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6.1 Introduction to software protection under Israeli law

6.1.1 Body of law

The Israeli Copyright Law of 2007 (the “Copyright Law”) modernized the protection of intellectual property in Israel. The Copyright Law replaced the prior outdated statutory framework, which consisted of both the Copyright Ordinance of 1924 and the British Copyright Act of 1911, the latter having been made applicable to the British Mandate in 1924 and adopted by the nascent State of Israel in 1948.¹ The Copyright Law expressly provides for the copyright protection of computer programs.

A full analysis of the patent license provisions incorporated in many free and open source software (“FOSS”) licenses is beyond the scope of this chapter. However, it should be noted that it is possible, in certain circumstances, to protect software under Israeli patent law. On March 15, 2012, the Israeli Patent Authority issued new guidelines regarding the patentability of software inventions in Israel. The new guidelines adopt a relatively liberal approach regarding the patent eligibility of software inventions.

6.1.2 Copyright Act: Object of protection

The Copyright Law expressly provides that computer programs, which are categorized as literary works, constitute copyrightable subject matter. The Copyright Law also provides that a computer program includes the program “in any form that it may be expressed”. This provision is intended to be consistent with the definition of computer programs in Article 4 of the WIPO Copyright Treaty.²

6.1.3 Authors/Copyright owners

Section 34 of the Copyright Law provides that, absent an agreement to the contrary, an employer shall be the owner of the copyright of a work that was created by an employee “for the purpose and in the course” of such employee’s work. As there may be circumstances where it is not clear whether an employment relationship exists, or whether the work was created “for the purpose and in the course of” employment within the meaning of the statute, employment agreements in Israel frequently contain express provisions to clarify the ownership of created works, as well as affirmative assignments of rights. The Copyright Law takes a different tack with respect to works for hire. Section 35(a) of the Copyright Law provides that in the absence of an “express or implied agreement” to the contrary, the default rule is that the creator of a work, and not the party that commissioned the work, will be the original owner of the

- 1 The Copyright Act of 1911 and the Copyright Ordinance of 1924 continue in certain circumstances to apply to works and acts of infringement that predate the Copyright Law.
- 2 Israel is a signatory to the WIPO Copyright Treaty, but has yet to ratify the treaty or introduce implementing legislation. Several provisions of the WCT, however, have been implemented in the Copyright Law. Other provisions, such as the requirement of contracting states to provide for legal remedies against the circumvention of effective technological measures, have not yet been adopted into Israeli law. See below under the heading “Technical Devices and Effective Technological Measures”.

copyright in a commissioned work. However, as that provision allows an "implied" agreement to determine copyright ownership, the default rule is less than clear. As such, it is recommended that consulting agreements or other "work for hire" arrangements in Israel include an express grant of the copyright to the commissioning entity, if that is the intention of the parties.

6.1.4 Compilations

The Copyright Law also protects compilations as literary works. Section 4(b) of the Copyright Law provides that the original expression protected in a compilation is the originality of selection or arrangement of individual works or material in the compilation.

6.1.5 Joint works

The Copyright Law recognizes the possibility of joint works but does not expressly provide for the manner in which joint owners in a copyright may exploit the work. Case law has not provided a clear determination of whether Israeli law should generally follow the rule in the United Kingdom – such that the consent of all joint owners would be required to license a work – or whether it should generally follow the rule in the United States – such that each joint owner should be able to license the work without consent of the other joint owners, subject to a duty of accounting.³ As such, the right of joint owners to exploit a jointly-owned work, including the right to grant licenses to third parties or to individually enforce the copyright, is at present unclear under Israeli law.

Section 54(b) of the Copyright Law requires that a plaintiff in a copyright infringement suit join all other right holders in the suit. This would seem to require that all joint owners of a copyright be joined in any action to enforce a copyright.

3 See paragraphs 15-16 of the dissenting opinion of Justice England in IE 1567/99 *Sivan v. Shefer*, discussing the English and American approaches and their application to Israeli law. See also IE 5365/11 *AKUM Ltd. v EMI Music Publishing Ltd.* (suggesting, but not holding, that the proper interpretation of the rights of joint owners under Israeli copyright law should be determined by reference to Section 31(A)(1) of the Real Property Law, which provides that joint owners in property can each make reasonable use of the property without the permission of the other owners, as long as that use does not interfere with the rights of other owners.)

6.1.6 Derivative works

Section 16 of the Copyright Law defines a “derivative work” as an original work that is “materially based” on another work. While not expressly set forth in the statute, the copyright of the author of the derivative work should extend only to the original elements of the derivative work, while the rights of the copyright holder of the original work should remain intact.⁴ As noted below, subject to certain statutory exceptions, the right to create a derivative work is one of the exclusive economic rights included in a copyright.

The question of what constitutes a “derivative work” is, of course, of primary importance in the interpretation of the GPL, which (in very brief summary) may potentially require the disclosure of the source code of works that are derivative of the licensed work. To the extent the statutory definition of a “derivative work” impacts the answer to that question,⁵ it should be noted that the statutory test of the Copyright Law looks to the “materiality” of the “use” that the subsequent work makes of the protected work. This test may subtly differ from the definition of a “derivative work” in other jurisdictions that look to the substance of the protected work that is incorporated in the potentially derivative work, rather than how the potentially derivative work uses that material.

6.1.7 Exclusive rights

Section 11 of the Copyright Law sets forth the exclusive economic rights afforded under a copyright. All of the rights apply in the case of a computer program. The rights include:

- (a) The right to copy the work;
- (b) The right to publish the work, if the work has not yet been published;
- (c) The right to publicly perform the work;
- (d) The right to broadcast the work;
- (e) The right to make the work available to the public;
- (f) The right to create and a exploit derivative works; and
- (g) The right to lease the work.

Several other provisions of the Copyright Law are relevant to the interpretation of these enumerated exclusive rights in the context of comput-

4 TONY GREENMAN, ZEHUYOT YOZRIM, “Copyright”, 2nd ed. 2008 (hereinafter GREENMAN), at 212.

5 This article does not address the question of whether the GPL may potentially reach beyond the statutory definition of a “derivative work”. The answer to that question depends on the contractual validity and interpretation of the GPL.

er programs. Section 12 of the Copyright Law provides that technological and electronic storage of a work, as well as “temporary” copying of a work, will also be deemed copying for purposes of the law. These provisions bear on the possibility of infringing a copyright by running a computer program or by accessing data over the internet. However, Section 26 of the Copyright Law limits the exclusive right of “temporary” copying to certain purposes and to the extent the copy itself has significant economic value.

In addition, section 11(7) of the Copyright Law expressly provides that the “right to lease the work” applies to computer programs. Section 17 of the Copyright Law limits this right to the lease of physical copies of the work for commercial purposes, and provides that the right does not include the exclusive right to lease computer programs or recordings that are inseparable from the item that is the primary object of the lease. As such, the exclusive right to lease a copy of a computer program is not infringed by the lease of consumer goods that include software.⁶

6.1.8 Exceptions to exclusive rights

The Copyright Law provides for certain “permitted uses” which constitute exclusions to the exclusive rights of copyright holder enumerated above. These include, as described in more detail below, the right to create copies or derivative works of computer programs for the purpose of backups, maintenance and support, fixing bugs, and ensuring interoperability.⁷ These “permitted uses” may be exercised only by the holder of a “lawful copy” of the program or on her behalf.

Section 24(a) of the Copyright Law provides for a right to create backup copies. It states that that the holder of a lawful copy of a computer program may create additional copies of such program for backup purposes. Such copies, however, must be destroyed once the need for them passes.

Section 24(b) of the Copyright Law provides that that the holder of a lawful copy of a computer program may copy such program, either for the purpose of maintenance of such program or for the purpose of maintenance of a computer system, if such maintenance is required to use such program. Such use is also permitted for the purpose of providing such maintenance to the holder of a lawful copy.

⁶ 1 GREENMAN, at 265.

⁷ The Copyright Law enumerates other “permitted uses” which are not applicable or not specific to computer programs, including the doctrine of “fair use”. These “permitted uses” are beyond the scope of this chapter.

Section 24(c) of the Copyright Law allows for creating both copies and derivative works of computer programs for the purpose of fixing bugs, interoperability and information security. Without repeating verbatim the detailed conditions set forth in this section, it should be noted that this section is broadly intended to allow reverse engineering and decompilation of computer programs for the enumerated purposes.⁸ It is not clear whether a licensee may contractually agree to forgo the rights of “permitted uses” set forth in this section. As such, the enforceability of common contractual terms against reverse engineering is at present unclear under Israeli law.

6.1.9 Moral rights

Section 45(a) of the Copyright Law expressly provides that moral rights do not exist in computer programs.

6.1.10 Terms of protection

The term of protection for computer programs is the same as for other works. Section 38 of the Copyright Law provides that copyright protection in a work is for the life of the author plus 70 years, regardless of whether the author owns the copyright. Section 39 of the Copyright Law provides that in a joint work, the term of copyright protection is for 70 years following the death of the last joint author. However, the term of protection for works that were originally published in a country outside of Israel is generally limited to the term of protection afforded by that country.

6.1.11 Copyright assignment

Except in the context of the employer-employee relationship, the transfer of a copyright (or the exclusive license in respect thereof) requires a written assignment. In contrast to the prior law, the Copyright Law does not require that such writing be signed by the parties, which raises the possibility that unsigned messages (such as emails) may be sufficient to effect an assignment of a copyright.

⁸ See the Proposed Copyright Law, 196 Reshumot 1116 (July 20, 2005), at 1127.

6.1.12 Enforcement

The Copyright Law sets forth both civil and criminal penalties for the infringement of copyrights. Civil penalties, as described in more detail below under the heading “Legal Remedies”, can include claims for an accounting of profits, actual damages or statutory damages. Criminal sanctions can include imprisonment and the imposition of a statutory fine, and generally can be imposed for infringement for the purpose of commerce, or the sale, lease or distribution of infringing work in commerce.

The Copyright Law also imposes a special duty on the office holders in a corporation. Section 63 of the Copyright Law provides that office holders must supervise employees in order to ensure that such employees do not commit acts of infringement. Section 63(b) of the Copyright Law sets forth a presumption that an office holder has not fulfilled his statutory duty of supervision if any such acts of infringement are committed. Statutory fines can be imposed on such office holders that do not satisfy their duty of supervision.

6.1.13 Technical devices and effective technological measures

The Copyright Law does not contain provisions regarding the circumvention of technological measures implementing digital rights management. This reflects the deliberate decision of the Israeli parliament (the Knesset) not to include such provisions in the law. In 5097/11 Telran Communications (1986) Ltd. v Charlton Ltd., the Supreme Court confirmed that the Copyright Law should not be interpreted as prohibiting the circumvention of technological measures implementing digital rights management.

It is possible, however, that the circumvention of effective technological measures may present a criminal violation of the Computer Law of 1995 (the “Computer Law”). Sections 2 and 7 of the Computer Law prohibit the unauthorized disruption of the proper operation of a computer system, or the unauthorized erasure, change or disruption of material on the computer system. It is unclear whether the circumvention of effective technological measures falls within the ambit of these provisions, especially considering the Knesset’s deliberate decision not to include express provisions regarding this issue in the Copyright Law.

6.2 Analysis of FOSS under Israeli law

Under Israeli law, rights in FOSS do not differ from other forms of copyright and patent licensing. FOSS is protected under the Copyright Law as with any other form of software, and there is no reason to believe that FOSS licenses would not constitute enforceable legal contracts. As such, a breach of a FOSS license would be viewed as a breach of a contract, and the use of FOSS in breach of a license is likely to constitute copyright infringement.

For example, recently the Jerusalem District Court in TA 3560/09 and TA 3561/09, *Reuveni v. Mapa Publishing, Ltd.* enforced the terms of the Creative Commons BY-NC-ND license against a commercial defendant. The plaintiffs, amateur photographers, had uploaded photographs to the Internet pursuant to that license. The defendant, a commercial publisher, published the pictures both in a book for commercial sale as well as on its website, violating the terms of the Creative Commons license. The Court found that, in violating the license, the defendant had infringed the plaintiffs' copyright and ordered the defendant to pay monetary damages. The case presents an important precedent which shows that Israeli courts are willing to enforce the terms of open source licenses against commercial defendants. Several questions raised by the decision, including the issues of the contractual validity of a FOSS licenses and how damages should be calculated in an action for infringement of FOSS, are discussed in more detail below.

6.2.1 Rights of the original co-authors

FOSS is often developed within a collaborative development model. As noted above, while the Copyright Law recognizes the possibility of joint authors, it does not specifically set out the rights afforded to each of the joint owners. This increases the importance under Israeli law of ensuring that contributors to open source projects have executed contribution agreements, in which they either assign or license their contributed code to such project.

6.2.2 Authors of modifications

Successive versions of FOSS may build upon the works of previous FOSS authors. As in many other legal systems, Israeli law recognizes the copyright of successive authors in the derivative work. This copyright in the derivative work should be subject to the copyright of the original author to the original work.

6.2.3 Validity of FOSS licenses

The Contract Law of 1973 (the “Contract Law”) provides that under Israeli law contracts are formed through a process of offer and acceptance. The statute details how this requirement of offer and acceptance can be satisfied. In addition, case law has generally emphasized the substance of contract law rather than the form and, as such, Israeli law puts a strong emphasis on questions of good faith and fair dealing between the parties.⁹

Commercial license agreements generally satisfy the statutory requirements of contract formation, in that they are often reached through express acceptance of the terms of the license following a process of negotiation. FOSS licenses that are reached through this standard process of offer and acceptance should also be seen as validly formed and should be enforced as regular contracts. In practice, however, the acceptance of a FOSS license will frequently not involve such a process of offer and acceptance.¹⁰ Often a FOSS license does not provide for an express agreement between the parties, but merely sets forth conditions that a licensee is required to satisfy in order to benefit from the protection of the license.¹¹ For example, FOSS code is often made available through the Internet with the minimal statement that it is being made available pur-

⁹ See, e.g., Sections 12 (requiring parties to act in good faith in contractual negotiations), and 39 (requiring good faith in satisfying contractual terms and obligations) of the Contract Law of 1973.

¹⁰ The Free Software Foundation has taken the position that the GPL is a license but not a contract. See <http://www.gnu.org/philosophy/enforcing-gpl.html>. This position seems to be motivated by an attempt to circumvent the legal requirements of contract formation, such as the elements of offer and assent. However, many commentators have asserted that this position is not an accurate description of the law. See HEATHER J. MEEKER, *THE OPEN SOURCE ALTERNATIVE* (2008) at 225. In addition, it is unclear under Israeli law whether a license cannot be a contract. See generally 2 GREENMAN, at 555 (describing a license as a contract) and 568 (describing the GPL and open source licenses as enforceable legal contracts). The question of whether the GPL is a contract or license may take on more significance in Israel, where specific performance can be available as remedy for breach of contract. This is discussed in more detail below in the context of contractual remedies for the breach of the GPL. In any event, the position taken by the Free Software Foundation need not be the stance of all licensors of FOSS, whether made available under the GPL or pursuant to other FOSS licenses.

¹¹ This approach is cogently and succinctly expressed by section 5 of version 2.1 of the GPL: “You are not required to accept this License, since you have not signed it. However, nothing else grants you permission to modify or distribute the Program or its derivative works. These actions are prohibited by law if you do not accept this License. Therefore, by modifying or distributing the Program (or any work based on the Program), you indicate your acceptance of this License to do so, and all its terms and conditions for copying, distributing or modifying the Program or works based on it.” See also Section 9 of version 3.0 of the GPL.

suant to a specific FOSS license. Even so, Israeli contract law is likely to recognize FOSS licenses as validly formed legal contracts. First, Section 6 of the Contract Law expressly recognizes that contracts may be accepted through a manner of conduct. In addition, the Standardized Contract Law of 1982 (the “Standardized Contract Law”) generally recognizes the contractual validity of “standardized contracts” that may be either accepted or rejected by a counterparty.¹² This conclusion is likely to be bolstered by the general emphasis of Israeli law with regard to good faith and fair dealing, since the FOSS license will be the only grant of permission to use the FOSS work.¹³

The plaintiffs in *Reuveni* (the case referenced above) did seem to advance contractual claims when they asserted that the defendants did not satisfy the conditions set forth in the Creative Commons license.¹⁴ The court, however, did not consider the question of whether the Creative Commons constituted an enforceable legal contract and proceeded directly to the issues of copyright infringement and damages. As such, the *Reuveni* decision leaves open the question of whether FOSS licenses constitute enforceable legal contracts.

The Contract Law does not incorporate a requirement of consideration. As such, questions that may arise in other jurisdictions regarding the consideration received by the licensor in a FOSS context do not arise under Israeli law.

6.2.4 Termination

As noted above, Israeli law generally interprets licenses according to the standard rules of contract law. As such, a license that does not contain an express term may be terminated by the licensor by providing reason-

12 GABRIELA SHALEV, DINEI HOZIM, “Laws of Contracts” at 608 (1990) (hereinafter SHALEV). Together with this acceptance of “standardized contracts” as generally valid, Israeli law limits the efficacy of “unconscionable” terms in such contracts. See the discussion below under the heading “Waiver and Liability”.

13 See also 2 GREENMAN, at 568 (describing the GPL and open source licenses as enforceable legal contracts). Note that the question of whether a FOSS license is a contract or not should not affect the rights in bankruptcy. Section 123 of the Bankruptcy Ordinance - 1980, which provides for the continued use of copyrights by a licensee in bankruptcy so long as royalties continue to be paid, does not distinguish between contractual or other rights in intellectual property.

14 As noted, the FOSS license is the only authorization a defendant may have to use the FOSS work. As such, defendants may have little incentive to challenge the validity of the license. The defendants in *Reuveni*, for example, did not attack the contractual validity of the Creative Commons license. This may not be true, however, with regard to FOSS licenses that impose affirmative obligations on licensees, such as the requirements of the GPL with regard to the disclosure of source code.

able prior notice. What constitutes “reasonable” prior notice varies on a case-by-case basis according to the circumstances, and is ultimately a question determined by the court. FOSS licenses do not generally contain an express term and are generally granted for an indefinite period of time. As such, Israeli law presents the risk that a FOSS licensor can terminate a FOSS license upon reasonable notice.¹⁵

6.2.5 Waiver and liability

FOSS licenses typically contain strong disclaimers of warranties and liability. The enforceability of such broad disclaimers under Israeli statutory law is not entirely clear, and the case law has not yet considered the application of broad disclaimers in the software licensing context. However, it is important to note under Israeli law that such disclaimers may be entirely reasonable for FOSS that is made freely available without charge, especially considering that the author of such works may not have any control over the actual distribution or use of her work.

Israeli law provides for certain implied warranties in the context of a sale of goods, services or rights, including with regard to rights in intellectual property.¹⁶ For example, Section 11(3) of the Sale Law of 1968 (the “Sale Law”) generally provides for implied warranties of “regular or commercial use or any other special purpose that may be implied by agreement”. These implied contract terms are similar but not equivalent to the implied warranties of merchantability and fitness for a particular purpose provided by the Uniform Commercial Code. Additionally, Section 18(a) of the Sale Law provides for an implied warranty of non-infringement. These provisions of the Sale Law predate the significant development of the Israeli high-tech industry and do not seem to have been directed towards the problems raised by intellectual property licenses generally and software licenses in particular. In addition, Israeli case law regarding the application of these statutory provisions to intellectual property is sparse.

The ability of contracting parties to entirely disclaim such implied warranties is not entirely clear. Section 4(b) of the Sale Law provides that warranties will be implied only in the absence of any agreement to the contrary between the parties. At the same time, however, the Standardized Contract Law provides that a court may ignore or change unconscionable terms in a “standardized contract”, and Section 4(1) of that

¹⁵ 2 GREENMAN, at 555.

¹⁶ See Section 4(a) of the Sale Law. See also EYAL ZAMIR, HOK HAMEHER, “The Sale Law of 1968” (1987) (hereinafter ZAMIR), at 138.

statute provides for a presumption that contractual terms limiting liability in a “standardized contract” will be deemed unconscionable. FOSS licenses, in that they are typically drafted in advance by the licensor for an indefinite number of licensees who are not able to negotiate the terms of the license, facially fit the statutory definition of a “standardized contract.” As noted above, however, broad disclaimers of liability and warranty may be entirely appropriate in the FOSS context. The enforceability of such disclaimers in the software licensing context in general and for FOSS licenses in particular has not yet been examined by Israeli case law.

Licensors should note that Section 16 of the Sale Law provides that the implied warranties of merchantability and fitness for a particular purpose may not be disclaimed if the non-conformity results from facts that the seller “knows or has reason to know of”. While not explicit in the statute, this provision may also apply to the implied warranty of non-infringement.¹⁷ Again, the application of these provisions to the licensing of intellectual property has not been satisfactorily explored in Israeli case law.

6.3 Remedies

6.3.1 Copyright infringement – damages

Under Israeli law, a copyright holder may be entitled to either an accounting of profits or damages (whether actual or statutory) for the infringement of a copyright.¹⁸ Criminal penalties may also be generally imposed with regard to infringements of copyright in commerce, but a full discussion of such criminal penalties is beyond the scope of this article.

¹⁷ ZAMIR, at 379.

¹⁸ The remedies of actual damages and an accounting of profits are implied by the Copyright Law, though not expressly provided for therein. Section 52 of the Copyright Law provides that the infringement of a copyright is cause for a civil action for damages, and case law has held that plaintiffs are entitled to an accounting of profits or actual damages. See, e.g., 23/81 Hershko v. Orbach (1988) and 241/55 Neographica Printing vs. Masada (1957). Actual damages, as used herein, includes possible damages for the “theft” of the copyright as well as indirect damages. A discussion of the method of calculation of actual damages for copyright infringement under Israeli law is beyond the scope of this article. Regarding the remedy of an accounting of profits, see 2 GREENMAN, at 790.

In an accounting of profits, the plaintiff is entitled to receive the profits obtained as a result of the infringement of the copyrighted work. Often only a part of the defendant's work is based on the infringed work, and in such event a court must determine what proportion of profits should be allocated to the infringed work. Though the question has not yet been addressed by case law, it seems that an infringer of software (including FOSS) should similarly be entitled to an accounting of profits of the infringing party.¹⁹

Actual damages may be difficult to assess in a suit for FOSS infringement, especially where the work is generally made available free of charge. In addition to actual damages, however, the Copyright Law also provides for the possibility of statutory damages in the amount of up to 100,000 New Israeli Shekels for each instance of infringement, without any requirement to prove actual damages. A court generally has wide latitude in setting the amount of statutory damages. Section 56(b) of the Copyright Law sets out factors that for the court to consider in this regard. Factors applicable to the infringement of FOSS may include the damage caused to the copyright holder, the profits of the infringing party and whether the infringing party acted in good faith.

FOSS copyright owners may find claims for statutory damages easier to assert than attempting to prove actual damages. The plaintiffs in *Reuveni*, for example, asserted a successful claim for statutory damages. At the same time, the court in *Reuveni*, in setting the amount of statutory damages, also took into account the fact that the plaintiffs were amateur hobbyists who did not expect to profit from the copyrighted works and who, in fact, did not suffer material economic damage from the infringement. In light of these factors, the court awarded the plaintiffs substantially less than the 100,000 NIS ceiling per infringement. The court distinguished the facts in *Reuveni* from another case where the infringed work was the well-known photo of a professional photographer and where the court had awarded substantially higher statutory damages per infringement. While FOSS copyright holders are often professional programmers or engineers, FOSS is often provided free of charge by the copyright holder with little or no expectation of economic gain. As such, the factors enumerated in *Reuveni* may prove relevant to the calculation of statutory damages in future FOSS infringement actions.

Section 60(c) of the Copyright Law may restrict the remedies available against a licensee in good faith of intellectual property. While Section 60 of the Copyright law sets forth certain actions that a court may order in

19 The questions raised by an accounting of profits did not come up in *Reuveni*, as the defendant in that case did not collect any actual profits from the sale of the infringing work. See *Reuveni* at pp.4.

respect of an infringing work, Section 60(c) subjects these provisions to the “market overt rule” set forth in Section 34 of the Sale Law. Subject to the conditions of the statute, the “market overt rule” provides that the purchaser of an item in good faith obtains good title regardless of whether the vendor itself can pass on good title. As such, an owner of intellectual property may be restricted in his ability to file suit against the end users of pirated or infringing intellectual property, and may only be able to file suit against the providers such infringing works.

6.3.2 Contract remedies – injunction

Section 53 of the Copyright Law provides that the holder of a copyright is entitled to obtain an injunction against an infringer, “unless the court determines that justifications exist for denying such an injunction.” Israeli courts may also grant temporary injunctions against infringers.²⁰ The grant of an injunction may prove of central importance to the licensor of open source software, especially given the difficulty of proving actual damages. The plaintiffs in *Reuveni* had dropped their demand for an injunction, and the court in that case opined that the course of events would have in any event mooted such a demand. Nonetheless, the court seemed to state that it would have been prepared to consider such a demand had it been raised by the plaintiffs.

6.3.3 Contract remedies – specific performance

In addition to an infringement claim, copyright holders may also bring an action for breach of contract. Specific performance is a remedy theoretically available under Israeli law for the breach of contract. Section 3 of the Contract Law (Remedies for Breach) of 1970 expressly provides for the availability of this remedy to the non-breaching party, and a long tradition of Israeli case law has emphasized the importance of specific performance as a remedy for breach of contract.²¹ This approach con-

²⁰ Generally, in determining whether to grant a temporary injunction, a court will weigh the “balance of the hardships” – the damage to the plaintiff if the request for temporary relief is rejected against the damage to the plaintiff (or other parties) if the request is granted. Prior to the adoption of the Copyright Law in 2007, the Supreme Court opined that a temporary injunction for the infringement of copyright “should be granted immediately once the copyright holder has succeeded in proving that its rights have been infringed.” See RAA 67141/02 *Akum Ltd. vs. Galie Tzahal* (2003). Even so, the subsequently-adopted section 53 of the Copyright Law might be interpreted as granting courts more discretion in determining whether to award a temporary injunction.

trasts strongly with the common law tradition of favoring an award of monetary damages rather than specific performance of the contract.

As such, to the extent contractual remedies are available for breach of an open-source license, licensees may find themselves exposed to the possibility of orders for specific performance. Such orders could include, for example under the terms of the GPL, an injunction to release the source code of the licensee's work. Licensees that have discounted the possibility of such injunctions under the rules of other legal systems should be aware of this possibility under Israeli law.

21 See SHALEV, at 527, n. 1.