviv*) *Golan v. Yodfat*, the similarity between two computer software programs, "Narkis" and "Nihulit", was discussed. Since the purpose of these two computer software programs was to manage execution files, the question concerned the similarity in the general idea of the software. The honorable judge *Levit*, in his decision to the restrictive order motion, repeated the *Harpaz V's Ahitov* ruling and added that the question whether one software program is similar to another must be reviewed according to each single stage of the software development process as well as according to the final product. The court expert found that the infringing software had been copied from the other software. The two software programs were having a common source and characterization, even if the technical code writing was different. The court therefore granted a temporary restrictive order which prohibited the use of the infringing software until several changes would be implemented with regard to the very similar components.
- 714** In civil claim 869/92 *Azuri v. Israel Theatre*, the common copyright ownership question in software was discussed. The honorable judge *Pilpel* determined that the copyright ownership in a computer program belonged to both the programmer and to the person who ordered the program, due to the fact that in the process of the development both parties had worked together in developing and adjusting the program to their common purpose. In the specific circumstances, both parties therefore had the legal right to use the program, including the right to develop it to an improved version, without any infringement of copyright.
- 715** In civil claim 554/00 (*Haifa District Court*) *Autodesk Inc v. B.A.B Development and Engineering Limited*, the plaintiff claimed infringement of its copyright in a computer software. Evidence of the defendants' infringement was found on their computer, which was seized by the police and the court awarded the plaintiff with statutory compensation.
- 716** In civil appeal 2392/99, *Ashraz Data processing v. Transbeton Limited*, the legal question was whether any separate module in computer software would be seen as an independent work entitling to a separate compensation. In addition, the court examined the question if making a copy in a different language than the source would also be seen as infringement, and whether a separate compensation should be determined. The court held that separate modules will not enjoy a separate protection. It is important to mention, however, that the court ruled that in principle it is possible to protect modules separately from the copyright in the software, but that this was not the case in the *Ashraz* claim.

C. Remedies for Copyright Infringement

1. Injunction

If the level of the potential damage can be demonstrated in a substantiated manner by the copyright owner, Israeli courts may issue a temporary injunction against an alleged copyright infringer. This procedural option takes account of the extensive harm that the copyright owner may suffer in awaiting trial or a final settlement of the matter. The issuance of an injunction is discretionary with the court; thus, all the facts and circumstances of the case will be considered. 717

In the matter of *Microsoft Corp v. Egma Computers*, the appellant requested a temporary injunction relief against the defendant. Microsoft claimed that Egma was selling the software license separately from the software itself, which was infringing the software license. The court ruled that such act constitutes contributory infringement of copyright. 718

2. Receivership

The court may appoint an *ex parte* receiver who has the authority to enter the premises of a defendant who is infringing another person's copyright (for example the possessors and/or distributors of pirated software) and confiscate, in the defendant's presence, the software believed to infringe the plaintiff's copyright.⁶ 719

Furthermore, the receiver is authorized to enter the defendant's premises at all times until the end of the particular case (this may take several years) in order to ensure that the directives of the injunction are being observed.⁷ This remedy is also given against end-users. In a case sponsored by the Business Software Alliance (BSA), a lawsuit was filed by Autodesk Inc. against a large engineering company and the plaintiff's attorney was appointed as *ex parte* receiver. Following the appointment, 18 prima facie infringing copies of AutoCad software were found.⁸ The appointment of a receiver is clearly a strong deterrent against potential infringement. 720

3. Anton Piller/Seizure Order

An Anton Piller order is an *ex parte* order authorizing an applicant's attorney, or the court's designee, to enter the defendant's property and seize the infring- 721

6 *Ashraz v. Rosh Geshet et al.*, civil file no. 2453/87 (the plaintiff obtained an injunction restraining former employees from marketing unauthorized copies of its software to its customers).

7 See *Magic Software Enterprises Ltd. v. Compushake Ltd.*, Civil file no. 617/94; Motion no. 4375/94; *Machshevet M.L. Ltd. & Compedia Ltd. v. n. Eilat Michon Computers Ltd.*

8 *Autodesk Inc. v. Nepro*, Civil, File No. 251/94.

ing products as well as the means used to produce them (i.e. the computers used to unlawfully reproduce the software). This remedy can be especially effective in preventing the destruction or hiding of illegal software prior to judicial hearings. Despite the harshness of the remedy, Israeli courts have demonstrated a willingness to use it if sufficient evidence exists.⁹

4. Enforcement Issues

- 722 During the last years there have been wide changes in the matter of criminal enforcement with regard to products infringing intellectual property rights. An intellectual property unit in the Israeli police was established and is operating all over the country against infringement of copyrights and trademarks. The police are authorized to confiscate suspected goods. Moreover, a prosecution unit was established which deals with criminal suits.

5. Private Criminal Complaint

- 723 A remedy available in Israel that is not available in some other countries for violations of copyright is the ability of a copyright owner to file a private criminal complaint in the magistrate court against the alleged infringer. In a private criminal case, the court can impose fines or even a jail term.¹⁰

6. Damages

- 724 The monetary remedies that a copyright owner may recover if an infringement is established include recovery of damages and lost profits and costs as well as attorney's fees. A permanent injunction may also be obtained. This is in addition to the confiscation of the infringing copies and the receipt of restraining orders for infringing activities.
- 725 Under Sec. 6–8 of the Act, an action may be filed to recover possessions of copies which infringe copyrighted works and to prohibit further acts of infringement. Even if a plaintiff cannot prove to have suffered damages, Sec. 3a of the Ordinance provides a statutory damage award as follows:

„Where the damage caused by the infringement of a copyright has not been proved, the court may, on the application of the plaintiff, award, in respect of every infringement, compensation in an amount of not less than 20,000 NIS” (currently about 4,255.00 US\$).

- 726 In *Saggai et al v. The estate of Abraham Ninio*¹¹ the Supreme Court held that the illegal reproduction of the same copyright-protected product in large quantities will be considered as a single infringement. Therefore, it is possi-

⁹ See for example: *Machsevet Ltd. v. Avi-Or*, civil file No. 10/92.

¹⁰ See for example: *Microsoft v. Pasgal computers Ltd.*, criminal file no. 9053/88.

¹¹ *Saggai et al. v. The estate of Abraham Ninio*, civil appeal No. 592/88.

ble to apply the statutory compensation several times only if the defendant has infringed several copyrights. However, the number of infringing acts will be taken into account in determining the amount of compensation.¹²

D. Organizational Actions against Software Piracy

One example of an effective fight against computer software piracy in Israel is demonstrated by AutoDesk Inc. In a series of civil law suits against the illegal use of software, AutoDesk has settled out of court, receiving damages based on Sec. 3a of the Ordinance plus expenses and acquisitions of legal software copies (by the defendants) at full.¹³ 727

A recent breakthrough in anti piracy activity occurred when AutoDesk joined BSA, the Israeli Organization of Software Protection (IOSP) and Microsoft in filing suit against one of the largest Israeli operators of online bulletin boards, One Man Crew.¹⁴ The operators of One Man Crew have been making illegal copies of a large variety of software programs, including popular programs (such as AutoCad, Office, computer games, etc.) available to its subscribers to download to their personal computers. The prosecutors have obtained a preliminary injunction from the district court in Haifa to stop the operation of the BBS One Man Crew and to enter the operators' premises in order to gather evidence of illegal activity of BBS. 728

Later on, Judge *Ginat* of the District Court of Haifa ruled that only a clear evidence on part of the defendant proving that he has obtained the software installed on his computer or the license to use them in conformity with the law, will be enough to dismiss an allegation of infringement of copyrights.¹⁵ At the end the parties reached a settlement out of court. 729

E. Recent Developments: The Copyright Act Memorandum and the Copyright Bill of 2005¹⁶

Copyright legislation in Israel is based on old British legislation. Therefore, during the past years, public committees have examined new legislation in order to provide answers for new developments and modern situations. In 2003, the Ministry of Justice published the copyright act memorandum. 730

12 *Sadar computers Ltd. v. Alkto et al.*, civil file No. 831/90.

13 *AutoDesk Inc. v. Nepro*, civil file No. 251/94 (unreported Be'er Sheva district court); *AutoDesk Inc. v. Arcadi*, civil file No. 1618/95 (unreported Haifa district court).

14 1077/97 *Haifa Autodesk v. One Man Crew*.

15 *AutoDesk Inc. and Microsoft Corp. v. B.A.B Engineering Inc. and others*, civil file No. 554/00 (unreported Haifa district court, Aug. 2002).

16 The Copyright Bill, 2005.

The memorandum, and later the copyright Bill of 2005, determined that computer software (in any kind of expression) is considered as a literary work.¹⁷

- 731 The fourth chapter of the memorandum deals with permitted usage and determines that whoever holds a legitimate copy of a computer software is entitled to copy it for backup use, errors fixing, and for adapting the software to another program. The purpose of this section is to permit, subject to certain conditions, limited usage of a legitimate copy of computer software, without the need of further permission from the copyright owner.
- 732 As for the treatment of infringing products, the memorandum suggests an essential change. The current legislation rules that the prosecutor will be the owner of the infringing copies. However, this can sometimes be unreasonable, especially when the financial value of the infringing product is higher than the value of the original literal work. Therefore, in order to level the rights of both parties, the memorandum rules that the ownership of the infringing copy can be transferred to the prosecutor only in return for the full payment of the value of the work prior to the infringement.

II. Protection of Software by Patent Law

- 733 In Israel, there is no clear policy regarding the computer software patent. There are some few cases which adapted the American approach according to which it is possible to apply for patent protection for computer software if the software combines a software process with an effective result, such as e.g. improving oil injection system as held in the case of *App. 23/94 United Technologies Corp. v. The Patent Registration*.
- 734 In the light of international agreements in the field of intellectual property, signed in connection with the TRIPS Agreement, the term "invention" has been broadened to include "any technological field", so some argue that this change is a formal acknowledgment of the possibility to apply for a software patent. In *App 80/501 Rosenthal v. The Patent Registration*, however, the court held that an invention that is primarily based on calculation or programming is not entitled to patent protection.
- 735 The key question in analyzing the question of the software patent in Israel is the interpretation of the term "process" in Sec. 3 of the Patent law. In the case of *Rosenthal*, the court held that this term means a treatment of specific material in order to change its form or condition. Therefore, an invention in which the sole innovation is software or a computerized process was not

¹⁷ See Art. 4 to The Copyright Bill, 2005.

considered a process in the sense of that provision, because it had no influence on a specific material.

However, in spite of these cases and in light of the large number of software patents that have been granted worldwide, many software patents have been registered in Israel as well, be it that the patents simply include software or that even the main innovation and inventive advancement was in the field of computer software or computerized process and the system or algorithm that were at the basis of that process. **736**