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## Fifth Amendment of the Israeli Copyright Law may bring relief to copyright owners in online copyright infringement

The Fifth Amendment of Israel's Copyright Law 2007, which came into effect on January 9, 2019, brought with it some significant changes to the Law which may have significant impact on right holders and on users of copyrighted materials.

Most of the changes included in the Fifth Amendment are with respect to what constitutes copyright infringement on the internet and the availability of certain new enforcement tools. What may be viewed as the most far-reaching change, a new chapter dealing with revealing the identity of an unknown alleged copyright infringer online, will only come into effect in October 2019. The changes introduced by the amendment are in line with the global legislative trend of bolstering copyright protection online (as also expressed in the controversial EU Copyright Directive<sup>1</sup>).

Below are the main changes introduced by the Fifth Amendment of the Copyright Law:

### **Use of works with respect to which the copyright owner is unknown**

The amendment adds statutory provisions governing the use of works with respect to which the copyright owner is unknown or had not be identified. Use of such works is allowed provided that (1) the user exercised due diligence in attempting to ascertain the identity and locate the copyright owner; (2) the user expressly stated, when using the copyrighted work, that the identity of the copyright owner is unknown, that the copyright owner is entitled to request that use of the work cease and provides contact details for that purpose; and (3) that once a request from the copyright owner had been received the user ceased using the copyrighted work. If the use was commercial in nature, additional obligations to publish a prior notice on the intent to use in print or online media and to pay royalties once the copyright owner contacts the user apply.

### **Recognition of indirect infringement through making a copyrighted work available to the public**

The doctrine of indirect infringement was already recognized in Israeli case law. The amendment made the doctrine part of the statutory provisions with respect to copyrighted works being made available to the public. The new clause states that when a person took actions intended to facilitate public access to a copyrighted work made available to the public without the authorization of the copyright owner, that person infringes the copyright in the work in question if (1) the actions were commercial in nature and (2) the person knew or should have known that the work was made available to the public in a manner that infringes the copyright in the said

work. It should be noted that while the amendment takes the doctrine of indirect or contributory infringement and, for the first time, cements it in statutory provisions, the scope of infringement in the Amendment is narrower than the doctrine as applied by the courts, since it requires that the facilitating act was done “for profit”. Thus, despite the Amendment, in suitable cases where the infringement is substantial, it is possible that the courts may still apply the doctrine as before and grant remedies even where the facilitating acts were made “not for profit” (but severely undermined the copyright owner’s rights).

## **Power to issue access limitation orders**

The District Courts were vested with the power to issue orders limiting access to copyrighted content online. Such orders may be directed at providers of access to electronic networks (e.g. ISPs), limiting access to copyrighted content where a petition had been filed by the copyright owner or the holder of an exclusive license, where the Courts are convinced that making the copyrighted work available to the public online or any action taken online with respect to the copyrighted content constitute copyright infringement. The Amendment also include provisions with respect to the scope of the orders the Courts may issue, the factors the Courts should consider in their decisions in such matters and entities that should be joined as parties to the proceedings. It should be noted that the Courts’ power to issue limitation of access orders applies regardless of whether servers on which the copyrighted content is stored are located in Israel or in another country.

## **Limitations on statutory damages**

The Copyright Law provides statutory damages (namely damages the courts may order where the actual damages cannot be ascertained or are difficult to ascertain) where copyright infringement is proved. The Fifth Amendment introduces some limitations on the ability of the courts to order statutory damages where a person makes an artistic work available to the public on the internet where said work was previously published under certain circumstances (said circumstances mostly focused on whether the use was commercial in nature).

## **Order to reveal the identity of a person that had allegedly infringed copyright**

Possibly the most far-reaching and controversial new addition introduced by the Fifth Amendment is a new chapter dealing with unknown alleged copyright infringers online. The new chapter provides a copyright holder with the right to request, and vests with the District Courts with the power to order, that the identity of an unknown person that allegedly committed acts constituting copyright infringement be revealed by a third party holding such information. These provisions vest with the Courts the power to order entities such as ISPs or website and platform owners or managers to reveal the identity of their users where such identity is usually not available to the public. The new chapter provides a detailed mechanism for hearing such requests by copyright owners and sets certain limitations with respect to when and under which circumstances the identity of an unknown user may be disclosed to the copyright owner (in an attempt to balance between the legitimate interests of the copyright owner and the right to privacy of internet users).

This specific issue became the subject of heated debate and objection from civil rights organizations in view of the potential conflict with the right to privacy and online freedom-of-speech.

It should be noted that this new chapter of the Copyright Law is not yet in force and will only become effective in October 2019. However, it must be accounted for in any existing policies of any internet service providers and managers of websites and online platforms and services where users may upload, store and present content publically.

#### **Practical takeaways:**

- Any use of copyrighted works in which the identity of the copyright owner is unknown must be made with caution and in compliance with the new provisions added to the Copyright Law;
- Owners and operators of websites, online databases and platform should take recognize that orders limiting access to content stored or presented by them, and (as of October 2019) orders to reveal and disclose the identities of their users, may be issued against them and that the scope of contributory copyright infringement had been expanded in the Amendment;
- Consequently, **policies with respect to access and use of content online, as well as any terms of use and privacy policies** (especially for online platforms and websites in which users can upload or enter content) **must be updated and adapted.**

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<sup>1</sup> The Directive on Copyright in the Digital Single Market 2016/0280(COD).