

Session IV: Fair Use and Other Exceptions*

Lital Helman

Thank you very much for having me here. It is great to be back at the Kernochan Center. My talk will address the adoption of the fair use doctrine into Israeli Law. I will offer Israel as an example that shows that it is possible to adopt the Fair Use doctrine into legal systems outside of the United States while maintaining desired features of the pre-adoption regime. Some of these features tackle the issues that were discussed earlier in this panel, such as the uncertainty and the ex-post concerns that the fair use regime entails.¹

Notably, and although I will not expand on this point in this talk, the Israeli example is particularly interesting because the 2007 Copyright Act,² which “imported” the Fair Use doctrine, was passed after the digital revolution occurred. This timing allowed the Israeli legislature to consider issues that in other countries had to be addressed by the courts ex post facto.

Let us begin with some historical perspective. As with the Canadian example³ that Ysolde Gendreau discussed earlier,⁴ prior to the adoption of the 2007 Copyright Statute, Israeli copyright law was based on the British law of 1911.⁵ With regard to copyright exceptions, the 1911 law set forth a “fair dealing regime.”⁶ Fair dealing is different from fair use in two main concepts. First and foremost is the concept of closed versus open-ended permissible purposes. Under a fair dealing regime, an unauthorized use of a copyrighted work is only permissible if it invokes one of a

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1. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (“The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.”). See also Richard J. Peltz, *Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law*, 17 TEX. INTELL. PROP. L.J. 267 (“The loose, multifactor fair use test of the U.S. Copyright Act is highly contextual, so fair use in the United States generally must be determined on a case-by-case basis, post hoc, without the benefit of bright-line rules.”).

2. Copyright Act 2007, 5768-2007, 2007 LSI 34 (Isr.) [hereinafter “Israeli Copyright Act”], <https://perma.cc/N9RF-9LCW>.

3. Canada first introduced fair dealing in 1921, when the Canadian government adopted Section 2(1) of the Copyright Act 1911 (UK). See Steven O’Heany, *Fair is Fair: Fair Dealing, Derivative Rights and the Internet*, 12 ASPER REV. INT’L BUS. & TRADE L. 75, 82 (2012).

4. Ysolde Gendreau, *Session II: The Impact of International Copyright Treaties and Trade Agreements on the Development of Domestic Norms*, 40 Colum. J. L. & Arts 335 (2017).

5. See 1911 Act, 1 & 2 Geo. 5, c. 46 (Eng.); Israeli Copyright Act, 1911 (hereinafter “1911 Copyright Act”). See also Lior Zemer, *Copyright Departures: The Fall of the Last Imperial Copyright Dominion and the Case of Fair Use*, 60 DEPAUL L. REV. 1051, 1054, 1073 (2011).

6. See Zemer, *supra* note 5, at 1073-77.

limited range of statutorily listed purposes for the use.⁷ Under the Israeli fair dealing regime, the list of purposes included private study, research, criticism, review, or newspaper summary.⁸ In contrast, under a fair use regime, the list of permissible purposes is an open list, as will be expanded below.⁹

The other difference between a fair dealing and a fair use regime concerns the availability of statutory guidance regarding the question of fairness. In the United States, for example, § 107 sets forth the four factor test as criteria for determining whether a use is fair.¹⁰ In a fair dealing regime, such a statutory guidance is typically not provided, and courts have the power to make the decision on their own as to the fairness of the use.¹¹

Let us then move to discuss the Israeli example in more detail. In 2007, Israel shifted from a fair dealing to a fair use regime, and adopted a statute that is almost a verbatim translation to Hebrew of the U.S. fair use law, as set forth in § 107 of the U.S. Code.¹² As in § 107, the Israeli fair use clause is composed of a two-pronged test. Section 19(a) concerns the purpose of the use, and § 19(b) concerns the fairness of the use.¹³ If and only if a use passes both prongs—purpose and fairness—it can enjoy the fair use protection.

Looking more closely, however, there are differences between the American and the Israeli fair use clauses. Indeed, both the U.S. code and the Israeli statute enumerate a list of purposes that a use can have in order to be considered fair use, and both laws include language to indicate that the list of purposes is an open list. What is more, both § 107 of the U.S. Code and § 19 of the Israeli Act use the term “such as” (or its Hebrew equivalent) to refer to the permissible purposes under the Section.¹⁴ Yet, while the U.S. law explicitly states that the term “such as” is meant to be illustrative and not limitative,¹⁵ § 19(a) of the Israeli act includes no such statement. In fact, the drafting history of the Israeli Copyright Act shows a clear intention to use the more limitative term “such as” over an alternative term that was offered (more similar to “inter alia”), indicating that the purpose of the use must be similar in nature to the listed purposes.¹⁶

7. See, e.g., MARTIN SENFTLEBEN, COPYRIGHT, LIMITATIONS, AND THE THREE-STEP TEST: AN ANALYSIS OF THE THREE-STEP TEST IN INTERNATIONAL AND EC COPYRIGHT LAW 69, 72 (2004).

8. 17 U.S.C. § 2(1)(I) (2011).

9. See O’Heany, *supra* note 3, at 84.

10. 17 U.S.C. § 107 (1976).

11. With time, the line between fair use and fair dealing has become more blurred, as some fair dealing countries added judicial criteria and some even flexed the closed-list feature of fair dealing. See Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook* (March 2015), <https://perma.cc/489F-MYUK>.

12. 17 U.S.C. § 107 (1976).

13. Israeli Copyright Act § 19.

14. Compare 17 U.S.C. § 107 of the U.S. Code (“...the fair use of a copyrighted work... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”) with Israeli Copyright Act § 19(a) (“Fair use of a work is permitted for purposes such as private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination by an educational institution.”).

15. 17 U.S.C. § 107 (“The terms “including” and “such as” are illustrative and not limitative”).

16. Cf. Zemer, *supra* note 5, at n.164 (“The original version of § 19(a) referred to ‘inter alia’ instead of ‘such as.’ The legislature adopted the latter since it considered the former too wide in scope.”).

In other words, when Israel shifted to a fair use regime, it moved away from a fair dealing world where only pre-defined, listed purposes are permissible, but it did not go all the way towards the American fair use system, where the purpose of the use poses little limitation for finding fair use. Rather, the country attempted to strike a different balance between certainty and flexibility by requiring that the purpose of the use would maintain some relation to the enumerated purposes.

Section 19(b), the “fairness” prong, adopts the four parameter test from the U.S. law.¹⁷ In the wording of § 107, Section 19(b) provides:

...factors to be considered shall include, inter alia, all of the following:

- (1) The purpose and character of the use;
- (2) The character of the work used;
- (3) The scope of the use, quantitatively and qualitatively, in relation to the work as a whole;

The impact of the use on the value of the work and its potential market.¹⁸

Most likely, by incorporating the U.S. four factor test, Israel also indirectly adopted the U.S. jurisprudence into Israeli law.

Finally, the third part of the Israeli fair use regime, § 19(c), is designed as a mechanism to mitigate the uncertainty inherent to the ex post, judge-made fair use decision making, a concern that was also raised by Stan [McCoy] earlier.¹⁹ Specifically, § 19(c) empowers the regulator (specifically, the Minister of Justice, with approval by a Knesset committee) to define ex ante fair uses, an arrangement we can dub “regulatory safe harbors.”²⁰ In the words of the law: “The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.”²¹

Section 19(c) potentially mitigates the uncertainty and the dependency on the judicial system that the fair use regime entails. Indeed, regulation can provide more certainty upfront as to the legitimacy of using a copyrighted work without authorization.²² Regulation can also codify already existing industry standards and court rulings.²³ What is more, regulation can correct undesired fair use trends in the

17. Israeli Copyright Act § 19(b).

18. *Id.*

19. *See also supra* note 1 and accompanying text.

20. *Id.* at § 19(c).

21. *Id.*

22. *See, e.g.*, 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* §§6.8-.9, at 497-508 (5th ed. 2010). *See also* Tim Wu, *Agency Threats*, 60 *DUKE L.J.* 1841 (2011) (mentioning the “long periods of uncertainty created by the judicial review process.”).

23. Academic use of books for teaching purposes can be a good candidate for an area where the regulator can codify industry agreements, because it is a central issue in Israel. Recently, an agreement was reached between the Hebrew University and a major publisher following Civil Case 3524/09, *The Hebrew University of Jerusalem v. Shoken Publishing House et al.* (2013). Under the agreement, which adopts to a large extent a “code of best practices” that universities composed, the parties agreed that the university shall be allowed to copy up to 20% of a book for the purpose of “course-packs” or e-reserves. This case followed another case between the parties that was tried at the Supreme Court, in which the

industry or even the courts when such trends occur. Section 19(c) is yet to be used by the regulator.

To conclude this point, Israel provides an example for a jurisdiction that adopted the fair use regime from the American law, almost verbatim, and yet made adaptations to the local normative landscape by incorporating mechanisms that would mitigate uncertainty and reducing the reliance on the court system.

It is worth mentioning that in Israel, the shift from fair dealing to fair use has not been sudden, and in fact started a while before the adoption of the fair use regime in the 2007 Copyright Act. Indeed, even before Israel passed the new Copyright Act, Israeli courts increasingly imported elements of the American fair use features into the interpretation of case law even under the fair dealing regime. In the words of Neil Netanel, “Israel’s new copyright statute essentially completes the move from fair dealing to fair use that the Israeli Supreme Court had already initiated in 1993 in its ruling in *Geva v. Walt Disney Co.*”²⁴

This process is apparent from a number of landmark cases. The *Geva case*²⁵ from 1993 concerned an artistic work that used the Donald Duck character for the purpose of criticism, but not criticism of the original work (e.g., the Donald Duck character, photos, or films), but rather for criticism of Israeli society. Despite the fact that under a fair dealing regime, the “purpose” prong is not supposed to be expanded by courts *ex post*, the court in the *Geva case* interpreted the term “criticism” broadly to include the use at bar.²⁶ The court in *Geva* also proposed to import the four factor analysis of the U.S. fair use law into the analysis of the “fairness” prong under fair dealing. What is more, the court expressed a general opinion that the fair use regime is superior to fair dealing.

Fast forward to 2000: seven years before the shift to fair use, a case called *Mifal Hapais* was decided by the Israeli Supreme Court.²⁷ There, the court adopted a view that fits the fair use regime much more than it fits the fair dealing regime. Specifically, the *Mifal Hapais* court stated that the key question regarding copyright exceptions should not concern the first prong, namely, the purpose of the use, but rather the second prong, fairness, and that this latter question should be determined by the four-parameter test of the United States.²⁸ In the court’s words, “[T]he first test—concerning the fairness of the use, which examines the behavior of the defendant, is the main test. . . . [T]he second test, concerning the purpose of the use, has lesser significance.”²⁹ Indeed, when the new Copyright Law was passed in 2007, it arrived in a legal climate that already had *de facto* fair use features in a *de jure* fair dealing regime.

court opined that there is public interest and justification in allowing universities to make “fair use” of works. See Civil Appeal 5977/07 the Hebrew University of Jerusalem v. Shoken Publishing House et al. (2011).

24. Neil W. Netanel, *Israeli Fair Use from an American Perspective* in *CREATING RIGHTS: READINGS IN COPYRIGHT LAW* Michael Birnhack, Guy Pessach, eds. (2009).

25. CA 2687/92 *Geva v. Walt Disney Company* 48(1) PD 251 [1993] (Isr.).

26. *Id.* (“[T]he term “criticism” . . . should be interpreted in a broad sense.”)

27. CA 8393/96 *Mifal Hapais v. The Roy Export Establishment*, 54(1) PD 577 [2000] (Isr.).

28. *Id.*

29. *Id.*

Since 2007, there have been three landmark cases concerning fair use: *Premier League*,³⁰ *Telran*³¹ and *Safecom*.³² These cases view themselves as continuing a regime that has already started, rather than as needing to rethink the whole exceptions regime since the new copyright law has passed.

To conclude with a question mark, it would be interesting to discuss concisely what the open questions right now in Israel on fair use are.

The first question, which echoes in the United States as well, concerns the scope of fair use and the balance between authors' rights and users' rights. Specifically, is fair use a right or a defense? The district court in the *Premier League* case (before the case arrived at the Supreme Court) opined that the new Copyright Act brought about a major change in the status of users' rights, and that the shift to a fair use regime points to a new balance between authors' rights and users' rights in favor of users.³³ The Supreme Court, however, rejected this broad interpretation. As to today, there is no decisive law about this question under Israeli law.

Another question stems from the fact that Israeli copyright law grants moral rights to authors (other than in computer programs and phonograms).³⁴ Israel recognizes two moral rights: the right of attribution and the right of integrity.³⁵ The right of attribution grants authors the right that their name will appear on their work, and the right of integrity allows author to prevent distortion or derogatory change of her work.³⁶ Interestingly, the moral rights doctrine blends into the fair use question: quite often, courts decide whether a use is or is not fair based, inter alia, on whether attribution was given or not given to the copyright owner.³⁷ The question under the fair use doctrine in this regard is whether attribution should or should not play a role in deciding fair use questions.³⁸

These and other fair use cases are likely to shape the development of the Israeli fair use jurisprudence.

30. Civil Appeal 9183/09 The Football Association Premier League Limited v. John Doe [2012].

31. CA 5097/11 Telran Communications, Ltd. v. Charlton, Ltd. [2013] (Isr.).

32. CA 7996/11 Safecom Ltd. v. Raviv [2013] (Isr.).

33. C.M. (Dist. T.A.) 1146/08 The Football Ass'n Premier League, Ltd. v. Ploni 08(3) Tak-District 2514 [2008] (Isr.).

34. 17 U.S.C. §§ 45-46.

35. *Id.*

36. *Id.*

37. See, e.g., C.M. (Dist. Cr.) 1549-08-07 Maariv Pub. vs. Businessnet Ltd. et al. [2012].

38. For criticism of this trend, see Michael Birnhak, *Fair Use – Even Without Credit*, 2015, available at <http://weblaw.haifa.ac.il/he/AcademyInCommunity/ClinicList/tech/techClinicBlog/Lists/Posts/Post.aspx?ID=4> (in Hebrew).