

# **Fair Use Best Practices for Higher Education Institutions: The Israeli Experience**

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# Fair Use Exemption - Israeli Copyright Act, 2007

- The new Israeli Copyright Act, 2007
  - The new *fair use* exemption replaced the narrower *fair dealing* exception in the old law of 1911.
  - To be considered *fair*, the use must be for purposes such as *private study, research, criticism, review, journalistic reporting, quotation, or instruction and examination* by an educational institution (section 19(a)).

# Fair Use Exemption - Israeli Copyright Act, 2007

- The courts are further required to determine the *fairness* of each use, by applying, at a minimum, the factors listed by section 19(b):
  - the purpose and character of the use;
  - the nature of the copyrighted work used;
  - the scope of the use in relation to the work as a whole;
  - the impact of the use on the value of the work and its potential market

# Fair Use Exemption - Problems

- High level of uncertainty - chilling effect.
- Avoid exploiting the work in ways which the law seek to encourage under fair use.
- It may no longer function to promote the production and dissemination of arts and sciences which is the ultimate goal of copyright law.

# Fair Use Exemption – *Code of Fair Use Best Practices*

- To address this uncertainty, and the chilling effect it entails on educational use we drafted a *Code of Fair Use Best Practices* for the use of copyright materials in Higher Education Institutions.
- The process was initiated by Intellectual Property Legal Clinics located at the Faculty of Law University of Haifa and at The College of Management School of Law

# **The Israeli Best Practices Code – Coalition Building**

- First goal - building a coalition of all higher education institutions in Israel.
- Second goal – negotiating a shared understanding of fair use among the partnering institutions.

# The Israeli Best Practices Code

- The Code is comprised of two parts.
  - Explanatory part
  - Guidelines for fair use

# The Israeli Best Practices Code

The making available of teaching materials, by any electronic means, is permissible, provided that:

- the materials are necessary for teaching;

and

- the scope of access to such materials is tailored to the teaching needs.

# The Israeli Best Practices Code

- Avoiding the ceiling effect - the guidelines recommend to establish procedures for deciding on access to copyrighted materials which goes beyond the practical rules defined by the guidelines.
- In difficult cases the copyright officer would be assisted by a copyright committee.

# The Israeli Best Practices Code

- Any decision regarding permissible use involves the following considerations:
  - Was the work requested by the teacher of the course?
  - Is there an open-access alternative for the materials?
  - Is electronic access limited to the students in the course and to academic and administrative personal for the duration of the course only?
  - Does the institution's library have a lawful access to at least one copy of the copyrighted work?

# The Israeli Best Practices Code

In deciding the scope of fair use, the following considerations should be taken into account:

- The use of *roughly one fifth* of a work is considered fair use. The determination should not be made simply on a quantitative basis but on a qualitative one as well.
- The use of an entire article taken from a periodical or an anthology of articles is a fair use.
- The use of an entire indivisible work, such as a picture, photograph, drawing, table, etc., is a fair use.

\*\*\* This rule of thumb does not constitute a suggested maximum of permitted use\*\*\*

# **The Israeli Best Practices Code – Future Activities**

- The first draft that was formed – course packs & electronic syllabus – now being incorporated in the institutions
- The Israeli Best Practices Code was handed in a civil lawsuit against the Hebrew University.
- Future guidelines – Best Practices Code of Media in Academic Institutions