

# Israel ALAI Group

## Questionnaire for ALAI Conference 2014

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### 1. The origin, the objectives and the underlying philosophy of the moral rights in Israel

Israel first incorporated the protection for moral rights into its law in 1981. It is now also part of Israel's current Copyright Law of 2007.

In the explanatory statements in the Bill of 1981, the government referred to the dual origin of the moral right: the first – that in the Berne Convention (then the 1948 Brussels version). The second – the ancient Talmudic Jewish law.

Thus, the Israeli legislator not only looked at the paternity and integrity rights in the Brussels Version of the Berne Convention, but at the paternity right in ancient Jewish principles; Talmudic law considers the attribution of words to their author as a safeguard for wisdom; in the absence of attribution, a citing fool appears as wise. Accordingly, false attribution of another person's words is regarded in Jewish law as worse than a theft of a physical object.

### 2. What do the moral rights consist of in Israel

The right of Attribution – the author is entitled that he/she be named on the work in a reasonable scope and manner under the circumstances.

The right of integrity – the author is entitled that his/her work will not be mutilated, distorted or otherwise modified and that no prejudicial act will be made in respect of the work, all provided that such acts are prejudicial to the author's reputation or name.

### 3. Can the moral rights be transferred or waived in Israel

Transfer – the Copyright Law 2007 stipulates that the moral right is "personal and that it is non-transferrable<sup>3</sup>.

Waiver – the Copyright Law 2007 is silent on whether the moral right may be waived. The original bill proposed that the right could be waived in writing<sup>4</sup>.

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<sup>3</sup> Section 45(b) to the Copyright Law, 2007.

Eventually, this proposal was not incorporated into the law and no express reference is made to a waiver in the language of the law.

Under the previous copyright laws, waivers by contact or conduct were enforceable in legal proceedings<sup>5</sup>. In view of the legislative silence on this issue in the new Copyright Law-2007, it appears that this view was not abolished.

Waivers could be recognized under general principles of waiver under the Israeli laws of contract. In the course of the legislative proceedings of the Copyright Act – 2007, the Ministry of Justice made a statement to that effect.

The governing principle in contract law is that of freedom of contract. This covers, inter alia, the parties' freedom to waive legal rights, such as the moral right. Freedom of contract is not absolute though, and yields to coercion; acts illegal or contrary to public morality; unconscionable clauses etc. Therefore we await judicial decisions on this matter under the 2007 Act.

**4. The term of protection of moral rights in your country? Is it identical to the term of protection of the economic rights? Can the moral rights be exercised after the death of the author and by whom? Are the works in the public domain still somehow protected under moral rights?**

The term of the moral right is identical to the term of copyright protection for economic rights<sup>6</sup>.

Moral rights may be exercised by the author during his lifetime<sup>7</sup>.

Since the duration of copyright for most works is life+70 after the author's death, moral rights are exercisable after the author's death as well. However, only the author's relatives may exercise this right (relatives, as opposed to heirs). The term "relatives" is defined as the author's spouse, parents, siblings and direct descendants (children, grand-children etc.).

Following the lapse of the work into the public domain, no moral right exists in the work. This, however, does not preclude the enforceability of contractual undertakings between the author and/or his relatives vis-à-vis third parties to honor the moral right even after the expiry of the moral right under the statute. The enforceability of such clauses would be decided upon based on general principles of Israeli contract law (see above).

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<sup>4</sup>Section 48(b) to the Copyright Act Bill-2005, Government Bill No. 196, p. 1116 (20.7.2005); Estate of the Late Zvi Narkis v. Microsoft Israel Ltd. (29.11.2010)

<sup>5</sup> PLA 1780/98 Hondt v. Kavim Hevra Le'Pirsum Ltd. (22.4.1998)

<sup>6</sup> Section 45(a) to the Copyright Law, 2007

<sup>7</sup> Section 55 to the Copyright Law, 2007

**5. Do other types of rights (such as "personality rights", "civil rights", "publicity rights", "portrait rights" or other depending on the jurisdiction) complement the protection of the moral rights in copyright.**

Some acts amounting to an infringement of the moral right could, in theory, also infringe the author's publicity rights, and also can amount to defamation etc.

For example, the right of publicity entitles a person to prevent the unauthorized use of his portrait for profit<sup>8</sup>. However, this right is limited to a very narrow line of the author's works (namely the author's self-portrait).

Another example is the law of defamation. The law forbids the publication of matters that might damage one's good name, make him the subject of ridicule, injure livelihood etc.<sup>9</sup> This law could give a cause of action where the derogatory treatment of a work is carried out in a prejudicial manner to the good name of its author or his/her's artistic name.

Another possible complementary law is that the law of unjust enrichment<sup>10</sup> might be invoked in attribution cases, if the user is consequently enriched unjustly at the expense of the author.

It should be remembered that these three laws do not protect the same interests as the moral right. Therefore, they are only partially applicable where the rights of integrity and attribution are damaged:

- 1) The law of defamation defines the publication of defamatory content as the primary focal point. In contrast, the moral right is intended to protect the integrity of the work, whether or not the prejudicial act is published or not.
- 2) Similarly, the right of publicity and the law of unjust enrichment have a different focal point: The right of publicity concerns the public use of one's likeness (e.g. name, picture) as a source of profit for third parties. Similarly, the laws of unjust enrichment come into play only where a third party is actually enriched at the plaintiff's expense. In contrast - the moral right safeguards the integrity and the paternity of the work, irrespective of whether a third party actually derives a profit at the expense of the author.

It should be noted that the applicability of the laws of privacy and defamation is somewhat narrow, primarily because they are rarely applicable to deceased authors<sup>11</sup>.

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<sup>8</sup> Section 2(7) to the Privacy Law, 1981.

<sup>9</sup> Section 1 to the Defamation Law, 1965

<sup>10</sup> Unjust Enrichment

<sup>11</sup> Claims for defamation and invasion of privacy (publicity rights) are available for a limited term of 6 months post-mortem – see Section 25 to the Privacy Law- 1981 and Section 25 to the Defamation

**6. Does the legislation or case law in your country provide sanctions or other mitigating mechanisms for the abusive exercise of moral rights, in particular by the author and/or his/her heirs?**

Moral rights are exercisable only by the author (or his relatives post-mortem).

In civil matters, courts have a general discretion to dismiss claims where the remedy sought is abusive. This principle is not unique to claims for moral rights infringement<sup>12</sup>.

In addition, an exercise of moral rights in bad-faith, could deprive the author of one or more of his remedies and in extreme case lead to a dismissal of his suit altogether. While there is not much case-law for this in moral rights cases<sup>13</sup>, the duty of plaintiffs to exercise their legal rights in good faith is embedded into the Israeli case law for decades<sup>14</sup>.

In addition, where the damage to the author's moral right is *de-minimis*, the court is authorized to decline the remedy sought by the author. This follows from general principles of tort law imported into the Copyright Law – 2007. While *de-minimis* acts are not necessarily abusive, they

Finally, the Copyright Law – 2007 further includes a defense against a claims for an infringement of the right of integrity – that of reasonableness. It provides a non-exhaustive list of considerations for determining whether the act complained of is "reasonable" under the circumstances. Although the list focuses on the reasonability of the defendant's actions, rather than on the non-reasonability of the author's action, there is a clear interaction between them in certain cases.

The list offers hints as to some of the behaviors of an author that might be considered abusive. For example –

- 1) An author exercising his rights regarding a work authored by him/her as a an employee or as a commissioned work;
- 2) An author exercising his right in relation to an act performed in the work which is customary in the field;
- 3) An author exercising his right despite the fact that his damages are outweighed by the defendant's necessity to perform the act complained of;
- 4) The nature of the work deems the act performed as reasonable;
- 5) The nature of the act and its purpose deems the act performed as reasonable;

Finally, with regard to buildings, the legislator apparently views injunctive remedies (or destruction orders) as abusive – again without saying so explicitly in the statute;

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Law- 1965. However, some case law has recognized a post-mortem right of privacy. The question of whether a post-mortem right of publicity exists has yet to be decided by the courts.

<sup>12</sup> PLA 6339/97 Rucker v. Solomon(23.9.1999); Pet. 280/57 Hachamov v. Schmidt (15.1.1958).

<sup>13</sup> PLA 1780/98 Hondt v. Kavim Hevra Le'Pirsum Ltd. (22.4.1998)

<sup>14</sup> PLA 305/80 Shilo v. Rachkovsky (4.6.1981).

therefore the Copyright Law -2007 stipulates that no such orders may be awarded in case of an infringement of a moral right.

**7. How would a conflict between the exercise of a moral right and of any other proprietary right, such as the right to “material” property on the “carrier” of the work, be solved in your country? (e.g. mention of the name of the author on a building, modification of a utilitarian work, demolition of an artistic work, graffiti on a building,...)**

Under the current legislation, a court is directed to balance the rights of the author against the property rights and the legitimate interests of the owner of the property, under the doctrine of reasonableness.<sup>15</sup> If the need to perform the act outweighs the legitimate interests of the Author, the act will not be an infringement. This balancing of rights and interests has been performed on occasion, even prior to the enacting of the current Act, particularly in regard to architectural works. In an earlier case, decided under the previous law, a magistrate’s court held that a renovation of a public building which compromised the integrity of the work infringed the moral rights of the author, even though it was undisputed that the renovation was necessary. The court held that the renovation could have been performed while conforming to the original architectural design and style.<sup>16</sup> However, in a later case, decided under the current Act, a District Court held that a renovation that added a modern style addition to a more traditional style existing structure was reasonable and thus not an infringement. The court noted that integration of the modern with the traditional is an accepted form of expression in modern architecture. The court continued to direct that a plaque be placed on the building, informing the public which parts of the building were designed by the original architect and which were designed by the later architect.<sup>17</sup>

Courts have found infringement in cases where public authorities have destroyed,<sup>18</sup> or even failed to maintain<sup>19</sup> sculptures in public places. However, the balancing of rights and interests between an author and a private owner of such an artwork may yield a different result. Again, the issue will be decided under the reasonableness doctrine.

**8. How would a conflict between the exercise of a moral right and the exercise of the right to freedom of expression or other fundamental rights be solved in your country?**

Freedom of expression is a fundamental right in Israel. The balancing of the moral rights of the author and the right of freedom of expression is achieved mainly

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<sup>15</sup> Sec. 50 (c) of the Copyright Act, 2007.

<sup>16</sup> C.C.(Mag. T.A.) 193532/02 Mosesko v. The City of Afula (25.7.2005).

<sup>17</sup> C.C. (Dist. Cent.) 1071/05 Daub v. Amutat Agudat Hagalil Lemchkar Vesheterutei Briut (4.10.2010).

<sup>18</sup> C.C. (Mag. T.A.) 73028/95 Fabian v. The City of Ramat Gan (15.9.1997).

<sup>19</sup> C.C. (Mag. T.A.) 64221/00 Fabian v. The City of Tiberias (31.3.2004).

through the doctrine of reasonableness discussed above. Thus, it is widely accepted that a parody of a work is permissible, even though that parody may well lampoon the work and, indeed, ridicule it. The parody will not be an infringement of moral rights. In a rather unique case, a District Court has also invoked the doctrine of reasonableness in a case in which a disabled defendant used the plaintiff's work as the basis of a work of art which completely transformed it by painting over it, even though the plaintiff's work was discernible at an interim stage of the process.<sup>20</sup> On the other hand, although Israel has adopted a U.S. style fair use exemption, which is designed, *inter alia*, to promote freedom of expression, a fair use claim will often fail where the user has failed to attribute the work used to the author.<sup>21</sup> At the end of the day, there is a delicate balance in play and each case will be decided in light of its particular set of facts and circumstances.

- 9. How do authors exercise their moral rights in practice? Do they consider this a matter of importance? How do they want to be acknowledged (which modalities exist for the exercise of the rights of authorship and integrity)? How do they impose respect of their moral rights when they are faced with derivative works? Do licences (in particular via creative commons) commonly provide a prohibition to create derivative works? Are there in your country model contracts per sector (such as the literary, audiovisual, musical, graphic arts or artistic sectors) that are made available by professional organisations or by collective management organizations and that contain clauses regarding the moral rights? If so, which ones?**

Moral rights, and, in particular, the right of attribution is important to most authors. Indeed, the majority of moral rights cases involve a claim of infringement of this right. Infringement of moral rights is actionable as a tort. The injured author is entitled to a range of remedies, including statutory damages of up to ILS 100,000 (about €21,000)<sup>22</sup> per infringement, although often the court will award a more modest sum. Still, one case of infringement of the right of integrity in a major literary work resulted in an award of the maximum sum.<sup>23</sup> In another case involving infringement of the right of attribution an award of 75% of the maximum sum issued.<sup>24</sup> An injunction may also be available in appropriate circumstances, although the court will balance the hardships before issuing one.<sup>25</sup>

An author will normally require a "based on" attribution on a derivative work.<sup>26</sup>

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<sup>20</sup> C.C. (Dist. Cent.) 7648-09-08 Katz v. Rotman (8.7.2010).

<sup>21</sup> C.A. 2790/93 Eisenman v. Kimron (30.8.2000).

<sup>22</sup> Sec 56 of the Copyright Act, 2007.

<sup>23</sup> C.C. (Dist. Cent.) Pugatch v. Kinerent Zmura-Bitan Publishers (3.3.2013).

<sup>24</sup> C.C. (Dist. Cent.) 26485-09-11 Kfar Blum's Kayaks v. Tzuk Manara, Ltd. (30.12.2012).

<sup>25</sup> Sec 53 of the Copyright Act, 2007.

<sup>26</sup> The right to receive such a credit has been recognized by the Supreme Court: C.A. 7774/09 Weinberg v. Weishopf (28.8.2012).

There are a range of licenses in practice, some allowing derivative works, others not allowing.

There are not many model contracts in Israel. Most contracts are individually negotiated. Since moral rights are statutory there is no need for a clause actually mandating their respect in the contract. However, since the form and prominence of credit (on the work itself and in advertising and publicity materials) is a matter that concerns many authors (particularly in the film and television industries), those issues will often be addressed in the contract. Also, since moral rights may be waived in Israel, the producers or publishers will often want to obtain contractual permission to edit or modify a work.

The licenses granted by collective management organizations usually containing a clause obliging the licensee to respect the moral rights of the author.

**10. Do collective management organisations play a role in the exercise of the moral rights in your country?**

Since CMOs do not manage moral rights, they do not play a central role in the exercise of moral rights in Israel. Nonetheless, as stated above, the licenses granted by collective management organizations usually containing a clause obliging the licensee to respect the moral rights of the author. Furthermore, CMO's will not issue licenses that could affect the moral rights of the author, such as a license to exploit a work in a commercial advertisement or political campaign, without the express consent of the author.

11. In your country, is it provided in legislation, case law and/or scholarly literature how the moral rights apply with regard to particular forms of use, such as:
- "artistic quotation"
  - user generated content
  - folklore
  - orphan works
  - cloud computing
  - alternative (free) licensing schemes (in particular open source licences or creative commons)
  - international aspects (determination of jurisdiction and applicable law)

None of these issues are addressed by legislation. As stated above, it has been held in case law that for quotation to be a fair use it must be accompanied by adequate attribution. However, the literature has pointed out that attribution should not be called for in the case of parody or satire, since the effectiveness of the parody or satire is dependent on recognition of the work.<sup>27</sup> The courts have *obiter dictum*,

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<sup>27</sup> TONY GREENMAN COPYRIGHT 643 (2<sup>nd</sup> ed. 2008)

recognized that one author may also quote another's work in an artistic expression that engages the first work in a form of artistic discourse.<sup>28</sup>

Some alternative licensing schemes require attribution. It has not been discussed what would be the case where attribution has not been specifically required. Since, unlike in the U.S. where most alternative licensing schemes originate, attribution is a statutory requirement, it may be that it will be required by law even if the license is silent on the point.

A moral rights infringement will be actionable if it occurs in Israel, including, it is assumed, if it occurs on a website directed at Israel.<sup>29</sup>

**12. The objective of certain moral rights appears to be changing in the digital context. The right of disclosure, which enables authors to decide when their works can be made public, is invoked at times to protect the confidentiality of certain kinds of content or data or their private dimension. The right to claim authorship (paternity) is changing into a right of attribution which places more emphasis on the identification of one contributor among others (for example, on Wikipedia or in free licences) than on recognition of authorship. Lastly, the right of integrity may become a right through which to protect a work's authenticity. Indeed, while modifications to works are more and more widely authorised, authenticity is assuming greater importance, notably through the use of technological measures to guarantee it. In your country, are there any indications in legislation, case law and/or scholarly literature that the moral rights "shift" in a digital environment:**

**- From a divulgation right to a right to the protection of privacy (private life)?**

In Israel, the right of divulgation is not recognized by law. Nonetheless, the right of first publication may often, but not always, serve as a substitute. Where a work contains expression of an intimate nature, it may well be protected by the right of privacy.<sup>30</sup>

**- From a right to claim authorship (paternity) to a right to attribution?**

This issue has yet to arise in our case law in the digital context. but may definitely do so in works involving user generated content. In the non-digital context, the Supreme Court has recognized the right of an author to attribution in regard to a derivative work based on his work.<sup>31</sup>

**- From an integrity right to a right to respect the authenticity of the work?**

This issue has yet to arise in our case law,

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<sup>28</sup> C.A. 2790/93 Eisenman v. Kimron (30.8.2000).

<sup>29</sup> This would appear to be the case according to analogous cases involving claims of defamation: C.A. 530/12 Yakobovitz v. Zais (28.3.2012).

<sup>30</sup> See C.A. 8954/11 Ploni v. Plonit (22.5.2014), where the court granted an injunction prohibiting the distribution of a novel that infringed on the privacy of plaintiff by divulging intimate details of her life (portrayed in the novel through a thinly disguised character based on her) and thus did not reach the plaintiff's copyright claims.

<sup>31</sup> C.A. 7774/09 Weinberg v. Weishopf (28.8.2012).



**- Up to acknowledging similar interests and rights akin to moral rights for authors and performing artists, for the benefit of publishers, producers and broadcasters**

A few lower court cases have recognized an "infringement of moral rights" of corporate copyright owners. However, such cases did not involve any substantial discussion of whether such a right can be held by a corporation and it appears that the defendants in those cases did not raise the issue.

Publishers, producers and broadcasters can enforce "quasi-moral rights" through the torts of passing off and false description.<sup>32</sup>

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<sup>32</sup> Sections 2 & 3 of the Commercial Torts Law, 1999.