

Facts: The Respondent and Cross-Petitioner (hereinafter: *Charlton*) acquired the exclusive right to broadcast the summer 2006 FIFA World Cup in the State of Israel. The Petitioner and Cross-Respondent (hereinafter: *Telran*) sold decryption cards (hereinafter: *cards*) that enabled the decryption of encrypted satellite broadcasts of foreign broadcast networks. The foreign networks broadcasted the World Cup games by encrypted satellite broadcast. The broadcasts could be received and watched in Israel only by means of the cards. The Tel Aviv District Court held that Telran had infringed (indirectly) Charlton's copyright, and ordered that it pay Charlton damages in the amount of NIS 1,250,000. It should be noted that the Copyright Act of 1911 (hereinafter: the *Act* or the *Copyright Act*) is the relevant normative framework in this matter, inasmuch as the alleged breaches occurred prior to the entry into force of the Copyright Law, 5768-2007 (hereinafter: the *Law*).

Held: The Supreme Court (*per* Z. Zylbertal, J., E. Rubenstein and Y. Amit, JJ. concurring) granted the appeal, in part, for the following reasons:

Intellectual property rights in general, and copyright in particular, are the result of a complex balancing of the various interests in the background of the legal regime established by the legislature. Therefore, the scope of copyright extends only to the boundaries delineated by law.

The Act distinguishes between a direct infringement (sec. 2 (1) of the Act) and an indirect infringement (sec. 2 (2) of the Act).

“Direct” Infringement: A copyright grants the owner of the right exclusivity in regard to certain acts in regard to the work. Performing one of those act reserved to the owner of the copyright by the Act, without its permission, constitutes a “direct” infringement of the right. Naturally, the Act did not treat of use of a work by means of broadcasting, and therefore, in order to adapt the Act to a changing technological reality, the term “public performance” in the Act has been interpreted to include broadcasting. In accordance with the case law, a broadcast requires the transmission of sounds or images, or their combination, from one instrument that sends the sounds or images. To another instrument that receives and plays or presents the sounds and images to the public. Inasmuch as the card sold by Telran does not “transmit” or “distribute” the World Cup broadcasts – but,

as noted, merely enables the decrypting of signals broadcasted by another body – the distribution of the card does not fall within the definition of a broadcast or a secondary transmission. Therefore, Telran did not perform an act reserved to the copyright owner – it did not broadcast the World Cup games (but only provided the cards that make it possible to watch them). Therefore, its conduct did not fall within the ambit of sec. 2 (1), and Telran cannot be held to have “directly” infringed the copyright of Charlton.

“Indirect” Infringement: An indirect infringement is the knowing performance of a prohibited act with an infringing copy. In order to establish that there has been an indirect infringement, there must be a direct infringement by a third-party. Three conditions must be met in order to show an indirect infringement: the existence of an infringing copy, the performance of one of the acts enumerated in the section, and that the indirectly infringing party knew, or should have known that the rights to the work belonged to another. In the instant case, the act performed by Telran was the providing of a means for “circumventing” a “technological fence”. Such an act does not constitute indirect infringement, inasmuch as no exclusive right of Charlton was infringed by a third-party (the foreign broadcasters did not unlawfully broadcast the games to Israel, and as for the viewers, the act of viewing protected content is not one of the acts reserved to the copyright owner under the Act).

“Circumventing” Technological Measures: No legislative provision has been adopted in Israel that would make the evasion of technological safeguards an infringement of the rights of the owner of a copyright, both under the old Act or under the new Law. As stated, the fundamental principle is that anything that the law has not included within the scope of copyright is not included among the protected rights. Therefore, the argument that the very selling of cards enabling the circumvention of technological measures constitutes an indirect infringement of Charlton’s copyright cannot be accepted.

“Contributory” Infringement: The Supreme Court has recognized that an act contributing to an infringement can impose liability for infringement upon the “contributor”. The Court’s judgment in CA 5977/07 in the matter of *The Hebrew University* established the following conditions for such a contributory breach: a breach by a third-party; actual

concrete knowledge of the breach; and a significant, substantial contribution to its perpetration. It was further stated that “the mere existence of protection does not negate the existence of the breach. Protection prevents the user from bearing responsibility, but does not eradicate the breach.” In addition, it was stated *obiter dicta* in the *Premier League* case: “Where a ‘permitted’ use is concerned, there is, indeed, no infringement according to the Law. But that does not suffice to eradicate the fact that, in substance, there is an infringement of the copyright, even if such infringement be permitted for various reasons. This is the case primarily where the combined effect of many protected infringements causes significant harm to the copyright holder. As has already been held, in such circumstances there is nothing to prevent us from recognizing the contributory responsibility of the intermediary that caused the infringement.” The judgment further explains that such permitted uses constitute defenses that the Act chose to grant to users, but do not grant a positive right of infringement.

In this regard, Zylbertal, J. added the additional observation that, in his view, the correct interpretation of “permitted use” is that it concerns a substantive finding rather than a technical defense. A “permitted use” is precisely what it says, i.e., permitted use that, therefore, does not constitute a “protected” breach, and indeed, is not a breach at all. Where there is no breach, there is nothing to which one might “contribute”. Thus, when end users do something that is permissible, the intermediary “contributes” to a permitted act, and cannot be said to breach a copyright holder’s rights that have not been infringed. Zylbertal, J. added that even were we to take the view that permitted use creates a defense, the contributory “infringer” would be protected *a fortiori* in cases of a “protected infringement”. In any case, he emphasized that his approach would not entirely abolish the contributory-infringement doctrine. That doctrine continues to operate in Israeli law, and it is right and proper that it do so in appropriate cases.

In the instant case, having found that there was no direct infringement, there is no need to examine whether the other conditions of a contributory infringement were met, and it must be held that Telran did not commit a “contributory infringement” of Charlton’s rights.

Therefore, selling a card that serves as a means for technological “circumvention” does not constitute an “infringement” by Telran of Charlton’s copyright under the Copyright Act.

However, it is possible that by those actions, Telran enriched itself at Charlton’s expense. This issue was not considered by the District Court (which found an infringement of copyright, and therefore, was not required to address the head of unjust enrichment), nor was it addressed in the instant case. Therefore, the case was remanded to the District Court so that it might rule upon the cause of action of unjust enrichment, as well as the issue of damages in regard to that cause of action.

E. Rubenstein, J. concurred, but added that while the result was legally correct, it was not the desirable result. Its import is that the sinner is rewarded. Rubenstein, J. called upon the legislature, reminding it that it is the legislature’s job to prevent injustice in a changing world in which technological advances are a daily occurrence. He further referred, *inter alia*, to Jewish law in the matter.

Amit, J. concurred that the result was legally correct, but it raised a sense of discomfort. He conjectured, *obiter dicta*, that it might be possible to include the sale of decryption cards within the definition of the Act by construing “perform” and “public performance” as including making the work available to the public.

Judgment

Justice Z. Zylbertal:

1. A company sold its customers a card that enables the decryption of encrypted satellite transmissions broadcast by foreign networks. The foreign networks transmitted encrypted television broadcasts for which another company holds exclusive copyright in Israel. Did the seller of the decryption cards infringe the copyright of the Israeli copyright holder? That is the primary question before this Court in the appeal and cross-appeal of the judgment of the Tel Aviv District Court from May 19, 2011 (*per* Deputy President D. Pilpel) in CA 1094/11

(hereinafter: the *Judgment*), which held that the Petitioner and Cross-Respondent infringed the copyright of the Respondent and Cross-Petitioner.

Background

2. In the summer of 2006, the 18th World Cup football tournament was held in Germany (hereinafter: the *Mondial*). The tournament was organized by Formal Respondent 4, the Fédération Internationale de Football Association (hereinafter: *FIFA*). FIFA owns the international broadcasting rights to the Mondial. The Respondent and Cross-Petitioner Charlton Ltd. (hereinafter: *Charlton*) purchased the exclusive rights to broadcast the Mondial in the territory of the State of Israel. As stated in the complaint, Charlton discovered that a company named Tube Ltd. (hereinafter: *Tube*) was publically broadcasting the Mondial games. In response to Charlton's enquiry, Tube explained that it had purchased a subscription to view the Mondial on a South African network called MNET (hereinafter: MNET) via satellite. The subscription was purchased by means of the Petitioner and Cross-Respondent Telran Communications (1968) Ltd. (hereinafter: *Telran*) – a private company registered in Israel, which, *inter alia*, imports, markets and sells communications media – that provided Tube an encoded card that enabled the decryption and viewing of MNET broadcasts. According to Charlton, it discovered that Telran sold and distributed encoded cards (hereinafter: *the cards*) that made it possible to decrypt encrypted satellite transmissions of foreign broadcasters, among them MNET and another satellite network, ART that (apparently) broadcasts from Jordan (hereinafter: ART, and all together: *the foreign networks*). The foreign networks transmitted the Mondial games by means of encrypted satellite broadcasts that could be viewed in Israel only by means of the cards. In light of these findings, Charlton brought suit in the District Court.

3. In its complaint, Charlton claimed that the use of the cards is prohibited in Israel, and that their sale constitutes an infringement of its copyright in regard to broadcasts of the Mondial games in Israel, which are protected broadcasts under the Copyright Act 1911 (hereinafter: the *old Act* or the *Act* or the *Copyright Act*). It was further claimed that Telran had sold at least 7,500 cards at a price of NIS 500 apiece. As a result, Telran and Formal Respondents 1-3, who are Telran directors and stockholders, were unjustly enriched in a total amount of NIS 3,750,000. It was added that in the framework of Charlton's enquiries into the activities of Telran and their

scope, a meeting was held in Charlton's offices on May 12, 2006 between one of Charlton's directors, Mr. Alex Weinstein (hereinafter: *Weinstein*) and a representative of Telran, Mr. Shai Aslan (hereinafter: *Aslan*), who is the son of Formal Respondent 3. Weinstein recorded the conversation. A transcription of the conversation (hereinafter: the *transcript*) was appended to Weinstein's affidavit (Appendix C1 to Exhibit P/1). According to Charlton, Aslan admitted to Telran's infringing conduct and to the scope of the profits garnered as a result of that infringing conduct.

In its brief, Charlton claimed a direct infringement of its copyright, or alternatively, a contributory infringement of its copyright (we will address the meaning of these terms, as well as the term "indirect infringement", below). *Direct Infringement*: It is claimed that the very distribution of the cards that enable decoding of the satellite signals of the foreign networks constitutes a direct infringement of the copyright, under sec. 2 (2) of the old Act. It was emphasized that the foreign networks that did not have broadcasting rights in Israel and that did not distribute cards for viewing their transmissions (as Telran failed to produce any agreement with any of the relevant networks), encrypted their transmissions such that they could not be viewed in Israel, which prevented infringement of Charlton's copyright. Telran distributed the encrypted cards, and thereby infringed Charlton's copyright. *Contributory Infringement*: It is claimed that this is recognized in Israeli law, which has established that providing infrastructure for perpetrating an infringement creates liability, even if the infringement itself is committed by others. It was emphasized that it was Telran that facilitated the infringing conduct – viewing of "blocked" channels that cannot be viewed in Israel without the cards – by supplying the cards. We would note that, in its brief, Charlton changed the basis of its calculation of damages, and claimed that Telran sold 5,000 cards at a profit of NIS 500 per card, for a total of NIS 2,500,000.

4. In response, Telran argued that the cards were purchased from the official representatives of the foreign networks, which broadcast lawfully, and that we are concerned with a purely technological device that serves solely for the reception of broadcasts. Therefore, it argued that there was no infringement of copyright. It was further emphasized that Telran has no control over the content of the channels that can be received by means of the cards. Telran claims that the cards were sold and distributed since 2003, without reference to the Mondial broadcasts, such that there was no connection between the sale of the cards and the Mondial. In addition, several

preliminary arguments were advanced: It was argued that there was a lack of privity and a failure to state a cause of action, in that Charlton did not produce the full chain of agreements that would show how it obtained the copyright from the original copyright owner – FIFA; laches – in that the action was instituted four years after Telran began marketing, and a year and a half after selling the subscription to Tube; as well as that the suit was not brought in good faith, and was vexatious – as the recording of the conversation between Aslan and Weinstein was the product of a misrepresentation of its purpose as a business meeting – and that the sole purpose of the suit is to extort monies from Telran.

In its brief, Telran claimed that it was not proved that the Mondial games were broadcast over the foreign networks, that it was not proved that Charlton owned the Israeli broadcasting rights, and that in any case, it did not hold exclusive rights for broadcasts in Arabic (it would appear from the recorded conversation with Aslan that the buyers of the cards were primarily Arabic speakers). It was further claimed that the cards only made it possible to view the broadcasts in Arabic, and that, as stated, Charlton did not hold exclusive rights over such broadcasts. It was emphasized that the contract under which Charlton purportedly acquired the Israeli broadcasting rights distinguished among Hebrew, English and Arabic, inasmuch as “FIFA knew” that representatives of the foreign networks were selling the cards such that it was possible to receive their broadcasts in Israel, and Charlton was intentionally not granted full broadcasting rights in Arabic. It was further claimed that, in fact, only 120 cards were sold, over the course of several years, and with no connection to the Mondial broadcasts, and that in 2006 – the year of the Mondial games in question – only 22 cards were sold. It was further emphasized that Charlton’s calculation was based upon the conversation between Weinstein and Aslan, but what was stated in that conversation was that there was a market *potential* of 5,000 cards, and not that such a number was actually sold.

5. To complete the picture, it should be noted that on May 25, 2008, the Copyright Law, 5768-2007 (hereinafter: the *new Law* or the *Law*) entered into force, replacing the Copyright Act. Nevertheless, the old Copyright Act is the relevant normative framework in the instant case, as the claimed infringements occurred prior to the entry into force of the new Law.

The Judgment of the Trial Court

6. These are the questions that were before the District Court: First, as a claim *in limine*, the questions of laches or a lack of good faith in bringing suit; second, do the Mondial broadcasts constitute a work protected by copyright; third, does that copyright belong to Charlton; fourth, did Telran and its owners (Formal Respondents 1-3), or any of them, infringe Charlton's copyright; fifth, can Telran rely upon the defenses established under the old Act; sixth, is Telran liable under the laws of unjust enrichment; seventh, what is the extent of damages.

We will now proceed to examine the lower court's holdings on each of these questions.

7. (A) In regard to the *in limine* claim of laches and an absence of good faith, the trial court held that the recording of Telran's representative did not amount to a lack of good faith that would constitute an abuse of process or of the right of access to the courts. As for laches, the court found that the complaint had been filed about half a year after Charlton became aware of the sale of the cards by Telran, and held that such a period did not constitute laches that would justify dismissing the suit *in limine*.

(B) The trial court held that the Mondial broadcasts were, indeed, a protected work under copyright law. It held that sec. 1 of the Act establishes that copyright may apply to a "dramatic work", and that in the *Tele Event* case (CFH 6407/01 *Arutzei Zahav & Co. Ltd. v. Tele Event Ltd.*, 58 (6) IsrSC 6 (2004), hereinafter: the *Tele Event* case), this Court explicitly held that a live broadcast of a sporting event constitutes such a work.

(C) It was held that Charlton owned the copyright over the broadcasting of the Mondial games in Israel. The court reviewed the entire chain of the transfer of rights from the original copyright holder – FIFA – to Charlton. What is important in the instant case is Telran's claim that Charlton did not adequately prove the transfer of rights. That claim was rejected by the trial court. The court held that although the original agreements among the various parties along the chain were not produced, but only copies thereof, there was no evidentiary basis whatsoever to ground a suspicion as to the veracity of the photocopies that were submitted, and that those copies, as well as additional evidence submitted (primarily letters from office holders in the various companies and testimony of representatives of Charlton), showed that Charlton held the copyright to the broadcasting of the Mondial in Israel on the relevant dates.

(D) The question of the infringement of the right by Telran and its owners was subdivided into a number of questions. First, did the rights purchased by Charlton include Arabic broadcasts in the territory of the State of Israel; second, did the very distribution of the cards constitute an infringement as defined by the Act; third, who perpetrated the infringement.

(1) As for the language question, the agreement between ISMM Investment AG (hereinafter: ISMM), which was the owner of the rights by virtue of a chain of agreements, and which is the relevant agreement for the instant question (hereinafter: *the Agreement*) delineated Charlton's rights by means of two elements – geography and language. The Definitions paragraph of the Agreement established that Charlton held exclusive rights in the geographic area (Licensed Territory) of the State of Israel, and non-exclusive rights in the areas of Judea, Samaria and Gaza (hereinafter: *the Area*):

"Licensed Territory" means Israel on an exclusive basis and Palestine (Occupied Territory) on a non-exclusive basis.

As for the language of the broadcasts, the Agreement established that Charlton had exclusive Hebrew broadcast rights in Israel and the Area; exclusive English broadcast rights in Israel, and non-exclusive English broadcast rights in the Area; and Arabic broadcast rights in Israel for cable television, terrestrial television and satellite television, provided that the satellite signals were fully encrypted as set forth elsewhere in the Agreement:

"Licensed Language" means:

- (a) Hebrew in Israel and Palestine on an exclusive basis.
- (b) English in Israel on an exclusive basis and in Palestine on a non-exclusive basis.
- (c) Arabic in Israel only for Cable Television, Terrestrial Television and Satellite Television provided that the signal is fully encrypted as contemplated by the agreement.

The District Court held that the fact that the Agreement did not grant Charlton exclusive rights in Israel in regard to Arabic broadcasts did not negate the territorial exclusivity that it was granted in the territory of the State of Israel. In other words, Charlton also held exclusive Arabic

broadcast rights to the extent that the broadcasts were made within the territory of the State of Israel.

(2) The second issue before the court in this regard was whether distributing and selling the cards constituted an infringement of Charlton's rights. The court held that Charlton held the exclusive right to broadcast the Mondial, and the transmission of broadcasts for commercial purposes also constituted an infringement under sec. 2 (2) of the Act. The court ruled that, in accordance with the judgment in the *Tele Event* case, the prohibition upon infringing the copyright of the owner of a right to broadcast also applies to the transmission of the broadcasts of foreign networks. The court emphasized that the *Tele Event* case held that, as opposed to a private individual who acquires a "dish" for receiving satellite broadcasts, a commercial company that transmits broadcasts to its subscribers is involved in prohibited "commercial distribution". The court explained that Telran sold cards, for a commercial purpose, which made it possible to decrypt the encrypted transmissions of the foreign networks, and that this was the only means by which such transmissions could be received. It was held that Telran knew that the Mondial games were broadcasted over the foreign networks, knew that the cards that it sold made it possible to view those games, and aimed "sale promotions" specifically at the period of the Mondial. It also knew that Charlton held the broadcasting rights to the Mondial. In view of the above, the trial court concluded that Telran had actively violated Charlton's rights.

(3) The final issue addressed by the trial court was that of the identity of the infringing parties. Based upon the above, the court determined that Telran had, indeed, infringed Charlton's copyright. However, in regard to Formal Respondents 1-3 (the owners of Telran), the court held that Charlton failed to meet the evidentiary burden required to show that any of them fulfilled the requisite elements required to attribute liability for an infringement of its rights. The court emphasized that establishing that a company committed a tort does not necessarily require a conclusion that the company's organs or office holders bear personal liability, and that the court was under the impression that those defendants were sued solely on the basis of their positions as organs of Telran. This issue was not raised in Charlton's notice of appeal.

(E) Telran argued that it enjoyed various legal defenses, *viz.*, good faith in accordance with sec. 8 of the Act, and market overt under sec. 34 of the Sales Law, 5728-1968 (hereinafter:

the *Sales Law*). The trial court ruled that Telran was not entitled to either of those defenses, as shall be explained.

(1) The Good Faith Defense: Section 8 of the Act establishes a defense that exempts the infringer from paying damages to the party whose rights were infringed if he prove that “he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work”. Telran argued that it did not know that copyright applied to the cards it sold and/or to the broadcasts that could be received through them, and that, in any event, it could not have known what programs, if any, would be broadcast by the foreign networks. The trial court held that, in light of the above findings, according to which Telran knew that Charlton held exclusive rights, and that the foreign networks were broadcasting the Mondial games, the claim of good faith must be denied.

(2) The Market Overt Defense: Section 34 of the Sales Law establishes that a buyer’s ownership of movable property sold by a person who carries on the sale of property of the kind of the object sold, when the sale was made in the ordinary course of his business, is free of any third-party right in the object sold, even if the seller is not entitled to transfer it, provided that the buyer bought it in good faith. The court held that Telran could not avail itself of this defense. Telran, the court emphasized, had not proven that it had purchased the cards from representatives of the foreign networks. Formal Respondent 3 testified before the court that he did not approach the official Israeli representatives of the foreign networks, and no documents were submitted to the court that showed a contractual relationship with any of the foreign networks or the purchase of cards from them. The court added that in CC (TA) 2469/02 *Hasbro International, Inc. v Li-Dan Agencies Ltd.* (April 8, 2008), it was held that market overt does not apply to an infringer of copyright, as in the contest between the Sales Law and the Copyright Law, the preferred and exclusive purpose favors the owner of the property rights. Applying the provisions of the Sales Law to the Copyright Law would eviscerate the Copyright Law.

(F) As for the cause of action for unjust enrichment, the court held that in light of the *Tele Event* rule, once it has been established that relief should be granted under the Copyright Law, there is no further need to address the question of relief under the head of unjust

enrichment. Inasmuch as it had been established that Telran had infringed Charlton's copyright, the trial court saw no need to rule upon the cause of action.

(G) The Amount of Damages – Pursuant to a court order, on July 30, 2009 and August 20, 2009, Telran deposited invoices related to the sale of the cards in the court's safe. Those invoices could have shed light on the scope of the card sales. On December 28, 2010, Judge H. Brenner ordered that Charlton be permitted to examine the invoices, after the identities of the customers had been blackened out. Charlton did not examine the invoices, explaining that the order granting permission to do so was issued after the hearing of evidence in the case had concluded, and that under those circumstances, the court order was no longer operative. As earlier noted, Charlton based its calculation of damages on the transcript. Telran argued that Charlton had not submitted any evidence in support of the method for its calculation; that the invoices that were handed over to Charlton were returned within a few hours, with a message that it had no intention of examining them; and that Charlton had made no attempt to examine the invoices over the course of a year and a half, such that its claim that it did not have sufficient time prior to the conclusion of the evidentiary stage of the trial could not be accepted. On point, Telran argued that it had sold only 120 cards over a period of several years, without any connection to the Mondial, and that from the beginning of 2006 until August of that year, it had sold only 19 cards.

The court ruled that the argument that the invoices were not evidence in the trial was unacceptable, as Charlton had sat on its hands for a year and a half, and took no steps to enquire whether or not the invoices had been deposited in accordance with the court's order. However, the court ruled that the invoices could not be relied upon in determining the scope of card sales, inasmuch as, in its brief, Telran claimed to have sold 120 cards, whereas Aslan attested to the purchasing of 250 cards in his affidavit. In his testimony, Aslan testified that 250 was an overstatement, and that after reviewing the invoices, they discovered that fewer than 100 cards were involved. Unfortunately, it was found that Aslan had signed his affidavit on November 29, 2009, that is, some four months after the invoices were deposited in the court's safe. In addition, in the recorded conversation, Aslan noted that 5000 cards were sold during the period of the Mondial. The court held that although, in the course of his testimony in court, Aslan stated that

he had exaggerated in order to impress Charlton's representative, in his affidavit he himself attests that he claimed that Telran had sold 5000 cards in the past.

The court ruled that the plaintiff must prove the damage it incurred and the factual data upon which to base the scope of compensation. However, the burden of proof in regard to the extent of damage is not uniform in all circumstances, and it must be adapted to the objective difficulty in bringing credible, precise evidence as to the extent of damage. It was noted that according to the case law, when the court faces difficulty in quantifying damages, it may make an estimate in order to respond to concrete cases. In light of that, and given the diametrically opposed versions in regard to the amount of damages, the court ruled that the damages must be estimated. Taking all the data into account, the court found that 2,500 cards had been sold. The court found that the amount paid to the foreign networks, as well as the sum stated by Aslan in the transcript, was NIS 500. Therefore, the total damages were set at NIS 1,250,000 (2,500 cards times NIS 500 per card). In light of that, Telran was ordered to pay NIS 1,250,000 in damages to Charlton. In addition, Charlton was awarded NIS 70,000 for attorneys' fees, and expenses as calculated by the registrar.

An appeal and cross-appeal were filed against the Judgment, upon which we are called to rule.

The Appeal and the Cross-Appeal

8. Telran bases its appeal on four primary footings: *The nature of the card* – regarding which Telran's primary argument is that the card is merely a technical device that is no different, in the matter before us, than any other device that enables the viewing of broadcasts, just like a television itself. *An absence of infringement* – the main argument here is that there was no direct infringement, inasmuch as "distribution" is, at most, an indirect infringement; that there was no indirect infringement, inasmuch as its actions did not meet the required conditions, and in particular, the absence of a direct infringement by a third party; and that there was no contributory infringement due to Telran's lack of knowledge, and due to the absence of a direct infringement. *Charlton's lack of copyright* – regarding which the argument is that Charlton did not have exclusive copyright in regard to Arabic broadcasts. And lastly, *quantification of damages* – where the main argument is that the scope of damage was not proved, and recourse

should not have been made to an estimate, and that the trial court did not distinguish between loss of profit (which is the damage) and loss of income (which is not). More specifically:

As for the card, it is asserted that it is nothing but a technical device, “raw” material, not unlike a television or antenna, whose sale is not an infringement. Telran, it was stressed, is not a “broadcaster” or “subsidiary transmitter”, like the satellite or cable companies, but a party that lawfully sold legitimate decrypting cards. Telran further explained that it cannot control broadcast content, or blackout screens. Telran did not encode the cards itself, but rather sold encoded cards to its customers. Telran asserted that holding it liable for infringing copyrights would place an absolutely unreasonable burden upon it and others like it, who would be deemed infringers every time that the foreign networks broadcast content over which some other actor holds exclusive Israeli copyright.

In regard to the infringement, it was argued, *first*, that there was no direct infringement. It was argued that the District Court found that the infringement perpetrated was the distributing of the card. Such an infringement, it was contended, constitutes an indirect infringement under sec. 2 (2) of the Act. Telran emphasized in this regard that it did not perform any act of direct infringement, in that it did not do anything for which the exclusive right was granted by law to the copyright holder, as the act requires. *Second*, it was argued that there was also no indirect infringement, inasmuch as an indirect infringement requires the existence of an “infringing copy” of the protected work, which does not exist in the instant case. Additionally, another condition that is not met is the existence of an “infringing third party”, as neither the foreign networks, nor the viewers, or any other party, infringed Charlton’s rights. In other words, in order for there to be an indirect infringement, there must be a direct infringement, which is not the case in this matter. *Third*, it was argued that Charlton had not raised the issue of contributory infringement in the proceedings before the District Court, and that raising the issue before this Court constitutes an impermissible introduction of a new issue on appeal. On point, it was argued that a contributory infringement requires some active, direct infringement, which was, as stated, not committed. Telran emphasized that supplying a technical device that enables viewing protected content does not meet the requirements of the legal definition of infringement. It was further contended that an additional condition for contributory infringement is the existence of actual knowledge of the infringing conduct, which was also not present, in that the cards were

sold before the Mondial games and unrelated to them. Another condition that was not met was that of a real, significant contribution to the infringement, in that Telran sold cards in connection with the satellite broadcasts of the foreign networks that broadcast lawfully and were entitled to broadcast, and thus Telran did not contribute in any way to the receiving of Charlton's broadcasts.

In regard to the broadcast language, it was contended that the Agreement made a clear distinction between English and Hebrew as opposed to Arabic. It was asserted that holding that geographic incidence "outweighs" language incidence is illogical, inasmuch as once absolute geographic incidence is established, there is no further reason to address the issue of the broadcast language. Nevertheless, the Agreement chose to address it, and with reason. Therefore, the conclusion of the District Court was in error. Secondly, it was argued that the language provision constitutes an additional element to the territory provision. In other words, there is an exclusive right within the territory, but only in regard to those languages designated in the provision. It was emphasized that an interpretation that denies a right must be made in strict accordance with the language of the license.

As for the method for calculating damages, *first*, it was argued that the amount of NIS 500 represented expected income, rather than expected profit. The harm to Charlton was of expected loss of profits, such that the calculation is not consistent with the District Court's ruling, and Charlton did not meet the burden of proof in regard to the extent of profits. Telran argues that, for this reason alone, the appeal should be granted. It adds that the profits of the foreign networks, upon which the trial court relied, did not exceed NIS 300 per card. *Second*, Telran contended that Aslan's statement in regard to the sale of 5,000 cards was taken out of context. It argued that Aslan presented this exaggerated figure in order to make an impression, and that no actual finding could be grounded upon it. Furthermore, there was real data in regard to the sale of the cards – Telran's invoices that were deposited in the court's safe. In this regard, it argued that the trial court's ruling that the invoices were admissible as evidence was not consistent with its ruling that the number of cards sold should be estimated on the basis of this evidence and on the basis of Aslan's statement. Telran emphasized that the cards sold were, for the most part, not sold for viewing the Mondial, but rather for viewing a broad package of channels. It was further argued in this regard that in speaking of 5,000 cards, Aslan was referring

to the possible market potential for the cards, and not to the number of cards actually sold by Telran. Lastly, it was argued that in the instant case there were clear, empirical data that were grounded in admissible evidence (Telran's invoices) in regard to the quantity of cards sold. Therefore, this case does not fall within the ambit of the exceptions in which damages are to be calculated by an estimate.

9. In its response, Charlton agreed with the judgment of the trial court, except in regard to the extent of damages. Charlton's primary argument is that distributing and selling the cards constitute an infringement of its rights. Telran's actions, it argued, constitute both a direct infringement and a contributory infringement. As for the extent of damages, it argued that despite the unambiguous data in regard to the harm incurred by Charlton, the District Court showed unjustifiable consideration for Telran. We will present the arguments in order.

In regard to the card, it is argued that the District Court made a factual finding that Telran failed to prove its claim that it purchased the cards from representatives of the foreign networks or obtained their permission to transmit their broadcasts in Israel, let alone that those broadcasts were encrypted by or with the permission of the representatives of the foreign networks. Additionally, no evidence whatsoever was brought to show that marketing the cards was permitted. The card, it was argued, was not merely a "technical" device, but rather a device intended to enable prohibited broadcasting by "breaking" the encryption that prevented viewing without the card. It was emphasized that Aslan noted in the transcript that it was Telran that burned the encoding on the cards. That being the case, we are not concerned with some "inert" object like an antenna, but rather with a device actively encoded to permit the viewing of transmissions that the broadcaster sought to prevent from being received in Israel.

In regard to its rights to the Mondial broadcasts, Charlton argued that the Mondial broadcasts constitute a copyright-protected work, and that it had proved the chain of transfer of rights that led the court to make a finding of fact that it held the Israeli rights. It was argued that those rights were, first and foremost, exclusive territorial rights, such that any broadcast of the Mondial games in Israel was prohibited. It added that the rights holder on behalf of FIFA insisted that the broadcasts of the games be encrypted by every broadcaster of the games in order to enforce the territorial exclusivity.

In regard to the nature of the infringement, it was argued that the infringement was direct and/or indirect and/or contributory. *Direct Infringement:* As in its argument before the District Court, Charlton asserted that the very distribution of the cards that enabled the decryption of the satellite signals of the foreign networks constituted a direct infringement of its copyright. It argued that the entire purpose of encryption was to prevent prohibited broadcasts, and that the sale and distribution of the cards that circumvented that encryption constituted a direct infringement, or at the very least, an indirect infringement. *Contributory Infringement:* In this matter, as well, Charlton reiterated its argument that contributory infringement has been recognized in Israeli law, and that Telran, knowing that Charlton held the copyright, enabled the “circumventing” of that right by selling and distributing the cards, which made a real contribution to (and, actually caused) the infringement. It emphasized that Telran was well aware that Charlton held the rights to broadcast the Mondial, and that Telran intensified its sales, and even embarked upon a marketing campaign for the Mondial period.

In its cross-appeal, and also as part of its response to Telran’s appeal, Charlton raised various arguments in regard to the extent of damages. *First*, it argued that its losses should be calculated on the basis of the profit garnered by the infringer, i.e., Telran. That profit, it was claimed, was incorrectly calculated by the District Court, inasmuch as 5,000 cards were sold for the Mondial, as is shown by the transcript. Moreover, it is argued that according to Aslan’s affidavit, the amount received for each card was NIS 650, and in his cross examination, Aslan put the amount at NIS 700. Since Telran did not prove the price it paid for each card, the entire amount should be treated as profit. At the very least, it was argued, Telran should be held to have sold 5,000 cards at a price of NIS 500. *Second*, in regard to the invoices deposited in the court’s safe, Charlton argued that they were made available only after the conclusion of the evidentiary stage of the trial, and therefore the discovery order was of no operative effect, and in any event, they were not submitted in evidence in the case, and should not have been considered by the court. Charlton emphasized that Aslan admitted under cross examination that Telran’s accounting department knew how many cards were sold during the period of the Mondial, but that it was Telran that refrained from providing that information. It should, therefore, be held that the absence of a document that was in its possession shows that the document would have been detrimental to Telran. *Third*, Charlton argued that interest and linkage should have been calculated from the date of the infringement – i.e., the date of the broadcasts – rather than the

date of the Judgment. *Fourth*, Charlton claimed that the award for legal fees was low – amounting to 5 percent of the judgment – and does not realistically reflect the legal fees.

Discussion and Decision

Did Charlton hold the Exclusive Right to Arabic Language Broadcasts in the Territory of the State of Israel?

10. The primary questions that must be decided in this framework concern copyright laws and their ramifications for this case. Before addressing that matter, we should dispense with Telran's argument that the Agreement did not grant Charlton the exclusive right to broadcast the Mondial in Arabic within the territory of the State of Israel. To the extent that broadcasting rights were not exclusively Charlton's, it would seem that Telran did not infringe Charlton's copyright. We will now examine this matter, in which I see no reason not to adopt the finding that Charlton proved the "chain of agreements" that originated with the original copyright holder (FIFA).

11. As stated, the Agreement between Charlton and ISMM defined Charlton's rights by means of two elements – geographic area and language. The Definitions section established that Charlton enjoyed exclusive broadcasting rights in the geographic area of the State of Israel:

"Licensed Territory" means Israel on an exclusive basis and Palestine (Occupied Territory) on a non-exclusive basis"

In regard to the Arabic language, the Definitions section stated:

"Licensed Language" means:

...

Arabic in Israel only for Cable Television, Terrestrial Television and Satellite Television provided that the signal is fully encrypted as contemplated by the agreement.

Reading the two definitions (the language provision and the geographical incidence provision) indeed raises a question as to whether the language provision restricts the exclusivity granted under the geographical incidence provision. The trial court held that the exclusivity granted in the geographical incidence provision takes precedence, and that the language provision

does not derogate therefrom. The court addressed, *inter alia*, the logic of the matter. No franchisee, including Charlton, that purchases broadcasting rights would invest substantial resources unless it held an exclusive license, for otherwise what purpose would be served by purchasing the license. The trial court also deemed this to be consistent with the language of the Agreement and the intention of the parties thereto.

12. Indeed, reading the language and geographical incidence provisions in the Definitions section divorced from the operative provisions of the Agreement raises the question whether the language provision is intended to detract from the exclusivity granted in the geographical incidence provision, as Telran asserts, or whether it is not intended to detract therefrom, as Charlton asserts. However, inserting the definitions into the operative provisions of the agreement shows that the language provision is not intended to derogate from the geographical exclusivity granted to Charlton. Thus, for example, sec. 2.1 (a) of the Agreement, which is similar in language and substance to the other operative provisions of the Agreement, establishes in regard to the right acquired by Charlton (with the above definitions in regard to the language and area of the license incorporated in square brackets):

"The exclusive license to make four (4) telecasts of the basic Feed and supplementary Feed (if any) in [Israel on an exclusive basis] in [Arabic in Israel only for Cable Television, Terrestrial Television and Satellite Television provided that the signal is fully encrypted as contemplated by the agreement] during that period"

The above clearly demonstrates that the language provision of the Definitions section was intended to clarify the modes of transmission that Charlton was permitted to use in broadcasting the games in Arabic in the geographical area over which it was granted exclusive broadcasting rights. It is not intended to limit or deny the geographical exclusivity, but rather to clarify contractually between Charlton and ISMM what broadcasting media were permitted to Charlton for its Arabic broadcasts (bearing in mind that other broadcasting media were permitted for Hebrew and English broadcasts). In other words, the Agreement states that Charlton, and only Charlton, has the right to broadcast the games in Israel, and further clarifies that Charlton's Arabic broadcasts are limited to cable television and satellite television broadcasts (provided that

the signal is encrypted), and terrestrial television. Therefore, Telran's arguments in this regard must be dismissed, and the conclusion of the District Court in regard to the interpretation of the agreement is affirmed.

Did Telran infringe the Copyright to the Mondial Broadcasts?

13. Intellectual property rights in general, and copyright in particular, are the result of a complex balancing of the various interests that form the background of the legal regime that the legislature chose to establish: the public interest in encouraging creativity, as well as access to it; the interest of the creator in monetary reward for his creation, as well as recognition and appreciation for it; the interest of future creators and various users in an appropriate "creative operating space", etc. (CA 513/89 *Interlego A/S v. Exin-Line Bros. S.A.*, 48 (4) IsrSC 133, 163-164 (1994); Explanatory Notes to the Copyright Law Bill, 5765-2005, *H.H. Government* 196). This requires the delicate, complex balancing of sometimes-conflicting public needs and worldviews. Therefore, copyright extends only as far as the limits defined by law. The legislature made a positive choice to include certain rights, and a positive choice to exclude others in the course of that balancing. Over-extending copyright comprises a serious potential for upsetting the balance established by the Act, as does restricting copyright. This fundamental understanding of copyright law should guide us in examining issues concerning the scope of copyright protection. We must further bear in mind that daily technological advances often present a complex challenge in identifying those limits and preserving that balance. This is all the more so when we are confronted with a "new" issue that we must address with an "old" tool – the Copyright Act, which was drafted over a hundred years ago in an entirely different technological reality. It is with this basic understanding that we embark upon the examination of whether Telran infringed Charlton's copyright.

"Direct Infringement"

14. A copyright grants the copyright holder the exclusive right to perform certain acts in regard to a work. These acts are set out in sec. 1 of the old Act (and in sec. 11 of the new Law). Performing any of those acts reserved by law to the copyright holder, without its permission, constitutes a "direct" infringement of the copyright, as provided in sec. 2 (1) of the Act. "Direct" infringement does not require a mental element of the infringer, but treats solely of the question

whether one of the acts listed as exclusive to the copyright holder was performed (CA 1007/10 *Cohen v. Medina*, para. 7 (Feb. 17, 2013), hereinafter: the *Cohen* case). According to Charlton, Telran directly infringed its copyright. We will now examine that claim.

15. Naturally, the old Act did not refer to the use of a work by means of broadcasting, and in order to adapt it to changing technological realities, the term “public performance” in the Act has been interpreted to include broadcasting (Tamir Afori, *The Copyright Law* 167 (2012) (Hebrew), hereinafter: *Tamir Afori*). It was held in the *Tele Event* case that the live television broadcasting of a tournament was, as a rule, reserved to the copyright holder (*ibid.*, at p. 22, and see: Guy Pesach, “Broadcasting Rights – Incarnations of the Soap Dispenser [Ruling on] A.S.I.R. and Its Influence on the Communications Market”, 10 *Hamishpat* 131 (2005) (Hebrew)). Therefore, broadcasting the Mondial games in Israel was a “direct” infringement of Charlton’s copyright. But what is “broadcasting”?

16. Section 1 of the Performers’ and Broadcasters’ Rights Law, 5744-1984, defines “broadcast” as follows:

Transmission or distribution to the public—by wire, wireless or any other means—of sounds and images or of a combination of sounds and images.

It should be noted that sec. 14 of the new law includes a similar, if somewhat narrower definition (see: Tony Greenman, *Copyright* 238 (2nd ed., 2008) (Hebrew) (hereinafter: *Greenman*)). For our purposes, this is of no practical significance. In CA 9138/09 *The Football Association Premier League Limited v. Anonymous* (May 13, 2012) (hereinafter: the *Premier League* case) it was held that “broadcast can be effected by various means, and broadcast is not contingent or limited, in substance, by the technological means for its *transmission*” (*ibid.*, para. 14, emphasis added). The important words in our context are “transmission or distribution”. In order for a broadcast to be made, there must be a transmission of sounds or images or their combination. In CA (TA) 149/94 *Israeli Actors’ Pension Fund v. Paltiel*, 5755 (3) IsrDC 151 (1995), the Tel Aviv District Court also addressed this matter, holding:

“Such transmission can be by technical, electronic or other means that science has developed or will develop, *as long as there be transmission* from one instrument,

from which the sounds or images are transmitted, to another instrument that receives them and plays or displays the images and the sounds to the public” (*ibid.*, emphasis added).

We must examine whether the card that Telran sold “transmits” or “distributes” the Mondial broadcasts. In examining this matter, we should bear in mind that “the Law intends, in general, to adapt itself to modern means of transmission, and not to exclude precisely those advanced technological means” (the *Premier League* case, para. 14).

17. The trial court held that the act performed by Telran was the commercial sale of cards that enabled the decryption of the encrypted broadcast. According to this holding, Telran did not “transmit” or “distribute” the broadcast. It indeed “distributes” a card that makes it possible to decrypt what another party broadcasts – the foreign networks – but that action cannot be interpreted as constituting “broadcasting” (or secondary transmission) within the confines established by law. We would note that Charlton agrees with that finding, and does not contend, so it would appear, that the very selling of the encoded card constitutes “broadcasting”, but rather that it enables the reception of the broadcasts of the foreign networks. According to Charlton, Telran created a platform for viewing the broadcasts. “Viewing protected content without a license” (by the end user – the viewers), it argues, constitutes an infringement (para. 37 of Charlton’s brief). In other words, even according to Charlton, the act performed by Telran is, essentially, the providing of a platform for (a purported) infringement by another. From the above, it appears that Telran did not perform an act that is reserved to the copyright holder – it did not broadcast the Mondial games (but rather provided the cards that made it possible to watch them). That being the case, its acts do not fall within the compass of sec. 2 (1), and it cannot be held to have performed a “direct” infringement of Charlton’s copyright. It would seem that this was also the opinion of the District Court in grounding its finding that Telran infringed Charlton’s rights upon sec. 2 (2) of the Act, which, as we shall immediately explain, treats of “indirect” infringement of the copyright.

“Indirect” Infringement

18. Alongside “direct” infringement, sec. 2 (2) of the Act (now, sec. 48 of the Law) also recognizes “indirect” infringement – situations in which a particular act is performed that is

related to a direct infringement, such as: renting, distributing or selling an infringing copy. Imposing liability for “indirect” infringement, as well, constitutes an additional ring of protection for the interests of the copyright holder, and its purpose is to widen the ambit of liability for the infringement of copyrights (see: the *Cohen* case, at para 7; Orit Fischman Afori, "Contributory Infringement in Israeli Copyright Law", 52 *Hapraklit* 3, 6-9 (2012) (Hebrew) (hereinafter: *Fischman Afori*)). The logic is clear: in order to enable effective enforcement of copyrights, the copyright holder must be able to prevent commerce in infringing copies, even when acting directly against the direct infringer is not relevant. Similar provisions can be found in other areas of intellectual property law. Thus, for example’ in design law (sec. 37 (1) (b) of the Patents and Designs Ordinance), trademarks (sec. 3 of the Trade Marks Ordinance), and patents (sec. 1 of the Patent Law, 5727-1967, although it should be noted that this law classifies the act as a “direct” infringement; and see: Fischman Afori, at p. 7). The Act thus distinguishes the commission of a direct act of infringement (subsec. (1)) from the commission of an indirect act of infringement (subsec. (2)). This Court has also recognized an act that contributes to an infringement as imposing liability for copyright infringement upon the “contributor” (CA 5977/07 *Hebrew University of Jerusalem v. Schocken Publishing House Ltd.* (June 20, 2011), hereinafter: the *Hebrew University* case; the *Premier League* case). We will treat more fully of contributing to an infringement (hereinafter: *contributory infringement*) below. An indirect infringement is the knowing commission of a prohibited act with an infringing copy (the *Cohen* case, para. 7). In other words, the commission of an indirect infringement requires that three conditions be met: the existence of an infringing copy, and the commission of one of the prohibited acts listed in the section, while the indirect infringer knew or should have known that the rights to the work belonged to another. We will now proceed to examine whether the actions of Telran met these conditions.

19. The first condition that must be examined is whether there was a “direct” infringement by a third party. Only if the answer proves positive can we proceed to consider whether Telran performed an act with an “infringing copy” (created by the direct infringer), and whether it knew or should have known that the copyright belonged to Charlton. The act reserved to the copyright holder, Charlton, was the broadcasting of the Mondial in Israel. The act performed by Telran was the sale of the cards. The foreign networks broadcasted the Mondial games (for the sake of this examination, we will assume that the broadcast was lawful, although it is not clear whether this

question is of consequence for the present examination, and in any case, Charlton does not claim that the foreign networks' encrypted satellite broadcasts were unlawful). Those broadcasts were carried out by transmitting encrypted satellite signals. Those encrypted signals could also be received in Israel, but could not be decrypted without the card. Encrypting signals is, in effect, a "technological means of protection" by which the foreign networks sought to prevent unlicensed viewing of their broadcasts. As we have seen, such means of technological "protection" or "hedging" were required by the original holder of the copyright for the Mondial (at least from Charlton, although we may assume that this was required of every Mondial broadcast licensee). Telran's customers watched the Mondial games that were broadcast by the foreign networks, but only thanks to the card that made decryption possible.

What have we learned so far? The foreign networks did not "broadcast" the Mondial games to Israel unlawfully, inasmuch as lawfully transmitting encrypted signals that cannot be received without a "decrypter" is, for this purpose (and in this specific regard), like not transmitting to Israel. Even Charlton did not claim that the foreign networks performed an act reserved to it. Telrad's customers watched the games, but did not broadcast them, and did not use them in the performance of any act reserved to the copyright holder. Although Charlton claimed that "watching protected content without a license is, of course, an infringement of copyright" (para. 37 of its brief), that claim is incorrect. Viewing protected content is not one of the acts that the Act reserves to the copyright holder, it does not require a license under the act, and doing it does not infringe the Act. Therefore, in the instant case, we cannot say that the viewers committed a direct infringement. Therefore, we have not found any infringement by a third party. In such a case, in the absence of any direct infringement by a third party, there can be no indirect infringement within the meaning of the Act, because, as explained above, finding that there was an indirect infringement is contingent upon there being a direct infringement. In light of the above, it would seem to me that we must rule that Telran did not indirectly infringe Charlton's copyright.

"Circumventing" Technological Measures

20. What Telran did was to supply a means for "circumventing" a "technological hedge". Such an act, we have learned, does not constitute an indirect infringement, inasmuch as no right

exclusively reserved to Charlton was infringed by a third party. However, Charlton argues that that is not sufficient, in that the act of supplying a device that enables an end user to “circumvent” the technological hedge is, itself, an infringement of copyright. We will examine that argument.

21. The age of information technology has revolutionized the way copyrighted works are preserved. It is no longer necessary to obtain a hard copy in order to read a book. It can be “downloaded” by touching a button on a portable technological device. To hear music or watch a performance, only a keystroke is required, etc. This technology, for all its blessings, has made it very easy to infringe a copyright holder’s rights. Digital copying devices were not slow to follow. In order to protect their works, copyright holders developed technological measures, essentially “technological fences” or “technological locks”, that permit access only to those who hold a key, and thus prevent infringement of copyrights or of user licenses (see: Niva Elkin-Koren, “Self-Regulation of Copyrights in the Information Age”, 2 *Aley Mishpat* 319, 332 (5762) (Hebrew), hereinafter: *Elkin-Koren*; Anne Barron, “Copyright Infringement, 'Free-Riding' and the Lifeworld”, in *Copyright and Piracy: An Interdisciplinary Critique* 93, 98 (Lionel Bently, Jennifer Davis & Jane Ginsburg, eds., 2010) hereinafter: *Barron*). Thus, for example, it is possible to distribute a work in a format that permits only a single viewing or reading, music discs that prevent copying the files to a computer, encrypted satellite signals that can only be decrypted by means of an encoded card, and so forth. Such technological measures constitute “self-regulation” in a double sense – they make it possible to enforce lawful copyrights, and they make it possible to enforce contractual agreements that, at times, are not part of the law (for example, although the law may permit certain uses, technological measures may prevent such uses). However, the introduction of technological measures saw the almost simultaneous development of “cracking” technologies intended to circumvent them (like the “anti-eraser” of the seventies of the last century, which was intended to overcome the “erasure” of color from Israeli public television broadcasts, and restore the color to the television of the end user). In response to the technological “locks” came technological “keys” that could “pick the locks” without the owner’s permission. Such codebreaking methods have the potential of rendering defenses worthless, and return creators to square one – “classic” defense through the law, without self-regulation by technological means. The question before us is, as stated, whether such technological measures are protected by copyright law.

22. To illustrate the point, let us imagine a situation of a person who writes a book in invisible ink. What is written is not visible to the naked eye, but can be read by wearing “miracle glasses”. For the sake of this illustration, let us say that a person who purchases the book is under no contractual obligation to the author to refrain from purchasing a pair of “miracle glasses” from a third party, and the relationship between author and buyer is solely governed by copyright law. A third party then sells a pair of “miracle glasses” that he manufactured to the buyer (who, we presume, purchased the book lawfully). The sole purpose of the glasses is to make it possible to read the book. The question is, can the seller of the glasses be accused of an indirect infringement of the author’s copyright?

23. Under Article 11 of the World Intellectual Property Organization Copyright Treaty, 1996, the parties to the Treaty are required to prohibit the circumvention of technological measures. The Treaty was not ratified by Israel (which signed it in 1997). Pursuant to the Treaty, various countries made legal arrangements making the circumvention of technological measures an infringement of copyright. The Directive of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society required that the member states provide legal protection against the circumvention of technological measures. Accordingly, the European states introduced legislation prohibiting technological circumvention, and that defines the related acts as infringements. For example, the British Copyright, Designs and Patents Act, 1988, was amended in 2003, adding sections 296ZA-ZF that make it possible to act against anyone who provides any service intended to circumvent technological measures, and defines such conduct as an offense. We would also note that sec. 298 of that law (added in 1991) specifically prohibits acts that enable access to protected transmissions without the permission of the copyright holder. In 1998, the United States enacted the Digital Millennium Copyright Act. Section 1201 (1) (a) provides:

No person shall circumvent a technological measure that effectively controls access to a work protected under this title.

In addition, the above law comprises various provisions that prohibit the manufacture of devices intended to circumvent technological measures. These provisions broadened the scope of copyright beyond the primary cluster of rights in terms of adding a “right” to control access to

the work; in making it possible to protect aspects that are not generally protected by copyright, such as data, and in preventing access to uses that the law – in balancing the various interests – intentionally left in the public domain (Elkin-Koren, at pp. 335-336; and see: Barron, at p. 117, who even suggests viewing certain “infringements” as desirable and worthy of support). It should be noted that the relevant legal arrangements included under the rubric of copyright do not treat of conduct that infringes the acts reserved to the copyright holder, but rather “infringement” of the protection of copyright. The legal literature therefore tends to refer to the rights that they confer as “digital rights” or “para-copyrights”; Barron, at p. 98). If we return to the example we provided above, then we would say that the countries that adopted this legal arrangement chose to prohibit not only acts involving the work itself, in regard to the book written in invisible ink (such as copying, reproducing, etc.), but also to prohibit the sale or distribution of the “miracle glasses” that enable reading it without the permission of the book’s copyright holder or its licensees.

24. As opposed to that, the State of Israel has not, as noted, ratified the Treaty, and has not created a similar legal regime (and see: Michael Birnhack & Guy Pesach, “Introduction” pp. 21-22, in *Authoring Rights – Reading the Copyright Law* (Michael Birnhack & Guy Pesach, eds., 2009) (Hebrew)). The new Law, we should note, has been around for a relatively short time in legislative terms, and was enacted several years after the Treaty and the legislation in Europe and the U.S. In other words, although at the time the relevant legislation was enacted, the legislature was aware of the issue of technological protection measures and of the question of whether to prohibit their circumvention, it chose not to include that issue in the legal regime. This is also expressly clear from the “Call for Public Positions – Technological Protection Mechanisms for Copyrights,” which was published by the Counseling and Legislation Department, and the Law, Information and Technology Authority of the Ministry of Justice on Feb. 19, 2007, and from the responses to that call (the responses, as well as the call can be viewed on the Internet site: <http://www.justice.gov.il/MOJHeb/ILITA/Pirsumim/docsforcomments/DRM/>) [note to editor: this link appears to be no longer active]. Thus, in Israel there is no legislation under which circumventing technological measures constitutes an infringement of copyright. Recently, the Ministry of Justice published the Copyright Law (Technological Protection Measures and Electronic Information about Managing Copyrights) Draft Bill, 5772-2012, which again recommends enacting a legislative framework for preventing the circumvention of technological

measures. To date, it has not been adopted, and it is not part of Israeli copyright law. This further emphasizes that, at the relevant time (and even now), the sale of technological “circumvention” measures was not deemed an infringement of copyright (of the copyright holder). We should note that even the British legislature took the trouble to *add* legislation prohibiting circumvention to copyright law in England. We may, therefore, conclude that it, too, did not believe that the British Act (of which the Israeli Copyright Act is an early version) deemed the circumventing of technological measures to be an infringement of copyright prior to its amendment. Let us return to our illustration. In Israel, the book written in invisible ink is a protected work. A prohibited act in its regard is an infringement of the author’s rights. As opposed to this, an act in regard to the “miracle glasses” would not be deemed an infringement of the author’s copyright (of course, it might be an infringement of the intellectual property rights of the inventor of the glasses, but that is not the issue before us).

25. Thus we find that, for the time being, Israel has not chosen to define the circumventing of technological measures as an infringement of copyright. That is the case both in regard to the new Law as well as the legal situation at the time of the sale of the cards by Telran. We must not forget the fundamental principle according to which what has not been legally defined as comprised by copyright is not part of the corpus of protected rights. Therefore, we cannot accept the claim that the very sale of the cards that serve to circumvent the technological measures constitutes an indirect infringement of Charlton’s copyright.

In light of the above, I am of the opinion that we must rule that Telran did not indirectly infringe Charlton’s copyright.

“Contributory” Infringement

26. Another issue that we must address is the question of whether Telran’s actions constitute a “contributory infringement” of Charlton’s copyright. This issue, we note, was not addressed at all by the District Court due to its finding in regard to the existence of an (indirect) infringement by Telran.

Before embarking upon this question, we should address Telran’s preliminary objection that Charlton raised the claim of contributory infringement only upon appeal, which constitutes

an impermissible raising of a new issue. However, in paragraphs 27-35 of Charlton's closing brief to the District Court, Charlton expressly raised this claim. In its closing brief to the District Court, Telran did not address this claim by Charlton. It is decided law that the flaw of first raising an issue in the closing brief is remedied if the opposing party does not object (CA 1184/04 *Kreuzer v. Schwartz*, para. 18 (April 15, 20017), hereinafter: the *Kreuzer* case; CA 685/81 *Licenses and General Insurance Co. Ltd. v. Borchard Lines Ltd.*, 38 (3) IsrSC 421, 427 (1984); Yoel Sussmann, *Civil Procedure*, fn. 215 at p. 512 (7th ed., 1995)). Above and beyond that, I would point out that if I were of the opinion (which I am not) that the claim of contributory infringement was a new claim, it could still be addressed in that it is not a new cause of action, but rather a legal conclusion that arises from the factual picture presented in the complaint (and see: the *Kreuzer* case, at para. 19).

27. This Court, as noted, has recognized the contributory infringement doctrine in Israeli copyright law. The following conditions for the existence of a "contributory" infringement were laid out in the *Hebrew University* case: the existence of an infringement by a third party; actual, concrete knowledge of the infringement; and a significant, substantial contribution to its perpetration (*ibid.*, at paras. 26-27; the *Premier League* case, para. 16 of the opinion of Deputy Chief Justice E. Rivlin). Before examining whether these conditions were met in the instant case, we should note that the contributory infringement doctrine has been applied both in regard to the old Act as well as to the new Law.

28. In the *Hebrew University* case, it was stated that "the mere existence of protection does not negate the existence of the breach. Protection prevents the user from bearing responsibility, but does not eradicate the breach" (*ibid.*, para. 24). Pursuant to that, it was stated *obiter dicta* in the *Premier League* case:

"Where a 'permitted' use is concerned, there is, indeed, no infringement according to the Act. But that does not suffice to eradicate the fact that, in substance, there is an infringement of the copyright, even if such infringement be permitted for various reasons. This is the case primarily where the combined effect of many protected infringements causes significant harm to the copyright holder. As has already been held, in such circumstances there is nothing to

prevent us from recognizing the contributory responsibility of the intermediary that caused the infringement” (ibid., para. 16 of the opinion of Deputy Chief Justice E. Rivlin).

That judgment goes on to explain that such permitted uses constitute a defense that the old Act chose to grant to users, and not a positive right of infringement (*ibid.*, para. 18). I am of the opinion that it is necessarily a defense rather than a (positive) right of users, as some contend (see, e.g: Niva Elkin-Koren, “Users’ Rights”, p. 327, in *Authoring Rights – Reading the Copyright Law* (Michael Birnhack & Guy Pesach, eds., 2009) (Hebrew)). In my opinion, an end user who views an infringing copy of a work whose creator enjoys the protection of copyright law does not infringe any right (even if we are concerned with a “protected” infringement), but rather performs a permitted act. However, even without addressing this question, it would seem that we must, at the very least, hold that a “permitted use” is precisely what it says – a permitted use. In other words, even if it is not a positive right of the user, it still is not, and cannot be, an actual infringement (even if “protected”). That which the law itself permits, cannot be an infringement of the law.

29. The decision that there are permitted uses is, in my view, a substantive decision, and not a technical defense (and see: Fischman Afori, at p. 47; Tamir Afori, at p. 189 fn 1). And note: Chapter D of the new Law, which regulates the permitted uses, is titled “Permitted Use” and not “Protected Use”. In other words, the Law takes the view that the action is permitted, and not that it is forbidden but that the actor is “immune” to sanctions. Let us consider an example from criminal law. A person has a defense to criminal sanctions when he perpetrates a proscribed act under certain circumstances (such as, self-defense, duress, or insanity). In other words, he transgresses the law, but he is not punished because the law protects him against sanctions (and note: the law does not permit him to commit the act). As opposed to this, when a person performs a permitted act, there is no need to ask whether or not to impose a sanction, inasmuch as he did not do anything that is subject to sanction *ab initio*. That is the case in all that concerns permitted uses of copyright. The user does not perform a proscribed act (i.e., an infringement) for which he enjoys a defense, but rather he performs a permitted act, such that no infringement ever occurred.

30. Since no infringement ever occurred, there was no infringement to which to “contribute”. Thus, when the end users performed a permitted act, the intermediary “contributed” to a permitted act, and therefore cannot be said to have infringed the rights of the copyright holder, as they were not infringed. Let us return to our last example. Let us assume that A convinces B, who can claim the insanity defense, to commit a crime. B enjoys a legal defense, whereas A can be accused of solicitation (or some similar category). As opposed to that, if A were to permit B to do some permitted act (for example, lawfully walking down a city street), he could not be accused of any crime.

The very fact that the copyright holder suffered a loss or “significant harm” due to a combination of a large number of permissible acts does not mean that a person who contributed to the commission of those permitted acts infringed a copyright (it is possible, without prejudging the present case, that one might argue that the legal requirements were met for seeking damages for unjust enrichment, as we will discuss below).

31. In my opinion, the above leads to the correct interpretation of the term “permitted use”. However, I believe that even according to the approach that sees “permitted use” as a defense, one must agree that the defenses can also serve a contributory infringer (as Michael Birnhack suggests in “The Birth of a Tort: Contributory Infringement in Patent Law”, p. 219, in *The Technology of Justice* (Shai Lavi, ed., 2003) (Hebrew)). Section 18 of the new Law applies to “permitted uses” and not to “permitted users”. The Act permits acts, and is indifferent to the actors. The act performed by the contributory “infringer” is a contribution to an act of a “principal” who is protected by the defense that the Act grants to the conduct. In a certain sense, the “contributory” actor acts in concert with the “principal” in committing the “protected” infringement. In such a case, if the principal is “protected” by virtue of the act, then his accessory is all the more so.

We will again illustrate these matters with the examples given above. The insanity defense is a defense that applies to a specific person – the person found not to be responsible for his conduct. In other words, the person enjoys the defense by virtue of being insane. As opposed to this, a defense provided for a permitted act does not apply to a specific person, the actor, by virtue of the commission of the act. Therefore, A who permits B (who has been found to be

insane) to do some act will not be entitled to a defense, inasmuch as the defense applies to B by virtue of his characteristics. As opposed to that, when A permits B to do some act in circumstances that are subject to a defense by virtue of the circumstances of its commission, then if the actor has a defense by virtue of the fact that the act invokes a defense for the actor, then it follows that the person who allowed him to perform that act will also have a defense.

We state this only to emphasize that even if we follow the view that permitted use provides a defense, then the contributory infringer enjoys that defense *a fortiori* in cases of a “protected infringement”.

32. All the above is somewhat *obiter dicta*. In the *Hebrew University* case, the direct infringer produced a course reader that was an infringing copy of the protected work. In the *Premier League* case, it was assumed that the end users created temporary copies of the broadcasts on their computers, and therefore, there as well, the situation was interpreted as a “protected infringement” (which, in my view, is no infringement at all). As opposed to this, in the instant case, there is no direct infringement at all. We will not repeat the entire analysis that we presented above in regard to indirect infringement, but merely point out that the action of the foreign networks does not constitute a direct infringement, nor does the action of Telran’s customers –the viewers. We would further note that Charlton, too, failed to identify a direct infringer. Its claim, in this regard, was that “watching protected content without a license is, of course, an infringement of copyright” (para. 37 of Charlton’s brief). As we stated above, the act of watching protected content is not one of the acts that the Act reserves to the copyright holder, it does not require a license under the Act, and doing it is not an infringement of the Act. Therefore, the instant case does not present a direct infringement, which is a precondition for a contributory infringement. Thus, in effect, there was no infringement at all (“protected” or otherwise). The above analysis was intended to make it clear that permitted use does not generate a “protected” infringement, but rather no infringement at all.

33. To remove all doubt, we would make it explicitly clear that the above analysis does not repudiate the contributory infringement doctrine. That doctrine continues to hold in Israeli law, and it should properly be applied in appropriate cases (and see: Birnhack, at p. 202; as well as Fischman Afori), for example, in parallel to acting against a direct infringer, or where, for

various reasons (e.g., limitation of actions), it is not possible or practical to take action against the direct infringer, or in other examples that may come to mind. I would further add and emphasize that even according to the approach that deems “permitted use” as only creating a defense (which is not my view), that can, as noted, also be claimed by the contributory “infringer”, in situations in which the “defense” does not arise from the nature of the act (permitted use), but rather from something particular to the direct infringer (like limitation of actions), the defense can be claimed only by the relevant party, and will not serve the contributory “infringer”.

34. We therefore find that there was no direct infringement. In other words, the first condition required for the existence of a contributory infringement was not met. Therefore, we need not consider whether the other conditions were met, and we find that Telran did not infringe Charlton’s copyright by a contributory infringement.

Summary in regard to the Infringement of Copyright

35. In summary: Telran did not perform any of the actions reserved to the copyright holder Charlton. Therefore, it was not a “direct” infringer of Charlton’s rights. No third party directly infringed Charlton’s rights, and therefore Telran was neither an “indirect” infringer, nor a “contributory” infringer. In light of the above, I am of the opinion that we should find that there was no infringement of Charlton’s copyright by Telran. We would reiterate that, in trying to show an infringement, even Charlton argued: “What, therefore, is an infringement of rights? The matter is clear. Without the encoded cards that Telran distributed, those who refrained from purchasing a subscription to the sports channels of the broadcasters [licensed by Charlton] could not watch the Mondial broadcasts” (para. 32 of Charlton’s closing brief). Indeed, were it not for the technological circumvention medium that Telran made available to its customers, they could not have viewed the broadcasts of the foreign networks. The card was therefore a *conditio sine qua non* – a necessary condition. But the mere fact of its being a necessary condition for viewing the broadcasts of the foreign networks does not mean that its sale constitutes an infringement of copyright. As we saw, that was so in Israeli law as applicable at the time, and it remains so.

Unjust Enrichment

36. In the District Court, Charlton argued that Telran's actions constituted unjust enrichment. The District Court ruled that, having found that Telran had infringed Charlton's copyright, there was no reason to address the tort under the Unjust Enrichment Law, 5779-1979, (hereinafter: the *Unjust Enrichment Law*) in regard to the infringement of rights, inasmuch a no remedy could be added to that already awarded under the Copyright Act.

37. In LCA 5768/94 *A.S.I.R. Import Manufacturing and Distribution v. Forum Accessories and Consumer Products Ltd.*, 54 (4) IsrSC 289 (1998), this Court recognized that, in certain circumstances, recourse can be made to the Unjust Enrichment Law in the field of intellectual property law (and see: CA 9191/03 *V&S Vin Spirt Aktiebolag v. Absolut Shoes Ltd.*, 58 (6) IsrSC 869 (2004); Greenman, at pp. 60-72).

In his book *Unjust Enrichment* (2nd ed., 1998) (Hebrew), Professor Daniel Friedman considers a situation so strikingly similar to the facts in the instant case that it seems as though it were written especially for this case. We will cite the material as written:

“An additional question arises where programs are broadcast in code, and the broadcasting company sells its customers a decrypting device, thereby permitting them to watch or hear the broadcast. The company's business is based upon receiving payment from the buyers of the device or by collecting payments based upon a meter placed in that device. Someone comes along and manufactures a device that ‘cracks’ the code and enables him to watch the broadcast without paying. If a private individual ‘cracks’ the code and watches the broadcast, there may be no cause of action against him. However, this point is not entirely clear. The question is whether a distinction should be drawn between invading a closed space, like cable (as was the case in the *Cablevision* matter, above) and decrypting the code of a broadcast over the airwaves. One might argue that there is no reason for such a distinction, and that the *Cablevision* rule should apply, but that approach might go too far. In any case, the situation is different if the developer of the decrypting device acts in a commercial setting. In such a case, there are two basic possibilities. One is that the code ‘cracker’ transmits the broadcasts to his customers for payment. That act contravenes the provisions of

the Performers' and Broadcasters' Rights Law, under which the rights of broadcasters were recognized, and I addressed this point above. The second possibility is that he sells the device to his customers, and they use it to watch another's broadcasts without paying (while others are required to pay for such viewing). The question of whether, in such a case, there is a cause of action [for unjust enrichment – Z.Z.] against him is not simple. For the sake of the discussion, let us assume that the device he sells has no lawful use, and its only function is to decrypt the broadcasting code of the plaintiff. I tend to the view that in such a case we should recognize the broadcaster's cause of action against the manufacturer and seller of the device, but the point is not clear" (*ibid.*, at p. 79).

As earlier noted, the sale of the device that "breaks" the code cannot be deemed "broadcasting" for the purposes of the Copyright Act. However, as Freidman points out, it is possible that, in such a case, the right holder may have a cause of action against the seller of the decrypting device (the card – the technological "circumvention" measure) by virtue of unjust enrichment. This question was not examined by the District Court, and in light of what was stated in that judgment, the point was not argued before us.

In light of the above, I would recommend to my colleagues that we remand the case to the District Court on the cause of action for unjust enrichment.

Damages

38. Above, we presented the findings and rulings of the District Court in regard to the extent of the damages incurred by Charlton and the amounts of compensation. Both sides attacked the judgment on this issue, each from its own perspective. In my opinion, there is no need for us to address these matters, in view of the decision to remand the case to the District Court to rule on the suit for unjust enrichment, which was not addressed. First, and with no intention to suggest the possible result of that hearing, it is possible that consideration of the issue may prove superfluous. Second, the parties should be permitted to make their arguments in this matter in accordance with the principles for awarding damages for the said cause of action. Third, inasmuch as the matter is remanded to the trial court, it can revisit its conclusions in the matter, including on the question of whether damages should be calculated on the basis of the income of

Telran or its profits, or perhaps on the basis of the profits denied Charlton. In any case, it should be clear that if Telran is ordered to compensate Charlton, it will be able to appeal that award again, as well as the findings in the judgment, to the extent that they remain unchanged.

Conclusion

39. Telran sold and distributed cards that made it possible to receive the broadcasts of the foreign networks in Israel. Those cards were a technological “circumvention” measure. The sale of those cards did not constitute an infringement of Charlton’s copyright under the Copyright Act. Telran did not perform any of the acts reserved to Charlton under the Act. However, it is possible that by those acts Telran profited at Charlton’s expense. This matter was not addressed by the District Court or by us. Therefore, I propose to my colleagues that we vacate the judgment and remand the case to the District Court so that it may address the cause of action of unjust enrichment, as well as the issue of compensation under that head, should Telran be found liable for damages. The District Court is granted full discretion in all that relates to the submission of further evidence and supplementary arguments, after the parties are permitted to present their arguments on the matter. I would recommend that no order be made for costs at this stage, and that, *inter alia*, the District Court take the results of this appeal into account in awarding costs.

Justice

Justice E. Rubenstein:

1. My colleague Justice Zylbertal delved deeply into the complex matter before us in this case, and arrived at the conclusion that we are unable to offer relief to the Respondent (and the Cross Petitioner) in all that relates to the sphere of copyright, and that the path remains open in regard to the laws of unjust enrichment, whose effect remains to be examined. In doing so, he adopted a different course from that of the District Court, which found an infringement of copyright, and therefore did not address the head of unjust enrichment. I see no alternative but to concur.

2. For some detail: My colleague analyzed the various options in copyright law, and reached the (unfortunate, in my opinion) conclusion that inasmuch as the legislature did not include protection against circumventing technological measures in the Copyright Law, 5768-2007, the sale of such does not constitute an infringement of copyright, either under the prior legal situation or under the new Law. In my opinion, this conclusion is legally correct, but not desirable in substance. Its significance for copyright law is that the sinner may be rewarded, and that what we are concerned with in this case is “doing business with his neighbor’s cow” (Mishnah Bava Metziah 3:2; Babylonian Talmud Bava Metziah 35b). Perhaps this decision will be a wake-up call for those responsible for legislation, bearing in mind that they already published the Copyright Law (Technological Protection Measures and Electronic Information about Managing Copyrights) Draft Bill, 5772-2012. The legislature may recall that its job is also to prevent injustice in a changing world in which, as my colleague also noted, technological developments are a daily occurrence – a “tsunami” that is like “waters without end”. In the absence of appropriate protection, the impulse to initiate and innovate may be harmed, as “for whom am I toiling?” (Ecclesiastes 4:8).

3. As for unjust enrichment, my colleague naturally referred to this Court’s decision in the *A.S.I.R.* case (LCA 5768/94 *A.S.I.R. Import Manufacturing and Distribution v. Forum Accessories and Consumer Products Ltd.*, 54 (4) IsrSC 289 (1998)). The result is that, in this case as well, the gates of recompense have not been sealed, but that is not the appropriate high road, but rather an escape route for times of legal distress. I would add that the instant case differs from my comment in CA 9191/03 *V&S Vin Spirit Aktiebolag v. Absolut Shoes Ltd.*, 58 (6) IsrSC 869, 888 (2004), where the matter could be addressed by the “high road”, inasmuch as it concerned a registered trademark, and the legal path was thus open, but the facts did not justify the suit. I therefore said in that case that “since the high road will not serve, neither will the side road”. That is not the case here, where the high road is blocked by a legal obstacle, and therefore recourse can be made to the side road of unjust enrichment. In this regard, also see Prof. Ofer Grosskopf’s enlightening article, “The Eagle and the Princesses – On the Relationship between the Law of Unjust Enrichment and Copyright Law”, in *Authoring Rights – Reading the Copyright Law* (Michael Birnhack & Guy Pesach, eds., 2009) (Hebrew) 201, and also see p. 224 and fn 85 (“When the intellectual property regime is not up to date in one or more of the aspects enumerated above (time, detail or conformance) there is room to allow judicial legislation”). I do

not believe that there is relevance in this case to sec. 3 of the Copyright Law, by which “Copyright shall not subsist in a work other than in accordance with the provisions of this Law”, which has been construed to limit the scope of protection granted to creators (see: Y. Weisman, “Comparative Reading, Characteristics of the Copyright Law, 5768-2007”, in *Authoring Rights* 69, 80-81) (Hebrew). The example brought by my colleague (para. 37) from Prof. Friedman’s book speaks for itself, and is worth considering so that there not, in fact, be unjust enrichment.

4. Out of a love for Jewish law, and having mentioned the statement in regard to doing business with one’s neighbor’s cow, I would note the halakha in the matter (Maimonides, Mishne Torah, Mishpatim, Laws of Hiring, 1:6): “If a person who hires a cow from his neighbor, then lends it to another person, and the cow dies of natural causes in the possession of the borrower, then, since the borrower is liable for every occurrence, he should return the value of the cow to its owner, for that hirer is not doing business with his neighbor’s cow. And so it is for all analogous situations”; and also see Shulhan Arukh, Hoshen Mishpat, Law of Hiring, 307:5, that goes beyond the obligatory rule of Maimonides: “And if he says to the hirer, if you like you may lend it (the cow – E.R.), your dispute will be with the borrower and my dispute will be with you, then the borrower must pay the hirer”, in other words, the owner will sue the hirer rather than the borrower. Thus, the law produces the remedy. And see: CA 3422/03 *Krone v. Inbar*, 59 (4) IsrSC 365, 379-380 (2005) for additional sources on intellectual property in Jewish law; and see N. Rackover, “Cursed is He who Trespasses upon his Neighbor, On Copyright and Publishers”, *Parashat Hashavua* (A. Cohen & M. Wigoda, eds.) 236 (Hebrew), in addition to his book *Copyright in the Jewish Sources* (5751) (Hebrew).

5. My colleague Justice Amit addressed the frustration of one who cannot reconcile himself to a situation in which it would appear that one who “does business with his neighbor’s cow” may fall through the cracks of copyright law and be a – dubious – beneficiary “within the limits of the law”, as in substance, we are concerned with a work that is not protected as it should be. He therefore creatively proposed the idea of recourse in situations like ours to the category of making something available to the public. It is, indeed, an attractive idea, but even this approach ultimately runs up against the history of non-legislation of technological measures, and the path is blocked. This may reinforce the above call to the legislature.

6. In the end, I concur in the opinion of my colleague Justice Zylbertal.

Justice

Justice Y. Amit

1. My colleague Justice Zylbertal cast a wide net that touches upon many questions that were not considered or examined at all in the trial court or in extant case law, primarily the fundamental question of whether “cracking” technological measures constitutes an infringement of copyright.

As my colleague concluded that Telran cannot be deemed to be a direct, indirect or contributory infringer under copyright law, I will address a few words to this subject. I would preface my comments by emphasizing that what I am about to say is strictly “heretical musings”, without any intent to establish any firm position on the matter in view of the operative conclusion recommended by my colleague, in which I concur.

2. I will not deny that the result that the Respondent cannot find a remedy within the framework of copyright law raises some discomfort. The Petitioners failed to show any contractual agreement between themselves and any other body from which the decrypting cards were purchased, and failed to present any evidence of how they obtained the cards.

If we were treating of a relay that redirected the transmission signal to another territorial area, and thereby made the broadcast available to the public for a fee without obtaining the permission of the rights holder, we would no doubt see that act as a “signal hijacking” of the broadcast. Is there really any significantly substantive distinction to be made between the results of such signal intrusion and the operation of the card? Without addressing the distinctions between secondary transmission and active conduct in the two examples, the protected work is placed at the disposal of the public contrary to the desire and permission of the owner of the rights or its licensees, and in both examples, the action is performed for commercial purposes (and compare to the opinion of Rivlin, J. in the *Tele Event* case, at p. 57).

The case law has pointed out that the legal tools at our disposal do not correspond with the technological developments in the field of information and communications. This is particularly true of the old Act, which forced the courts to fit new technologies into old molds that were created by the legislature ages before those technologies saw the light of day. In construing the Act, our interpretation must be purposeful rather than literal. In this way, it may be possible to include the sale of code “breaking” cards within the scope of the Act, as will be explained in paragraph 4, below.

3. My colleague began his discourse by establishing that the term “public performance” has been interpreted in the case law as comprising broadcasting. He continued by addressing the question of whether the card sold by Telran “transmits” or “distributes” the Mondial broadcasts, and found that distributing the cards does not fall within the compass of broadcasting or secondary transmission. He therefore held that sec. 2 (1) of the Copyright Act 1911 (hereinafter: the Act) does not apply, but rather sec. 2 (2), which treats of indirect infringement. But in order to recognize an indirect infringement, an infringing copy is required, and my colleague goes on from there.

Indeed, some are of the opinion that distribution under sec. 2 (2) (b) of the Act can only be accomplished through the distribution of a copy (and therefore does not include “secondary transmission” – see: Yuval Karniel, “Broadcasting Sporting Events on the Foreign Networks – Does Copyright Law require Screen Blackouts”, 6 *Alei Mishpat* 259, 274 (2007) (Hebrew)). Additionally, an indirect infringement by “public performance” under sec. 48 (4) of the new Law expressly speaks of an “infringing copy of a work”, which is not met in the matter before us. I would note on this point that an action that does not constitute an infringement under the new Law, is not actionable under the former Act, pursuant to the end of sec. 78 (c) of the new Law.

4. I believe that one might propose an additional way to assess the matter. The “public performance” referred to as one of the copyright rights under the Act is divided into three separate categories under the new Law: public performance, broadcasting, and making available to the public. This last category is established in sec. 15 of the new Law, according to which, “Making a work available to the public means the doing of an act in relation to a work that shall enable members of the public to access the work from a place and at time chosen by them.” (for

a comparison of the old arrangement and the new one, see: Rachel Aridor-Hershkovitz, “From Public Performance to Making Available to the Public: Innovation or Confusion under the New Law?” in *Authoring Rights* 405 (Michael Birnhack & Guy Pesach, eds., 2009) (Hebrew)). I would further note that nothing in the words “from a place and at time chosen by them” rules out an infringement in cases in which a live broadcast is involved (see the *obiter dictum* of Rivlin, J. in para. 13 of his opinion in the *Premier League* case).

Purposive interpretation of the Act could also include making available to the public, since using the card makes the protected work available to the public. Sec. 1 (2) (d) of the Act establishes that copyright also includes any “other contrivance by means of which the work may be mechanically **performed** or delivered”, and sec. 2 (2) (b) establishes that infringement of copyright also includes “any person who ... distributes - either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright”. The term “performance” is defined under sec. 35 (1) of the Act as “any acoustic representation of a work and any visual representation of any dramatic action in a work, **including such a representation made by means of any mechanical instrument**”. And note: while copying a work requires making a copy (see the definition of “infringing” in sec. 35 (1) of the Act), that is not the case in regard to performance of a work. A creative, purposive interpretation could thus include a technological medium the use of which, like the miracle glasses mentioned by my colleague, leads to the result of making the work available to the public, even as a direct infringement and not an indirect one.

5. As my colleague noted in his opinion, significant weight should be attributed to the fact that the legislature has not yet seen fit to address the subject of technological measures. Therefore, I see no reason to make any hard-and-fast statement in regard to the approach that would deem “performance” and “public performance” as also comprising making available to the public under the Act, as suggested in para. 4, above. In the final result, I therefore concur in the opinion arrived at by my colleague, but leave for further examination some of the issues that are not necessary for deciding the instant case, such as whether an end user will never be deemed an infringer, or whether a “copy” is required for an infringement under the Act.

Justice

Decided in accordance with the opinion of Justice Z. Zylbertal.

Decided this 27th day of Elul 5773 (Sept. 2, 2013).