

February 26, 2007

The Honorable Moshe Kahlon
Chairman of the Economics Committee
The Knesset
Jerusalem, Israel

Re: Fair Use Provision in Copyright Bill

Dear Chairman Kahlon:

The undersigned organizations, representing a broad spectrum of technology companies, libraries, and consumers in the United States, write to commend the Economics Committee for its effort to bring Israeli copyright law into the 21st Century and, in particular, for its inclusion of a non-exhaustive fair use provision in its approved text for Section 19 of the pending Copyright Bill.

Copyright law strives to promote the broad availability of literature, music, and other works by providing authors with exclusive rights over their creations while maintaining a rich public domain that allows creativity to flourish. To achieve this optimal level of copyright protection, legislators must balance the scope of rights accorded to authors with limited exceptions to those rights. Preserving this balance during a period of constant technological evolution is a daunting challenge currently confronting legislators and courts around the world.

We understand that Section 19 permits the fair use of copyrighted works for purposes such as private study, research, criticism, review, news reporting, quotation, or instruction or testing by an educational institution. The provision also sets forth four nonexclusive factors to be considered in determining whether a particular use is fair. We strongly support adoption of this provision.

The non-exhaustive fair use provision in the Israeli Copyright Bill is similar to the fair use provision in the U.S. Copyright Act, 17 U.S.C. § 107. Fair use is a central feature of U.S. copyright law which allows courts to balance the competing interests of copyright owners in protecting their expression and the public in accessing and using that expression. The U.S. Supreme Court has described fair use as an “equitable rule of reason which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” *Stewart v. Abend*, 495 U.S. 207, 237 (1990).

Avoiding “rigid application of the copyright statute” is particularly important in a time of rapid technological change, when legislatures cannot possibly keep pace with product innovations. Applying the four fair use factors, U.S. courts have permitted consumers to use videocassette recorders to record television programs for later viewing. *Sony v. Universal*, 464 U.S. 417 (1984). Likewise, courts have allowed search engine

firms to store images from the World Wide Web in their search indices and display them in response to user queries. *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

At the same time, the fair use provision has not diminished the legitimate economic interests of copyright owners. A court, for example, rejected the claim of an oil company that fair use permitted its research scientists systematically to photocopy articles in the company's library for their convenience. *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2nd Cir.), *cert. denied*, 516 U.S. 1005 (1995). Similarly, a court recently ruled that fair use did not allow a law enforcement agency to install a computer program on more computers than authorized under the license, even though only the authorized number of users would use the program at any one time. *Wall Data v. Los Angeles County Sheriff's Department*, 447 F.3d 769 (9th Cir. 2006).

In sum, the fair use doctrine promotes the creation of new works and educational uses of existing works. It also permits private, noncommercial uses by individuals and families, directed solely to their own enjoyment and appreciation of lawfully obtained content. Significantly, the fair use doctrine allows these uses without harming copyright owners. A fair use exception thus provides copyright law with the flexibility necessary for a vibrant information economy such as Israel's. Accordingly, we wholeheartedly support the inclusion of a non-exhaustive fair use provision in Section 19 of the Copyright Bill.

Please feel free to contact us if we may be of any assistance as this legislation moves forward.

Respectfully,

American Association of Law Libraries
American Library Association
Association of Research Libraries
Computer & Communications Industry Association
Consumer Electronics Association
Electronic Frontier Foundation
Google
Home Recording Rights Coalition
Internet Archive
Media Access Project
Medical Library Association
NetCoalition
Public Knowledge
Society for Cinema and Media Studies
Special Libraries Association
Yahoo! Inc.

cc: Ministry of Justice