CA 3616/92

Dekel Computer Engineering Services Ltd.

v.

Heshev Inter-Kibbutz Management Services Unit, Agricultural Co-Operative Society Ltd.

The Supreme Court Sitting as the Court of Civil Appeals

Justices T. Strasberg-Cohen, J. Turkel, D. Beinish

[December 10, 1997]

On appeal from a decision of Justice M. Ben-Yair of the Tel-Aviv/ Jaffa District Court, handed down on June 22, 1996, file number 2250/88.

Facts: Appellant sued respondent for damages under the Copyright Ordinance, arguing that respondent had copied several price lists that appellant had published in at least eleven different booklets. The district court found that the respondent, despite copying from several different sources, had, for the purposes of section 3A of the Copyright Ordinance, only committed one single act of infringement. The district court also held that once appellant had failed to prove actual damages, it could not sue for statutory damages.

Held: The Court held that, for the purposes of section 3A of the Copyright Ordinance, an "infringement" should be interpreted as each infringement of a

separate copyright, and not as each separate act of infringement. The Court held that respondent should be liable for eleven counts of infringement, as each booklet that it copied had "independent economic value," and, as such, constituted a separate work, with its own copyright. The Court further held that even if the appellant had failed to prove actual damages, he was still entitled to statutory damages. Furthermore, in proving statutory damages, appellant could make use of evidence with which he had attempted to prove actual damages.

Statutes Cited:
Copyright Ordinance-1924.
Copyright Ordinance Amendment Law (Amendment no. 4)-1981.

Israeli Supreme Court Cases Cited:
[1] CA 592/88 S. *Sagi v. The Estate of Abraham Ninio*, 46 (2) P.D. 254.

Israeli District Court Cases Cited:
[2] DC (Jerusalem) 472/90 *Shore International Programming Industries Ltd. v. Sha'arei Yerushalaim Hotel Ltd.* (unreported case)

United States Cases Cited:
[3] *Walt Disney Company v. Carl Powell*, 897 F.2d 565 (D.C. Cir. 1990).
[4] *Gamma Audio & Video Inc. v. Ean-Chea*, 11 F. 3d 1106 (1sr Cir. 1994).
[5] *Data General v. Grumman Systems Support*, 795 F. Supp. 501 (D. Mass. 1992).
[6] *Glazier v. First Media*, 532 F. Supp. 63 (D. Del. 1982).
[7] *F.W. Woolworth v. Contemporary Arts*, 344 U.S. 228 (1952).

Israeli Books Cited:
[8] H. Cohen, The Law (1992).

Foreign Books Cited:

[9] II P. Goldstein, Copyright – Principles, Law and Practice (1989).

[10] P.A. Hay, *The Statutory Damages Provision Under the 1976 Copyright Act*, 26 IDEA: J .L. & Tech. 241 (1985-1986)

Jewish Law Sources Cited:

[11] Deuteronomy 19:14.

[12] Jerusalem Talmud, Tractate Pe'ah 5:6

[13] Babylonian Talmud, Tractate Kiddushin 59a

[14] Midrash Sifri, Deuteronomy 188

[15] Jeremiah 23:30

[16] Jerusalem Talmud, Tractate Sanhedrin 11:5

[17] Babylonian Talmud, Tractate Sanherin 89a

[18] Proverbs 22:22

[19] Midrash Tanhuma, Numbers 22

[20] N. Rackover, Sources for the Principle of Intellectual Property Rights (1970).

[21] N. Rackover, *The "Agreement" of Authors as a Basis for Intellectual Property Rights*, 3 Research and Survey Series of Jewish Law (1970).

[22] Rabbi Shaul Israeli, *Publication of Words from the Torah Without the Permission of Those Who Uttered Them*, 4 Tehumin 354 (1985).

[23] Rabbi Zalman Nehamia Goldberg, *Copying From a Cassette Without the Owners' Permission,* 6 Tehumin 185 (1985)

For the appellant—A. Gavrieli
For the respondent—Y. Shacham

JUDGMENT

Justice T. Strasberg-Cohen

1. This case concerns an award of statutory damages under section 3A of the Copyright Ordinance-1924 [hereinafter, the Ordinance]. The three principal issues raised before this Court are the following. First, how should the term "infringement," as it appears in section 3A of the Ordinance, be interpreted. Second, may the plaintiff seek to prove actual damages (or, in the alternative, show the defendant's unjust enrichment at his expense), and, if this strategy proves unsuccessful, subsequently seek statutory damages; Third, in the event that the answer to the previous question is affirmative, how much weight should the Court give to evidence introduced for the purpose of showing actual damages, when deciding the amount of statutory damages to be awarded.

The Facts

2. In a partial judgment, the district court held that the respondent [hereinafter Heshev] infringed the copyright of the appellant [hereinafter Dekel] by copying parts of a price list relating to construction costs (labeled "Price Records for the Construction Industry"), published by the appellant. This infringement on Dekel's copyright was said to have continued from 1986 to 1990, during which time Heshev published 11 booklets, each of which including parts copied from various Dekel booklets.

Before this Court is Dekel's appeal regarding the amount of damages awarded to it by the district court. In its judgment, the district court awarded Dekel the minimum amount of statutory damages prescribed by the Ordinance for an infringement of this nature, namely 10,000 NIS. The district court held that all 11 individual booklets published by Heshev, which contained parts of Dekel's price list, constituted a single

infringement for the purposes of section 3A of the Ordinance. Indeed, the court ruled that all eleven instances in question be deemed a "repeat infringement" of the same copyright—Dekel*'s* rights in the price list, entitling Dekel to no more than the minimum rate of damages. In evaluating the amount of damages to be awarded Dekel, the district court considered the evidence introduced to prove Heshev's profits, and concluded that it was not convinced that Dekel should be granted a sum greater that 10,000 NIS.

The Parties' Arguments

3. Appellant submits that the district court erred in law when it held that there was only a single copyright infringement, and rejected the argument that each time Heshev copied from the price list booklets it constituted a separate infringement of Dekel's copyright. To this end, the appellant submits that its booklets are published at regular intervals and that each booklet is distinct from its counterparts, and contains different information, such as price updates, changes in items priced, and changes in the arrangement of the price lists. Moreover, Dekel argues that Heshev copied different items from each of its publications. This being the case, it contends that each Dekel booklet copied by Heshev should be deemed an individual infringement, thereby entitling the appellant to separate statutory damages for each instance of copying. It should be noted that Dekel did not specify the exact number of its booklets that had been copied. It did however indicate the number of Heshev booklets containing parts copied from its own material and requests that the Court award it damages for each of these individual booklets. In the alternative, Dekel argues that even if all of its booklets are to be deemed a single endeavor, as per the district court's ruling, the copying of different parts from the Dekel booklets would *per se* support a determination that each of the eleven Heshev booklets constitutes an

individual copyright infringement. Yet a second alternative advanced by the appellant proposes that each of the infringing booklets published subsequent to the filing of this action constitute a separate infringement. According to this latter approach, there would be a total of six infringements: the Heshev booklets published prior to the commencement of the action would be counted as one infringement, whereas each of the five issues Heshev published subsequent to this action would constitute an additional individual copyright infringement.

Additionally, and with respect to the matter of statutory damages, Dekel contends that the district court erred in awarding it only the minimum amount prescribed by law. Instead, it argues that the maximum amount of damages (20,000 NIS) should have been granted, if for nothing else, by reason of the six copyright infringements that occurred subsequent to the filing of Dekel's action, after Heshev was served a notice warning it of the copyright infringement. Furthermore, it is submitted that the low amount of damages awarded by the district court are inadequate, as they cannot serve as a sufficient deterrent to potential copyright infringements. Moreover, Dekel argues that the damages granted do not account for the violator's state of mind and fail to reflect the severity and extent of the infringements in question. Similarly, the appellant contends that the lower court erred in allowing evidence of Heshev's sales figures to be considered in establishing the appropriate measure of statutory damages, after having already held that that same evidence was insufficient to calculate actual damages. Thus, Dekel argues that once the evidence of Heshev's sales income was found lacking, it could not appropriately be admitted to establish the amount of statutory damages to be awarded.

4. For its part, Heshev maintains that Dekel's copyright was not infringed and that damages were not proved. Furthermore, it contends

that statutory damages should not have been awarded, as an award of this nature can only be granted where, as per section 3A of the Ordinance, "damages…have not been proved." In fact, respondent argues, when plaintiff brings forth evidence to show damages, and that evidence is rejected, as was the case here, the court has effectively determined that the plaintiff was not caused any damages and is therefore not entitled to statutory damages.

Infringement Under Section 3A

5. Section 3A of the ordinance, introduced by virtue of the *Copyright Ordinance Amendment Law* (Amendment no. 4)-1981, provides the following:

> 3A. Where the damages caused by copyright infringement have not been proved, the court may, on the application of the plaintiff, award compensation in an amount of not less than 10,000 NIS. and not more than 20,000 NIS., with respect to each infringement. The Ministry of Justice may, subject to the approval of the Knesset's Constitution, Legislation & Law Committee, alter these amounts.

6. The leading case dealing with the proper interpretation of section 3A is CA 592/88 *S. Sagi* v. *The Estate of Abraham Ninio* [1]. In *Sagi* [1], the court held that the statement "each infringement" should be read as referring to each type of infringement. The relevant test to be employed for ascertaining whether an incident constituted an "infringement" looks to the right, rather than the number of acts performed in infringing the right. As per President Shamgar in *Sagi* [1], at 267:

> The "infringement" to which this section relates, and by virtue of which a plaintiff may apply for statutory damages, generally refers to a single *right* infringed by the defendant. The number of infringements of that same right is immaterial. The expression "each infringement" must be interpreted as relating to every type of infringement. In other words, statutory damages may be awarded several times, but only where the defendant infringed a number of separate copyrights.

President Shamgar goes on to state, at 269-270:

> Nonetheless, when the same tortious act is performed on separate occasions, at irregular intervals and at different times, such repetitious incidents may, in certain circumstances, be regarded as giving rise to independent causes of action. It would generally be accurate to consider a continuing infringement on the same right—in our case a copyright—as giving rise to only one single cause of action. This is at least the case with respect to infringements occurring prior to the date the action is filed. The date that the infringement suit is filed, however, can serve as a potential barrier between actions, and this same criteria governs actions involving a continuous act or acts that are repeated or reoccur at different intervals.
>
> This having been said, I do recognize a situation in which the various acts of infringements differ so substantially as to justify regarding each infringing act as constituting a separate infringement for the purpose of section 3A. According to the infringed rights test, repeated

> infringements of *different* copyrights relating to the *same* work may properly be regarded as independent infringements, within the meaning of section 3A. This is the case even when the matter involves repeated infringements on the right in question by the same individual. Thus, for example, when an individual infringes on his fellow's copyright, in his capacity as author, and translator and as dramatist, these infringements should be deemed separate. Subject to the Court's discretion, such infringements should entitle the plaintiff to as many awards of damages under section 3A as there are infringed copyrights.

American Law

7. The approach adopted in *Sagi* [1] regards "infringement" under section 3A of the Ordinance as referring to the infringement of a single copyright, regardless of the actual instances of acts of infringement. Such an approach**,** it should be noted, is by no means universal. Indeed, in the United States, the 1909 Copyright Act provided that the right to statutory damages was for "each infringement that was separate." By contrast, the 1976 Copyright Act, which replaced its earlier edition, provided that damages be awarded "for all infringements involved in the action with respect to any one work." *See* 17 U.S.C. § 504(c). For an analysis of the difference between the two statutes, see P.A. Hay, *The Statutory Damages Provision Under the 1976 Copyright Act*, 26 IDEA: J .L. & Tech. 241 (1985-1986) [10].

8. According to the new American statutory regime, the plaintiff is entitled to one unit of statutory damages for all infringements relating to "one work." To this end, any derivative work is considered part of the original. As per this approach, the original and its derivatives are deemed to be one work. With respect to statutory damages, the Courts have stated

that "separate copyrights are not distinct works unless they can live their own copyright life." *Walt Disney Company v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1990) [3].

In addition, it was held that, under specific circumstances, works boasting "separate economic value" or works that are in themselves "viable" may be considered distinct. In *Gamma Audio & Video Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1994) [4], the Court held that each episode of a television series constitutes an independent work, despite the fact that the episodes formed a single script and were interrelated. This result was in contrast to *Walt Disney Co.* [3], where the defendants copied the Disney characters of Mickey and Minnie Mouse in six different poses. There, the Court held that, for the purpose of calculating statutory damages, all six forms of copying Mickey and Minnie's constituted a single work, as all the forms were in fact derivatives of the basic Mickey and Minnie Mouse characters. The Court noted that Mickey remains Mickey, regardless of the different positions in which he is depicted—whether he is smiling or running, walking or waving goodbye, and whether he waves with his left or right hand. Similarly, this reasoning applies to improved versions of a computer program, when the improvements are based on an earlier version. All subsequent versions of the original program are regarded as constituting one work for the purpose of calculating statutory damages. *See Data General v. Grumman Systems Support* (1992) [5]). A similar approach was adopted here in Israel. *See* DC (Jerusalem) 472/90 *Shore International Programming Industries.* [2]).

The Sagi Decision

9. Discussing American jurisprudence in *Sagi* [1], President Shamgar noted, with a hint of criticism, that American courts were not always

careful in their application of the provisions of the 1976 Copyright Act, and persisted in considering several infringements of a single work as warranting separate damages for each individual act of infringement. This despite Congress' desire, reflected in the 1976 Act, to unite all acts of infringement of one work, however many there may have been, within the scope of a single award. Indeed, a review of the relevant American case law reveals a lack of consensus. Thus, in contrast to President Shamgar's approach in *Sagi* [1], there still are those who favor granting separate damages for each individual act of infringement. In President Shamgar's view, however, the term "infringement," as it appears in section 3A of the Ordinance is to be interpreted as referring to the infringement of a single copyright, regardless of the number of instances in which that same right was infringed. Consequently, it becomes possible to award multiple awards of statutory damages only when the defendant is found to have infringed several distinct copyrights, and is being sued for each separate infringement. This having been said, President Shamgar's approach to this matter is by no means inflexible. If the same tortious act is committed on separate occasions and at sporadic intervals, such repeated acts may, in the Court's discretion, be regarded as giving rise to separate causes of action.

A Draft Copyright Law

10. Following consultations by a committee headed the former Director-General of the Ministry of Justice, Meir Gabbai, a Draft Copyright Law-1997 was recently prepared. According to the Committee's recommendations, statutory damages should be awarded "for the infringement when the gap between the minimum and maximum amounts is great, leaving much room for judicial discretion. Contrary to the case law regarding section 3A of the Ordinance, the plaintiff is not required to show damages, as the very infringement is damage *per* se."

An additional difference between the new draft and the present statutory regime is that the Draft would enable statutory damages to be awarded for each act of infringement of the same work. Thus, according to the Draft Law, an individual who copies the same work 1,000 times may be required to pay the specified amount of statutory damages 1,000 times. To this end, the Committee added the following: "This draft is intended to make amends for any injustice the interpretation of section 3A may have caused authors."

Following the Committee's recommendations, the Draft Law included the following provision in section 58(f):

> Where an action for damages is commenced pursuant to this Chapter, the court may, at any time, at plaintiff's request, award damages for each individual act of infringement committed by the same individual with respect to a particular work, or for each copy made in violation of the author's copyright. The damages awarded in such instances should be no less than 100 NIS, while not exceeding 30,000 NIS, regardless of whether the plaintiff has adduced evidence for the purpose of proving damages.

From the General to the Particular

11. It is important to note that the case at bar differs from the *Sagi* [1] decision in several respects. For instance, in *Sagi* [1], the Court held that a show performed at repeated intervals constituted a single infringement. The case before us today, however, involves eleven different Heshev booklets, each containing entire sections copied from Dekel's booklets, a significant number of which were distributed. Following *Sagi* [1], damages are not to be calculated in accordance with the number of

booklets distributed. Instead, the amount to be awarded will depend on the number of Heshev booklets that copied from Dekel, which, in this instance, comes to eleven. This having been said, the question of whether each copied booklet constitutes a separate infringement—entitling the plaintiff to multiple awards—has yet to be addressed. In this instance, the Court must decide whether Dekel*'s* booklets, from which Heshev copied, are so different from one another so as to be regarded as separate works, entitling Dekel to an independent copyright for each booklet. If this is found to be so, Heshev*'s* copying from each of these would be deemed an infringement of a separate copyright. Clearly, the complex issues outlined above may only be addressed via a careful factual examination of the original and the offending booklets, bearing in mind the nature of the infringed rights in the present case. Thus, for example, using the logic of *Sagi* [1], if Heshev copied only the format of the Dekel booklets, but applied it to eleven of its issues, this would likely be found to only constitute a single infringement. On the other hand, if each Dekel booklet is deemed to be an independent work, and if various pieces of information, rather than the mere format, was copied from each, a right to damages for infringement of each individual copyright would arise.

The District Court's Ruling

12. In its ruling, the district court described the effort that Dekel invested in preparing its price lists in the following manner:

> Dekel gathers information on the prices of various activities in the construction industry. Information, such as different bids submitted, is collected from tenders and the like, issued by various bodies in the construction industry. Based on this information, Dekel calculates the suggested price applicable to each area. The information collected is edited by classifying

> the various jobs in the construction industry in sections and sub-sections. Each of these sub-sections is composed of multiple parts, intended to encompass the diversity of construction jobs relevant to that particular sub-section. In the court's view, the information used by Dekel to create the price list in question was obtained from sources readily available to the general public. This having been said, Dekel did invest much effort and skill in order to convert this otherwise raw data into an original work, worthy of copyright protection. Clearly, Dekel created an elaborate system which included both employees and independent contractors, and, through hard work, succeeded in transforming the information collected from readily available sources into a distinct and original project meriting protection.

The district court held that while the originality of Dekel's price list, which entitled it to legal protection, extended to the clauses drafted, their content, numbers and individual prices, it did not encompass the form in which the data was presented, such as dividers between chapters.

With respect to the actual infringement, the court, relying on its examination of two Heshev booklets, found that chapters of the Dekel price list had been copied in part, and at times entirely. In addition, parts of Heshev*'s* price list featured prices copied from the Dekel price lists, either directly or subsequent to a revaluation (such as an additional 5%). In light of the above, the Court opined:

> An examination of the evidence and detailed analysis thereof reveals that Heshev copied substantial parts of Dekel's work both qualitatively (relating to the value of the copied sections) and quantitatively (the significant number of clauses copied).

> Taken cumulatively, the similarity between the two works is so striking that the possibility of it resulting from anything other than copying must be excluded.

13. According to the district court's findings, publishing a new, updated booklet of the relevant sort involves the collecting and compilation of data, at least with respect to updating the collected prices. Clearly, doing so is not simply a matter of revaluating prices or extracting them from figures appearing in earlier editions. Rather, each booklet requires its publisher to engage in an independent collection of data, as well as the sorting and classification of the information obtained. It is not incumbent upon us to disturb the above findings, which are findings of fact, and these form the basis for the legal conclusions that we must reach. Based on these facts, however, the district court held that there was only a single copyright infringement, which it labeled as infringement of the "price records for the construction industry." Consequently, the court awarded the appellant only one measure of statutory damages.

Analysis

14. In this Court's view, it would appear that the conclusion reached by the lower court fails to conform to the findings of fact concerning the booklets. The appropriate legal conclusion, self-evident from the district court's finding of facts, in our opinion, is that each Dekel booklet constitutes a distinct work. Although not every booklet is created from scratch, each issue does contain updated information, the fruit of serious analysis, data collection, compiling and updating information, performed by Dekel and significant to the booklets' creation. Indeed, the very purpose for issuing updated issues intermittently, and the reason for the related demand is the presence of the updated data, even when not

quantitatively significant. The substantial effort involved in acquiring and publishing the updated information, and the relevance of this new data to the booklets' very function, confirms that each of these booklets should be deemed a separate work. This being the case, the copying from each booklet constitutes a separate infringement of a distinct copyright. This is true even though the first Dekel issue required more work than its subsequent counterparts, with respect to design, classification, and format.

15. Moreover, employing the "independent economic value test," which is prominent in American jurisprudence and properly applied to the case at bar, each Dekel booklet is to be deemed a separate work, entitled to distinct legal protection. Although the Dekel booklets are sold to private subscribers, the very fact that customers require regular updates of the booklets indicates that each new booklet includes a significant amount of new data, thereby justifying attributing it distinct economic value. As such, each booklet has its own economic value as an independent unit. Moreover, the new information added to each updated issue results from additional work, and is indispensable to its publication. Indeed, the fact that Heshev was not satisfied to copy material from one booklet, but instead chose to copy information from each of the versions clearly confirms each booklet's independent economic value. Let us recall that the very purpose of this publication is to ensure the provision of current and up-to-date information. As the primary objective of the publications is to regularly send its readers assembled, compiled and updated information, the update must constitute a work in its own right.

16. The view outlined above is equally supported by judicial policy considerations. If we were to hold that Heshev*'s* acts only amounted to one copyright infringement, Heshev, having copied from Dekel once, could continue to do so with impunity. Undoubtedly, such a situation

would permit, and indeed encourage Heshev to persist in copying new information, without fear of reprisal, profiting at Dekel*'s* expense. Moreover, without additional copyright protection for updates of previously published material, publishing such updates would prove unprofitable as authors would understandably not wish to risk their hard work being copied without any effective remedies for such infringements. Such an approach would inevitably weaken creativity, thereby harming and depriving both authors in this field and the public at large. *See* II P. Goldstein, Copyright – Principles, Law and Practice 336 (1989) [9].

The Infringements

17. Having determined that each of Dekel*'s* booklets is, in principle, a distinct work entitled to the law's protection, and that copying from each of these booklets constitutes a separate infringement, justifying a separate award of statutory damages, we must now determine the number of times Heshev actually infringed on Dekel*'s* rights and calculate the amount of damages to which Dekel is entitled.

In its arguments before the lower court, Dekel made reference to the fact that all eleven booklets issued by Heshev contained parts that they had copied from Dekel. Although Dekel failed to specify the exact number of its own booklets which had been copied, it is the Court's view that the relevant issue is not how many works were copied but rather how many copyrights were infringed.

Examination of the evidence submitted to the lower court reveals that substantial extracts were copied from at least eleven Dekel booklets, leading us to conclude that the number of works infringed is at least

eleven. Let us now turn our minds to the question of the appropriate measure of damages.

Damages

Is the plaintiff entitled to claim statutory damages, even though he was unable to prove the damages he suffered?

18. As stated above, the respondent, Heshev, argues that a plaintiff cannot elect to claim statutory damages where he has already attempted to prove actual damages—or the defendant's unjust enrichment—and failed in his attempt. This argument was rejected by the district court.

The purpose of awarding statutory damages is to aid those authors who cannot show the damages that resulted from the copyright infringement. See the explanatory notes to the Draft Law to Amend the Copyright Ordinance (amendment no. 4)-1981. As such, Heshev*'s* argument that failure to prove damages bars recovery of statutory damages would frustrate the very purpose of the Ordinance. It would clearly be inappropriate to "punish" a plaintiff for having merely attempted to prove actual damages, and deprive him of the right to recover statutory damages after copyright infringement is successfully proved.

To this effect, the Court in *Sagi* [1] stated:

> In the present case, we are satisfied that the deterrent value alone justifies a broad interpretation allowing for statutory damages, irrespective of proof of actual injury. Thus, a plaintiff who has shown a copyright infringement may always elect an award of statutory damages in lieu of ordinary

> damages, on the basis of evidence presented before the Court, irrespective of his success in proving actual damages.

As per the American approach, a plaintiff may request statutory damages *at any time prior to the case being decided*, and may even first attempt to prove actual damages, and subsequently elect statutory damages at a later stage of the proceedings. Thus, the court in *Glazier v. First Media Corp.*, 532 F. Supp 63 (D. Del. 1982) [6] held that statutory damages may be awarded even where the plaintiff clearly suffered no actual injury and the defendant, for his part, did not significantly profit from the infringement (in such cases, courts tend to award the minimum rate prescribed by law).

19. Moreover, the Court's discretion in awarding statutory damages is not restricted to the amount of damages actually proven. Instead, in calculating the amount of damages, the Court is free to consider all of the evidence before it. Depending on the circumstances, the Court may also set the level of damages at the minimum rate prescribed by law, even where it is convinced that the damages actually suffered by plaintiff were in fact inferior to that minimum amount.

Not only may the Court consider evidence brought by plaintiff with respect to actual damage resulting from the infringement, it is in fact suggested that plaintiff submit all relevant proof, in order to help guide the Court. Such evidence is not required to meet the standard of proof normally demanded in civil cases. In this regard, the court in *Sagi* [1], at 265, stated:

> The plaintiff is required to bring forth evidence, however minimal, based on which the court can exercise its discretion in calculating the appropriate amount of damages from the

> spectrum of possibilities available to it. At present, there is no need to determine the minimum amount of damages that can be awarded, as the appropriate amount may vary from case to case. Suffice it to say that the directives which can assist in guiding the Court to fix the proper amount of statutory damages should be introduced at the hearing or entered into evidence brought before the bench.

Similarly, under American law, *see* 17 U.S.C. § 504(c)(1), courts are free to consider evidence as to actual damages, even when awarding statutory damages within the fixed boundaries of the law:

> There is nothing in …[this section] to prevent a court from taking into account evidence concerning actual damages…in making an award of statutory damages within the range set out [in the statute]

See also F.W. Woolworth v. Contemporary Arts, 344 U.S. 228 (1952) [7].

An approach that permits courts to consider evidence for actual damages when awarding statutory damages conforms to the view which allows a plaintiff to elect statutory damages, even subsequent to a failed attempt to prove actual damages. It is imperative that the measure of statutory damages awarded strike a fair balance between the objective of compensating plaintiff for his injuries, according to the general principles of tort law, and that of deterring defendants from infringing on copyrights. Only a flexible approach to selecting the basis for awarding damages best serves these two objectives. It therefore follows that Heshev's argument, that no further use should be made of evidence

offered to show actual damages when it is deemed insufficient according to civil law standards, should be rejected.

20. The statutory damages fixed by law are, in and of themselves, relatively low, and imposing fixed minimum and maximum amounts only restricts the Court further. As such, it is proper that courts have a wide range of discretion in determining their amount. The relevant considerations in determining the amount of statutory damages include "the intensity, the number of infringements, the number and duration of infringements, the type of work, the fault of the individual infringing the copyright, the nature and size of the business infringing the copyright." *See Sagi* [1], at 272. This list is not exhaustive.

It should be noted that the scope of the discretion available to Israeli courts, under section 3A of the Ordinance, is narrower than that of their American counterparts. Courts in the United States may award higher damages than the maximum amount fixed by the act—$100,000 per infringement—if the plaintiff shows that the infringement was willful. If, by contrast, the infringement is shown to have been in good faith, the amount of damages awarded may be lowered to an amount below the minimum of $200 per infringement. Indeed, this Court in *Sagi* [1], at 271, criticized the lack the courts' discretion:

> The provision regarding to the maximum amount of damages to be awarded, appears to satisfy the law's underlying purpose with respect to both the compensatory and the deterrent aspects. By contrast, the minimum amount, as defined, is extremely restrictive in that does not allow the Court to award damages in an amount lower than 10,000 NIS Unless the legislature acts to change this lack of flexibility, the Court will

> have no choice but to exercise its discretion and refrain from awarding any damages at all in cases of minor infringements.

Given this criticism, it is not surprising that the Draft Law provides for a greater range of statutory damages. Allowing broader discretion assists the Court in achieving the objectives of statutory damages—achieving similarity to actual damages suffered, encourage creativity, and deterring copyright infringements.

Conclusion

21. In light of the above discussion, and considering the circumstances of the present case it would appear desirable to award the minimum award of statutory damages provided by law, per each infringement. Thus, as the respondent infringed on eleven of the appellant's works, it must pay the specified minimum amount eleven times.

The Court therefore grant's Dekel's appeal and proposes that an amount of 110,000 NIS in damages be awarded it, instead of the 10,000 NIS awarded by the lower court.

In addition, we order the respondent to pay the appellant's court costs, including both the first instance and appeal, in the amount of 25,000 NIS.

Justice D. Beinish

I concur with Justice Strasberg-Cohen's judgment.

Justice J. Turkel

I concur with the analysis proposed by my colleague, Justice Strasberg-Cohen, and with her conclusion. I too believe that, on the facts, and in light of the policies of copyright law, each Dekel booklet should be deemed as having its own independent value. Copying any booklet therefore constitutes a separate infringement, entitling the owner of the copyright to a separate award of statutory damages. With regard to the amount of statutory damages to be awarded within the narrow scope provided by statute, it is my opinion that the Court be strict with copyright infringers and, absent special circumstances, award the maximum amount, or a proximate amount. I propose doing so primarily for purposes of deterrence, as the importance of deterring copyright infringements has grown with the increase of opportunities to violate intellectual property rights through improved methods of copying and duplicating material.

To enrich the theory animating the above reasoning, I will include a discussion of the basis underlying intellectual property rights in Jewish Law. Such protection flows from the prohibition stating that "Thou shalt not remove thy neighbour's landmark, which they of old time have set in thine inheritance, which thou shalt inherit in the land that the Lord thy God giveth thee to possess it." Deuteronomy 19:14 [11]. Thus, our rabbis have instructed us on a number of matters. For instance, it is taught that he who prevents the poor from gathering in the fields—their biblical right—is considered as though he stole their property, and regarding this matter it is stated "Remove not the ancient landmark." *See* Jerusalem Talmud, Tractate Pe'ah 5:6 [12]. Likewise, it is written that this same prohibition teaches, that he who takes a thin cake from a beggar is deemed a wicked man. Babylonian Talmud, Tractate Kiddushin 59a [13]. The interpretation of this prohibition was expanded and applied to any

individual attempting to prevent another from obtaining that which he seeks. In such cases, although the pre-emptor is not directly guilty of theft, he is nonetheless deemed wicked.

Respecting intellectual property in particular, we learn from the biblical prohibition on shifting property landmarks that it is also forbidden to encroach on an author's creation. It is taught "Where a person substitutes the name of Rabbi Eliezer for that of Rabbi Yehoshua, and the name of Rabbi Yehoshua for that of Rabbi Eliezer, so that the pure should be considered impure, and that the impure should be considered pure, he has violated a biblical commandment, as it is said "[t]hou shalt not remove thy neighbour's landmark." Midrash Sifri, Deuteronomy 188 [14] 188. For an interesting discussion comparing between the concepts of "property owner" and "author," see H. Cohen, The Law 613 (1992) [8]

Intellectual property law has also evolved from the verse "Therefore, behold, I am against the prophets, saith the Lord, that steal my words every one from his neighbour." Jeremiah, 23:30 [15]. *See* Jerusalem Talmud, Tractate Sanhedrin 11:5 [16]. *Compare* Babylonian Talmud, Tractate Sanherin 89a [17]. Likewise, the obligation to attribute words to their speaker is taught by the verse "Rob not the poor, because he is poor." Proverbs 22:22 [18]; *See also* Midrash Tanhuma, Numbers 22 [19]; N. Rackover, *Sources for the Principle of Intellectual Property Rights* (1970) [20] and N. Rackover, The 'Agreement' of Authors as a Basis for Intellectual Property Rights, 3 *Research and Survey Series of Jewish Law* (1970) [20]. Examples of contemporary discussions on the matter, in light of the principles of Jewish Law, may be found in the writings of Rabbi Shaul Israel, *Publication of Religious Words Without the Permission of Those Who Uttered Them*, 4 Techumin 354-60 (1983) [21] and Rabbi Zalman Nehamia Goldberg's work, *Copying From a*

Cassette Without the Owner's Permission, 6 Techimin 185-207 (1985) [22]. See also the decision handed down by Rabbi Ezra Batziri of the Jerusalem District Rabbinical Court regarding copyright.

Decided as set forth in the judgment of Justice Strasberg-Cohen.

December 10, 1997