

Country Report – Copyright Developments in Israel

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Israel has been endeavoring for 15 years to create a new copyright law that will replace existing legislation, some of which is almost 100 years old. The 1911 Copyright Law (which is the English copyright law applied to the Palestine Mandate in the 1920's) continues to be in force in Israel today. An additional Copyright Ordinance, originally legislated by the Palestine Mandatory Government in the 1930's, continues to supplement the 1911 Copyright Law. It has been updated frequently throughout the years to keep up with Israel's treaty commitments (Berne and TRIPS).

A first attempt at drafting a new copyright law was submitted for comment in 1999 after almost a decade of work. Unfortunately, this draft did not address the revolutionary issues of copyright in digital works. It was replaced 4 years later by a new version for comment, which has meanwhile gone through changes. This amended version, now known as the draft Copyright Law of 2004, was vetted in October 2004 by The Ministers' Committee on Legislation and is now waiting to be presented to Israel's Parliament (The Knesset) for what could be an extended legislative process.

The new draft law contains two significant changes relevant to libraries and to the general public. The first is a change in world-view regarding "fair use." Under today's 1911 Copyright Law, there is "fair dealing", based on English law. "Fair dealing" in Israel is limited to a closed list of five categories of use (private study, research, criticism, review or newspaper summary). According to Israeli legal precedent, once use has been deemed to fall into one of these categories, it must then be assessed for "fairness." Israeli courts have adopted the United States four-criteria test for fairness.

The drawback of the current Israeli law is that it allows for a "fair dealing" exception only for usage that falls squarely within one of the specific categories mentioned above. By comparison, the United States "fair use" exception also contains a list of permitted uses – but the list is illustrative and not closed. Therefore, even uses not mentioned in the United States fair use list could be deemed "fair use" should they meet the four-criteria fairness test under United States law. Thus the United States "fair use" exception provides more flexibility than the current Israeli "fair dealing" exception.

The new draft Copyright Law discards the English model of “fair dealing” and adopts the United States model of “fair use.” Article 19 of the new draft now states as follows:

“19. Fair Use

- a. Fair use of a [protected] work is permitted for purposes such as private study, research, criticism, review, newspaper summary, quotation or instruction and testing in educational institutions;*
- b. Use of a [protected] work will be deemed to be fair, taking into account, among other things, the following:*
 - 1. The nature and purpose of the use;*
 - 2. The nature of the [protected] work being used;*
 - 3. The extent of use, from the standpoint of quality and quantity, in relation to the [protected] work in its entirety;*
 - 4. The effect of the use on the value of the [protected] work or on its potential market.”*

For the sake of comparison, following is Section 107 of the United States Copyright Law (17 USC 107), on Fair Use:

“..... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”*

The second significant change regards permitted copying by libraries and archives. The current law does not provide exceptions regarding copying by libraries and archives. Both the 2003 and 2004 drafts of the new Copyright Law contain identical sections regarding this issue to remedy this problem. Following is a translation of Sections 30 and 31 of the 2004 draft.

“30. Permitted use by libraries and archives

- (a) Copying of a [protected] work, a copy of which is found in the permanent collection of a library or archive, is permitted for the purposes set out below, on condition that it is not possible to purchase an additional copy of the [protected] work within a reasonable time and under reasonable conditions:*
 - (1) preservation of the copy of the [protected] work by the library or archive;*

- (2) *replacement of another copy of the [protected] work that was in the possession of the library or archive, and that was lost or destroyed, or that become unusable;*
 - (3) *replacement of a copy that was in the permanent collection of a different library or archive, that was lost or destroyed, or that became unusable.*
 - (b) *Copying of a copy of a [protected] work that is in a library or archive, for someone who requests such a copy, is permitted on condition that such copying would be permitted under law if done by the person making the request.*
- 31. *The Minister [of Justice], with the agreement of the Minister of Education, Culture and Sport, may create Regulations that determine -*
 - (1) educational institutions, libraries and archives that Sections 16(2), 29 and 30 will apply to them.”*
 - (2) rules and conditions for the application of the terms of Sections 29 and 30, in general or as regards certain types of educational institutions, libraries or archives;*
 - (3) the form of request to a library or archive according to Section 30(b).”*

One final noteworthy matter is the inclusion of Israel and Hebrew language licenses in the Creative Commons project. The official inauguration of this service was hosted by the Haifa Center of Law and Technology at Haifa University on June 9, 2005.