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Fair Use in Israeli Copyright Law

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Copyright Act 2007

- Replaced the British 1911 Act that was still in force
- Based on British tradition, with influence from other English-speaking countries, notably the US Fair Use doctrine
- Negotiated for many years; reflects a wide agreement between major interest groups
- Includes many “standards” (as opposed to rules) that invite wide judicial discretion, including Fair Use.
- “Fair Use” was adopted from US law almost literally.

Text comparison: possible purposes of the permitted use

UK 1911	US 1976	Israel 2007
<p>2(1) ... (i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary</p>	<p>107 ...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.</p> <p>The terms “including” and “such as” are illustrative and not limitative.</p>	<p>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.</p>



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Compromise during the legislation process: two words that made the difference - “such as”

Debate regarding the tension between certainty and flexibility.

Initial text in the government bill was “*inter alia*”. During the discussion, the term “such as” was accepted as a compromise.

Israeli law does not contain the *illustrative* interpretation rule, thus making “such as” somewhat *limitative*.

Text comparison: Fairness analysis

US	Israel
<p>... factors to be considered shall include—</p> <ul style="list-style-type: none"> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 	<p>...factors to be considered shall include, inter alia, all of the following:</p> <ul style="list-style-type: none"> (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; (4) The impact of the use on the value of the work and its potential market. <p>(c) The Minister may make regulations prescribing conditions under which a use shall be deemed a fair use.</p>

- The 2007 Act made the US considerations a formal part of the law. US jurisprudence is thus indirectly adopted into Israeli law.
- Regulations could give better and more precise answers to certain uses, in two typical situations:
 - Codify the practice in certain industries
 - Codify court rulings or intervene when courts did not strike the right balance

User's Rights?

UK 1911	US 1976	Israel 2007
<p>2(1) ... Provided that the following acts <u>shall not constitute an infringement</u> of copyright:</p> <p>(i) Any fair dealing with any work...</p>	<p>107 ...the fair use of a copyrighted work... <u>is not an infringement</u> of copyright.</p> <p>The terms “including” and “such as” are illustrative and not limitative.</p>	<p>18. Notwithstanding the provisions of section 11, the doing of the uses specified in sections 19 to 30 <u>is permitted</u> subject to the conditions specified respectively...</p> <p>19(a) Fair use of a work <u>is permitted</u>...</p>

User's Rights

- Defense from liability v. User's Rights
- No clear ruling of the Israeli Supreme Court yet; majority of the judges thinks that Fair Use reflects User's Rights.
- Implication: can there be liability for contribution if the alleged "direct" infringer is protected by Fair Use?



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“Premier League” case

- Website offering links to live streaming of football games – held not fair.
- Held: Fair use is intended to allow certain uses where the public interest in the use prevails over the public interest in incentivizing the creator.
- We argued that the use in dispute was not for the enlisted purposes nor for purposes “such as” those. No decision on that point.

“The Marker” case

- Website of a leading newspaper publisher quoted and published excerpts from competing newspapers.
- Held – not Fair Use. The length of quotations was over 30% of original items, the copying done by a commercial competitor.

Academic Uses

- Hebrew University (1) – Supreme Court held: there is public interest and justification in allowing universities to make “fair use” of works
- Hebrew University (2) – settlement before the district court, regarding academic use: using up to 20% of a book for the purpose of “course-packs” or e-reserves, is Fair Use.

“Google Books” case

- A class action was dismissed for procedural reasons.
- Supreme Court noted during oral hearing that the project is beneficial.

Effect of Fair Use on the Market

- Effect of Fair Use includes the lawsuits that are not submitted.
- Fair Use de-incentivizes abuse of the copyright regime.
- Users' self-restraint before using a work makes the market more responsible.
- Example: Universities took a self-restraining decision over what is "fair" in the form of "code of best practices". Publishers filed a lawsuit but reached a settlement that adopted the universities' code .



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Thank you!