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Copyright, to be or not to be

Report of the Israel ALAI Group

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The traditional justifications for copyright and related rights

In your country, which justifications for copyright have been presented in connection with your national legislation, for example in the preamble of the Statute or in its explanatory remarks or similar official documents?

Copyright in Israel is firmly based on the incentive theory. This finds expression in the explanatory notes to the Copyright Bill, which was the precursor of the current 2007 Copyright Act. Because Israel is a common law jurisdiction, the case law is also very influential. In 1997, the Supreme Court stated that the purpose of copyright protection is to encourage and enrich the diversity of expressions and knowledge.² This theoretical basis is generally followed. However, over time, authorities have expressed the need to balance the incentive with the public interest in access to works. The Copyright Bill stated that the aim of the law is the provision of a framework for the encouragement of creation of works by the creation of economic rights, while balancing those rights against the need of the public to use works in order to advance knowledge and culture. This “balancing philosophy” finds expression in later court opinions.³

Are there any similar justifications for related rights? Are the arguments the same as for copyright in literary and artistic works or are there different or additional justifications?

The incentive theory is also the major justification for neighboring rights, especially because the subject matter of some of them (e.g. broadcasts and phonograms) require, in addition to skill, an incentive for investment of financial resources.

Is it possible with any certainty to trace the impact of such justifications in the provisions of the law, or is their influence more on a general (philosophical) level?

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² C.A. 513/89 Interlego A/S v. Exin-Line Bros. S.A., 48(4) P.D. 133, 172 (1994)

³ C.A. 5097/11 Telran Tikshoret, Ltd. v. Charlton, Ltd. (2013).

The justifications do not just exist on a philosophical level. Certain provisions of the law, particularly those on fair use and other permitted uses can be traced back to the theoretical basis of copyright protection. *i.e.* the incentive theory.⁴ These permitted uses serve to limit the perceived monopolistic effects of incentivizing copyright and to create a balance between the rights of copyright owners and the needs of users to make use of works.

Are there similar, or different or supplementary justifications for copyright and related rights expressed in the legal literature?

One can find in the literature reference to the incentive theory, natural rights theory and the labor theory, although most commentators agree that the incentive theory has precedence in our legal system.⁵

Economic aspects of copyright and related rights

Has there in your country been conducted research on the economic size of the copyright-based industries? If yes, please summarize the results.

Unfortunately, not.

Has the research been conducted in accordance with a generally accepted and described methodology in order to make it comparable to similar research abroad?

N/A

Has there been any empirical research in your country showing who benefits economically from copyright and related rights protection? If yes, please summarize the results and the methodology used.

Unfortunately, not. However, there is a definitely a need for such studies.

Individual and collective licensing as a means of improving the functioning and acceptance of copyright and related rights

Is there a wide-spread culture of collective management of copyright and related rights in your country, or is it limited to the 'core' areas of musical performing rights and reprography rights? Please describe the areas where collective management is used.

Collective management of copyright and related rights is employed on a wide scale, beyond the traditional areas of musical performing rights and reprography rights (in which respect it is actually under used). Mechanical licenses of musical works are also administered through collective licensing. So to, are the performing rights (including broadcast and making available) of film and

⁴See the discussion on limitations and exceptions below.

⁵ Tony Greenman COPYRIGHT 5 (2nd edition 2008); Guy Pesach The Theoretical Basis for Recognition of Copyright, 31 MISHPATIM, Jer. L.Rev. 359 (2001).

television directors and screenwriters, in as far as they pertain to collection of royalties. Audio-visual performers' rights to royalties for the broadcast and screening of their performances are collected by the state recognized collective of performers' rights, together with the royalties of musical and other performing artists.

Are there legislative provisions in your national law aiming at facilitating the management of copyright and related rights? If yes, please summarize.

The law sets out a specific statutory framework, regulating in part the fulfillment of the statutory duties of Collective Management Organizations in collecting and distributing the remuneration paid to copyright owners and performers' rights owners as compensation for private and domestic recording of their works. The law entrusts this duty to the "royalty society representing the majority of copyright owners, the royalty society representing the majority of owners of performers' rights and the royalty society representing the majority of producers of sound recordings together with the society representing the majority of audiovisual producers." These CMOs must be approved by the minister responsible for that under the law.

There are similar rules applicable to the statutory equitable royalty paid to performers' rights owners for exhibition and playing of their performances. These royalties, paid to performers for exhibition and playing of their performances, are to be paid to one "royalty organization", being the organization representing the largest number of performers and holders of performers' rights. There is no statutory scheme for appointment of this organization, but courts have recognized de facto the Representative Organization of Performers in Israel as holding this status.

Additionally, a recently enacted provision of the Cinema Law specifically permits the operation of CMO's that represent the rights of authors of cinematic works. However, these provisions do not create a formal framework for these operations and do not exempt the CMO's from the scrutiny of anti-trust laws.

Which models for limitations and exceptions have been implemented in your national law? Such as free use, statutory licensing, compulsory licensing, obligatory collective management, extended collective management, other models? Please provide a general overview.

The Copyright Act sets out a long list of specifically permitted uses, alongside a general and flexible fair use provision.

The list of specific permitted uses includes, subject to certain provisions, public performance of a work by the students or employees of an educational institution in the course of the educational activity of the institution, use of a work in judicial or administrative proceedings, reproduction of a work that has been deposited for public inspection under law, certain uses designed to provide access to works for the disabled, making of ephemeral recordings for use in broadcasts, incidental inclusion and use of a work in a photographic or cinematographic work, or in a sound recording, the broadcast or reproduction of a work of sculpture, or a work of applied art permanently situated in a public place, certain uses of computer programs for backup, maintenance and service, achieving interoperability and error correction, the making of temporary, or transient copies of a work, creation of a further artistic work by an author which

partially copies, or is a derivative work of, a previous work of hers, renovation and reconstruction of building and copying by libraries and archives for preservation and replacement

The fair use provision, set out in section 19(a) of the law, is based on section 107 of the U.S. Copyright Act. It provides that fair use of a work is permissible for purposes such as (*but not only*) private study, research, criticism, review, journalistic reporting, quotation or instruction and examination by an educational institution. Beyond the enumerated uses, fair use may be invoked in case of parody, satire and even “artistic discourse” between works, subject to examination of the “fairness element”.

Claims of fair use are analyzed, *inter alia*, by examining: (1) the purpose and character of the use; (2) the character of the work which is the subject of the use; (3) the scope of the use, quantitatively and qualitatively, in relation to the work as a whole; (4) the effect of the use on the value of the work and its potential market. Courts often examine also whether a fair use claimant has respected the moral rights of the original author, although this may be inappropriate in certain cases, such as in parody. This has created a hybrid type of fair use, different in this aspect from the US fair use. Thus, in cases of quotation of a work in documentary setting, a fair use claim may quite well pass the fairness test if the source has been credited, but failing such credit, the very same use will be considered an infringement.

Courts are, at present, split on the question of whether fair use is a defense, or whether it is a “users’ right”. This question will probably be resolved in the coming years when a suitable case comes before the Supreme Court.

Additionally, the Copyright Act creates a compulsory license allowing the reproduction of a musical work in a sound recording against payment of royalties, upon quite detailed conditions. The legislation regarding telecommunications and broadcasts also provides compulsory licenses for the retransmission of certain broadcasts.