

# **The New Israeli Copyright Act**

## **A Case-Study in Reverse Comparative Law**

# Introduction

- The Notion of Reverse Comparative Law:
- The comparer <> The compared
- Comparative law as a dynamic bilateral model
  - ➔ Added value for the compared legal system

# The New Israeli Copyright Law of 2007

- First modern and updated Israeli copyright law
- Characterized by extensive reliance on comparative study

# **Legal Schemes of the new law that carry comparative imprints**

**(a) The Fair Use Defense**

**(b) The Remedy of Injunction for copyright  
infringement**

**(c) The Author's Moral Right of Integrity**

# The Fair Use Defense

- Common Law *“fair dealing”* v. U.S *“fair use”*
- Novelty of section 19(c) of the Israeli Copyright Act: authorizing the Minister of Justice to make regulations prescribing conditions under which a use shall be deemed as fair use.
- Positive consequences:
  - Legal certainty (mitigating chilling effects)
  - Dynamics of *checks and balances between courts and legislators*

# The Fair Use Defense

- First parameter of “fairness” under Israeli Law:
  - *“the purpose and character of the use”*
- First parameter of “fairness” under American Law: *“the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”*
- Advantages of the Israeli approach: the coverage of:
  - Commercial-beneficial fair use
  - Harmful non-commercial uses
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# The Fair Use Defense

- Compatibility (?) with Article 9 of the Bern Convention and Article 13 of the TRIPS Agreement.
- The “*three-step test*”:
  - (1) "certain special cases";
  - (2) "which do not conflict with normal exploitation of the work"
  - (3) "do not unreasonably prejudice the legitimate interests of the right holder"

# The Fair Use Defense

- The example of U.S. Trade office's objection to the importation of the “American” fair-use doctrine.
- The Example of U.S Trade Office’s approach in the context of Foreign Sound recordings’ public performance.
- ==→ Reverse comparative law exposes contradictions between domestic and foreign policy.

## **(b) The Remedy of Injunction for Copyright Infringement**

Another novel element of the Israel Copyright Act:

**Section 53 -: Courts may refrain from issuing an injunction against a copyright infringement whenever "there are reasons that justify not doing so"**

# Injunction for Copyright Infringement

Sources of inspiration:

1. American law's balance of hardship (*New York Times Co. v. Tasini* and *Campbell v. Acuff-Rose Music, Inc.*).
2. The commonwealth and Britain's public interest defense (*Ashdown v. Telegraph Group Ltd.*).

# Injunction for Copyright Infringement

- Reverse comparative law may reveal:
  - Restraints of traditional common law
  - The need for an additional layer of balancing between competing values and interests

# **(c) The Author's Moral Rights**

Section 50 of the Israeli Copyright Act 2007:

**Acknowledges a safe-harbor from legal liability for an infringement of the author's moral right of integrity when the action is *"reasonable in the circumstances of the case"*.**

# The Author's Moral Rights

Sources of inspiration:

1. Section 195AS(1) of the Australian Copyright Act – a safe-harbor of reasonableness regarding both the right of integrity and the right of attribution.
2. French “*abuse of right*” doctrine
3. The German approach
4. American Law’s narrow application of moral rights (if at all..).

# The Author's Moral Rights

Reverse comparative law implications:

- A need to soften the absolutist image of moral rights as captured by traditional European countries.
- European Countries' reputation for a rigid conception of the author's moral right may be misleading – clarifications may help.

**Thank You**