

The Approach of Israeli Courts to Disruptive Technologies in the Copyright Field

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The last few decades have marked the beginning of an era driven by the rapid development of disruptive technologies. While highly beneficial, these technologies are distinctive in their capacity to disrupt established markets —entrenching incumbents in some sectors and forcing dramatic restructuring in others. Predictably, some established stakeholders have resisted the integration of disruptive technologies, seeking to mitigate their impact through existing legal frameworks such as intellectual property law, unjust enrichment, and competition law.

This chapter explores how Israeli courts have addressed disruptive technologies in the field of copyright, focusing on four pivotal rulings: the Israeli Supreme Court decisions in *Tele-Event*, *Premier League*, and *Telran*, and the Israeli District Court ruling in *A.L.I.S.* It also examines the interpretive methodologies the courts adopted in these cases and provides a comparative analysis of the approach taken by courts in the United States.

In three of the four Israeli rulings, when confronted with issues involving disruptive technologies, the courts opted for an activist approach, proactively shaping the law and often deviating from legislative history. This reflects the interpretive approach the Israeli Supreme Court has generally taken when adapting established copyright law to the current digital age. The comparative analysis reveals that U.S. courts have similarly addressed issues posed by disruptive technologies independently, even in the absence of explicit legislative guidance.

The activist approach empowers courts to infuse new meaning into existing legal principles, reconcile the divide between law and technology, adapt legal norms to fast-evolving realities, and craft remedies in cases where the statutory law remains silent.

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Despite the benefits of this approach, the discussion in this chapter suggests that purposive interpretation by activist courts may introduce uncertainty into the market and undermine individual reliance interests. Additionally, judicial over-reach can incentivize litigants to bypass public discourse by advancing their interests directly through the courts, thereby avoiding broader debates on the societal implications of such decisions. With these drawbacks in mind, it is essential for the judiciary to exercise careful restraint when entertaining such an approach.

◆A. Background ◆ B. Approaches to Statutory Interpretation in Israeli Court Rulings; 1. Purposive Interpretation and Judicial Activism; 2. Originalism. **◆ C. The Interpretive Approach of Israeli Courts in Intellectual Property ◆ D. The Interpretive Approach of Israeli Courts in the Realm of Disruptive Technologies and Copyright Law;** 1. Disruptive Technologies – Satellite Broadcasting; 2. Disruptive Technologies – Streaming; 3. Disruptive Technologies – Tokens enabling the decryption of encoded satellite broadcasts; 4. Disruptive Technologies – Online Piracy **◆ E. Comparative view – Disruptive Technologies and Copyright Law in the United States;** 1. Disruptive Technologies – Betamax; 2. Disruptive Technologies – Peer-to-Peer File Sharing; (a) The Napster Case; (b) The Aimster Case; (c) The Grokster Case; 3. Disruptive Technologies – Digitization and Accessibility of Copyright-Protected Content; (a) Google's Digital Books Project; (b) The HathiTrust Case **◆ F. Discussion and Summary.**

A. Background

The term “disruptive technologies” generally refers to new technologies that displace existing ones and instigate transformative shifts in markets or industries. While most technological advancements follow a gradual, organic progression, disruptive technologies stand apart due to their ability not only to replace established technologies but also to redefine industries and create entirely new ones. For example, digital photography revolutionized the analog photography industry; the internet and the sharing economy reshaped the hotel and taxi

industries;¹ and streaming technology reconfigured the operations of the entertainment and music industries.²

Although disruptive technologies bring undeniable benefits and drive further innovation, they often entail significant disruptions that threaten the positions of incumbent stakeholders. Established, profitable companies may experience dramatic declines in market share or be entirely displaced by emerging players. These disruptions are particularly painful for traditional market leaders who are unable to adapt to the rapid changes brought about by new entrants. Consequently, it is not surprising that some entities seek to resist, limit, or mitigate the adoption of disruptive technologies.³

Intellectual property law, along with the laws of unjust enrichment and competition,⁴ has played a pivotal role in regulating the integration of disruptive technologies into the market. Indeed, courts are frequently called upon to adjudicate cases with far-reaching implications for the market dynamics of these innovations.

This chapter explores how Israeli courts have addressed the challenges posed by disruptive technologies in the realm of copyright law. It examines landmark rulings that confronted the novel issues these technologies raise, provides a critical analysis of judicial responses, and compares the Israeli approach to that of U.S. courts in similar contexts.

Over the years, copyright law has had to grapple with numerous groundbreaking technological advancements, each introducing new layers of legal and practical complexity. These innovations have triggered profound changes in the creative landscape, offering undeniable benefits to creators of protected works. They have made it possible for creators to distribute their works across multiple platforms simultaneously and to reach a global audience. Moreover, these platforms have enabled creators to monetize their popularity in diverse and innovative ways. Yet, these same technologies have presented significant challenges. They facilitate—and in some cases promote—widespread plagiarism and high-quality piracy of protected works, which can be distributed with remarkable ease and anonymity. In the current digital

¹ See applications such as Airbnb and Uber.

² In this context, see platforms such as YouTube. See also Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. TELECOMM. & HIGH TECH. L. 125 (2011).

³ See discussion below in Chapters 3 and 4.

⁴ Mark Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 101, 104 (2020).

environment, enforcing copyrights has become an increasingly arduous task. As a result, creators have been compelled to adopt new business models, diversifying their income streams beyond the traditional method of selling access to their works.

This chapter begins by presenting the two main interpretive approaches the Israeli Supreme Court has employed in various contexts—the purposive interpretative approach and the originalist approach—and highlighting the respective strengths of each. It then focuses on the Court’s intellectual property jurisprudence, examining which of these approaches has predominated. The analysis concludes that in intellectual property disputes, the Israeli Supreme Court has consistently favored judicial activism over a more restrained, originalist construction of the law.

The chapter then turns to an in-depth review of four landmark rulings in Israeli copyright law involving disruptive technologies: the Supreme Court decisions in *Tele-Event*, *Premier League*, and *Telran*, alongside the District Court ruling in *A.L.I.S.* This section examines the interpretive challenges posed by disruptive technologies while avoiding an overly technical legal analysis that might detract from the broader discussion. These case studies illustrate how, in each instance, the Israeli Supreme Court actively intervened to modernize and adapt Israeli copyright law to the realities of disruptive technologies.

Finally, the chapter offers a comparative analysis of U.S. courts’ approach to similar issues and concludes with a recommendation as to the most appropriate interpretive framework for addressing the intersection of disruptive technologies and copyright law. While the activist approach adopted by Israeli courts often yields favorable results in individual cases and adapts the law to technological advancements, it can also lead to unintended consequences and, at times, fall short of achieving broader systemic balance.

B. Approaches to Statutory Interpretation in Israeli Court Rulings

According to Israeli Supreme Court Justice Aharon Barak, judicial functions fall into three categories: interpretation, gap-filling, and legal development.⁵ Interpretation involves the assignment of meaning to the legal text in question.⁶ Similarly, gap-filling begins with

⁵ Aharon Barak, *Haheser (Lacuna) beMishpat veHok Yesodot haMishpat* [The Lacuna in Law and the Foundations of Law Statute], 20 MISHPATIM 233, 234 (1991) (Hebrew).

⁶ *Id.* at 234–235.

interpretation, as the judge must first determine that a gap exists within the text.⁷ The judge must then look beyond the language of the text,⁸ to bridge and assign a meaning to it that is consistent with the text's purpose.⁹ Legal development moves beyond interpretation and gap-filling and involves developing new legal policy that is better suited to meet evolving societal needs.¹⁰

When faced with the introduction of a new technology, the court must begin by identifying the governing law. Specifically, it must identify the relevant legal framework and determine how it applies to the new technology. If there is no appropriate legal framework, the court must recognize a gap in the legal system.¹¹ Regardless of whether the court identifies an applicable framework, the process ultimately requires interpretation.¹² This chapter focuses on judicial interpretation and the approach Israeli courts have taken in cases involving disruptive technologies.

To establish a foundation for this analysis, we first explore the Israeli Supreme Court's two main approaches to statutory interpretation—purposive and originalist—highlighting the strengths and weaknesses of each. Although this chapter focuses primarily on copyright law, its analysis offers insights that can guide judicial approaches across a broad range of disputes involving disruptive technologies. Given the profound societal implications of this topic, the analysis has the potential to shape public discourse and encourage efficient, community-centered policymaking.

1. Purposive Interpretation and Judicial Activism

⁷ *Id.* at 235, 263–264.

⁸ *Id.* at 247.

⁹ *Id.* at 250.

¹⁰ *Id.* at 236. See also Aharon Barak, *HaHalakha haShifutit veHaMetziut haHevratit: haZika el Ikronot haYesod [Judicial Rulings and Social Reality: The Link to Fundamental Principles]*, in SEFER ZUSSMAN: LEZIKHRO SHEL YOEL HAKOHEN ZUSSMAN, NASI BEIT HAMISHPAT HAELYON [Book In Memory of Yoel haKohen Zussman, President of the Supreme Court] 71 (Aharon Barak, Itzhak Zamir, Chaim Cohen, Naftali Lipshitz & Gabriela Shalev eds., 1984) (Hebrew).

¹¹ Barak, *supra* note 5, at 256–258. Barak explains that, in his view, the identification of a legal gap should be grounded in the purpose of the legal framework. As he writes, “a conceptual unity of the legal perception is created, establishing full synchronization between the interpretive activity and the activity of filling the gap. This unity is essential to gap-filling theory, as it relies on the outcomes of interpretation” *Id.* at 257.

¹² *Id.* See also Daphne Barak-Erez, *Parshanut, Shivyon veHa'atzama [Interpretation, Equality, and Empowerment]*, in SEFER YORAM DANZIGER – ASUFAT MAAMARIM LEKHEVODO SHEL HASHOFET (BEDIMOS) PROF' YORAM DANZIGER [Essays in Honor of Justice (Ret.) Prof. Yoram Danziger] 503 (Limor Zer-Gutman & Ido Baum eds., 2019) (Hebrew).

Purposive interpretation is the dominant interpretive method in Israeli law,¹³ championed by Justice Barak, who has developed it extensively through a series of rulings and academic writings.¹⁴ While a comprehensive analysis of its principles exceeds the scope of this chapter, the following paragraphs outline the key aspects most relevant to the discussion.¹⁵

At its heart, purposive interpretation seeks to align the meaning of a legal text with its intended purpose.¹⁶ While the preferred interpretation should best reflect this purpose, it must also remain consistent with the text's language,¹⁷ partially limiting the otherwise considerable discretion afforded to the judge-interpreter.¹⁸

According to Justice Barak, a legal text has both an objective and a subjective purpose.¹⁹ The subjective purpose reflects the intent of the text's author, whether it be a legislative body or

¹³ The purposive method of interpretation first appeared in the 16th century, when English judges began employing interpretive techniques that sought to uncover the legislative purpose. By the late 19th century, the approach took hold in Europe as part of a new legal theory that viewed the law of the modern welfare state as a purposive means of advancing individual and societal well-being. It emerged as an alternative to formalism and as a partial response to the realist approach. In the European purposive tradition, law is understood to have a purpose—grounded in the realization of social goals—and interpretation must therefore center on identifying and advancing the legal norm, not merely on its formal or structural articulation. The approach was later refined in the 1930s and 1940s by American scholars, who developed it into a comprehensive interpretive methodology tied to a broader jurisprudential outlook. Following World War II, purposive interpretation became a cornerstone of legal philosophy in the United States, shaped by leading scholars such as Hart, Sacks, and Fuller, who framed law as an instrument for social change. In the early 1980s, the American purposive approach splintered as tensions mounted between a conservative Supreme Court and a liberal Congress, prompting the rise of two interpretive strands: one conservative, emphasizing subjective legislative intent, and the other activist, favoring the objective purpose of the legal text. In Israel, the purposive approach was not initially part of the legal tradition. Justice Barak, however, drawing on its development in the United States, was instrumental in its adoption into Israeli jurisprudence. See Nir Kedar, *HaMahapecha haParshanut: Aliyata shel Shitat haParshanut haTaklitit beYisrael* [*The Interpretive Revolution: The Rise of the Purposive Interpretation Method in Israel*], 26 *IYUNEI MISHPAT* 737, 745–51 (2002) (Hebrew).

¹⁴ Rafi Reznik, *Tehilata shel Yeridat haParshanut haTakhitit veAliyat haMekoranut? Likrat Vikuah Parshani baMishpat haYisraeli* [*The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism? In anticipation of an Interpretive Debate in Israeli Law*], 12 *MISHPATIM AL ATAR* 67 (2019) (Hebrew), <https://lawjournal.huji.ac.il/article/24/1656>. (hereinafter *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*)

¹⁵ For further discussion, see AHARON BARAK, *PARSHANUT TAKLITIT BAMISHPAT* [*Purposive Interpretation in Law*] (2003) (Hebrew) (hereinafter *Purposive Interpretation in Law*); Barak, *supra* note 5, at 234; Kedar, *supra* note 13. See also Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 *CARDOZO L. REV.* 1109 (2008).

¹⁶ Aharon Barak, *Ikronot Klaliyim shel haMishpat beParshanut haMishpat* [*General Principles of Law in Legal Interpretation*], in SEFER WEISMAN: MEHKARAI MISHPAT LEKHEVODO SHEI YEHOSHUA WEISMAN [*Weisman Volume: Legal Studies in Honor of Yehoshua Weisman*] 1, 2 (Shalom Lerner & Daphne Levinson-Zamir eds., 2002) (Hebrew) (hereinafter *General Principles of Law in Legal Interpretation*).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 3–4.

contracting parties. In contrast, the objective purpose conveys the fundamental values of the legal system,²⁰ independent of the author's intent.²¹

Justice Barak explains that both internal and external sources are relevant when determining the subjective and objective purposes of a legal text. While the text itself is always the relevant internal source, ascertaining the subjective purpose requires consideration of such external sources as the context and circumstances that gave rise to the text's creation, and sometimes developments that unfolded thereafter,²² while discerning the objective purpose requires consideration of such external sources as fundamental legal principles, the constitutional-democratic framework, and relevant case law. The relevant fundamental principles are those prevailing at the time of interpretation rather than at the time of the text's creation.²³ Not all principles carry the same weight, however, and it is the role of the judge-interpreter to determine how to weigh them in keeping with the values of society.²⁴ Practically, these principles manifest in the form of "presumptions"—interpretive aids carefully developed by the judiciary over time—which, in turn, form an integral part of purposive interpretation.²⁵

The interpreter must also be mindful of the nature of the legal text and the rules that govern its application.²⁶ The type of text involved defines the interaction between the subjective and objective elements, clarifying which should take precedence in the specific context. Ultimately, the process yields an understanding that integrates both subjective and objective elements to achieve what Justice Barak calls "legislative harmony".²⁷ Once defined, the purpose determines which of the text's possible linguistic interpretations reflects its correct legal meaning.²⁸

²⁰ Barak, *Purposive Interpretation in Law*, *supra* note 15, at 417.

²¹ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 3–4; See also Barak, *Purposive Interpretation in Law*, *supra* note 15, at 374–375.

²² *Id.* at 181.

²³ *Id.* at 474.

²⁴ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 11–12.

²⁵ *Id.* at 13. See also 2 AHARON BARAK, *INTERPRETATION IN LAW: STATUTORY INTERPRETATION* 477 (1993) (Hebrew).

²⁶ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 4.

²⁷ *** ADD CITATION HERE

²⁸ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 4.

When interpreting statutes, Justice Barak asserts that greater emphasis should be placed on the objective purpose,²⁹ though the subjective purpose—the legislator’s intent—is not entirely irrelevant.³⁰ The weight assigned to the legislator’s intent differs on a case-by-case basis and depends on the type of law at hand. For example, distinctions must be made between “new” and “old” laws, “technical” and “values-based” laws, and laws addressing narrowly defined issues versus those dealing with broad, comprehensive fields.³¹

Purposive interpretation offers several notable advantages: (a) It enables judges to incorporate the cultural, political, and social conventions of the society in which they operate. By grounding the interpretation in principles existing at the time the text is being analyzed, purposive interpretation introduces a dynamic dimension to the interpretive process.³² Under this approach, legal texts are treated as “living” documents whose meanings evolve to reflect shifts in societal values.³³

²⁹ *Id.* at 7–8.

³⁰ *Id.* at 8.

³¹ *Id.* at 8–9.

³² Kedar, *supra* note 13, at 770.

³³ See HCJ 5026/16 *Gini v. Chief Rabbinate of Israel*, D. P. (emer.) Rubinstein, at ¶ 7; D. P. (emer.) Joubran, at ¶ 4, Nevo Legal Database (Sept. 12, 2017) (Isr.) [en banc].

(b) In a democratic system, most public decisions are rightly entrusted to the legislature, whose primary role is to represent the diverse range of views within society. However, there are circumstances in which the judiciary must ignore public sentiment and remain faithful to the regime's core constitutional principles. When public sentiments stray from these foundational values, the Supreme Court is tasked with preserving them, even when doing so will provoke considerable backlash. In such cases, purposive interpretation empowers courts—whose independence shields them from fleeting public pressures—to safeguard the regime's enduring values.³⁴

Purposive interpretation has been the subject of substantial criticism: First, the de facto appropriation of legislative authority by the judiciary risks unsettling the delicate balance of power within a democratic system.³⁵ Second, the broad discretion granted to judges under the guise of pursuing the law's "objective purpose" may encourage judicial partisanship by allowing judges to substitute society's values with their own personal beliefs.³⁶ Third, the subordination of the subjective purpose in relation to the objective purpose increases ambiguity and undermines legislative intent. This poses a danger to the principles of democracy by allowing judicial interpretation to supplant the explicit will of the legislature. Moreover, it threatens legal certainty, stability, and the rule of law—core tenets of modern legal thought that emphasize the predictability and generality of legal norms.³⁷ As American Judge Robert Bork aptly observed, Justice Barak's theory of purposive interpretation risks overriding the will of the people, whose interests are represented by the legislature, thereby accelerating the erosion of the separation of powers.

Israeli Supreme Court Justice Sohlberg has similarly critiqued purposive interpretation, arguing that it grants excessive discretion to the judiciary, thereby undermining legal certainty and disrupting the balance of power between governmental branches. He contends that this

³⁴ Menachem (Menny) Mautner, *Aktivizm Shifuti – Ha'aracha* [Judicial Activism – An Assessment], 4 *ALIY MISHPAT* 7, 11 (2005) (Hebrew).

³⁵ Richard A. Posner, *Enlightened Despot*, *THE NEW REPUBLIC* (Apr. 23, 2007), <https://bit.ly/3BTkQHH>.

³⁶ *Id.*

³⁷ Kedar, *supra* note 13, at 745.

interpretive method should be applied sparingly and only in instances where the subjective purpose of the law is ambiguous.³⁸

The theory of purposive interpretation acknowledges that interpretation is a dynamic process often shaped by political and cultural biases. It characterizes interpretation as a political-constitutional act, one that shapes the political landscape of the state and the intricate relationships among society, law, and government. Its emphasis on the judiciary's evolving role in the political and social arena has blurred the line dividing politics and law. Consequently, legal discourse has become entangled with political and economic debates, fostering a growing perception of the courts as partisan political actors.³⁹ As this distinction continues to blur, public perception of the courts declines, diminishing their unique role as objective arbiters and undermining trust and engagement with the legal system.

Notwithstanding these criticisms, purposive interpretation has been adopted as the dominant interpretive methodology in Israeli law. It emphasizes the judge's pivotal role as an interpreter, prioritizes the judge's objective evaluation over the legislator's subjective intent, and reinforces the interpreter's ability to discern the text's true purpose.⁴⁰ As subsequent sections will illustrate, this method and the associated judicial activism have been a cornerstone in several landmark intellectual property rulings. The court's decision to adopt this approach coincides with the presupposition that interpretation should inherently align with the fundamental values of the legal system.⁴¹

2. Originalism

Although purposive statutory interpretation has been dominant in Israel since the 1980s,

³⁸ Noam Sohlberg, *Al Arakhim Subyektiviyim uShofetim Obyektiviyim* [On Subjective Values and Objective Judges], 18 *HASHILOACH* 37, 42 (2019) (Hebrew). See also Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*, *supra* note 14; Menachem (Menny) Mautner, *Be'ad veNeged haMekoranut, Be'ad haParshanut haTaklitit* [For and Against Originalism, For Purposive Interpretation], *ICON-S-IL BLOG* (Feb. 5, 2019) (Hebrew), <https://tinyurl.com/y2fo9778>.

³⁹ Kedar, *supra* note 13, at 770.

⁴⁰ *Id.* at 762.

⁴¹ Barak, *Purposive Interpretation in Law*, *supra* note 15, at 133–34.

originalism—the competing interpretive theory advocated by Justice Sohlberg—has recently gained traction.

Originalism⁴² focuses on the original intent of the legislator,⁴³ and like purposive interpretation, it operates within the boundaries of the text's language.⁴⁴ Unlike purposive interpretation, however, originalism assigns paramount importance to legislative history, often prioritizing it over other factors such as the text's literal meaning, the legal system's foundational principles, and post-enactment events.⁴⁵

As explained above, Justice Barak's approach posits that the purpose underlying a legal text comprises both objective and subjective elements,⁴⁶ and it presumes that the intent of the text's author, i.e., the subjective purpose, is fully contained within the text's language. This presumption can be rebutted, however, if external elements such as legislative history suggest otherwise. By contrast, Justice Sohlberg's originalist approach places less weight on the text's language and more weight on external elements, particularly legislative history.⁴⁷ This approach asserts that such external data most accurately captures the legislator's intent.⁴⁸ Accordingly, Justice Sohlberg contends that where legislative history clearly outlines the legislator's intent, it should be accorded equal interpretive weight to the language of the law.⁴⁹ In his view, this framework brings several benefits: it represents a commonsense approach, aligns with the

⁴² Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*, *supra* note 14, argues that this approach parallels the American interpretive doctrine of originalism and is accordingly termed *mekoronut*, derived from the Hebrew root *mekor*, which corresponds in meaning to the English word 'origin'.

⁴³ *Id.* at 69, 72. For further discussion of interpretive trends in the United States and originalist interpretive doctrine, see Lawrence B. Solum, *What Is Originalism?: The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM* 12 (Grant Huscroft & Bradley W. Miller eds., 2011).

⁴⁴ Reznik, *supra* note 14, at 81.

⁴⁵ *Id.* at 82.

⁴⁶ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 3–4.

⁴⁷ *Id.*

⁴⁸ Rafi Reznik, *BiShulei haMekoranut: He'ara al Metodot Parshaniyot uMahanot Ideologiim* [*On the Margins of Originalism: A Note on Interpretive Methods and Ideological Camps*], ICON-S-IL BLOG (Nov. 20, 2018), (Hebrew) <https://tinyurl.com/xu9ektnx>. (hereinafter *On the Margins of Originalism: A Note on Interpretive Methods and Ideological Camps*)

⁴⁹ Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*, *supra* note 14, at 82.

principle of separation of powers, enhances the neutrality and objectivity of the judicial process, and fosters legal certainty.⁵⁰

Under purposive interpretation, the objective purpose of a text is assessed in light of the overarching principles of the legal system (e.g., the rule of law, democracy, and human rights).⁵¹ Because Justice Sohlberg views the incorporation of such values into the interpretive process as an act of policymaking rather than interpretation,⁵² he prefers originalism, which reduces the interpretive significance of these abstract principles.

Finally, the purposive approach strives to reconcile the gap between the objective and subjective purposes.⁵³ However, Justice Sohlberg argues that the court should not immediately attempt to resolve this conflict through balancing or integration.⁵⁴ Rather, adherence to legislative intent should be the default rule,⁵⁵ with exceptions in cases where the legislator's intent is inherently unlawful, or where the passage of time has resolved the underlying dispute.⁵⁶

⁵⁰ H CJ 5026/16 *Gini v. Chief Rabbinate of Israel*, D. P. Sohlberg, at ¶ 6, cites Aharon Barak, *Kavanat haMehokek – Metzuit o Dimyon? [Legislative Intent: Reality or Illusion?]*, 36 *HAPRAKLIT* 165 (1985) (Hebrew), stating: "A proper standard for determining the purpose and policy of a legal norm lies in the intentions of its creator. When the matter concerns legislation, this standard means that the law's purpose and objectives may be inferred from the legislator's intent and goals. As J. Zussman stated: 'The legislator began with a thought or idea and concluded with speech. We begin with that speech and attempt, from there, to retrace the legislator's steps and uncover his intention. This is the interpreter's task.' This standard carries numerous advantages. First, it reflects common sense—that the creator of a norm is best positioned to testify as to its purpose. Second, it aligns with the principle of separation of powers, under which the legislative branch creates the law, while the judiciary merely gives it effect. Third, it underscores the objectivity and neutrality of the judicial function: it is not the judge's subjective policy preferences that determine the scope of a norm, but rather the legislator's view and policy choice among competing alternatives. Finally, it enhances legal certainty and predictability regarding the interpretation of the norm, thereby promoting equal application of the law."

⁵¹ Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 11.

⁵² *Id.*

⁵³ Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*, *supra* note 14, at 85.

⁵⁴ Rafi Reznik, *Od biShulei haMekoranut: He'ara al Metodot Parshaniyot uMilhamot Tarbut [More on the Margins of Originalism: A Note on Interpretive Methods and Culture Wars]*, ICON-S-IL BLOG (Jan. 29, 2019) (Hebrew), <https://tinyurl.com/2j4w943f>, (hereinafter *A Note on Interpretive Methods and Culture Wars*); Reznik, *On the Margins of Originalism: A Note on Interpretive Methods and Ideological Camps*, *supra* note 48; Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism?*, *supra* note 14, at 87.

⁵⁵ *Id.* at 85–88.

⁵⁶ *Id.*

Rafi Reznik, interprets the differences between originalism and purposive interpretation as indicative of deeper philosophical divides between Justice Barak and Justice Sohlberg.⁵⁷ According to Reznik, originalism represents a conservative judicial philosophy,⁵⁸ which seeks to adhere to the subjective purpose of the text as reflecting the author's original intent.⁵⁹

Scholarly literature identifies several key advantages to the conservative approach and its adherence to legislative intent: (a) it encourages judicial restraint;⁶⁰ (b) it upholds constitutional principles such as democracy and the separation of powers;⁶¹ and (c) it bolsters public trust in the judiciary,⁶² enhances legal certainty and stability, and reinforces the rule of law.⁶³

Meanwhile, critics of this approach identify four important disadvantages: (a) Judges often assign different meanings to the same text as a result of their individual prior experiences and perspectives.⁶⁴ (b) Literal interpretation can be inefficient and may fail to ascertain a clear legal meaning from a range of plausible textual constructions.⁶⁵ Furthermore, the interpreter is not a

⁵⁷ Reznik, *More on the Margins of Originalism: A Note on Interpretive Methods and Culture Wars*, *supra* note 54; Reznik, *On the Margins of Originalism: A Note on Interpretive Methods and Ideological Camps*, *supra* note 48, stating: "Originalism challenges the foundational assumptions of purposive interpretation, and its application carries far-reaching implications: interpretation is viewed as an empirical-historical project rather than a normative one; core values, foremost among them human rights, lose their status as guiding interpretive tools; the relevance of legal or social developments that occurred after the time of enactment is significantly diminished; values such as certainty and stability are elevated above those of justice and fairness; the judge's role is conceived as limited to uncovering the legislator's creation, while identifying the 'intent of the system' is seen as a veil for the judge's own subjective values. In place of the three pillars of purposive interpretation—language, purpose, and discretion—originalism offers an alternative triad: language, original intent, and validation."

⁵⁸ Reznik, *More on the Margins of Originalism: A Note on Interpretive Methods and Culture Wars*, *supra* note 54.

⁵⁹ Barak, *Purposive Interpretation in Law*, *supra* note 15, at 165.

⁶⁰ They argue that adherence to the intent of the text's creator restrains the interpreter, barring the entry of personal views into the process. See 1 AHARON BARAK, *INTERPRETATION IN LAW: THE GENERAL THEORY* 325, 327, 339 (1992) (Hebrew).

⁶¹ Fidelity to legislative intent aligns with the democratic model, in which norms are to be interpreted based on the social assessments of the legislator, not the interpreter. It is the legislator who created the law, and therefore it is their will that must be realized. *Id.* at 355.

⁶² *Id.* at 333.

⁶³ *Id.* See also Barak, *Statutory Interpretation*, *supra* note 25, at 329.

⁶⁴ The text alone is incapable of directing the interpreter toward a single, definitive meaning. The interpreter's subjective perceptions may guide their process of literal interpretation in the absence of any external interpretive tools that could constrain their activity. As such, literal interpretation fails to achieve objectivity; the interpreter's own assumptions inevitably seep into the interpretive process without any attempt to restrain them. Barak, *Purposive Interpretation in Law*, *supra* note 15, at 350.

⁶⁵ *Id.* at 322. Moreover, when the text is vague or ambiguous, the literal method fails to yield a clear meaning and must therefore resort to extra-textual elements to clarify the ambiguity. This need underscores that the legal text,

linguist, and while the text's language provides an essential starting point, it is insufficient on its own to complete the interpretive process.⁶⁶ (c) Rigid adherence to the text's language can result in absurd or unworkable outcomes.⁶⁷ (d) The collective nature of the legislative process often leads to inconsistencies and contradictions in legislators' statements about the text's subjective purpose.⁶⁸

Having identified the primary interpretive approaches in Israeli jurisprudence, the discussion will now turn to how Israeli courts navigate intellectual property law.

C. Israeli Courts' Interpretive Approach to Intellectual Property Law

As noted above, the Israeli Supreme Court's approach to intellectual property law is defined by judicial activism and the application of purposive interpretation. This approach is evident in a series of landmark rulings across diverse branches of intellectual property, where the Court proactively introduced novel legal doctrines unsanctioned by the legislature. The following analysis examines this pattern through key rulings issued by District and Supreme Court panels.

The first major intellectual property case in which the Israeli Supreme Court demonstrated an activist approach was *Rav Bariach*. In that decision, the Court introduced the previously

in many cases, is insufficient on its own. Even the textual context does not always resolve the issues that may arise from the language. See Aharon Barak, *The General Theory* 328, *supra* note 60, at 328.

⁶⁶ Yaniv Roznai, *KshehaMehokek omer 'dag' – lama hu mitkaven? Al Hashivutan shel haHagdarot baHakika [When the Legislature Says "Fish" – What Does It Mean? On the Importance of Definitions in Legislation]*, 5 *IYUNIM BASAFA VEHEVRA* 106, 111 (2012) (Hebrew): "First, language is inherently limited. Our vocabulary is not sophisticated enough to fully capture and reflect the complexity of life and the range of situations it presents—especially at the margins, where concepts become blurry. Are a stool, an armchair, and a toilet all types of chairs? Every person would likely answer differently. Second, no legislator can anticipate every possible circumstance. At times, the facts of a legal dispute are so far removed from, or so different than, the typical scenarios the legislator had in mind when passing the law that no one considered them at the time of enactment. Had they done so, the law might have been drafted differently, or an explicit exception might have been included." See also Lawrence M. Solan, *The New Textualists' New Text*, 38 *LOY. L.A. L. REV.* 2027 (2005); Lawrence M. Solan, *Definition: Rules in Legal Language*, in *ENCYCLOPEDIA OF LANGUAGE & LINGUISTICS* 403 (Keith Brown ed., 2d ed. 2006)

⁶⁷ An interpretive tool beyond the linguistic one is necessary to eliminate absurdity and irrationality. It must be extralinguistic, because the linguistic expression of the legislator created the absurdity and therefore cannot resolve it. For further discussion, see Barak, *Purposive Interpretation in Law*, *supra* note 15, at 328.

⁶⁸ *Id.* at 177–80. See also Kenneth A. Shepsle, *Congress Is a "They", Not an "It": Legislative Intent as Oxymoron*, 12 *INT'L REV. L. & ECON.* 329 (1992); John F. Manning, *Inside Congress's Mind*, 115 *COLUM. L. REV.* 1911 (2015).

unrecognized doctrine of contributory infringement into Israeli patent law.⁶⁹ When evaluating whether to adopt the doctrine of contributory or indirect infringement, the Court emphasized the need to balance the competing interests at play, namely, patent protection versus the principles of freedom of expression and creativity.⁷⁰ The Court's reasoning and subsequent adoption of the contributory infringement doctrine relied heavily on developments in U.S. patent law.⁷¹

Rav Bariach established specific conditions for holding a contributing party liable for patent infringement. First, the component sold by the contributing party must constitute a substantial part of the protected invention. Second, the contributing party must have known, or reasonably should have known, that combining the component with other elements would result in patent infringement. The Court clarified, however, that when the component is a basic product with significant non-infringing uses, the alleged contributing party will not be held liable.⁷²

The *Rav Bariach* ruling has attracted considerable academic criticism. Scholars contend that the decision effectively created a new tort of contributory infringement in patent law, expanding intellectual property protections at the expense of other societal interests. Key concerns raised include the potential for increased costs of innovation, harm to market competition,⁷³ and restrictions on freedom of expression. Additionally, critics contend that the elements of the newly established tort are insufficiently defined, resulting in greater legal uncertainty and confusion.

The Israeli Supreme Court took a similar approach in *McDonald*, where it recognized the right to publicity as a dimension of intellectual property grounded in the Unjust Enrichment Law.⁷⁴ Although the right to publicity had been long acknowledged in other jurisdictions, particularly in the United States, it had not been addressed by the Israeli legislature. Although the Court

⁶⁹ CivA 1636/98 *Rav Bariach Ltd. v. Habshush Auto Accessories Trading Co. (1987) Ltd.*, 55(5) PD 337 (2001) (Isr.).

⁷⁰ *Id.*

⁷¹ *Id.* at 354.

⁷² *Id.*

⁷³ Michael D. Birnhack, *Lidata shel Avla: Hafara toremet beDinei Patentim [The Birth of a Tort: Contributory Infringement in Patent Law]*, in *TEKHNOLGIYOT SHEL TSEDEK: MISHPAT, MADA VEHEVRA [Technologies of Justice: Law, Science and Society]* 169 (Shai Lavi ed., 2003) (Hebrew).

⁷⁴ CivA 8483/02 *Aloni Ltd. v. McDonald*, 58(4) PD 314 (2004) (Isr.).

ultimately dismissed Ariel McDonald's claim on other grounds,⁷⁵ it nonetheless incorporated the right to publicity into Israeli law, thereby granting celebrities proprietary rights over their voices, names, likenesses, and other personal attributes. Justice Rivlin grounded this right in classical property law theories, including labor theory, economic theory, and personality theory. Building on this foundation, he concluded that infringing another's right to publicity constitutes unjust enrichment and, as such, establishes a valid legal claim.⁷⁶

The recognition of a broad right to publicity in the narrow context of a single dispute represents a significant activist step, effectively precluding a more inclusive discussion of its potential merits and drawbacks. The ruling fails to address whether Israeli celebrities, the intended beneficiaries of this right, genuinely require its recognition, or whether Israeli society—from a moral and social standpoint—supports granting celebrities' economic control over their personas. By sidestepping these important considerations, the judgment exposes itself to subsequent criticism as an excessively activist measure. Moreover, the precedent paved the way for further judicial developments. For instance, in the *Salvador Dalí* case, the Tel Aviv District Court established the duration of the right to publicity, holding that it spans the lifetime of the celebrity plus 25 years.⁷⁷

Another key ruling exemplifying an activist approach, specifically in the realm of copyright law, is the Israeli Supreme Court's *Shoken* decision.⁷⁸ In that case, the central issue was whether the doctrine of contributory infringement could be extended to copyright law. The ruling was issued in 2011, three years after the Copyright Law's 2007 enactment.⁷⁹ Despite the legislature's deliberate decision to address specific aspects of indirect copyright infringement,⁸⁰ and to omit any reference in the statute to contributory infringement,⁸¹ the Israeli Supreme Court

⁷⁵ *Id.* at 346–348.

⁷⁶ *Id.* at 358–366.

⁷⁷ CivC (DC CT) 11740-03-13 *Fundacio Gala Salvador Dali v. V.S. Marketing (Israel 2005) Ltd.*, Nevo Legal Database (Aug. 28, 2016) (Isr.).

⁷⁸ CivA 5977/07 *Hebrew Univ. of Jerusalem v. Schocken Pub. House Ltd.*, 64(3) PD 740 (2011) (Isr.). (hereinafter *The Schocken Appeal*)

⁷⁹ Copyright Law, 5768–2007, SH 2119 38 (2007–11), as amended (Isr.). The law entered into force in 2008.

⁸⁰ The existing provisions—including the recently enacted Section 48A—address various forms of contributory infringement, albeit only partially. See §§48–49, Copyright Law, 5768–2007 (Isr.), https://www.nevo.co.il/law_html/law00/3953.htm.

⁸¹ *The Schocken Appeal*, *supra* note 78, D. P. Rivlin, at ¶ 20.

insisted on recognizing the doctrine. This was achieved by incorporating the principles of vicarious liability articulated in Section 12 of the Tort Ordinance [New Version] into copyright law.

The Supreme Court's opinion, authored by Justice Rivlin, acknowledged that copyright law does not include a comprehensive provision addressing contributory liability. Nevertheless, the Court proceeded to examine the broader purposes of the Copyright Law, emphasizing that it is grounded in a "web of interests" encompassing both public and private considerations.⁸² The key guiding principles the Court identified include the public interest in fostering collective creativity, and the importance of safeguarding the private interests of creators. The latter principle stems from the notion that creators, having invested effort and resources in their work, are entitled to reap the resulting benefits.⁸³

In accordance with the purposive approach, the Court's analysis extended beyond the statutory language, delving into the fundamental principles of copyright law and broader property law theories. Drawing on these principles, the Court determined that "consideration of these factors in the present case indicates that it is inappropriate to allow an entity that significantly contributed to the infringing activity, and may even have benefited from the use of the work, to escape liability."⁸⁴ The ruling established that liability for contributory copyright infringement rests on the fulfillment of three cumulative conditions: Actual direct infringement must have occurred; the contributory infringer must have had knowledge of the direct infringement; and the contributory infringer must have made a significant and material contribution to the infringing activity.⁸⁵ Notably, the Court denied a request for *en banc* review of the ruling.⁸⁶

The District Court's decision in *Sanofi*, which was under appeal before the Supreme Court,⁸⁷ is the most recent intellectual property ruling exemplifying judicial activism. The plaintiff,

⁸² *Id.*, at ¶ 13.

⁸³ *Id.*

⁸⁴ *Id.*, at ¶ 14.

⁸⁵ *Id.*, at ¶23–26.

⁸⁶ CivA 5004/11 *Schocken Pub. House Ltd. v. Hebrew Univ. of Jerusalem*, Nevo Legal Database (Sept. 11, 2011) (Isr.) [en banc].

⁸⁷ CivC (DC CT) 33666-07-11 *Unipharm Ltd. v. Sanofi*, Nevo Legal Database (Oct. 8, 2015) (Isr.).

Unipharm, claimed that its competitor, Sanofi, intentionally misled the Patent Registrar into unjustly extending the term of Sanofi's patent and thus its market monopoly, preventing competitors from entering the market. Unipharm sought damages from Sanofi for its alleged fraud. In his analysis, Judge Grosskopf considered whether the remedies the Patent Law provides for misleading the Patent Registrar implies a "negative inference" that precludes a plaintiff from pursuing remedies under alternative legal frameworks. The District Court sided with the plaintiff, holding that no such inference existed.⁸⁸ By doing so, the court invited plaintiffs to seek recourse under alternative theories, such as antitrust,⁸⁹ and unjust enrichment,⁹⁰ in cases of deliberate deception of the Patent Registrar, where the remedy under the Patent Law proved inadequate.

These cases highlight the Supreme Court's consistent adoption of a values-driven and activist interpretive approach across various domains of intellectual property law. The subsequent section delves into a detailed examination of pivotal copyright rulings addressing disruptive technologies, shedding light on the distinct legal and interpretive challenges these cases present.

D. Israeli Courts' Interpretive Approach in the Realm of Disruptive Technologies and Copyright Law

Israeli courts have had numerous opportunities to address the challenges posed by new technologies in the realm of intellectual property. As mentioned above, most rulings in this area indicate an activist approach taken by the courts in addressing these technologies.

Israeli copyright legislation has evolved significantly over time. Notably, the enactment of the new Copyright Law in 2008 replaced the outdated 1911 Copyright Act (the "old Copyright Law") and the 1924 Copyright Ordinance. While these reforms sought to modernize the antiquated legislative framework and adapt it to the technological and legal advancements of recent decades, they fell short of addressing the full spectrum of legal questions arising within

⁸⁸ *Id.* J. Grosskopf, at ¶ 79.

⁸⁹ *Id.*, at ¶82–92.

⁹⁰ *Id.*, at ¶93–99.

copyright law. This shortfall is particularly evident in the context of disruptive technologies, where many issues remain unresolved.

This section examines, in chronological order, Israeli courts' key rulings on copyright law across various levels of adjudication. The discussion begins with the landmark *Tele-Event* ruling, which centered on the challenges posed by satellite broadcasting. It then explores: the *Premier League* case, which addressed streaming technology; *Telran*, involving decoding cards for accessing encrypted satellite broadcasts from foreign networks, and *A.L.I.S.*, which introduced the notice-and-takedown mechanism into Israeli copyright jurisprudence.

1. Disruptive Technologies – Satellite Broadcasting

The landmark *Tele-Event* case involved cable companies that used satellite technology to access—with consent—broadcasts from foreign television channels, then retransmitted the content to their Israeli subscribers in real-time. Tele-Event, the petitioner, held exclusive broadcasting rights for the Wimbledon tennis tournament in Israel and argued that the cable companies infringed its copyright by broadcasting the tournament matches without authorization.

The District Court rejected the claim,⁹¹ but the Supreme Court overturned the decision on appeal, ruling that Wimbledon broadcasts were protected works under copyright law.⁹² Accordingly, Tele-Event was entitled to pursue a claim for copyright infringement based on the cable companies' broadcast of the tournament in Israel. The Court held that by retransmitting the matches as aired on foreign channels, the Israeli cable companies violated the exclusive rights held by Tele-Event. Furthermore, it determined that the restrictions outlined in the Communications Law—such as the prohibition against broadcasting copyright infringing content—extend to the retransmission of foreign satellite broadcasts.

In the appeal, Justice Mazza reviewed the duties imposed on cable operators concerning copyright and performance rights holders in the context of live satellite broadcasts. He concluded that the cable companies' actions constituted copyright infringement,⁹³ and found

⁹¹ CivC (DC TA) 931/92 *Tele-Event Ltd. v. Aruzei Zahav P'ship*, PM 5754(2) 328 (1994) (Isr.).

⁹² CivA 2173/94 *Tele-Event Ltd. v. Aruzei Zahav P'ship*, 55(5) PD 529 (2001) (Isr.). (hereinafter *The Tele-Event Appeal*).

⁹³ *Id.*, at 552–553.

that, as commercial entities, their retransmissions to their subscribers amounted to commercial distribution as defined in Section 2(2) of the old Copyright Law.⁹⁴ On this basis, he concluded that the cable companies' retransmissions of foreign broadcasts via satellite—notwithstanding the technical complexities involved—were subject to the same obligations as those that apply to other, more mundane, types of transmissions. Justice Mazza emphasized the need for cable companies to verify in advance whether retransmitting satellite broadcasts would result in infringement.

Following the decision Supreme court decision, a petition for rehearing *en banc* was filed by the Israeli cable companies .In the *en banc* hearing, the Supreme Court considered several critical questions, including: under what circumstances does the retransmission of broadcasts by cable companies constitute copyright infringement?⁹⁵ While the Court affirmed that the Wimbledon tournament broadcasts were protected by copyright, it also acknowledged that the old Copyright Law, enacted in the early 20th century, likely no longer aligns with modern technological realities. On this issue, Justice Cheshin, pondered the law's scope and whether it could be extended to cover relay transmissions by cable companies.⁹⁶ He remarked:

“The court strives to do its utmost, yet its efforts may sometimes fall short. This is particularly true when there is a substantial gap between the realities of life and the provisions of a law drafted in the context of a vastly different reality. Such challenges are especially pronounced in technology-dependent laws or provisions shaped by the technological landscape of their time. In these situations, the court may find it impossible to extend the law's reach to encompass new realities that were unimaginable at the time of its enactment. Such a gap becomes insurmountable when the language of the law cannot contain these new phenomena without collapsing under the strain, and when all available interpretive tools prove inadequate to stretch the statutory language without breaking it.”⁹⁷

⁹⁴ *Id.*, at 553–554.

⁹⁵ CivC 6407/01 *Arutzei Zahav P'ship. v. Tele-Event Ltd.*, 58(6) PD 6 (2004) (Isr.) [*en banc*].

⁹⁶ *Id.* at 32.

⁹⁷ *Id.* at 25. For further clarification see *id.*, J. Cheshin, at 23–24: "Courts have always been required to confront the discrepancy between yesterday's statutes and rulings and today's legal reality. Law and legislation are, by nature, products of the past; their evolution is deliberate, calculated, and slow. Reality, on the other hand, changes constantly—sometimes at a dizzying pace. So too the disputes that arise from that reality. Indeed, it is the way of the world that 'scientific and technological progress outpaces the establishment of social norms and the procedural scaffolding periodically enacted by the legislature'. Yet more often than not, the law adapts to shifting circumstances, and even when a gap opens between statutory language and current reality, we take up the tools of

Given the above disclaimer, The Supreme Court proceeded to the analysis concerning whether Tele-Event's broadcasting rights in Israel had been infringed.⁹⁸ In the absence of explicit statutory guidance in the old Copyright Law on retransmitting foreign channels via cable, the Court evaluated whether the cable companies violated the copyright owner's public performance and commercial distribution rights.

The Court drew a distinction between primary and secondary broadcasts. Justice Cheshin recognized that a primary broadcast of a work—whether on radio, television, the internet, or any other medium—could amount to copyright infringement. However, regarding secondary broadcasts, he determined that retransmitting foreign channels via cable does not violate any exclusive right granted to the copyright holder under the current law.⁹⁹ Justice Cheshin grounded this conclusion in the principles underpinning copyright law and the significant burden that requiring cable companies to obtain copyright licenses for retransmitted content would impose. He noted that any other arrangement would be “impractical and would effectively shut down cable retransmissions or establish unworkable regulatory mechanisms.”¹⁰⁰

Justice Cheshin also clarified that cable companies are not exempt from paying royalties, but in the absence of a statutory framework for such payments, the Court lacks the authority to create one. Accordingly, he urged the legislature to address this gap by updating Israel's copyright laws to reflect modern technological advancements in a detailed and explicit fashion.¹⁰¹ Justice Or concurred with Justice Cheshin's opinion and took up his urgent request for the legislature to revise the legal copyright framework.¹⁰²

Justice Beinisch likewise concurred with Justice Cheshin's opinion, agreeing that the old Copyright Law did not explicitly address whether copyright protection applies to secondary

interpretation to bridge that gap and extend the law to new realities. This flexibility is one of the law's most basic and elevated virtues.”

⁹⁸ *Id.* at 17.

⁹⁹ *Id.* at 38.

¹⁰⁰ *Id.* at 33.

¹⁰¹ *Id.* at 51.

¹⁰² *Id.*

transmissions via relay systems.¹⁰³ She acknowledged that the law could be interpreted in two ways: broadly, to protect secondary transmissions, or more narrowly, to exclude such transmissions. In her view, absent express legislative guidance on the matter, the old Copyright Law should be narrowly construed to protect only primary broadcasts. She argued that imposing liability on secondary broadcasters for copyright infringement, without a suitably modernized legislative framework, could result in an uninformed and disproportionate revocation of competing protected rights, including the rights to freedom of expression and access to information, as well as the public good. Consequently, she aligned with Justice Cheshin's position, emphasizing that without updated legislation, there is no optimal solution to this issue. Like the other members of the panel, she joined the call for legislative intervention.

Justice Mazza reiterated the views expressed in his opinion prior to the *en banc* hearing that reversed the district court's ruling in favor of the cable companies, where he held that the television production of the Wimbledon tournament events should be recognized as a protected work under the law, given the skill and effort invested in their production. He noted that the final product, presented to television viewers, undergoes editing and transformation, requiring professional expertise typical of such productions. Based on the originality and personal expression inherent in the tournament broadcasts, Justice Mazza believed they fell within the definition of a "protected work." As previously noted, he opined that under Section 48 of the Telecommunications Regulations, franchisees are subject to restrictions on retransmitting foreign satellite broadcasts, which supplement the limitations imposed under Section 6(25) of the Telecommunications Law and Section 2 of the Telecommunications Regulations. Additionally, Justice Mazza held that the cable companies violated the petitioner's copyright because the retransmission of the broadcasts to their subscribers constituted a commercial distribution under Section 2(2) of the old Copyright Law. He noted his disagreement with Justice Cheshin's opinion and asserted that the petition should be rejected.¹⁰⁴

Justice Turkel, who had joined Justice Mazza's opinion in favor of Tele-Event on appeal—which granted Tele-Event declaratory relief affirming its exclusive right to broadcast Wimbledon matches, and concluded that the cable companies had violated this right by transmitting the tournament broadcasts without authorization—similarly concurred with Justice

¹⁰³ *Id.* at 67.

¹⁰⁴ *Id.* at 51.

Mazza's *en banc* opinion holding that the Israeli cable companies' petition should be dismissed.¹⁰⁵ Justice Rivlin shared the views of Justices Mazza and Turkel.¹⁰⁶ In his view, the cable companies infringed Tele-Event's copyright by retransmitting the broadcasts.

Justice Rivlin disagreed with Justice Cheshin's view that imposing a requirement on cable companies to obtain copyright licenses for works they retransmit would impose an onerous burden that could effectively terminate cable broadcasting. In his view, a contractual solution could be found within the framework of the relationships between the cable companies and the foreign channels. Justice Rivlin agreed with Justice Cheshin, however, that the drafters of the old Copyright Law had not intended for it to apply to retransmissions via cable. Given the significant passage of time since the law's enactment, and the substantial technological changes that had occurred in the interim, he opined that the law's applicability could not be resolved solely based on its text or the drafters' intent.

Finally, Justice Rivlin disagreed with the distinction Justice Cheshin drew between passive and active broadcasting. In Justice Rivlin's view, cable companies are distinct from passive viewers in that they actively choose the channels to broadcast to their subscribers based on commercial considerations and charge monthly fees for these services. He therefore regarded them as broadcasters in every respect. Justice Rivlin concluded that the cable companies' broadcasts constituted public performance, thereby necessitating a license from the copyright holder.¹⁰⁷ He clarified that the solution to this issue lies within the contractual sphere. According to Justice Rivlin, once cable companies are made aware of their obligation to obtain a broadcasting license, they would demand assurances from any foreign channel they contract with to secure their interests vis-à-vis copyright holders. In turn, foreign channels would include in their agreements with the copyright holder a clause permitting the broadcasts in Israel.

In light of the considerations discussed, Justice Rivlin sided with Tele-Event while echoing the call for legislative intervention to address the issues raised regarding the outdated nature of the old Copyright Law. Justice Naor in her opinion noted that ideally the underlying problem of 3rd party liability risk in territorial licensing agreements required resolution through an

¹⁰⁵ *Id.* at 52.

¹⁰⁶ *Id.* at 60.

¹⁰⁷ *Id.* at 57.

international treaty.¹⁰⁸ Barring international cooperation, the licensee—Tele-Event—should seek recourse from the licensor—a German company called UFA. Alternatively, if recourse against the licensor wasn't available—say, because the agreement immunized them from liability (as it did in Tele-Event's contract with UFA) then other forms of recourse existed that could impose liability on other licensees, such as the foreign broadcasters, for the infringement of a secondary broadcaster.

Regarding the Court's primary concern, whether the cable companies could be held liable for copyright infringement, Justice Naor concurred with Justices Mazza, Turkel, and Rivlin. She argued that, had the cable companies secured in their contracts with foreign broadcasters an undertaking to prevent any copyright infringement, they might have preserved a good-faith defense in an administrative enforcement proceeding. Here, however, in a civil dispute between private parties, claims of ignorance on the part of the alleged infringer—no matter how justified—are overlooked.¹⁰⁹ Furthermore, she expressed the view that a secondary transmissions via relay might qualify as either “public performance” or “distribution”. After examining relevant U.S. regulations governing satellite transmissions—both within and outside the framework of compulsory licensing—Justice Naor joined her colleagues in urging the legislature to update the copyright laws in light of the modern technological reality.

The case's final outcome saw the rejection of the cable companies petition by the majority, in favor of Tele-Event, over the dissenting opinions of Justices Cheshin, Or, and Beinisch. Despite the divisions over whether the old Copyright Law applied to satellite transmission technologies, the Court ultimately embraced an activist approach. Although the justices called on the legislature to provide clear legal guidance, the Court opted for an interpretive strategy that extended protections to works not explicitly addressed by the statute, departing from both the text of the statute and the legislature's original intent.¹¹⁰

2. Disruptive Technologies – Streaming

¹⁰⁸ *Id.* at 60.

¹⁰⁹ *Id.* at 61.

¹¹⁰ Ofer Tur-Sinai, *Dinei Kinyan Rukhani – Tseida El Milenium Hadash (Megamot VeHidushim BaMishpat HaYisraeli)* [Intellectual Property Law – Marching into the New Millennium (Trends and Innovations in Israeli Law)], 5 KIRYAT HAMISHPAT 177 (2005) (Hebrew).

A pivotal case addressing disruptive technologies that included notable opinions written by both the Israeli District Court and the Israeli Supreme Court, was *Premier League*.¹¹¹ The case concerned an unknown person who facilitated free online streaming of live Premier League football matches without obtaining permission or a broadcasting license. The identity of the website operator was unknown to the copyright owner, prompting the court to consider whether it could order the relevant internet provider to disclose the individual's identity.

The plaintiff was the Premier League, the organizer and commercial operator of the top tier of professional football matches in England. The Premier League records each match live, initially without commentary or graphics, then enhances the recording with subtitles, graphics, commentary, and background music. It then transmits the enhanced recording via satellite to broadcasting entities in approximately 200 countries, creating the experience of a “live broadcast” for viewers worldwide, which they could view with a processing delay of only five seconds. While the match was being broadcast, an unknown website operator streamed a free version of the entire broadcast—including commentary, graphics, and subtitles—through a website called Liverfootv. The streaming technology used on the infringing site enabled direct transmission to viewers without requiring them to download the full match.

In the District Court, Judge Agmon-Gonen ruled that the website operator did not infringe on the Premier League's broadcasting rights, reasoning that those rights do not extend to streaming. Under the Copyright Law, the definition of broadcasting rights is technology-specific and applies only to transmissions by “wired or wireless means.” The explanatory notes accompanying the legislation clarify that these rights were intended to cover television broadcasts, not internet-based transmissions.¹¹²

The court also considered whether the new right introduced in the Copyright Law—the right to make content available to the public—applied to this case. It concluded that this right was not infringed, as the live-streamed content was not available for download or accessible at a time and place of the public's choosing. As a result, the court found no copyright infringement in the streaming of the Premier League's matches.

¹¹¹ CivC (DC TA) 11646/08 *The Football Ass'n Premier League Ltd. v. Ploni*, Nevo Legal Database (Sept. 2, 2009) (Isr.) (hereinafter *The F.A.P.L. Case*); CivA 9183/09 *The Football Ass'n Premier League Ltd. v. Ploni*, 65(3) PD 521 (2012) (Isr.) (hereinafter *The F.A.P.L. Appeal*).

¹¹² *The F.A.P.L. Case*, *supra* note 111, at 32.

Although the court determined that the Premier League’s intellectual property rights were not infringed, it proceeded to address the issue of “fair use”.¹¹³ The court opined that even if the Premier League’s content had been infringed, the website operator’s use would still constitute fair use, thereby exempting it from liability.¹¹⁴ The court’s analysis applied the criteria under Section 19 of the Copyright Law concerning fair use and concluded that the purpose and character of the use were non-commercial and served a public interest by granting free access to viewers who could not otherwise afford the viewing fee. The court observed that the nature of the copied work—a live sports event—is not inherently protected or situated within the core sphere of copyright protection. It further noted that while the use involved the entire work, due to the lower quality of the infringing broadcast, it only attracted viewers who were unlikely to opt for a paid subscription and consequently did not harm the original work’s market share. Based on this analysis, the court legitimized the website operator’s use of the game broadcast and ruled that disclosing the individual’s identity was unwarranted, citing concerns over the chilling effect that might result from exposing anonymous users.¹¹⁵

The Premier League appealed to the Supreme Court, where it argued that streaming technology should not be excluded from the scope of the broadcasting right. It further contended that the Court should treat the disclosure of an anonymous user’s identity differently in cases involving copyright infringement than it does in defamation cases, reasoning that concerns about a “chilling effect” were irrelevant in the copyright field.

The Supreme Court examined two main questions: first, whether the website operator was liable for infringing the Premier League’s copyrights; and second, whether the court should order the disclosure of the website operator’s identity to allow the Premier League to enforce its rights

¹¹³ *Id.* at 35.

¹¹⁴ Guy Pesach analyzes *The F.A.P.L. Case*, *supra* note 111, in his article, Guy Pesach, *Al Psika beInyanei Mishpat veTekhnologiya* [On Adjudicating Issues of Law and Technology] – *CivC (MC TA) 11464/08 The Football Ass’n Premier League Ltd. v. Ploni*, in SHLOMO LEVIN BOOK : ESSAYS IN HONOUR OF JUSTICE SHLOMO LEVIN 579 (Asher Grunis, Eliezer Rivlin & Michael Karayanni eds., 2013) (Hebrew) [The title has been partially transliterated and the case type and jurisdiction reformatted from Hebrew for accessibility]. The article critiques the expansion of the fair use doctrine in a manner that undermines the delicate balance between promoting creativity through fair and legitimate uses, and protecting an author’s rights to enjoy the product of their intellectual and financial investment. The author emphasizes that understanding new technology is essential for shaping the law in the proper way. In other words, in order to properly address a new technology, the court must first grasp how the technology functions and what its implications are—only then can it begin to craft a legal solution to the issue at hand. Conducting legal analysis without fully understanding how the technology operates, the author argues, is a central flaw in the District Court’s ruling.

¹¹⁵ *The F.A.P.L. Case*, *supra* note 111, at 58.

through additional proceedings. On the first issue, the Supreme Court sided with the Premier League, concluding that the website operator had infringed its copyright in the sports broadcasts. But the court declined to order the disclosure of the operator's identity, as no legal mechanism existed at the time to enable such disclosure. Justice Rivlin authored the majority opinion, clarifying that while a match itself is not eligible for copyright protection, the acts of documenting, filming, editing, directing, and producing the event require significant creative skill, bringing the event within the scope of protection.¹¹⁶

The court then examined whether the Premier League's exclusive broadcasting rights had been infringed. Unlike Judge Agmon-Gonen in the District Court, the Supreme Court relied on the plain language of the new Copyright Law and determined that the Premier League's rights had indeed been infringed. The Court did not address the right to make content available to the public, as the Premier League had agreed over the course of the prior proceedings that it hadn't been infringed.

Regarding the broadcasting right, the Court assessed infringement based on three factors: (a) the existence of a public audience for the transmission; (b) the nature of the broadcast work; and (c) the act of broadcasting itself. Justice Rivlin determined that the first and second elements were satisfied, as placing the work on a publicly accessible website fulfilled the "public" requirement, and the work's audiovisual nature was undisputed. Thus, the dispositive question was whether streaming the matches constituted "broadcasting".¹¹⁷

To answer this question, the Court examined the provisions of Section 14 of the new Copyright Law, which defines broadcasting as "wired or wireless transmission." Justice Rivlin adhered to the statutory language, disregarding the legislative history and the fact that streaming technology did not exist when the broadcasting right was enacted. He concluded that broadcasting is not confined to any specific technical method and may occur through various means, including online streaming. Justice Rivlin further noted that streaming is substantively akin to television or radio broadcasts, as the content is not made wholly available to the user to be enjoyed at their discretion. For these reasons, Justice Rivlin concluded that streaming

¹¹⁶ *The F.A.P.L. Appeal*, *supra* note 111, at 542–543.

¹¹⁷ *Id.* at 544–545.

constitutes broadcasting for purposes of the Copyright Law, and that the Premier League's exclusive broadcasting right had been infringed.¹¹⁸

The Court further departed from the lower court's conclusion on fair use, holding that the anonymous infringer had not engaged in fair use. First, regarding the purpose and nature of the use, Justice Rivlin found that the individual had a commercial motive, as he earned revenue from advertisements displayed on his website. Additionally, the Court concluded that the individual's activities significantly harmed the potential market for the work, as he offered a product largely identical to that of the Premier League. These findings precluded any fair use defense.¹¹⁹

Finally, the Court addressed whether to enforce the disclosure of the website operator's personal details. On this issue, Justice Rivlin distinguished between cases involving freedom of expression and those involving copyright infringement. The Justice explained that in freedom of expression cases, anonymity should be protected to allow individuals to voice their opinions without fear, within legal limits. In cases of intellectual property infringement, by contrast, anonymity fails to serve a legitimate speech interest of the infringer, while also shielding the infringer from liability. Therefore, revealing the infringer's identity was necessary to safeguard the rights of creators.

However, Justice Rivlin opined that mandating disclosure of an infringer's identity would require further legislative action, and he called on the legislature to address this issue.¹²⁰ Justice Hendel agreed with Justice Rivlin on the issue of copyright infringement but dissented regarding the Court's inability to order disclosure absent an explicit legislative procedure. In his view, no procedural barrier existed to prevent the court from compelling internet providers to disclose a website operator's identity under contemporary tort law. Justice Hendel opined that by contracting web services to website operators, internet providers incur a general duty—in this case towards the copyright owner—to ensure their services are not being used in harmful or illegal ways. While this duty may fall short of making the providers themselves liable, it nonetheless requires them, at a minimum, to assist the copyright owner's enforcement efforts

¹¹⁸ *Id.* at 548.

¹¹⁹ *Id.* at 551–554.

¹²⁰ *Id.* at 561–562. For similar prompts emanating from the court see, e.g., LCivA 4447/07 *Mor v. Barak I.T.C. [1995] Int'l Telecomm. Servs. Ltd.*, 63(3) PD 664 (2010) (Isr.).

by sharing any information in their possession that could identify infringers on their platform. identity.¹²¹ Justice Meltzer added that if the legislative process does not progress in a timely manner, future proceedings may grant requests to disclose the infringer's identity. He suggested that this be done through an order of disclosure stemming from one of three legal claims: contributory infringement, negligence, or unjust enrichment.¹²²

This ruling reconciles innovative technologies such as streaming with Israel's 2008 Copyright Law, which was enacted before streaming became widely available. The District Court adhered to a conservative approach, interpreting the language of the law narrowly and thus concluding that it does not apply to modern streaming technology. In contrast, the Supreme Court adopted a broader reading text, while giving little weight to its legislative history and background. The more inclusive meaning assigned by the Supreme Court reflects purposive interpretation of the Copyright Law whose purpose is to protect content creators. This more inclusive approach allowed the Court to rely on the substantive similarities between streaming and traditional broadcasting methods to reach its desired conclusion.

Nevertheless, the Court refrained from ordering the disclosure of the website operator's identity absent an appropriate legislative framework. In other words, while the Court took an activist approach when interpreting the scope of the Copyright Law, it was more conservative with respect to the disclosure of the infringer's identity, refraining from action and urging the legislature to address the issue promptly.

Notably, in November 2011, a bill addressing this issue reached the Knesset General Assembly but was sent back to committee for further amendments. The proposed law sought to require internet service providers to disclose the identities of anonymous users responsible for defamation or copyright infringement under certain conditions, thereby enabling injured parties to pursue legal action them. This proposal arose in response to *Mor*, a case in which the Supreme Court observed that no procedural framework currently existed for issuing an order to disclose the identity of an anonymous online user and called for legislative action. The Court held that

¹²¹ *The F.A.P.L. Appeal*, *supra* note 111, at 564.

¹²² *Id.* at 586.

it could not “invent” such a framework through judicial action.¹²³ Ultimately, however, the bill failed to mature into law.¹²⁴

3. Disruptive Technologies – Tokens Enabling the Decryption of Encoded Satellite Broadcasts

Another significant Supreme Court ruling concerning disruptive technologies in the field of intellectual property was issued in the *Telran* case.¹²⁵ At the center of this case was technology that enabled the decoding of encrypted satellite broadcasts from foreign broadcasting networks. The respondent and counter-appellant, Charlton Ltd., held the exclusive rights to broadcast the World Cup football matches within the territory of Israel. Foreign networks, which did not have broadcasting rights in Israel, transmitted the World Cup matches via encrypted satellite broadcasts, rendering them unwatchable in Israel. The appellant and counter-respondent, Telran Ltd., sold cards to its customers that enabled them to decode the encrypted satellite transmissions from foreign networks.

Charlton Ltd. argued that selling these cards constituted both direct and contributory copyright infringement. Telran countered that the cards were purchased from official representatives of the foreign broadcasting networks, which broadcast legally, and that the cards were merely a technical means of accessing the broadcasts. Therefore, Telran argued, no copyright infringement had occurred.

The District Court ruled that Telran had infringed Charlton’s copyright and ordered it to pay damages.¹²⁶ Appeals and counter-appeals were subsequently filed. Telran argued that the cards

¹²³ *Mor v. Barak I.T.C. [1995] Int’l Telecomm. Servs. Ltd.*, 63(3) PD 664 at 667.

¹²⁴ In recent years, similar calls to restrict the legal protections afforded to online platforms have been voiced in both Europe and the United States. These calls focus particularly on legislation creating safe harbors, which under certain conditions shield platforms from liability for user-generated content. For further discussion on this topic see Niva Elkin-Koren, Yifat Nahmias & Maayan Perel, *Is It Time to Abolish Safe Harbor? When Rhetoric Clouds Policy Goals*, 31 STAN. L. & POL’Y REV. 1 (2020).

¹²⁵ CivA (IsrSC) 5097/11 *Telran Comm. (1986) Ltd. v. Charlton Ltd.*, Nevo Legal Database (Sept. 2, 2013) (hereinafter *The Telran Appeal*).

¹²⁶ CivC (DC TA) 1094/07 *Charlton Ltd. v. Telran Comm. (1986) Ltd.*, Nevo Legal Database (May 19, 2011) (Isr.).

were merely technical devices, that no direct or indirect infringement had occurred, that contributory infringement did not apply, that Charlton did not hold an exclusive copyright over broadcasts in Arabic, and that the extent of damages was not proven. Conversely, Charlton contested the district courts damage calculation, arguing—in simplified form—that the reward was disproportionately low compared to the harm they suffered.

The Supreme Court addressed three central questions: Does circumventing technological protection measures constitute direct copyright infringement? Does it constitute indirect copyright infringement? And does it constitute contributory infringement?

Justice Zylbertal authored the majority opinion, clarifying at the outset that intellectual property law requires a delicate balance between competing interests,¹²⁷ and noting that the realities of life and evolving technologies pose significant challenges for courts in maintaining these balances.¹²⁸ Further emphasizing the discrepancy in pace between law and Technology—and a unique factor in this case—was the fact that while the respective District and Supreme Court hearings took place after the old Copyright Law was already replaced, the alleged infringement had occurred still beforehand which meant that the relevant statute for assessing the infringement was the old Copyright Law.¹²⁹ This legal quirk did not escape mention by the court, as will be demonstrated in the following analysis.

Regarding the question of direct copyright infringement, Justice Zylbertal began by reviewing the actions the law defined as within the copyright holder’s exclusive rights (e. g., broadcasting). He explained that the old copyright statutes did not address broadcasting, as such technology did not exist when they were enacted. To align the law with technological advancements, courts interpreted the exclusive “public performance” right under the old law to include broadcasting.¹³⁰ After developments in the law led to the recognition of broadcasting as among

¹²⁷ *The Telran Appeal*, *supra* note 125, J. Zylbertal, at ¶ 13: “Intellectual property law in general, and copyright laws in particular, is the product of a delicate balancing act between the various interests underlying the legal framework crafted by the legislature: society’s interest in encouraging creation and ensuring access to it; the creator’s interest in receiving compensation and recognition for their work; the interests of future creators and of users, who require an adequate ‘creative breathing space’; and so forth... This is a complex and delicate balancing of competing social needs and worldviews.”

¹²⁸ *Id.*, at 19.

¹²⁹ *Id.*, at 7.

¹³⁰ *Id.*, at 20.

the exclusive rights of the copyright holder, the question arose as to what constitutes the act of broadcasting.

On this point, Justice Zylbertal referred to *Premier League*, which held that broadcasting could be conducted through various technological means but required the transmission of sounds, images, or both from one device to another.¹³¹ The key question was whether the cards sold by Telran transmitted or distributed the satellite broadcasts of the World Cup.

The District Court found that Telran sold cards enabling users to decode signals broadcast by foreign networks but held that this act did not constitute broadcasting. Justice Zylbertal agreed with this conclusion, noting that Charlton had not claimed that selling the cards, in itself, constituted broadcasting. Instead, Charlton argued that Telran's actions amounted to "providing a platform for infringement" by a third party.¹³² The court ruled that Telran's actions did not constitute direct infringement of Charlton's rights.¹³³

As for indirect infringement, Justice Zylbertal explained that the doctrine expands the scope of liability in copyright law but requires proof of direct infringement as a precondition. In the case at issue, no third party directly infringed Charlton's exclusive rights. Telran's actions involved selling cards that enabled users to bypass a technological protection measure in the form of encrypted broadcast signals. The foreign networks did not infringe Charlton's rights, as transmitting encrypted signals is akin to non-broadcasting, and viewers who accessed the content did not violate any exclusive rights under the law. Accordingly, the Court concluded that Telran's actions did not constitute indirect infringement.¹³⁴

Charlton further argued that providing a tool to circumvent technological protection measures amounted to statutory indirect infringement.¹³⁵ The Supreme Court examined both the old Copyright Law and the new Copyright Law and concluded that circumventing technological measures does not constitute indirect statutory infringement under Israeli law. The court also

¹³¹ *Id.*

¹³² *Id.*, at 21.

¹³³ *Id.*, at 30–31.

¹³⁴ *Id.*, at 23.

¹³⁵ *Id.*

noted that while the WIPO Copyright Treaty (1996) requires member states to prohibit circumvention of such measures, the Israeli legislature chose not to adopt a similar provision.¹³⁶ Consequently, the Court ruled that Telran's actions did not constitute indirect statutory copyright infringement.¹³⁷

Finally, the Court addressed contributory infringement, noting that Israeli courts have recognized liability for contributory acts under certain conditions. In the *Shoken* ruling, the Supreme Court established that contributory infringement requires direct infringement, actual knowledge of the infringement, and a substantial contribution to its commission.¹³⁸ Since no direct infringement occurred, Justice Zylbertal ruled that there was no need to examine the other conditions for contributory infringement.¹³⁹

In conclusion, Justice Zylbertal held that Telran did not infringe Charlton's rights through direct, indirect, or contributory infringement. He noted in passing, however, that Telran's actions might give rise to a claim of unjust enrichment thereby sending it back to the district court on remand.¹⁴⁰

Justice Rubinstein and Justice Amit reluctantly joined Justice Zylbertal's opinion, though both acknowledged that the legal conclusion was unsettling. Justice Rubinstein noted that the practical implication of the judgment was that wrongdoers could proceed with harmful activities unchallenged, and he called on the legislature to act to prevent further injustice.¹⁴¹ Justice Amit similarly observed that it might have been possible to include the sale of the cards within the scope of the old Copyright Law. He explained that under the Old Law, the right to public performance was divided into three categories: public performance, broadcasting, and making works available to the public. The last category—making works available to the public—was

¹³⁶ *Id.*, J. Zylbertal, at ¶ 24: “That is, although the legislature was aware—at the time it enacted the relevant legal framework—of the issue of technological protection measures and the question of whether to prohibit their circumvention, it chose not to address the matter.”

¹³⁷ *Id.*, at 27.

¹³⁸ *The Schocken Appeal*, *supra* note 78.

¹³⁹ *The Telran Appeal*, *supra* note 125, at 27–31.

¹⁴⁰ *Id.*, at 33.

¹⁴¹ *Id.*, at 35–36.

later enshrined in Section 15 of the new Copyright Law.¹⁴² According to Justice Amit, a purposive interpretation of the old law could encompass making works available to the public, and, in his view, using the cards amounted to making the work publicly accessible.¹⁴³

The Supreme Court's ruling reflects an uncharacteristically conservative and cautious approach, which contrasts with its activist leanings in previous copyright cases. Recalling, for instance, that the Court recognized contributory infringement in patent law in the *Rav Bariach* case and in copyright law in *Shoken*.¹⁴⁴ Although these rulings did not specifically address disruptive technologies, they demonstrated the Court's willingness to adopt new doctrines in Israeli copyright law, even in the absence of a legislative source.

The *Telran* judgment deliberately refrains from adopting measures to prevent piracy through the circumvention of technological protections. In this case, the Court's approach marks a trend reversal and a departure from judicial activism. The Court's restraint is underscored by the dissatisfaction it expressed with the outcome. Justice Amit acknowledged the possibility of interpreting the old Copyright Law to find infringement but refrained from pursuing this path. Ultimately however, the Court's decision to remand the case back for consideration under an unjust enrichment claim resulted in a settlement agreement that generously compensated Charlton for Telran's actions.

It appears that the Court deliberately avoided fashioning a creative solution under copyright law, opting instead to address the case through the doctrine of unjust enrichment. Although the Copyright Act has been amended several times since this judgment, the Israeli legislature has yet to regulate the use of technology that circumvents protective measures and grants unauthorized access to copyrighted works. Applying unjust enrichment principles provided a practical alternative for creators to seek relief where the copyright law fails to provide adequate protection. Much has been written about relying on unjust enrichment to achieve protection akin to copyright under specific circumstances, though this approach has seen its share of criticism among scholars.¹⁴⁵

¹⁴² *Id.*, at 38.

¹⁴³ *Id.*, at 39.

¹⁴⁴ *The Schocken Appeal*, *supra* note 78.

¹⁴⁵ For further discussion on the relationship between the Law of Unjust Enrichment and intellectual property law, see Yossi Markowitz, *Al Ma sheNish'ar meHilkat A.S.H.I.R – Iyun meHadash beYahasei haKinyan haRukhani*

4. Disruptive Technologies – Online Piracy

The most recent judgment addressing the challenges posed by disruptive technologies was issued by the Israeli Central District Court in the *A.L.I.S.* case.¹⁴⁶ The judgment sought to confront the serious challenges the internet poses to copyright enforcement. The plaintiff was a company established by international film producers to combat movie piracy in Israel, which invests significant resources in combating online copyright infringement. As part of its anti-piracy efforts, the plaintiff also targeted websites that facilitate the distribution of illegal copies and host user forums sharing pirated movies.

The plaintiff alleged that paid forums hosted on the defendant's website, Rotter.Net, contained links that regularly directed users to sites containing pirated copies of copyrighted works. The plaintiff further argued that the "notice-and-takedown" mechanism in place was ineffective, as it primarily protects inadvertent infringers, whereas the forums' intended purpose was to enable users to download pirated movies.

In his ruling, Judge Grosskopf examined three key questions: Does the law recognize the possibility of suing an intermediary? What conditions establish an intermediary's liability? And what defenses are available to intermediaries? Judge Grosskopf noted that Israeli law currently lacks clear rules regulating intermediary liability for content distributed on the internet. He thus examined two possible theories of liability: direct infringement and contributory infringement.¹⁴⁷

When considering whether providing a link to an infringing site amounts to direct liability, Judge Grosskopf explained that such liability requires proof of an action constituting copyright

veAsiyat haOsher [On What Remains of the A.S.I.R. Precedent – A Reconsideration of the Relationship Between Intellectual Property and Unjust Enrichment], 7 SHA'AREI MISHPAT 35 (2014) (Hebrew); Ofer Grosskopf, *HaNesher vohaNesikhut – Al haYahas sheBein Dinei Asiyat Osher veLo baMishpat leVein Dinei Zkhuyot Yotserim* [The Eagle and the Principality – On the Relationship Between the Laws of Unjust Enrichment and Copyright Law], in *AUTHORING RIGHTS : READINGS IN COPYRIGHT LAW 201* (Michael D. Birnhack & Guy Pesach eds., 2009) (Hebrew); Niva Elkin-Koren, *Al Klal veal 'Nekhalat haKlal:' miKinyan Rukhani leAsiyat Osher veLo baMishpat* [On Rule and the Public Domain: From Intellectual Property to Unjust Enrichment], 25 IYUNEI MISHPAT 9, 13 (2001) (Hebrew); Miriam Markowitz-Biton & Yifat Nahmias, *20 Shana leHilkat A.S.I.R.: Megamot bePsikat Batei haMishpat* [20 Years Since the A.S.I.R. Ruling: Trends in Israeli Case Law], 15 DIN VEDVARIM 599 (2021) (Hebrew).

¹⁴⁶ CivC (DC CT) 567-08-09 *A.L.I.S.—Aguda leHaganat Yetzirat Sinematografyot (1993) Ltd. v. Rotter.Net Ltd.*, Nevo Legal Database (Aug. 8, 2011) (Isr.). (hereinafter *The A.L.I.S. Case*)

¹⁴⁷ *Id.*, at 10–11.

infringement under Section 47 of the Copyright Law. He examined whether publishing a link falls under the creator's economic rights defined in Section 11 of the Copyright Law, 2007, specifically the right to "make works available to the public" under Section 15. Judge Grosskopf concluded that merely providing a link to an infringing site does not constitute "making works available to the public" for several reasons. First, creating a link is not an "act performed with the work" as required under Section 15. Second, while a link directs users to an infringing work, it does not itself create access to the work, as the content has already been made available to the public by the infringing site. Therefore, the defendants could not be held directly liable for copyright infringement based on links provided in forums hosted on their website.¹⁴⁸

With respect to contributory liability, Judge Grosskopf applied the doctrine of contributory infringement as established in *Shoken*.¹⁴⁹ He acknowledged the risks associated with this doctrine, such as restricting users' freedom of action, reducing the public's access to works, and creating a chilling effect that could deter socially beneficial activities. Judge Grosskopf reiterated the cumulative conditions the Israeli Supreme Court established for contributory liability in copyright law. Applying these conditions to website owners, he concluded that liability depends on whether the website owner received notice of the infringing link and failed to act under the "notice-and-takedown" procedure.¹⁵⁰ By tying the notice-and-takedown procedure to copyright law and contributory infringement doctrines, Judge Grosskopf effectively integrated the two frameworks.¹⁵¹

Judge Grosskopf was not persuaded that imposing a constant monitoring obligation on website owners was justified from an efficiency standpoint. He reasoned that the costs of fulfilling such an obligation—requiring website owners to review all forum posts and verify that they did not include links to infringing sites—were prohibitively high.¹⁵² Further, Judge Grosskopf opined

¹⁴⁸ *Id.*, at 12–14.

¹⁴⁹ *The Schocken Appeal*, *supra* note 78.

¹⁵⁰ *The A.L.I.S Case*, *supra* note 145, at 17–18.

¹⁵¹ For further discussion on the judgment and the court's adoption of the "notice-and-takedown" standard, see Orit Fischman-Afori, *Ahrayut Toremet leHafarat Zkhuyot Yotserim beYisrael: MehaForum beHar haTsofim laForum Mekuwan* [Contributory Copyright Infringement in Israel: From the Forum on Mount Scopus to the Online Forum], 52 HAPRAKLIT 3 (2013) (Hebrew); Sharon Bar-Ziv & Niva Elkin-Koren, *Bein Shteit Zivot: Akifat Zkhuyot Yotserim baInternet* [Between Two Arenas: Copyright Enforcement on the Internet], 48 MISHPATIM 411 (2019) (Hebrew).

¹⁵² *Id.*, at 19.

that shifting the burden of monitoring onto website owners was also unjustified from a distributive justice standpoint. Internet forums, the vast majority of which are legal and legitimate, provide significant social value. Judge Grosskopf thus concluded that intellectual property rights holders, rather than uninvolved third parties such as website owners, should bear the costs of protecting their property from infringers.¹⁵³

Judge Grosskopf outlined two exceptions to this general rule:¹⁵⁴(a) The Encouragement Exception: A website owner who actively encourages the posting of links to infringing websites, or who markets their site as a platform for such links, may be liable for contributory infringement; (b) The Improper Forum Exception: A website owner or forum manager who dedicates a forum specifically to posting links to infringing websites may also be held liable for contributory infringement.

Judge Grosskopf concluded that neither exception applied in *A.L.I.S.*, as the plaintiff failed to prove that the defendants encouraged or facilitated the posting of infringing links. Regarding the “improper forum” exception, Judge Grosskopf found that the number of links at issue was insufficient to classify the forums as improper. As a result, Judge Grosskopf dismissed the lawsuit on the condition that the defendants comply with the “notice-and-takedown” procedure as they had committed to doing.

This ruling builds on the activist approach established in *Shoken* and introduces a novel procedure—the notice-and-takedown procedure—into Israeli law. While it is recognized in jurisdictions across the European Union and the United States,¹⁵⁵ it remains highly controversial.¹⁵⁶ Its recognition in Israel through a district court decision sidelines the structured evaluation of the legislative process to weigh its merits and drawbacks. An informed legislative process is essential to balance copyright protection with the rights of users and future creators.

¹⁵³ *Id.*, at 20.

¹⁵⁴ *Id.*, at 21.

¹⁵⁵ See e.g., Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

¹⁵⁶ See Bar-Ziv & Elkin-Koren, *supra* note 150.

In summary, an analysis of the key rulings above shows that courts have often engaged in judicial activism to protect creators in a rapidly evolving technological landscape while urging the legislature to address pressing technological dilemmas. This is evident in the *Shoken* ruling and the continued developments in *A.L.I.S.* and *Premier League*. By contrast, in *Telran*, the court adopted a conservative approach but left the door open for addressing the issue through the doctrine of unjust enrichment. In other words, while disruptive technologies continually challenge the legal system, Israeli Supreme Court justices have consistently chosen to advance the law through judicial interpretation rather than waiting for legislative action.

E. Comparative View – Disruptive Technologies and Copyright Law in the United States

Courts in the United States have also grappled with the challenge of adapting copyright law to disruptive technologies. This section reviews the most prominent cases in that regard.

1. Disruptive Technologies – Betamax

In *Sony*, one of the landmark rulings in U.S. copyright law, the U.S. Supreme Court held that Sony could not be held liable for contributory copyright infringement committed by end users of its video recorders. This case arose during the video format wars of the 1970s, when Sony developed Betamax, a video format that allowed home users to record television shows and films onto magnetic tape cassettes for later viewing.¹⁵⁷ Concerned about the technology's potential market impact, Universal Studios and other copyright holders sued Sony for contributory copyright infringement in 1976.¹⁵⁸

The plaintiffs argued that because Sony manufactured a device capable of being used to infringe copyrights, it should be held responsible for any infringement committed by end users.¹⁵⁹ While the U.S. Copyright Act does not explicitly recognize the doctrine of contributory liability,¹⁶⁰

¹⁵⁷ See *This is a Revolution*, SONY (Oct. 17, 2002), <http://www.sony.net/Fun/SH/1-13/h5.html> [<https://web.archive.org/web/20021017222845/http://www.sony.net/Fun/SH/1-13/h5.html/>].

¹⁵⁸ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

¹⁵⁹ Under U.S. law, contributory infringement occurs when: (a) there is direct infringement; (b) the contributory infringer knows or should have known about the infringing activity; and (c) the contributory infringer materially contributes to or participates in the infringing activity. See *id.* at 435.

¹⁶⁰ J. Holmes's opinion in *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 60–61 (1911), is commonly regarded as the decision that opened the door to imposing liability on third parties for copyright infringement in the United States. See Christopher S. Yoo, *The Impact of Codification on the Judicial Development of Copyright*, in INTELLECTUAL

the Court ruled that statutory silence did not preclude third-party liability for copyright infringement.¹⁶¹ On the contrary, the Court recognized contributory liability as a well-established doctrine applicable across various areas of law.¹⁶²

The Court drew an parallel between patent law and copyright law regarding third-party liability, particularly for products with substantial non-infringing uses.¹⁶³ The Court concluded that although Betamax devices had infringing potential, they also had substantial non-infringing uses.¹⁶⁴ Accordingly, it held that Sony could not be liable for contributory infringement.

The Betamax case stands for the principle that a third party cannot be held liable for contributory infringement if the potentially infringing product in question has substantial legitimate non-infringing uses.¹⁶⁵ Equally importantly, the Court held that recording a program for later enjoyment—commonly known as time-shifting—constitutes fair use. Therefore, Sony could not be held liable for copyright infringement as the manufacturer and distributor of Betamax devices because the end users of these devices were protected by the fair use defense. Absent direct infringement, the Court ruled that there could be no claim for indirect infringement.¹⁶⁶

Although Sony won the legal battle, it lost the war, as Betamax was eventually eclipsed by VHS. Nevertheless, the Supreme Court's decision in *Sony* remains a landmark ruling and is a prime example of an activist judicial approach that prioritized technological innovation over other competing interests.¹⁶⁷ Moreover, the Court's recognition of time-shifting as fair use

PROPERTY AND THE COMMON LAW 177 (Shyamkrishna Balganeshe ed., 2013); In 1952, changes were introduced to the provisions of the U.S. Patent Act, including a specific statutory provision imposing liability on those who knowingly contributed to patent infringement. See 35 U.S.C. § 271(b). By contrast, when Congress amended the Copyright Act in 1976, it declined to include a similar provision. See Yoo, *supra*.

¹⁶¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, at 436.

¹⁶² *Id.* "vicarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of a broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another."

¹⁶³ *Id.*, at 435–441.

¹⁶⁴ *Id.*, at 442.

¹⁶⁵ *Id.* at 434–442. See also Jessica Litman, *The Story of Sony v. Universal Studios: Mary Poppins Meets the Boston Strangler*, in *INTELLECTUAL PROPERTY STORIES* 358 (Jane C. Ginsburg & Rochelle C. Dreyfuss eds., 2006).

¹⁶⁶ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, at 442–456.

¹⁶⁷ Veronica Corsaro, *From Betamax to YouTube: How Sony Corporation of America v. Universal City Studios, Inc. Could Still Be a Standard for New Technology*, 64 *FED. COMM. L.J.* 446 (2012).

demonstrates how judicial decisions can adapt copyright principles to accommodate technological advancements.¹⁶⁸

2. Disruptive Technologies – Peer-to-Peer File Sharing

In the late 1990s and early 2000s, Peer-to-Peer (P2P) file-sharing networks achieved immense popularity,¹⁶⁹ enabling individuals to collaborate across various fields. Nevertheless, these networks were widely exploited for the purpose of evading copyright protections. This development raised a fundamental legal question: Can an intermediary that develops and distributes file-sharing software—later used to share copyrighted works without authorization—be held liable for resulting copyright violations?

The legal discussion surrounding file-sharing technology in U.S. courts unfolded in three stages, each corresponding to a distinct point in its evolution.

(a) The Napster Case

In the late 1990s, Napster became one of the most prominent file-sharing networks,¹⁷⁰ allowing users to search for and exchange MP3 audio files. To participate, users downloaded and installed Napster's software, which connected them to a central server that maintained a directory of shared files. Although the files were stored on end-users' personal computers, Napster's technology relied on central servers to facilitate file searches and transfers.¹⁷¹ The vast majority of these files were copyrighted works shared without the authorization of the rights holders.¹⁷²

In 1999, five of the world's largest record companies—Warner Music, BMG, EMI, Universal, and Sony—sued Napster for direct infringement, contributory infringement, and vicarious

¹⁶⁸ Michael D. Birnhack, *Yetzira Mishpatit: Shimush Hogen beDinei Zkhut Yotserim [Legal Creation: Fair Use in Copyright Law]*, in *NILI'S BOOK : LAW, CULTURE AND LITERATURE* 84 (Ofar Grosskopf & Shai Lavi eds., 2017) (Hebrew).

¹⁶⁹ See Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679 (2003).

¹⁷⁰ *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

¹⁷¹ *Id.*, at 1006.

¹⁷² *Id.*, at 1012.

liability. The case underscored the growing tension between disruptive technologies and established copyright laws, particularly with the advent of P2P networks.

The matter reached the U.S. ninth circuit court of appeals after the district court below had issued a preliminary injunction against Napster pending a ruling on the merits. Therefore the standard used by the ninth circuit to decide—upon Napster’s request—whether to uphold the injunction included an inquiry into the validity of the record companies’ claims and whether they were likely to succeed on the merits. In keeping with this standard the court addressed whether Napster users’ activities qualified for the fair use defense under Section 107 of the U.S. Copyright Act. The fair use analysis considers: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect on the market value of the work.¹⁷³ The court dismissed Napster’s fair use argument, concluding that Napster’s service accomplished little more than to allow users to evade the necessary payment for copyrighted works. The court thus characterized the use as exploitative and commercial rather than transformative or innovative. Factors that featured prominently in the court’s analysis included the fact that songs, composed of various musical works, are universally recognized as core protected works, and that users were downloading the songs in their entirety. The court explained that taken together, these factors significantly harmed the work’s commercial value and market, negating Napster’s claim to fair use.¹⁷⁴

Regarding the contributory infringement claim, Napster relied on *Sony* to argue that it should be exempt from liability. The court rejected the comparison, concluding that Napster was not only aware of widespread copyright infringement on its platform,¹⁷⁵ but also facilitated the infringement.

On vicarious liability, the court found that Napster had both the technological ability to monitor user activity and a direct financial interest in the infringing use. Napster’s willful blindness to

¹⁷³ 17 U.S.C. § 107.

¹⁷⁴ *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004.

¹⁷⁵ *Id.*, at 1020.

the persistent infringing activity, combined with the financial incentives involved,¹⁷⁶ led the court to conclude that the plaintiffs would likely succeed on their claims.¹⁷⁷

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(b) The Aimster Case

The Aimster case,¹⁷⁸ also concerned file-sharing technology and intermediary liability for copyright infringement. Like Napster, Aimster allowed users to share files, and it provided them with a search engine and a centralized database, leading to lawsuits for contributory and vicarious copyright infringement. Unlike Napster's technology, however, Aimster's system utilized encryption,¹⁷⁹ allowing the company to argue that it neither knew about nor could have known about copyright infringements by its users.¹⁸⁰

The court ruled that while Aimster's use of encryption shielded it from direct knowledge of specific instances of infringement, the company's development and distribution of its software substantially contributed to copyright violations by end users.¹⁸¹ While this contribution alone was insufficient to hold Aimster liable for misuse of its platform by end-users, it shifted the burden of proof to the company to show that its file-sharing software had significant non-infringing uses.¹⁸² The court further held that even if Aimster could carry this burden, it would also need to demonstrate that the duty to monitor and police its platform would impose an undue strain on its resources.¹⁸³ On the issue of vicarious liability, the court expressed skepticism about the music industry's ability to satisfy the legal requirements for such claims.¹⁸⁴

¹⁷⁶ *Id.* at 1022. See also *Polygram Int'l Pub., Inc. v. Nevada/TIG, Inc.*, 855 F. Supp. 1314, 1325–1326 (D. Mass. 1994).

¹⁷⁷ *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, at 1022.

¹⁷⁸ *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

¹⁷⁹ *Id.*, at 646.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*, at 651–653.

¹⁸² *Id.*, at 653.

¹⁸³ *Id.*

¹⁸⁴ *Id.*, at 654–655.

Ultimately, while the court acknowledged potential non-infringing uses of Aimster's platform, such as sharing non-copyrighted works or exchanging ideas and information, the company failed to demonstrate these in practice. Far from providing a safe harbor, Aimster's encryption policy proved a detriment to its defense, as the court found it to reflect Aimster's willful blindness to end users' infringement.¹⁸⁵ This decision expanded the precedent set in the *Napster* case, further solidifying the imposition of third-party liability for end-user copyright infringements.

(c) The Grokster Case

Similar to Napster and Aimster, Grokster and StreamCast marketed file-sharing software directly to consumers, enabling large-scale sharing of copyrighted content such as movies and music.¹⁸⁶ This time, however, Grokster's services operated without relying on central servers.¹⁸⁷ This technological shift introduced a new chapter in the file-sharing debate, forcing courts to grapple with the issue of intermediary liability for end-user infringement when the software provider played no active role in managing the infringing activity.

The plaintiff relied on the doctrine of contributory infringement,¹⁸⁸ asserting liability against Grokster and StreamCast despite conceding that they did not commit any direct infringement. The trial court held that Grokster and StreamCast were not liable for contributory infringement, citing the *Sony* case.¹⁸⁹ Although the court acknowledged that end-users had committed direct infringement, it found the defendants' awareness of potential misuse of their software insufficient to establish liability. In line with the *Sony* case, the court emphasized that the software had substantial non-infringing uses. Accordingly, the imposition of liability would

¹⁸⁵ *Id.* at 654. See also *In re Aimster Copyright Litig.*, 252 F. Supp. 2d 634 (N.D. Ill. 2002).

¹⁸⁶ *Id.* at 1031: "Defendants Grokster, Ltd. ('Grokster'), StreamCast Networks, Inc. (formerly known as MusicCity Networks, Inc.) ('StreamCast'), and Kazaa BV (formerly known as Consumer Empowerment BV) ('Kazaa BV'), distributed software that enabled users to exchange digital media via a peer-to-peer transfer network".

¹⁸⁷ *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003).

¹⁸⁸ *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029.

¹⁸⁹ *Id.* See also *MGM Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

have required the plaintiff to establish that the defendants had specific knowledge of infringement and failed to prevent it. Yet, notifications of infringement had been sent only when it was too late to intervene effectively.¹⁹⁰

On the issue of vicarious liability, the court concluded that while Grokster and StreamCast had a direct financial interest, the duty to monitor and police their platforms would put them under significant financial strain. For these reasons, the court ruled in favor of the defendants, exempting them from liability for the alleged misuse of their platforms.

The district court's decision was affirmed on appeal, but in 2005, the U.S. Supreme Court reversed and held Grokster and StreamCast liable for contributory infringement. The Court found that the companies intentionally distributed their software to promote copyright infringement,¹⁹¹ distinguishing the case from *Sony*. In *Sony*, the Court declined to impose liability on an intermediary that merely provided a tool with substantial non-infringing uses that could incidentally facilitate infringement. Grokster and StreamCast, by contrast, actively invited infringement.¹⁹² StreamCast, for instance, marketed its platform to advertisers and users as "the next Napster." The Court further highlighted that both companies were aware of widespread infringement and failed to take any steps to address it. The opinion reflects skepticism about the software's intended purpose, with Justice Ginsburg questioning whether it genuinely served legitimate non-infringing uses.¹⁹³ At the same time, it raised wider concerns about the implications of intermediary liability, with Justice Breyer warning in a concurring opinion that overly broad interpretations could risk stifling technological innovation.¹⁹⁴

The four cases described above serve as a parallel example of the tug of war between the judiciary and the phenomenon of widespread copyright infringement fueled by the relentless introduction of new technology. Also indicative of this struggle is the idle role of the legislature as courts resort to increasingly activist means. In *Sony*, the Court took a restrained stance,

¹⁹⁰ *Id.*

¹⁹¹ *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005).

¹⁹² *Id.*, at 2780.

¹⁹³ *Id.*, at 2786.

¹⁹⁴ *Id.*, at 2790–2792.

though—as technologies grew more capable—¹⁹⁵that restraint all but eroded. This is evident throughout *Napster*,¹⁹⁶ *Aimster*, and *Grokster*, where the burden imposed on intermediary platforms to police end-user infringement heightened significantly. All the while, the Copyright Act of 1976—containing no express provision for contributory liability—has remained unchanged.¹⁹⁷

3. Disruptive Technologies – Digitization and Accessibility of Copyright-Protected Content

(a) Google’s Digital Books Project

Google’s digital books project,¹⁹⁸ also known as Google Books, gave rise to one of the most debated copyright cases of the past decade. Launched in 2004, the project began as an initiative to digitize and catalog millions of books by scanning works from major U.S. libraries, including those at the University of Michigan, Harvard, and Stanford.¹⁹⁹ Notably, Google did not seek permission from copyright holders for the scanned works.²⁰⁰

In October 2005, a year after the project’s launch, two lawsuits were filed against Google in the Southern District of New York.²⁰¹ The Authors Guild, a professional organization for writers,

¹⁹⁵ Yuval Karniel & Ehud Nissimian, *Zkhuyot haYotserim beldan haMeyda: haTzorekh belzon Hadash bein Zkhut haYotser levein Khofesh haMeyda* [Copyright in the Information Age: The Need for a New Balance Between Author’s Rights and Freedom of Information], 3 ALIY MISHPAT 191, 217 (2003) (Hebrew).

¹⁹⁶ As noted, in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, the technology in question enabled end users to infringe copyright, but Sony had no way of knowing which of its customers were actually doing so. In contrast, in *A&M Records Inc. v. Napster, Inc.*, 239 F.3d 1004, at least in theory, the company could have prevented users from sharing copyrighted works.

¹⁹⁷ The Copyright Act, 17 U.S.C. §§ 101–1205 (1976).

¹⁹⁸ The project began to take shape in 2002. In 2004, Google started scanning the books. In December 2004, the company officially announced the project and named it "Google Print", See *Google Checks Out Library Books*, News from Google (Dec. 14, 2004), <https://bit.ly/3hf5K7F>.

¹⁹⁹ James Grimmelman, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC’Y U.S.A. 497, 498 (2011).

²⁰⁰ The corpus of works scanned by Google includes: (1) works whose copyright protection period had expired and thus are part of the public domain; (2) works still protected by copyright, which require authorization from the rights holder for use; and (3) orphan works—those for which the copyright status or rights holder is unknown.

²⁰¹ An identical claim filed in Israel, was rejected by the Jerusalem District Court on the grounds that the claim did not fall within the list of issues for which a class action may be filed. See CivC (DC Jer) 11319-04-11 *Google Inc. v. Brauner*, Nevo Legal Database (Nov. 23, 2011) (Isr.).

filed the first lawsuit, which was followed by a second suit by five major book publishers.²⁰² The Authors Guild’s lawsuit was a class action brought on behalf of all copyright holders whose works were included in the University of Michigan’s collection.²⁰³ The plaintiffs argued that Google infringed their copyrights by scanning and copying protected works without obtaining their consent.²⁰⁴

Google countered that its service was akin to digital catalog cards, as it only displayed snippets of text rather than entire works. The company claimed that this limited display fell under the fair use doctrine as defined in Section 107 of the U.S. Copyright Act.²⁰⁵

After extensive negotiations, the parties reached a settlement agreement under which Google would pay \$125 million to establish a Book Rights Registry, compensate rights holders, and cover legal costs.²⁰⁶ The agreement allowed Google to continue scanning copyrighted works unless rights holders explicitly objected, while also sharing revenues from book sales and allocating funds to locate the owners of orphan works.²⁰⁷ Despite these terms, the district court rejected the settlement, citing concerns about its broader implications.²⁰⁸

The court, while acknowledging the inherent benefits of a project like Google’s,²⁰⁹ found that the agreement granted Google an unfair competitive advantage, effectively creating a “de facto” monopoly.²¹⁰ Additionally, contrary to established copyright law principles, the settlement shifted the burden onto copyright holders to object to Google’s use of their works rather than

²⁰² *McGraw Cos., Inc. v. Google Inc.*, No. 05 CV 08881 (S.D.N.Y. complaint filed Oct. 19, 2005).

²⁰³ The University of Michigan Library was the first to make its collection of works available to Google. See Grimmelmann, *supra* note 198, at 499.

²⁰⁴ See discussion of the events leading up to the lawsuit in *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011).

²⁰⁵ See 17 U.S.C. § 107.

²⁰⁶ See Notice of Motion for Preliminary Settlement Approval, *Authors Guild v. Google Inc.*, No. 05 CV 8136 (DC) (S.D.N.Y. filed Oct. 28, 2008); See also *Authors, Publishers, and Google Reach Landmark Settlement*, News From Google (Oct. 20, 2008), <https://bit.ly/3E0cDTP>.

²⁰⁷ *Id.*; see also Grimmelmann, *supra* note 198, at 500–501.

²⁰⁸ *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666; Grimmelmann, *supra* note 198.

²⁰⁹ *Authors Guild, Inc. v. Google Inc.*, 770 F. Supp. 2d 666, at 666–670.

²¹⁰ *Id.*

requiring Google to seek permission.²¹¹ The court emphasized that issues such as orphan works should be addressed by the legislature, not resolved through private settlements. Since the class action could bind third parties not involved in the proceedings,²¹² the court denied approval of the settlement.²¹³

The case proceeded, and in 2013, the court ruled that Google's use of copyrighted works constituted fair use under copyright law.²¹⁴ The court held that Google's use was transformative and did not substitute for the original works.²¹⁵ Further, the court ruled that copying entire works did not negate fair use, as users could view only limited excerpts.²¹⁶ The court highlighted the project's immense benefits, including reviving out-of-print works, improving access for disadvantaged populations, and dramatically easing researchers' ability to locate relevant materials through a simple keyword search.²¹⁷

The Authors Guild appealed, and the Court of Appeals for the Second Circuit affirmed, holding that digitizing protected works for searches and displaying limited excerpts constituted fair use.²¹⁸ In 2016, the U.S. Supreme Court denied certiorari, finalizing the ruling in Google's favor.²¹⁹

(b) HathiTrust Case

Similar legal questions arose in the HathiTrust case,²²⁰ which the Authors Guild and associations representing foreign authors initiated in September 2011. The lawsuit targeted a consortium of colleges, universities, and nonprofit institutions collectively known as the

²¹¹ *Id.*, at 698–700.

²¹² *Id.*, at 705–706.

²¹³ *Id.*, at 710.

²¹⁴ *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).

²¹⁵ *Id.*, at 291.

²¹⁶ *Id.*, at 291.

²¹⁷ *Id.*, at 293–294.

²¹⁸ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

²¹⁹ *Authors Guild v. Google, Inc.*, 136 S. Ct. 1658 (2016).

²²⁰ *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445 (S.D.N.Y. 2012).

HathiTrust Project.²²¹ The HathiTrust Project, established in 2008 following the Google Books initiative, aimed to provide long-term preservation and access services for digitized works.

After the settlement between Google and the Authors Guild was rejected in 2011, the Guild filed a lawsuit against the consortium. The central issues in this lawsuit mirrored those raised in the suit against Google, particularly whether digitizing works without copyright holders' permission constitutes infringement.

In 2012, the court ruled that the consortium's actions qualified as fair use and thus did not constitute infringement. The court emphasized the significant public interest in the HathiTrust Project, and particularly its role in improving access to works. In June 2014, the Second Circuit affirmed, holding that creating a fully searchable text database that was accessible to individuals with disabilities qualifies as transformative for the purposes of fair use.²²²

In the *Google Books* and *HathiTrust* cases, U.S. federal courts adopted an activist stance, narrowing the scope of copyright protection while expanding the fair use doctrine. This approach effectively permitted the digitization of hundreds of millions of books without requiring prior permission from copyright holders.²²³ By prioritizing technological advancement and societal interests over the rights of copyright holders, the courts paid little heed to the absence of explicit legislative guidance and departed from defining principles of copyright law.

F. Discussion and Summary

Despite claims of a reversal in trends within the Israeli Supreme Court and a decline in dominant interpretative methodologies,²²⁴ three of the four key Israeli rulings above reflect a consistently activist approach. A comparative analysis shows that this judicial tendency to shape jurisprudence around disruptive technologies is not unique to Israeli courts but extends to other

²²¹ *Id.*, at 449.

²²² *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

²²³ See Victoria Campbell, *Authors Guild v. Google, Inc.*, 804 F.3d 202 (S.D.N.Y. Oct. 16, 2015), 27 DEPAUL J. ART, TECH. & INTELL. PROP. L. 59 (2019). An additional example of the interpretive effort undertaken by courts to address the challenges posed by disruptive technologies can be seen in the Canadian decision in *Geophysical Service Incorporated v. Encana Corporation*, 2016 ABQB 230 (Can.) (hereinafter *GSI Decision*).

²²⁴ See Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism*, *supra* note 14, at 81.

common law jurisdictions.²²⁵ For example, courts in the United States frequently address challenges posed by disruptive technologies, often stepping in to resolve issues in the absence of explicit legislative guidance.

The courts' activist approach has significantly shaped intellectual property law, and particularly copyright law,²²⁶ by employing purposive interpretation to go beyond legislative intent and engage with the fundamental values of the legal system.²²⁷ This method contrasts sharply with approaches that focus on legislative intent,²²⁸ and legal history and tradition.²²⁹ Indeed, reliance on legislative intent in the context of disruptive technologies has certain limitations, as the unforeseen nature of these technologies precludes any genuine specific legislative intent. As the Court observed in the *Premier League* appeal, "Technology has always been one (or two) steps ahead of the law, and the law is still trying to catch up with the challenges posed by it. One of the challenges of the law in this century is closing this gap and adapting the legal framework to address issues we had not previously encountered."²³⁰

The activist approach has enabled courts to reinterpret existing legal concepts, bridging the gap between traditional legal frameworks and rapidly evolving technological realities.²³¹ Additionally, this approach has allowed courts to address legislative inertia by providing remedies in cases where statutory language fails to account for technological advancements.²³²

²²⁵ See, e.g., *GSI Decision*, *supra* note 222.

²²⁶ *The F.A.P.L. Appeal*, *supra* note 111, J. Meltzer, at ¶ 5: "It is well known that technology often advances ahead of the law. In such cases, the legislature and the courts are called upon to pour the essence of sound, well-established principles into new legal vessels"

²²⁷ See Barak, *General Principles of Law in Legal Interpretation*, *supra* note 16, at 3–4; Barak, *Purposive Interpretation in Law*, *supra* note 15, at 374–375.

²²⁸ See *supra*, note 43.

²²⁹ Reznik, *The Beginning of the Decline of Purposive Interpretation and the Rise of Originalism*, *supra* note 14, at 82.

²³⁰ *The F.A.P.L. Appeal*, *supra* note 111, J. Hendel, at ¶ 6.

²³¹ *Id.*, D. P. Rivlin, at ¶ 14: "Transmitting content via the internet, including by way of streaming, is a defining feature of the digital age. There is no justification, therefore, to limit the term 'broadcast' to pre-internet-era technologies. Quite the opposite: the enactment of the new law marks an adaptation of Israeli copyright law to the digital age and the challenges it presents in the realm of intellectual property. The law generally seeks to align itself with modern transmission technologies—not to exclude the very advancements that define the current era. It follows that not only does the statutory language not preclude internet streaming, but there is also a substantive justification for recognizing it as a form of broadcasting."

²³² *The Tele-Event Appeal*, *supra* note 92, at 541: "Israeli copyright law was copied from an English statute enacted in 1911. The legislature made no effort to update it, and aside from a few minor amendments, the statute remained

For instance, in recent years, multiple legislative proposals have been introduced in the Israeli Knesset to regulate intermediaries' liability for online content, yet none have been enacted. The first proposal, introduced in 2007, was the Draft Law on the Legal Responsibility of Internet Site Administrations for Comments by Users (Amendments to Legislation). The second, introduced in 2008, was the Draft Electronic Commerce Law, which followed the recommendations of a government committee addressing legal issues related to e-commerce.²³³

In other instances, the activist approach taken by the courts has acted as a catalyst for legislative intervention. For example, the Copyright Law (Amendment No. 5), enacted in 2019, tackled the complexities of addressing copyright infringement in the digital age, acknowledging the enforcement difficulties posed by disruptive technologies.²³⁴ Among its provisions, the amendment broadened the definition of indirect copyright infringement to encompass activities occurring within virtual domains. The preamble to the proposed amendment states:

“Applying the doctrine of indirect infringement to works unlawfully made available to the public allows for addressing internet activities that create a distance between the individual committing direct infringement and the infringement, making it difficult to assign liability for direct infringement on a factual and legal plane.”²³⁵

The amendment specifies that when a copyrighted work is made available to the public without the consent or authorization of the copyright owner, any subsequent act facilitating public access to the work or expanding its reach to a broader audience for profit constitutes copyright infringement. This applies if, at the time of the act, the individual knew or reasonably should

in its original form. It is therefore not surprising that the law contains no reference to the possibility of acquiring copyright in a motion picture or television production. Nevertheless, when interpreting the outdated provisions of the Copyright Law, the court cannot ignore the dramatic developments that have taken place in the fields of creative expression over the past ninety years.”

²³³ This proposal was based on the European "Safe Harbor" model and the notice-and-takedown procedure under U.S. law regarding the liability of online intermediaries for copyright infringement. However, the proposal elicited controversy, and was ultimately abandoned. See the explanatory notes for the Draft Bill Electronic Commerce, 5768–2008, HH(Gov.) 322 (Isr.). See also Rafa'at Azzam, *Al Hatsa'at Hok Mis'har Elektroni uModel haHat'ama haIntegrativi leHesderato ulemisuyo shel haMis'har haElektroni [On the Electronic Commerce Bill and the Integrative Adjustment Model for Its Regulation and Taxation]*, 13 MISHPAT VEASAKIM 191 (2010) (Hebrew).

²³⁴*** NEEDS CITATION

²³⁵ See preamble to Draft Bill Copyright Law (Amendment No. 5), 5778–2017, HH(Gov.) 32, 33 (Isr.).

have known that the work was made available to the public without the copyright owner's consent.²³⁶

The legislature when confronted with an interpretation it disapproves of ruling has always had the power to respond through statutory amendments, and even when judges adopt an activist approach, they often urge legislative action, as seen in *Tele-Event*, *Premier League*, and *Telran*. In fact, the legislature—prompted by activist judicial decisions—has on occasion put its foot down, most notably with the amendment to Section 25 of the Contracts Law on contract interpretation.²³⁷ Purposive interpretation, and the judicial activism associated with it, can introduce market uncertainty and undermine the principle of reliance.²³⁸ This has sparked significant criticism, both in academic circles and among the public. However, disruptive technologies, by their nature, already introduce a high degree of uncertainty into existing legal frameworks, which often evolve at a much slower pace than technological advancements. In this context, the uncertainty created by judicial activism becomes less significant, as it merely mirrors the instability inherent in the technological landscape. Instead, this approach can provide the interpretive flexibility needed to resolve immediate disputes and address broader challenges surrounding copyright enforcement in the digital age.

In other words, the accelerated technological development that has taken place in recent decades demands “judicial flexibility.” Without such flexibility, there is a risk of stagnation and harm to innovation. Conversely, the considerable discretion granted to judges under the purposive interpretation approach can sometimes contribute to delays in legislative processes and hinder the development or amendment of statutory texts. For instance, according to Prof^r Lior Zemer, Supreme Court rulings exhibit a rigid adherence to utilitarian considerations, which tend to entrench norms while avoiding broader moral and ethical dilemmas.²³⁹

²³⁶ §48A, Copyright Law, 5768–2007 (Isr.), https://www.nevo.co.il/law_html/law00/3953.htm.

²³⁷ §25, Contracts Law (General Part), 5733–1973 (Isr.), https://www.nevo.co.il/law_html/law00/71888.htm.

²³⁸ See the discussion, *supra*, in Chapter 2 on the shortcomings of purposive interpretation.

²³⁹ Lior Zemer, *HaHofesh Litzor [The Freedom to Create]*, in KINYAN RUKHANI: IYUNIM BEINTKHUMIIM [*Intellectual Property: Interdisciplinary Studies*] 99, 124 (Miriam Markowitz-Biton & Lior Zemer eds., 2015) (Hebrew).

The activist approach often incentivizes litigants to seek judicial resolutions to advance their interests, bypassing the traditional legislative process. This tendency can undermine the broader public discourse on the substantive implications of such rulings, excluding the perspectives of affected stakeholders from meaningful consideration.²⁴⁰ Although legislatures retain the prerogative to delegate certain decision-making powers to the judiciary, the establishment of broad precedents by courts—particularly in regulating disruptive technologies—can blur the line between judicial interpretation and legislative action, often carrying significant long-term economic ramifications. Therefore, we argue that courts should exercise heightened caution in these cases, thoroughly evaluating whether an activist approach grounded in purposive interpretation is the most suitable means of resolving such disputes. Alternatively, courts might consider adopting a more restrained approach, deferring to legislative bodies to craft appropriate solutions to these challenges.

The issue of judicial flexibility and the necessity of developing legal frameworks to address technological advancements inevitably arises in a variety of contexts. This tension highlights the intricate intersection of law and technology, where competing demands for adaptability and consistency must be reconciled. While the discussion above focuses specifically on judicial decisions in the realm of copyright law, the broader challenge is ensuring that legal systems effectively respond to disruptive technologies while striking the right balance between the values of flexibility and stability alongside other ethical and moral considerations.

²⁴⁰ See *The Schocken Appeal*, *supra* note 78.