

# Hebrew Authors and English Copyright Law in Mandate Palestine

*Michael D. Birnhack\**

*This Article discusses the first steps of Israeli copyright law, dating it back to Ottoman times, which is earlier than thus far discussed in the literature. The account provides an early case of legal globalization through colonialism (although Palestine was a Mandate, not a colony). The imposition of copyright law in Palestine enables us to observe the difficulties of applying an uninvited legal transplant and to trace its dynamics.*

*The discussion queries the fate of copyright law in Mandate Palestine from two perspectives. First, the Colonial-Imperial point of view: I ask why the British government imposed copyright law in the newly administered territory only a month after the establishment of the civil administration in 1920 and then replaced it in 1924. The answers are to be found in the general imperial agenda, its Palestine agenda, as well as the nature of copyright and the personal background of those involved. Second, from the local point of view, I trace the first steps*

---

\* Professor of Law, Faculty of Law, Tel Aviv University. Thanks to Lionel Bently, Maurizio Borghi, Michael Crystal, Orit Fischman Afori, Ron Harris, Adam Hofri-Winogradow, Eyal Katvan, Nir Keidar, Assaf Likhovski, David Nimmer, Guy Pessach, Amihay Radzyner, Yoram Shachar, Diane Zimmerman, participants at the ISHTIP Workshop (Milan, 2009), Conference of the Law & History Association (Jerusalem, 2009), Tel Aviv Law Faculty Seminar (Tel Aviv, 2009), Conference on Copyright Culture, Copyright History held by the Cegla Center at Tel Aviv University, January 2010, Hebrew University Law Faculty Seminar (Jerusalem, 2010), workshops at Bar Ilan University and Haifa University, to Iris Agmon, Diren Çakmak and Avi Rubin, for providing directions on Ottoman law, to Omri Paz for translating from Ottoman, to Ray Luker (PRS) and Dvora Stavi (Authors' Association) for archival assistance, and to Yael Levy and Ricki Newman for outstanding research assistance.

I use the following abbreviations: PRS for English Performing Rights Society archive, TAU for Tel Aviv University archive, ISA for Israel State Archive, CO for Colonial Office archive, CZA for Central Zionist Archive, and Gnazim for the Hebrew Authors' Association Archive.

*of copyright law within the Hebrew community and especially within the literary circle in the 1920s. The local needs of the literary field concerned the author-publisher relationship, attribution, the integrity of the work and international transactions. However, the answers to these problems were not found in the law but rather in private ordering, namely contracts and social norms.*

## INTRODUCTION

This Article tells the as yet-untold story of the first steps of Israeli copyright law. It is a story about the introduction of copyright law in one region, beginning a century ago: the Ottoman province that became Palestine under British rule (1917-22)<sup>1</sup> and a League of Nations Mandate (1922-48),<sup>2</sup> and then Israel (1948).<sup>3</sup> The account provides an early case of legal globalization through colonialism (although Palestine was a Mandate territory, not a colony). The imposition of copyright law in Palestine enables us to observe the difficulties of applying an uninvited legal transplant and to trace its dynamics. The discussion that follows queries the fate of copyright law in Mandate Palestine from two perspectives combined. First, the Colonial-imperial point of view: I will ask "why that then," i.e., why did the British Mandate impose copyright law in the newly administered territory only a

- 
- 1 The British army conquered the region in 1917-18 and established a military administration which lasted until July 1, 1920, when it was replaced with a civil administration.
  - 2 Pursuant to League of Nations Covenant art. 22, the League entrusted His Britannic Majesty as the Mandatory for Palestine and Transjordan (July 24, 1922). According to article 25 of the Mandate and a subsequent resolution of the League of Nations (Sept. 16, 1922) it was narrowed so as not to cover the Transjordan. *See* NORMAN BENTWICH, ENGLAND IN PALESTINE 309 (1932). The legal instrument of the Mandate was to be transitional in character, leading to the independence of "certain communities." Thus, it was not a colonial government but a regime designed to offer "administrative advice and assistance" by "advanced nations who by reason of their resources, their experience, or their geographical position can best undertake this responsibility." *Id.* For the legal chain of authority see JACOB REUVENY, THE ADMINISTRATION OF PALESTINE UNDER THE BRITISH MANDATE 1920-1948: AN INSTITUTIONAL ANALYSIS 20-23 (1993) (Hebrew).
  - 3 Thus, I discuss the region that comprises today's Israel. The occupied territories of the West Bank were under a similar regime until 1948. For a discussion of copyright law in the West Bank from one Israeli perspective, see Elad Lapidot, *Harm to the Interests of Israeli Authors and Corporations in the West Bank*, 14 LAW & MILITARY 289 (2000) (Hebrew).

month after the establishment of the civil administration in the summer of 1920 and then replaced it in 1924? Second, from the local point of view, I will trace the first steps of copyright law within the Hebrew community and especially within the literary circle in the 1920s. I focus on the non-Orthodox Jewish Zionist Hebrew community, known as the *Yishuv*, and leave the discussion of copyright law in other communities, as well as the perspective of the local British government in Palestine, to further research.<sup>4</sup> The Article examines the literary field (and within it, the mainstream activities), with necessary excursions to other creative fields.

These guiding questions are located within several theoretical frameworks. The first is that of globalization and legal transplants. Copyright law today is at the forefront of the battle over globalization. Copyright features high on the agenda of those nations that are pushing for stronger legal protection and for more enforcement measures in the name of free trade and private property, as well as harmonization and unification.<sup>5</sup> The new global copyright regime imposes foreign concepts on countries which are not always interested in these legal formulas. The meeting point of the global and the local is a scene of glocalization, which might be one of fusion or conflict. Thus, the forced transplants might conflict with local notions of free speech,<sup>6</sup> cultural needs,<sup>7</sup> or market structure, or they might simply be irrelevant. As for Palestine, while copyright law was first introduced in the region by the Ottoman Empire in 1910, it was the 1911 (British) Imperial Copyright Act,<sup>8</sup> applied to Palestine in 1924 (with a precursor in 1920), together with a Copyright Ordinance, that left their mark in the long run.

A second framework of discussion is the interaction between law and social norms. This is a subset of the glocalization framework, as the law was foreign and the social norms were local. As we shall see, it took a while for copyright law to be absorbed in the region and for the notion of a legal protection for intangible creative works to resonate within the local

---

4 The overall picture that emerges provides yet another framework, that of identity politics. It is another example of Likhovski's observation, that "British, Jewish and Arab legal thought in Palestine was defined by an obsession with identity." ASSAF LIKHOVSKI, *LAW AND IDENTITY IN MANDATE PALESTINE* 214 (2006).

5 For a discussion of copyright and globalization see *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* (Neil Netanel ed., 2008).

6 See Michael D. Birnhack, *Global Copyright, Local Speech*, 24 *CARDOZO ARTS & ENT. L.J.* 491 (2006).

7 See, e.g., Madhavi Sunder, *Bollywood/Hollywood*, 12 *THEORETICAL INQUIRIES L.* 275 (2011).

8 Copyright Act, 1911, 1 & 2 *Geo. 5*, c. 46 (Eng.).

community. This does not mean that there were no local copyright-related needs. There were. The legal issues that bothered the literary field concerned the author-publisher relationship, attribution, the integrity of the work, and international transactions. However, the answers to these problems were not found in the law, but rather in private ordering, namely contracts and social norms. It was only in the 1930s, as the *Yishuv* expanded, and with the appearance of new technologies of public performance of music and radio, that copyright law began to resonate within the *Yishuv*. Foreign copyright owners, first the German Performing Rights Society (GEMA) and then the English Performing Rights Society (PRS), were the ones to set the law in motion via an energetic local agent. A Hebrew Composers', Authors' and Publishers' Society was formed (Acum). The Hebrew Authors' Association (HAA), established in the 1920s finally turned to formal copyright law and the first copyright cases found their way to the courts. Here I shall focus on the previous decade, as one goal of this Article is to point out the somewhat late blooming of copyright law and suggest some explanations.

The period of the British Mandate was a time of dramatic change in Palestine. Within thirty years the Jewish population multiplied tenfold; the relationship between Jews and Arabs became tense and complex. Within the *Yishuv*, the population was passionately and enthusiastically engaged in constructing the National Home. Hebrew culture was an important ingredient in this social construction. Copyright was a footnote to these changes, but it reflected the drama.

Part I provides an initial exposition of Ottoman copyright law and then the first steps of British copyright law in Mandate Palestine. I outline the statutory scheme and discuss the reasons for the enactment(s) of the law(s). I then survey the few copyright cases which reached the courts, beginning in the 1930s, and locate both the law and its practice in a larger picture of the legal field. Part II explores the cultural field. Building on historical research of the *Yishuv*, I describe the emergence of the literary center in Palestine in the 1920s and then identify the copyright-related needs of the authors and publishers, which were dealt with, not by the law, but by turning to social norms.

## I. THE LEGAL FIELD

This Part surveys the development of copyright law, beginning with the almost unknown Ottoman Act, which hardly had any effect in the *Yishuv*, and then turning to the British enactments. The discussion allows us to observe the substantive changes in copyright law. I query the timing of the British enactments and point to general Imperial concerns, to specific concerns tied

with the governing of Palestine, and to some personal background of those involved. I then survey the fate of copyright law in the Mandate courts and conclude with an outline of the legal (copyright) field.

### A. The Legislative Framework

Up until now, the story told in Israel about its copyright law begins in 1924, when the British implemented the 1911 Copyright Act.<sup>9</sup> Scholarly literature has thus far failed to take notice of the Ottoman predecessor of the British law.<sup>10</sup> Tracing the legal framework of copyright law in Palestine is surprisingly tricky, due to frequent changes within a short period, a dual statutory mechanism (Imperial and local), inconsistent publication practices and poor translation. The legislative timeline in fact begins with the Ottoman Authors' Rights Act in 1910; it continues with amendments introduced by the British civil administration in 1920, and the replacement of the Ottoman Act and the British amendments with a two-pronged copyright system in 1924, based on the 1911 (Imperial) Copyright Act and a local Copyright Ordinance.

#### 1. *An Ottoman Act with a British Flavor (1910-24)*

The *Mejelle*, the Ottoman civil code, did not address copyright issues. However, copyright law was codified in the Authors' Rights Act of 1910.<sup>11</sup> The law was modeled after Continental laws of the mid-nineteenth century. Importantly, the Ottoman Empire was not a member of the Berne Convention and its 1908 Berlin revision, which came into force in 1910. Thus, the law's subject matter was rather narrow, formalities were a condition for copyright and foreign works were not protected.

The 1910 Act was a codification of an Ottoman Act of 1850, as amended in 1857.<sup>12</sup> It provided copyright protection for literary and pictorial works,

---

9 See Copyright Act, 1911 (Extension to Palestine) Order, 1924, 114 Official Gazette 643.

10 There is one exception, in a short comment in an article that discusses copyright law in the West Bank, occupied by Israel. See Lapidot, *supra* note 3, at 292. Since this territory has not been annexed to Israel, the law in place is that which preceded the occupation in 1967, which is the British law. Lapidot mentions the Ottoman Act and assumes it was replaced *de facto* by British law.

11 Hakk-ı Telif Kanunu, 2 Düstör 273 (1910), 12 Jamad ul Awal 1328 (Muslim calendar), May 22, 1910 (Gregorian calendar).

12 See Diren Çakmak, *Osmanlı Telif Hukuku İle İlgili Mevzuat [Concerning the Ottoman Copyright Legislation]*, 21 SELÇUK ÜNİVERSİTESİ TÜRKİYAT ARAŞTIRMALARI DERGİSİ [SELÇUK U. TURCOLOGY STUDY J.] 191 (2007) (Turk.). Other than this article, current Turkish literature mentions the 1910 Act in passing, without elaboration. Email from Prof. Dr. Ergun Özsunay, Faculty of

engravings, sculptures, maps, musical works and notes (§ 2), as well as lectures (§ 3); legislation was excluded from protection (§ 8). The bundle of rights included copying, distribution, translation, dramatization (§§ 3, 6, 29), as well as public performance of theatre plays and opera (§ 10), subject to a right to publish political speeches and judicial proceedings (§ 3) and to criticism. Interpretation or notes were allowed (§ 31). The Act required formalities — notice (§ 4), registration (§§ 21-24) and deposit (§ 20). The copyright commenced upon publication of the work (§ 9) and lasted for the lifetime of the author and 30 years after death (§ 6), with the exception of charts, engravings and maps which lasted for 18 years after death (§ 7). Translators owned the copyright in the translations, a right that lasted for 15 years after the translator's death (§ 14). A special rule applied to orphan works whose authors had died and left no heirs — the work could be copied, published and translated (§ 17). Besides the criminal penalties in the Authors Rights Act (§ 32), infringement constituted an external criminal offense as well.<sup>13</sup>

I have found no evidence that the Ottoman Act was applied in formal proceedings or invoked in other legal discourse in the region during its short life (1910-24). The circumstances of the legal field, to be discussed shortly, and of the *Yishuv's* literary field, to be discussed in Part II, strengthen the assumption that the Act was not applied. However, it should be kept in mind that the region was a rather remote area of the Ottoman Empire and administered from afar. Copyright issues may also have been dealt with in that manner, which might explain why no local evidence of enforcement was found. The Ottoman Act was referred to in court at least once, after it was no longer the law of the land, in regard to a 1915 song.<sup>14</sup> Interestingly, the reference to the Act was made by a young Jewish attorney who represented the British PRS in a case against a local cinema. He learned about the Act only as he was preparing for the case. The lawyer was Shimon Agranat, later to become the (third) Chief Justice of the Israeli Supreme Court.<sup>15</sup>

---

Law, Istanbul University (Aug. 27, 2009). For comments on the law from the early twentieth century, see WILLIAM MORRIS COLLES & HAROLD HARDY, *PLAYRIGHT AND COPYRIGHT IN ALL COUNTRIES* 88-89 (1906); WALTER ARTHUR COPINGER, *COPINGER ON COPYRIGHT* 458-60 (5th ed. 1915).

13 Ottoman Penal Code, § 241 (1858), available at JOHN A.S. BUCKNILL & HAIG A.S. UTIDJIAN, *THE IMPERIAL OTTOMAN PENAL CODE: A TRANSLATION FROM THE TURKISH TEXT* 190 (1913).

14 CC (Hi) 20/36 Francis, Day & Hunter, Ltd. v. Belozersky (May 9, 1937) (PRS, A319 Agranat 1).

15 The case was about the public performance of *Pack Up Your Troubles in Your Old Kit Bag* (George Asaf (lyrics), Felix Powell (music), Francis, Day & Hunter 1915), which was composed prior to the coming into force of the British copyright enactments. Agranat faced a problem: it was clear that the English law did not

In August 1920, shortly after the establishment of a British civil administration (July 1, 1920), the High Commissioner issued the Copyright Ordinance of 1920, which declared the Ottoman Act to be applicable in Palestine subject to some (substantive) modifications.<sup>16</sup> The changes were that the copyright extended to all authors regardless of their nationality; the subject matter was extended to cover photographs and records (or other similar instruments), with a 50-year term from their making; and initial ownership of photographs and records was accorded to the owner of the negative or the recording. The general copyright term was extended to a period of 50 years after the death of the author. The Ordinance canceled all formalities: copyright subsisted even if the work had not been deposited or registered. The reader who is familiar with the 1911 Copyright Act can easily trace the source of these changes and the clear influence of the Berne Convention and its Berlin revision. The Ordinance repealed the Ottoman criminal offenses and set its own sanctions for various activities regarding infringement of copyright (making, selling, distributing, importing, or making plates for the purpose of infringing), based on the 1911 Copyright Act (§ 11). These were almost identical to sanctions applied elsewhere by the British,<sup>17</sup> although the Palestinian version included "hard labour" as an optional punishment.<sup>18</sup>

In 1922, the civil administration was replaced with the Mandate. The Mandate was the "Grund Norm" of the law in Palestine, alongside a

---

apply, and hence he turned to the Ottoman Act — but he was unable to obtain it in Palestine. *See* Letter from Shimon Agranat to PRS (Mar. 24, 1937) (PRS, A319 Agranat 1). The PRS sent him a summary of the Act in French, though it was clear to the PRS, too, that the Ottoman Act did not provide owners of musical works (other than operas) with the public performance right. Letter from PRS to Shimon Agranat (Apr. 2, 1937) (PRS, A319 Agranat 1). However, the court construed a complex argument and found for the plaintiffs. The major biographic work of Pnina Lahav reports that Agranat dealt mostly with real property cases and the collection of bills. PNINA LAHAV, *JUDGMENT IN JERUSALEM: CHIEF JUSTICE SHIMON AGRANAT AND THE ZIONIST CENTURY* 94 (1999) (Hebrew). However, Agranat served as the PRS's attorney for seven busy years (1933-40) and was involved in many copyright cases.

<sup>16</sup> Copyright Ordinance, 1920, 172 Official Gazette 3. Malchi quotes the High Commissioner's report for 1920-21, which commented that the Ottoman copyright law was more modern than its patent law, but new international obligations required amendments. These obligations are probably the result of the 1914 protocol to the Berne Convention. *See* ELIEZER MALCHI, *THE HISTORY OF LAW IN ERETZ YISRAEL: A HISTORICAL INTRODUCTION TO THE LAW IN ISRAEL* 106 (2d ed. 1953) (Hebrew).

<sup>17</sup> *E.g.*, Copyright Ordinance No. 140, 1914, Ss. 1 & 2 (Sing.).

<sup>18</sup> *See* Copyright Ordinance, 1920, § 5(1), § 5(2). This punishment appeared also in section 11 of the 1911 Copyright Act.

British source, the Foreign Jurisdiction Act of 1890. Based on the Mandate and the 1890 Act, the King issued the Order-in-Council of 1922. Norman Bentwich, the influential first Attorney General of the Mandate Government, described the Order-in-Council as the Constitution of Palestine.<sup>19</sup> The Order applied then-existing Ottoman law, subject to new British enactments and to the substance of the common law and doctrines of equity in force in England (§ 46). Accordingly, between 1922 and the 1924 legislation, had the courts faced any copyright cases (none were found), they should have applied the 1910 Ottoman Act, subject to the 1920 Ordinance, but its interpretation should have turned to English common law.

## 2. *British Law (1924-48 (1953))*

Mandatory copyright law was composed of two instruments of primary legislation, a structure also applied in other British territories.<sup>20</sup> The substantive principles were laid down in the 1911 Copyright Act, which was extended to Palestine in 1924. The Copyright Ordinance of 1924 supplemented it, by dealing with the power of the Customs and criminal aspects of commercially infringing actions. The 1924 Ordinance repealed the Ottoman Act and the 1920 Ordinance.<sup>21</sup> In 1953 Israel amended copyright law for the first time. The dual structure (Imperial Act and a local Ordinance) remained in force until 2007. In the paragraphs that follow, I describe the legislation, trace its disorderly publication, its late and poor translation, and conclude with querying the motivation for the legislation.

---

<sup>19</sup> BENTWICH, *supra* note 2, at 91.

<sup>20</sup> See WALTER ARTHUR COPINGER, *COPINGER ON THE LAW OF COPYRIGHT IN WORKS OF LITERATURE, ART, AGRICULTURE, PHOTOGRAPHY, MUSIC AND THE DRAMA* 300 (6th ed. 1927). For the legislative process in Mandate Palestine in general, see BENTWICH, *supra* note 2, at 270. Reuveny explains that the Mandate government had relatively wide leeway to copy legislation from other colonies and British dominions, as well as the British laws. He further notes that the Colonial Office discouraged the enactment of original new laws which did not have a British colonial precedent. See REUVENY, *supra* note 2, at 118, 123-24; see also Elyakim Rubinshtein, *The Jewish Institutes and the Yishuv's Institutions*, in *THE JEWISH NATIONAL HOME: FROM THE BALFOUR DECLARATION TO INDEPENDENCE* 136, 210 (Binyamin Eliav ed., 1976) (Hebrew).

<sup>21</sup> See first paragraph of the preamble of the 1924 Ordinance and section 5. The draft of the Ordinance was published in 114 Official Gazette 623 (May 1, 1924), and it was promulgated in Copyright Ordinance, 1924, 117 Official Gazette 711 (June 5, 1924). Interestingly, both references to the Ottoman Act were omitted from the later publication of the Ordinance in both the English (1934) and Hebrew (1936) editions.

*a. The 1924 Application of the Copyright Act, 1911*

The mechanism for the application of the 1911 Copyright Act was an Order issued in Buckingham Palace in London: *The Copyright Act, 1911 (Extension to Palestine) Order*.<sup>22</sup> The authority to enact the law derived from the British Foreign Jurisdiction Act and the Imperial Copyright Act itself rather than the Order-in-Council.<sup>23</sup> The extending order was published in the official publication, but the Act itself was not officially published until a decade later.<sup>24</sup>

The Act sets out the general structure of copyright law: it defines the subject matter of copyright law (original literary, dramatic, musical and artistic works), the scope of the legal protection (the sole right of the owner to produce, reproduce or publish a translation of the work), some defenses (fair dealing, re-use by the author, publicly located sculptures, educational use, news reporting), the duration of copyright (life plus 50 years), rules of ownership, civil remedies, including injunction,<sup>25</sup> summary remedies, importation of copies, and some special provisions for certain works (joint works, posthumous works, government publications, mechanical instruments, political speeches, photographs, foreign works). Those familiar with current copyright law will notice that the Act, as applied in Palestine, did not include criminal aspects (which were addressed in the Ordinance) or moral rights (which were incorporated in Israeli law only in the 1980s). Thus, a full-scale copyright law was applied in Palestine, at least *de jure*.<sup>26</sup>

*b. The Copyright Ordinance*

A second piece of primary legislation was the Copyright Ordinance, 1924. The authority to enact it was found in the Order-in-Council of 1922.<sup>27</sup> Given

---

22 Copyright Act, 1911 (Extension to Palestine) Order, 1924, 114 Official Gazette, 643.

23 In a leading textbook on the law in Palestine, the author provides copyright law as an example of this channel of legislative power. See 2 CHARLES A. HOOPER, *THE CIVIL LAW OF PALESTINE AND TRANS-JORDAN* 61 (1936).

24 Copyright Act, 1911, 3 Laws of Palestine 2475 (Drayton) (English, published 1934).

25 The power of the courts to issue injunctions in copyright cases was later questioned by the local agent and lawyers of the PRS, due to conflicting Ottoman rules of civil procedure. See Letters Exchanged Between Meir Kovalsky and PRS (Mar. 12, Apr. 27, May 5, 10, 15, 29, 1936) (PRS, A236, Palestine 4); Letters from Shimon Agranat to PRS (Jan. 24, 1933, Aug. 30, 1935) (PRS, A319, Agranat 1).

26 There was only a minor modification to the Imperial Copyright Act, with respect to updating the dates regarding the application to mechanical rights and to then-existing works. See Imperial Copyright Act, §§ 19(7), 19(8), 24(1)(b).

27 Article 17 of the Palestine Order-in-Council as amended in 1923. See BENTWICH, *supra* note 2, app., at 318. The power to legislate was vested with the High Commissioner, after consultation with an Advisory Council and pre-publication of the draft of the legislation. See *id.* at 100; Melville B. Nimmer, *The Uses of Judicial*

the prime status of the Order in Council,<sup>28</sup> the legislative process was more transparent to the local community. In May 1924, alongside the publication of the Extension Order of the 1911 Act, the proposed Ordinance was published, with the full text thereof.<sup>29</sup> A month later, the High Commissioner issued an Order that promulgated the Ordinance.<sup>30</sup> Thus, the text of the Ordinance was made available to the local communities.<sup>31</sup>

The Ordinance instructed that the 1911 Act be read as modified by the Ordinance (§ 4). Thus, the Ordinance served as a vehicle for amending the Act. With respect to powers of enforcement, it replaced the U.K. customs officers with the Director of Customs in Palestine (§ 2). The Ordinance repeated the criminal aspects introduced in the 1920 Ordinance (§ 3). The punishment of hard labor, by the way, was omitted.

*c. Subsequent Amendments and Regulations*

In the course of the Mandate there were a few legislative amendments. In 1928 the provisional orders set by the Board of Trade in England were applied to Palestine, not without some confusion.<sup>32</sup> In 1929, the Director of Customs issued Copyright Regulations.<sup>33</sup> Additionally, an official notice of the extension of the 1911 Copyright Act to several countries was published.<sup>34</sup> The extension meant that the works first published in foreign countries were protected under the Act "in like manner as if they were first published in the parts of His Majesty's dominions to which this Act extends," and that the Act provided protection also for authors who were citizens of foreign countries,

---

*Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217, 1246-47 (1970). Nimmer, a leading copyright scholar, did not discuss copyright law in this article.

28 *See supra* note 19 and accompanying text.

29 Copyright Ordinance, 1924, 114 Official Gazette 623.

30 The Order was issued on June 5, 1924, but published in 117 Official Gazette 711 on June 15, 1924.

31 During the Mandate the Ordinance was amended once, in a technical manner, according to the Statute Law Revision Ordinance (No. 30), 1934, 1 Laws of Palestine, at iv (Drayton), which reduced the kinds of secondary legislation to four. For an explanation, see Robert Harry Drayton, *Preface to The Laws of Palestine* (Drayton) (published 1934).

32 *See* Internal Correspondence in the Colonial Office (Mar. 18-Apr. 17, 1929) (CO 733/170/1). The orders set new rates of royalties to be paid according to the compulsory license scheme for mechanical rights: Copyright Mechanical Instruments (Royalties) Order, 1928, 1929 Official Gazette 20.

33 Copyright Regulations, 1929, 163 Official Gazette 231.

34 Notice Under the Copyright Act, 1911 (Extension to Palestine) Order, 1924, 1929, 717 Official Gazette 1012.

as if they were British subjects.<sup>35</sup> During the 1930s there was a series of extensions of the Imperial Act to additional jurisdictions.<sup>36</sup> In 1933 the Act was applied to works of citizens of countries who were parties to the Rome Convention of 1928, which amended the Berne Convention,<sup>37</sup> and thereafter it was extended to additional countries.<sup>38</sup>

The United States was not a member of the Berne Convention at the time (nor did it become one until 1989),<sup>39</sup> and hence the copyright relationship between Britain and the United States required a special arrangement. This was achieved by a proclamation of the American President and an Order-in-Council in 1915,<sup>40</sup> but was extended to Palestine only in August 1933,<sup>41</sup> accompanied by another American Presidential Proclamation.<sup>42</sup> Thus, works published in the U.S. before 1933 were probably not protected in Palestine and vice versa (unless also published in countries which did have reciprocal copyright relationships with the U.S.).

World War II brought about some copyright changes, with the enactment of emergency measures that empowered the Registrar of Trade Marks, Patents and Designs to grant licenses under the patents, trademarks and copyright of enemy subjects.<sup>43</sup>

---

35 Copyright Act, 1911, 1 & 2 Geo. 5, c. 46, § 29(1)(a), (b).

36 Copyright (Federated Malay States) Order, 1931, 3 Laws of Palestine 2499 (Drayton) (English); Copyright (Sarawak) Order, 1937, 1066 Official Gazette 78; Copyright (North Borneo) Order, 1937, 740 Official Gazette 1179.

37 Copyright (Rome Convention) Order, 1933, 3 Laws of Palestine 2501 (Drayton) (English) (containing a reference to the Convention's text in Palestine Gazette No. 491 (1935), supp. no. 1).

38 Copyright (Rome Convention) (Morocco (Spanish Zone)) Order, 1935, 511 Official Gazette 423; Copyright (Rome Convention) (Vatican City) Order, 1935, 598 Official Gazette 367; Copyright (Rome Convention) (Latvia) Order, 1937, 721 Official Gazette 855.

39 See Jane C. Ginsburg & John M. Kernochan, *One Hundred and Two Years Later: The United States Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988).

40 Order in Council, Under the Copyright Act, 1911 (1 & 2 Geo. 5, c. 46), Regulating Copyright Relations with the United States of America, 1915, 3 Laws of Palestine 2509 (Drayton) (English).

41 Copyright (United States of America) Order, 1915 (Extension to Palestine) Order, 1933, 405 Palestine Gazette 1767.

42 Proclamation by the President of the United States of America, Copyright — Palestine (Excluding Trans-Jordan) (Nov. 28, 1933), *reprinted in* 405 Palestine Gazette 1767.

43 Patents, Designs, Copyright and Trade Marks (Emergency) Ordinance, 1939, 973 Palestine Gazette, 1485 & supp. no. 1 at 171; Rules Under Patents, Designs, Copyright and Trade Marks (Emergency) Ordinance, 1939, 973 Palestine Gazette,

*d. Publication and Translation*

The comprehensive statutory scheme might convey the impression that there was a full and orderly legal copyright regime in Mandate Palestine. However, the Ottoman Act was not formally published or easily accessible in Palestine and some of the earlier British laws were inaccessible until the mid-1930s. Chief among them was the 1911 Imperial Copyright Act itself, the cornerstone of the copyright regime. While the Extension Order was published in the Official Gazette in 1924,<sup>44</sup> the extended Act itself was not published there. The Gazette was the main means of informing the public about legislation and also fulfilled the principle of publication of laws. The 1911 Act was published in 1926 in an unofficial compilation, which was not as widely circulated as the Gazette.<sup>45</sup> It took a decade for the Act to be officially published in English in the collection edited by Robert Harry Drayton (1934),<sup>46</sup> and another two years before it was translated into Hebrew (1936)<sup>47</sup> and Arabic (1936).

The lack of official publication caused some confusion. One of the first copyright cases was *The Palestine Telegraphic Agency v. Jaber* (1931).<sup>48</sup> The Palestine Telegraphic Agency and the Palestine Bulletin, the predecessor of the Palestine Post, sued Jaber, the editor and publisher of an Arab newspaper, Al-Hayat, for the unauthorized copying of news reports. The defendant argued *inter alia* that the Act "although extended to Palestine by the Order in Council of 21st March 1924, has never been promulgated in Palestine, and therefore cannot be held to form part of the Law of Palestine."<sup>49</sup> Kalman Friedenberg, attorney for the plaintiff, responded that the 1922 Order-in-Council required

---

supp. no. 2; see also report in *Special Powers Conferred in Registrar of Trade Marks*, PALESTINE POST, Dec. 29, 1939, at 2.

44 Copyright Act, 1911 (Extension to Palestine) Order, 1924, 114 Official Gazette 643.

45 Copyright Act, 1911, Legislation of Palestine 412 (Bentwich 1918-25) (published 1926).

46 Copyright Act, 1911, 3 Laws of Palestine 2475 (Drayton). The publication of the Drayton collection was an important event in the development of the law in Palestine. See MALCHI, *supra* note 16, at 122.

47 Copyright Act, 1911, 3 Hukei Eretz Yisrael 2633 (1917-33) (Hebrew).

48 See the Magistrate's decision: *Palestine Telegraphic Agency v. Jaber* (Oct. 9, 1931), PALESTINE BULL., Oct. 11, 1931 (PRS, A209, Palestine 2); the District Court's decision: CA 236/31 *Palestine Telegraphic Agency v. Jaber* (n.d.) (CZA, JAS/1); the Supreme Court's decision: CA 66/32 *Palestine Telegraphic Agency v. Jaber*, [1933] 1 PLR 780. For news reports, see *Appeal in the Copyright Case*, HA'ARETZ, Jan. 20, 1932, at 1 (Hebrew); *PTA Appeal on Copyright Case*, HA'ARETZ, Jan. 5, 1933, at 1 (Hebrew); *In the Courts*, PALESTINE POST, Jan. 5, 1933, at 4.

49 Quoted in Letter from PRS to Sec'y of State for the Colonies (Apr. 19, 1932) (ISA, M32/2 doc. 51a).

only the publication of *local* statutes, i.e., Ordinances, but did not apply to legislation issued by the Crown and the Privy Council. The Magistrate and District Courts agreed. The issue was not raised again in the appeal to the Supreme Court. Nevertheless, Friedenbergr himself voiced the concern that similar arguments would be made in the future and suggested that the Copyright Act be published.<sup>50</sup>

The petitions were taken seriously. The Director of Customs, who was the Registrar of Patents and Designs, advocated an exception for copyright law and urged ("I feel strongly") that it be published. His reasoning is telling:

[A]n exception should be made in the case of the Copyright Act 1911, since the subject of Copyright is of considerable importance and interest to many people in Palestine as correspondence on the subject filed at this Office shows. . . . It is hardly possible ["necessary" appears above this in handwriting — M.B.] to point out that with the large Jewish population in Palestine the position is somewhat different from that of other British Colonies.<sup>51</sup>

There are two arguments here: copyright is different, and Palestine is different. The justification for publication was found in the connection between the Jewish community and the law (copyright). No less interesting is the absence of the Arab population. Recall that the publication issue was raised in court by an Arab defendant (represented by a Jewish attorney, Goiten).<sup>52</sup> These themes — the uniqueness of copyright law, the special cultural needs of the Jews, and the exclusion of Arabs — are part of the identity puzzle in Palestine.<sup>53</sup>

The internal discussion within the Mandate Government ended temporarily with the High Commissioner's decision not to publish the Act. The reasons provided to the Secretary of the Colonies were that there was "no practical necessity for doing so, and publication would involve translating the Act into Arabic and Hebrew," and that "[t]he subject is not

---

50 Letter from Kalman Friedenbergr to Chief Sec'y of the Gov't of Palestine (Sept. 1, 1932) (ISA, M32/2, doc. 66). Friedenbergr, who served as an attorney for the PRS at the time, pulled that string as well and asked the PRS to approach the Colonial Office in London on the same matter. *See* Letter from Kalman Friedenbergr to PRS (Apr. 7, 1932) (PRS, A209, Palestine 2). The PRS followed his advice. *See* Letter from PRS to Sec'y of State for the Colonies, *supra* note 49.

51 Letter from Dir. of the Dep't of Customs, Excises & Trade to Chief Sec'y of the Mandate Government (June 21, 1932) (ISA, M32/2, doc. 57).

52 David Goiten was later to become a Supreme Court Justice in Israel (1953-61).

53 *See* LIKHOVSKI, *supra* note 4.

one with which the average member of the public is closely concerned," whereas lawyers would be able to find the Act.<sup>54</sup> Copyright law was finally and officially published in September 1934, when the Mandate Government issued three volumes of the Laws of Palestine edited by Drayton.

It took another two years until the Hebrew edition was published. The translation was made by Izhak Abbady, the Chief Hebrew translator to the Mandate Government, or by one of his assistants. Abbady explained that most of the translations were based on the Hebrew versions of the Official Gazette, with some corrections and unification of terms. Interestingly, Abbady reflected on the methodology of translation, pointing to two options: literal translation and "interpretive translation." The ideal way, he concluded, was to translate the original text in a literal manner and turn to the interpretive method only when necessary.<sup>55</sup> Unfortunately, the Hebrew translation of the 1911 Act was rather poor, earning it notoriety in the years to come.<sup>56</sup>

*e. Motivation*

Why did the British enact copyright law as early as August 1920, just a month after establishing the civil administration, and then reenact it less than four years later? Clearly, copyright was not the most urgent issue on the table of the High Commissioner. Land and immigration were the burning issues of the day.<sup>57</sup>

No known single event triggered the enactment of the copyright laws. There was no specific local demand or particular international pressure. The initiative for the 1924 enactments came from both London and Jerusalem.

---

54 Letter from High Comm'r of Palestine to the Sec'y of State for the Colonies (July 9, 1932) (ISA, M32/2, doc. 67). The High Commissioner pointed to the reproduction of the Copyright Act in the "Legislation of Palestine". The reference is to the compilation edited by Bentwich, *Legislation of Palestine* (Bentwich 1918-25). The Colonial Office followed suit and replied to the PRS along similar lines. See Letter from Colonial Office to PRS (July 28, 1932) (PRS, A209, Palestine 2).

55 See Izhak Abbady, *Hebrew Introduction* to HUKEI ERETZ YISRAEL 9 (Robert Harry Drayton ed., 1936) (Hebrew).

56 Most regretful was the omission of the word "original" from section 1(1), the single most important condition for copyright protection. Only in 1985 did the Israeli Supreme Court clarify that the original language of the 1911 Copyright Act is binding and originality has not been omitted from Israeli copyright law. CA 360/83 Strosky Ltd. v. Vitman Ice-cream Ltd. [1985] IsrSC 40(3) 340, 346.

57 See Nathaniel Katzburg, *Introduction — Britain and the Question of Palestine 1915-1925*, in RACHELA MAKOVER, *GOVERNMENT AND ADMINISTRATION OF PALESTINE, 1917-1925*, at 11 (1988) (Hebrew). The British Civil Administration enacted the Immigration Ordinance in August 1920 and the Land Transfer Ordinance in September 1920.

The Colonial Office in London circulated instructions on the matter to various colonies in 1917; in 1922 London wrote Jerusalem about the matter; in 1923 the High Commissioner proposed an Ordinance pursuant to those instructions, and it was finally executed alongside the extension of the 1911 Act, in 1924.<sup>58</sup> This procedure fits the general pattern of Palestine's legislation.<sup>59</sup>

The introduction of copyright law seems to have been the result of two cumulative British interests. One was a general Imperial interest in copyright law: the nature of copyright combined with the then-emerging international scheme of the Berne Convention and the interests of British authors and publishers. A second British consideration was a specific interest in establishing a legal infrastructure for commercial activities in Palestine.

First, the Imperial interest in copyright should be noted. Copyright law was on the British colonial checklist. The British implemented copyright law in all of the colonies and territories under their rule, Mandates included.<sup>60</sup> Disagreements and debates between London and the colonies over copyright had mostly ended by 1911, with the exception of Canada.<sup>61</sup> The British interest was to achieve some level of uniformity in the territories under British control.<sup>62</sup> Thus, for example, less than a month after the extension of copyright to Palestine in 1924, similar actions were taken regarding Tanganyika, another British Mandate.<sup>63</sup> Applying copyright law throughout the Empire served the British authors and publishers, who enjoyed copyright protection even if located far away from home.

This British interest accorded with the strengthening internationalization

---

58 See Letter from High Comm'r of Palestine to the Principal Sec'y of State for the Colonies (Jan. 19, 1923) (CO733/41); Despatch of the Indus. Prop. Dep't 702, 708 (Feb. 8, 1923) (CO733/41). I am indebted to Eyal Katvan for pointing me to these sources.

59 Bentwich described the legislative process (in general, not specifically in the copyright field): "The procedure of legislation was simple. Measures drafted in my office and approved in Executive Council were submitted to the Advisory Council and criticized in detail. But the authority was in the High Commissioner, subject to the unqualified veto and amending power of the Second Chamber in Downing Street." NORMAN BENTWICH, *WANDERER BETWEEN TWO WORLDS* 111 (1941).

60 See the 1927 edition of Copinger, COPINGER, *supra* note 20, at 300, which lists the colonies and other territories in which the Act was implemented.

61 BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW — THE BRITISH EXPERIENCE, 1760-1911*, at 136 (1999).

62 On this point, see Lionel Bently, *The "Extraordinary Multiplicity" of Intellectual Property Laws in the British Colonies in the Nineteenth Century*, 12 *THEORETICAL INQUIRIES L.* 161 (2011).

63 COPINGER, *supra* note 20, at 300.

(perhaps too early to be called globalization) of copyright law. By 1920, the 1886 Berne Convention had already been supplemented by the "additional protocol" of 1896, revised in 1908 (Berlin) and supplemented with another protocol in 1914. The emerging international scheme required that copyright be extended to as many territories as possible. The reasons were both the formal-legal commitment and the nature of the subject matter of copyright law. Unlike property or tangible objects, copyrighted works can and do cross borders, bypassing border controls. The concern was simple: that works would be imported to a country which does not protect the copyright in the work and be copied there without authorization. It was a real concern and also a matter of national interest, as illustrated by the sometimes tense copyright relationships between exporting and importing countries during the nineteenth and most of the twentieth centuries.<sup>64</sup> Of course, the concern was greater with relation to countries that shared similar cultures, in terms of language, religion and history. However, the Hebrew *Yishuv* in Palestine during the 1920s shared much more in common with Eastern and Central Europe than with England. Hence, the British interests in implementing copyright in Palestine had less to do with the direct interests of British authors and publishers and more with the general copyright agenda.

The second interest was the particular situation of Palestine. Was copyright law unique? To better understand the timing of the copyright enactments, we should locate them within the larger legislative project of the British government. The legislative project began immediately after the establishment of the Civil Administration in July 1920. The Copyright Ordinance was fourth in line, after the Advertisement Ordinance (July 1920), the Immigration Ordinance (August 1920), and the State Flags Ordinance (August 1920).<sup>65</sup> In 1922, the Mandate itself specifically recognized the international aspects of copyright law. Article 19 stated:

The Mandatory shall adhere on behalf of the Administration of Palestine to any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave traffic, the traffic in arms and ammunition, or the traffic in drugs, or relating to commercial equality, freedom of

---

<sup>64</sup> See for example a discussion of the events that led to the Berne Convention: CATHERINE SEVILLE, *THE INTERNATIONALISATION OF COPYRIGHT LAW: BOOKS, BUCCANEERS AND THE BLACK FLAG IN THE NINETEENTH CENTURY* (2006).

<sup>65</sup> For discussion of the legislative project, see Norman Bentwich, *Palestine*, 4 J. COMP. LEGIS. & INT'L L. 177 (1922).

transit and navigation, aerial navigation and postal, telegraphic and wireless communication or literary, artistic or industrial property.

This list reflects the League of Nations' minimum legislative "wish list." The British government checked the items on the list and signed various treaties on behalf of Palestine, some before the commencement of the Mandate, including the Berne Convention as revised in Berlin, 1908.<sup>66</sup>

Assaf Likhovski analyzed the Mandatory legislative project and the Anglicization process of the law and concluded that "the British were not eager to replace local substantive law but were more willing to replace procedural law," and that "[t]he British began with procedural and public law and gradually moved on to more private/substantive areas of law."<sup>67</sup> Copyright law does not quite fit into this picture: it is more substantive and private rather than procedural and public (though it has some public features), and yet it was one of the very first British enactments. Perhaps the cause was the character of copyright law: it was hardly, if at all, applied or used prior to the British administration, it concerned only a small industry, and there was a ready-made law, a comprehensive legal regime that could be implemented almost as-is. That was an easier task than engaging in a land reform, for example.<sup>68</sup>

The Mandate's instructions re copyright and the local legislative project converged with the British interest in establishing a viable commercial environment,<sup>69</sup> and with its distaste for Ottoman law, especially that which relied on French sources.<sup>70</sup> Bentwich wrote in 1932:

---

66 The Palestine Mandate § 19 (July 24, 1922), available at [http://avalon.law.yale.edu/20th\\_century/palmanda.asp](http://avalon.law.yale.edu/20th_century/palmanda.asp). For the treaties signed before the Mandate, see COLONIAL OFFICE, REPORT OF HIS BRITANNIC MAJESTY'S GOVERNMENT TO THE COUNCIL OF THE LEAGUE OF NATIONS ON THE PALESTINE ADMINISTRATION 21 (1925); for the treaties adhered to after the Mandate's commencement, see 2 SURVEY OF PALESTINE, PREPARED IN DECEMBER 1945 AND JANUARY 1946 FOR THE INFORMATION OF THE ANGLO-AMERICAN COMMITTEE OF INQUIRY 963-66 (1946).

67 LIKHOVSKI, *supra* note 4, at 55, 57.

68 Thanks to Diane Zimmerman for making this point. See also *id.* at 56.

69 See Yoram Shachar, *History and Sources of Israeli Law*, in INTRODUCTION TO THE LAW OF ISRAEL 1, 4 (Amos Shapria & Keren C. DeWitt-Arar eds., 1995).

70 See Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQUIRIES L. 536, 566 (2009) ("Hostility to Ottoman law was augmented in the field of commercial law by hostility to French law."); see also ROBERT H. EISENMAN, ISLAMIC LAW IN MANDATE PALESTINE AND MODERN ISRAEL: A STUDY OF THE SURVIVAL AND REPEAL OF OTTOMAN LEGISLATIVE REFORM 36 (1977); Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324, 328 (1975).

The High Commissioner's powers of legislation have been used liberally in Palestine during the last ten years. Nearly as many laws are issued annually for the little country as are passed by the Mother of Parliaments for Great Britain. The Arab Press speaks derisively of "the law-factory" which turns out new Ordinances without rest. But two main causes have induced the multiplication of laws: the inadequacy of the Ottoman Law-book for the needs of modern life; and the legalistic spirit which has spread among the people under British Administration, and makes it necessary to have a legal text as the basis of any exercise of authority.<sup>71</sup>

Thus, the legislative activity was driven by a sense of superiority of British law, encapsulated in the principle of the rule of law. British law was presented as an instrument of modernity and economic progress. Likhovski attributes this also to Bentwich's Zionist agenda: the belief that commercial law facilitates economic development, which would then attract Jewish immigrants.<sup>72</sup>

The legislative activity was also justified as a demand for such modern laws by the population, the *Yishuv* in particular. We have seen the comments of the Director of Customs in 1932, explicitly referring to the Jewish population.<sup>73</sup> Bentwich, reflecting on his prior legislative work, wrote (also in 1932):

The other main motive of law-making is the demand for modern institutions by the progressive population which comes to Palestine from Western and Eastern Europe. The Palestine legislator requires the agility of a circus rider with his feet on two horses, one that will not go fast, and the other that cannot go slow.<sup>74</sup>

The not-so-hidden undertones in Bentwich's statements were Orientalist, aimed explicitly at the Ottomans and implicitly at the Arab population.<sup>75</sup> Bentwich did not spare metaphors for the legislative project: a new outfit

---

71 BENTWICH, *supra* note 2, at 273.

72 LIKHOVSKI, *supra* note 4, at 57.

73 See *supra* text accompanying note 51.

74 BENTWICH, *supra* note 2, at 273.

75 For the British Orientalism towards the local population in Palestine, see LIKHOVSKI, *supra* note 4, at 47-48, 59. He argues that it was directed at Arabs and Jews alike. The "copyright instances", however, indicate mostly a differential treatment of the Arabs and Jews by the British, as illustrated by the reasoning for the enactment of commercial laws, the publication of the Imperial Copyright Act and, later on, the treatment of performing rights over the radio. The perspective of the local British government in Palestine will be examined in a separate article. On Orientalism, see EDWARD W. SAID, *ORIENTALISM* (1979).

and new wine in new bottles were required.<sup>76</sup> He provided a few examples of modern law, including trademarks, patents and copyrights.<sup>77</sup> Indeed, copyright law fits this description nicely: it was a rather new body of law, dealing with cutting edge technologies, one of the first to be part of an international scheme.

Finally, another possible explanation for the enactment of copyright law in the early days of the Mandate turns to the Bentwich family.<sup>78</sup> Norman Bentwich was intimately familiar with this body of law; his father, Herbert Bentwich, was a copyright lawyer and co-author of an important book on the law of designs (1908).<sup>79</sup> Herbert Bentwich counseled art publishers as a solicitor in continuous litigation, with cases reaching the House of Lords.<sup>80</sup> Interestingly, these cases dealt with foreign works, i.e., the international aspects of copyright law. Herbert, a Zionist leader in London, was an influential and dominant character in Norman's life. Norman and his sister Margery published a book about their father in 1940. One chapter in the book, entitled "The Lawyer,"<sup>81</sup> discusses the copyright cases in which Herbert was involved in great detail and also mentions that he testified before the Committee of the House of Lords which took up copyright reform. Several of his father's recommendations, Norman wrote, were adopted in the 1911 Copyright Act.<sup>82</sup> While there is no explicit mention in Norman's book and in his other writings on Mandate law linking the father's practice and scholarship to the son's legislative activity, the former, at the very least, familiarized Norman with this field of law, thus enabling its smooth introduction into Palestine.

## B. Copyright in Court

A British judicial system was set up in Palestine shortly after the country was conquered.<sup>83</sup> However, only a handful of copyright decisions were reported

---

<sup>76</sup> BENTWICH, *supra* note 2, at 273.

<sup>77</sup> *Id.* Bentwich mentioned copyright law once more, as an example of applying Imperial Acts of Parliament to Palestine. *Id.* at 278.

<sup>78</sup> I am indebted to Lionel Bently for pointing me to this connection.

<sup>79</sup> LEWIS EDMUNDS & HERBERT BENTWICH, *THE LAW OF COPYRIGHT IN DESIGNS* (2d ed. 1908).

<sup>80</sup> *See, e.g.*, *Tuck & Sons v. Priester*, (1887) 19 Q.B.D. 48; *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1; *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109 (H. 543); *Hanfstaengl v. American Tobacco Co.*, [1894] 1 Q.B. 347; *Hanfstaengl v. H.R. Baines & Co. Ltd.*, [1895] A.C. 20.

<sup>81</sup> MARGERY BENTWICH & NORMAN BENTWICH, *HERBERT BENTWICH: THE PILGRIM FATHER* 132-41 (1940).

<sup>82</sup> *Id.* at 135.

<sup>83</sup> The conventional view is that the British civil judicial system was put in place

in the official publications, mostly Supreme Court cases. The following list is based on published cases and those found in archives.

In the first copyright case (1930), a foreign copyright association, the German Performing Rights Society, acting through its local agent, Meir Kovalsky, criminally charged the Zion Cinema in Jerusalem with the public performance of live music played as background music for a silent movie.<sup>84</sup> Kovalsky's lawyer, Friedenberg, whom we have already met in the *Telegraphic Agency* case, based the charges on a section that dealt with performance from infringing copies. This was an unusual legal strategy. As for the criminal charges, Friedenberg explained to the puzzled PRS (which closely followed the case and shortly thereafter led a cartel of several European performing rights societies) that it was meant to bypass the need to prove the chain of ownership.<sup>85</sup> Indeed, in civil cases that followed against cafes and cinemas, proof of ownership was a major hurdle. As for the specific offense — it was clearly wrong, as there was no argument that the cinema played the music from infringing copies. Nevertheless, Kovalsky and Friedenberg won and the court imposed a fine of 1 Palestine Lira. GEMA and the PRS were unimpressed by both the decision and the lawyer, to say the least.<sup>86</sup> The foreign collecting societies were determined to set copyright law in motion in Palestine. Despite the victory in the case, it was not a good start, as it signaled that the users, lawyers and courts still had a lot to learn.

During the 1930s the PRS initiated a series of cases, focusing on the right of public performance, which resolved various legal questions regarding issues of burden of proof, chain of assignments, amount of damages and the proper procedure, including the appropriate court (Magistrate or District).<sup>87</sup>

---

by Norman Bentwich. Brun argues that Orem Clarke, a young British officer and Barrister, deserves the credit for establishing the judicial system during the military government. See NATHAN BRUN, *JUDGES AND LAWYERS IN ERETZ YISRAEL* 148 (2008) (Hebrew).

84 See CrimC 1844/29 Attorney General v. Guth (Jan. 9, 1930) (PRS, A209, Palestine 2).

85 Letter from PRS to Kalman Friedenberg (Mar. 4, 1930) (PRS, A209, Palestine 1); Letter from Kalman Friedenberg to PRS (Mar. 18, 1930) (PRS, A209, Palestine 1).

86 Letter from PRS to Kalman Friedenberg (Mar. 31, 1930) (PRS, A209, Palestine 1); Letter from GEMA to PRS (July 25, 1930) (PRS, A209, Palestine 1).

87 See Attorney General v. Guth (PRS, A209, Palestine 2); File No. 1442/31 Kovalsky & Son v. Gut (Apr. 10, 1931); and appeal: CA (Jer) 110/31 Gut v. Kovalsky (June 9, 1932) (PRS, A209, Palestine 2); PRS v. Klein (Mar. 15, 1932) (PRS, A209, Palestine 2) (concerning Vienna Café); PRS v. Eden Cinema, P.R. GAZETTE, Oct. 1933, at 196 (Apr. 1933); (Hi) R. Ricordi & Co. v. Ein Dor Cinema, Haifa (Mar. 6, 1934) (preliminary judgment), (Mar. 29, 1934) (final judgment) (PRS, A319, Agranat 1); CA (TA) 239/34 Carasso v. G. Ricordi & Co. (Apr. 29, 1934) (PRS,

Other than the performing rights cases, the first officially published copyright case was *The Telegraphic Agency* (1932) (unauthorized publication of news.)<sup>88</sup> The first copyright case between Jewish parties was related to Theodor Herzl's writing and adjudicated by a Jewish arbitrator appointed by the Jewish Agency (1936).<sup>89</sup> The second case between Jews was the first to be adjudicated in the Mandate courts: the Magistrate Court in Tel Aviv ruled in the criminal case of *Margolin v. Schocken* (1937).<sup>90</sup> The next reported case (1941) was a dispute between a Jewish pilot whose photograph was taken and used in an advertisement for cigarettes. The District Court dismissed the case after finding there was no case to answer (in a civil case).<sup>91</sup> Further published cases were those of the heirs of Ahad Ha'am, the pen-name of Asher Ginsberg, a prominent Zionist thinker and publicist, over the ownership of copyright, *Ossorguine v. Hotza'ah Ivrit, Ltd.* (1943),<sup>92</sup> and *el-Amiri v. Katul* (1946), which was a dispute between two Arab authors over the copyright in educational books on health.<sup>93</sup> The last documented dispute was *Azuz v. Benayahu*, over the copying of ancient letters (1947).<sup>94</sup>

---

A293, Palestine 5); CC (Hi) 2055/35 PRS v. Ein Dor (Oct. 27, 1935) (PRS, A319, Agranat 1); CC (Hi) 2056/35 PRS v. Wildhorn (Oct. 27, 1935) (PRS, A319, Agranat 1) (concerning Aviv Cinema); CC (Jer) 38/36 PRS v. Khayat (May 19, 1936) (PRS, A293, Palestine 5) (concerning Café Paradise); CC (Jer) 3588/36 PRS v. Rotman House (Dec. 1, 1936) (PRS, A293, Palestine 5); Honegger v. Homa (Feb. 18, 1937) (ruling), (Mar. 5, 1937) (judgment) (PRS, A293, Palestine 5); and the appeal, in CA (Hi) 86/37 Homa v. Honegger (June 1, 1937) (concerning Orah Cinema).

88 CA 66/32 Palestine Telegraphic Agency v. Jaber, [1933] 1 PLR 780.

89 See Neumann v. Mizpe Publishing House (May 5, 1936) (Y. Aharonovitch, Arb.) (CZA S5/11321). Trude Margarethe Neumann, Herzl's daughter, sued the Mizpe Publishing House for copyright infringement, by way of publishing her late father's writing without permission. The arbitrator ruled that the daughter be paid a sum of 125 Palestine Lira and that the rights be fully transferred to the publisher. Fourteen years later, Herzl's writings were once again the subject of a copyright lawsuit, this time between the Hotza'ah Ivrit (Hebrew Press) against the World Zionist Organization. The case was tried by the District Court in Jerusalem, now an Israeli court: CC (Jer) 139/50 Hotza'ah Ivrit v. World Zionist Organization (CZA S5/12455). After several hearings, the plaintiff withdrew the suit.

90 CrimC (TA) 5756/37 Margolin v. Schocken et al. (Sept. 16, 1937) (Gnazim, file 20787/4).

91 CC (TA) 344/40 Steinberg v. Dubek Ltd. [1941] Reports of the District Court of Tel Aviv 25.

92 CA 332/43 Ossorguine v. Hotza'ah Ivrit Ltd. [1944] 11 PLR 419.

93 CA 320/45 el-Amiri v. Katul [1946] 13 PLR 189. The Supreme Court ruled on a procedural issue, that once particulars were requested during the hearing in the District Court, they should be given. No subsequent procedures were found after this ruling.

94 CrimC (Magistrate Ct., Jer) 6899/46 Azuz v. Benayahu (Jan. 21, 1947) (Benayahu

In the *Yishuv* there were two non-state judicial systems: the Hebrew Law of Peace (1909-49)<sup>95</sup> and the Comrades' Law (est. 1923), operated by the *Histadrut*, the influential labor union.<sup>96</sup> The two systems were secular in nature, composed mostly of lay judges who applied common sense as a guiding principle, as opposed to the formal positivist state-law.<sup>97</sup> Both adjudicated civil matters between individuals and between individuals and institutions.<sup>98</sup> Thus far, the research has found only one case dating from 1937 that indirectly bears upon copyright, a dispute over payment for the translation of a book.<sup>99</sup> There

---

private archive). The charges were brought by Menahem Azuz against a young student, Meir Benayahu, the son of a prominent rabbi, Yizhak Nissim (who later became the Chief Rabbi of Israel). Benayahu published an article analyzing several letters dated to the eighteenth century written by Jews in Turkey and the Balkans. Azuz, who claimed to be the owner of the letters, accused Benayahu of copying them without permission. It was a private criminal case, according to section 17 of the Magistrates' Courts Jurisdiction Ordinance, 1939. The judge seems to have dismissed the case without a hearing, or at least before the plaintiff reached court. Azuz appealed to the District Court. It is unclear what happened in the appeal, but later the Palestine Post reported that the Magistrate court dismissed the prosecution. *Rights to Use of Ancient Letters*, PALESTINE POST, June 30, 1947, at 3. Benayahu became a prominent professor. He died in April 2009. I am indebted to Mr. Hanan Benayahu who allowed me access to his father's documents.

- 95 See PALTIEL DAYKAN (DIKSHEIN), *THE HISTORY OF THE HEBREW LAW OF PEACE — TRENDS, ACTIVITIES AND ACHIEVEMENTS* (1964) (Hebrew). For the ups and downs of the Hebrew Law of Peace see Eliahu Epstein-HaLevy, *Hebrew Law of Peace, Its Direction and Needed Changes*, 2 HA-MISHPAT 120 (1927) (Hebrew). Its power diminished substantially by the end of the 1920s. See DAYKAN, *supra*, at 35; Paltiel Dikshtein, *On the Expansion of the Function of the Hebrew Law of Peace*, 1 HA-MISHPAT 154, 158 (1927) (Hebrew). For a current analysis see Ronen Shamir, *Lex Moriendi: On the Death of Israeli Law*, in ISRAEL AS A MULTI-CULTURAL SOCIETY 598 (Menachem Mautner, Avi Sagi & Ronen Shamir eds., 1998) (Hebrew).
- 96 See Israel Bar-Shira, *About the Substance of the Comrades' Law*, 4 HA-MISHPAT 103 (1930) (Hebrew). For a current analysis, see David De Vries, *The Making of Labour Zionism as a Moral Community-Workers' Tribunals in 1920s Palestine*, 65 LAB. HIST. REV. 139 (2000).
- 97 Shamir, *supra* note 95, at 593, 615. Shamir further observes a division of litigants between the two systems and no apparent competition: the Comrades' Law was applied to the members of the *Histadrut* (a substantial proportion of the *Yishuv*), the Hebrew Law of Peace targeted the rest of the population. Ronen Shamir, *The Comrades Law of Hebrew Workers in Palestine: A Study in Socialist Justice*, 20 LAW & HIST. REV. 279, 285 (2002) [hereinafter Shamir, *The Comrades Law*].
- 98 The rationale and motivation of both systems was the interest to operate non-state mechanisms as an alternative to the foreign (colonial) power. See DAYKAN, *supra* note 95, at 14; Shamir, *The Comrades Law*, *supra* note 97, at 284-85; Shamir, *supra* note 95, at 601.
- 99 CC 8135 Dweck v. Kahana, Tel Aviv Hebrew Law of Peace (June 6, 1937) (on file

are no other indications that either tribunal adjudicated copyright issues, but there are several reports of private arbitrations, the *Herzl* case being a first and dramatic such case.

Several other cases were litigated later on, but did not reach a judicial decision due to compromise. The translators' case against the publishers over royalties for new editions was an important case, litigated (unclear as to where) during 1945-46, which concluded with a detailed agreement about the royalties for republications of translations to Hebrew.<sup>100</sup> During the 1940s, the HAA arbitrated several disputes between authors and publishers.<sup>101</sup> This signaled the maturation of the book industry and the regulation of the relationship between the different players in the market.

### C. Copyright Law in Practice

What did the *Yishuv* know about copyright law? The fact that the main statute — the 1911 Act — was neither officially published nor widely accessible provides us with only a general answer: not much. Artists and authors did care about their rights, but not until the early 1930s did they phrase their needs and concerns in formal terms of copyright law. Put differently, blaming and claiming (though not in court) preceded (legal) naming.<sup>102</sup>

During the 1930s, the use of "copyright language" grew and by the 1940s it was the main tool being used to address such issues. This Section

---

with author). DAYKAN, *supra* note 95, discusses the various issues adjudicated by the Hebrew Law of Peace and does not mention any copyright related case.

100 The plaintiffs were Y.H. Yevin and L. Hazan, who sued the Masada Press. Yevin translated a book by Guy de Maupassant and Hazan books by Ivan Sergeyevich Turgenyev. Both the Hebrew Authors' Association (HAA) and the Publishers' Association closely followed the case, as indicated in numerous minutes of the HAA executive board's meetings. See, for example, Minutes of the Board of HAA (Oct. 15, 22, 1945, Nov. 19, 1945, Dec. 31, 1945, Jan. 6, 14, 21, 28 1946, Feb. 4, 1946) (Gnazim, files 84850, 84851, 84852), in which the terms of the compromise were agreed upon. See also the discussion in ZOHAR SHAVIT, *THE LITERARY LIFE IN ERETZ YISRAEL 1910-1933*, at 401 (1982) (Hebrew).

101 For example, a dispute between Reuveny and Masada-LeGvulam Press and a dispute between Teilhaber and Shapira over the Historical Atlas, both discussed in Minutes of the Board of HAA (Jan. 4, 1944) (Gnazim, file 84850); a dispute between A. Hermoni and the Tversky Press (1948), see Minutes of the Board of HAA (Nov. 1, 1948) (Gnazim, file 84840) (after the establishment of Israel); SHAVIT, *supra* note 100, at 403.

102 William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1980).

establishes the argument about the lack of familiarity with copyright law until circa 1930. Negative evidence is based on the study of the general legal field, which shows little circulation of information on copyright law. Positive evidence is based on the few cases decided during the Mandate, mentioned above, which only began in the 1930s and the alternative practices, which will be discussed in Part II. Searching for copyright law "footprints" takes us to several locations within the legal field of the time: the lawyers, the judicial system, legal education, libraries, legal scholarship and the general press.

### 1. Lawyers

By the end of World War I there were very few trained lawyers in Palestine; the Jews amongst them were a minority.<sup>103</sup> The few lawyers who had a European background did not practice law; a few others had studied law in Istanbul and were rehearsed in Ottoman law. The postwar waves of immigration, the third (1919-23) and, even more so, the fourth (1924-28), brought with them also Jewish lawyers trained in Europe, especially Germany.<sup>104</sup> Thus, during the 1920s, among the small Zionist population there were few lawyers (38 practicing Jewish lawyers as compared to 85 Arab lawyers in 1922).<sup>105</sup> Most of the graduates of the Jerusalem Law Classes were Arab.<sup>106</sup> There was hardly any specialization, let alone in copyright law. The pioneers in the field were Friedenbergs and Agranat.<sup>107</sup>

### 2. Legal Education

In 1920, the Mandate Government established the Law Classes in Jerusalem,<sup>108</sup> which operated until the establishment of Israel in 1948. The Law Classes curriculum shows no indication of any IP-related material. In 1935, the School of Law and Economics was established in Tel Aviv,<sup>109</sup> but the curriculum had no IP-related material.<sup>110</sup> The syllabus of the course on

---

103 See BRUN, *supra* note 83, at 59.

104 See Fania Oz-Salzberger & Eli M. Salzberger, *The Hidden German Sources of the Israeli Supreme Court*, 15 TEL AVIV U. STUD. L. 79, 83 (2000).

105 See data in LIKHOVSKI, *supra* note 4, at 26.

106 BRUN, *supra* note 83, at 64.

107 See *supra* notes 15, 50 and accompanying text.

108 LIKHOVSKI, *supra* note 4, at 109-23.

109 In 1959 the School became a branch of the Hebrew University of Jerusalem and in 1967 part of Tel Aviv University.

110 Shmuel Eisenstadt, *The Law and Economics School — The History of the Institution and Its Development, 1939-1959* (n.d.) (unpublished manuscript, on file with TAU, file 20, 900.969).

public international law as taught by Professor Laserson in the summer of 1939 also included "Protection of the Author's Rights."<sup>111</sup> The listed reading material, however, did not include any IP-related material. By 1945 there were indications of IP material being included in the curriculum. The course description of "Law of Commerce" included, *inter alia*, the topic of "patents, trademarks, industrial drawings, copy-right."<sup>112</sup> Another course on criminal commercial law included the topic of "Trade Mark and Products Marks. Patents. Trespass (Author's Rights. Unfair Competition)."<sup>113</sup> In the meantime, in 1941 Jerusalem's Law Classes reported that a new teacher had been added to the staff, "who will lecture on Trade Mark and Patent Copyright."<sup>114</sup>

### 3. Libraries

The two law schools did not have rich libraries. The reading materials for the classes consisted mostly of legislation (Ottoman, Mandatory, international, Jewish law), Mandatory case-law and a few books. In many cases the professors issued their class notes to their students. As for copyright law, the leading book on English copyright law was *Copinger on Copyright*, the sixth (1927) and seventh editions (1936), but it was not held in the libraries.<sup>115</sup> However, some local lawyers did own a copy. Lawyers of the foreign performing societies, Friedenberg and Agranat, received it directly from London.<sup>116</sup> Other lawyers occasionally cited the book, though not always the updated edition.<sup>117</sup>

### 4. Legal Literature

Local academic literature on copyright law was rare. One book that was cited

---

111 Material for Final Exams 7 (May 11, 1939) (TAU, file 20, 900.273).

112 School of Law and Economics, Course Procedures and Contents for 1944/45, at 10 (TAU, file 19, 900.275). The criminal law course included the topic of counterfeiting documents, stamps, coins and bills, but this seems to be a matter of fraud, rather than an IP issue.

113 *Id.* at 12.

114 *130 Enrolled in New Law Class*, PALESTINE POST, Nov. 23, 1941, at 2. The lecturer was Dr. H. Kiewe. Attempts to identify him (more likely than her) have thus far been unfruitful.

115 The book was not available at Tel Aviv University's library until 1983.

116 *See* Letter from Meir Kovalsky to PRS (July 11, 1933) (PRS, A326, Palestine 3) (acknowledging the receipt of the book, and writing that it and an English decision that were sent "have been of big interest to our lawyer in Haifa, Mr. Agranat").

117 *See* Letter from Dr. H. Goldberg on behalf of Acum to Chief Sec'y of Gov't (Mar. 4, 1947) (ISA, M32/3, doc. 1) (citing the 6th edition of *Copinger on Copyright*, 1927).

in the syllabi of some courses was originally published in Russia in 1917, translated into Hebrew and published in Jerusalem in 1923, by Professor Pokorovski.<sup>118</sup> The author devoted a chapter to the "problem of immaterial interests," which discussed intellectual property ("intellectual properties") alongside what we would call *in personam* rights, such as breach of contract and violation of privacy.<sup>119</sup> The author briefly described the evolution of the legal protection of intangibles and surveyed several legal systems, including Roman, French, German, Swiss and Russian law.

A second scholarly publication was an article by Ze'ev Markon, who wrote from Moscow. His article, published in 1927, was an overview of copyright in Jewish law.<sup>120</sup> Its concluding statement was:

Jewish law now faces the problem of arranging the relationship between authors and publishers, and especially [the problem] to explore the authors' rights and their heirs', regarding works of art, music notes, paintings, maps, single articles in the newspapers, and radio broadcasts — all need to be determined according to the spirit of our people and in line with our cultural needs in Eretz-Israel and the Diaspora.<sup>121</sup>

The law in Palestine was not mentioned.

A third short scholarly piece on copyright law was a brief comment on the 1943 case of the heirs of Ahad Ha'am.<sup>122</sup> Following an English precedent, the Supreme Court denied the heirs' motion but was clearly uncomfortable with the outcome.<sup>123</sup> A 1945 comment by Dr. Ludwig Bendix criticized the decision for its overly formalistic approach.<sup>124</sup> The criticism was based on a proprietary

---

118 I.A. POKOROVSKI, *THE FUNDAMENTAL PROBLEMS OF CIVIL LAW* (A. Litai trans., Y. Yonovich ed., 1923) (first published in 1917).

119 *Id.* at 95.

120 See Ze'ev Markon, *The People and the Book — Material on the History of Author's Rights*, 2 HA-MISHPAT 192 (1927) (Hebrew).

121 *Id.* at 201.

122 CA 332/43 *Ossorguine v. Hotza'ah Ivrit Ltd.* [1944] 11 PLR 419. The heirs were represented by Dr. Moshe Smoira, later to become the first Chief Justice of the Israeli Supreme Court.

123 The court cited *Odhams Press Ltd. v. London Provincial Sporting News Agency* (1929) Ltd., (1936) 1 All E.R. 217.

124 L. Bendix, *Early Protection of the Author's Right*, 2 HA-PRAKLIT 216 (1945) (Hebrew). Bendix was a Jewish lawyer who immigrated to Palestine from Germany, but did not stay long, and in 1947 emigrated to the U.S. This was considered a loss to the local academic community at the time. See Editorial, *Farewell*, 4 HA-PRAKLIT 62 (1947) (Hebrew).

view of copyright. This was the first normative comment on copyright law. It illustrates a close familiarity with copyright law and, moreover, with the theoretical understanding thereof. By 1945, copyright law was no longer a strange legal field.

A final scholarly engagement with copyright law during the period of the British Mandate is an article by Ze'ev Falk,<sup>125</sup> who later became a law professor. The article was published in 1947, when Falk was a second-year student at the Law Classes.<sup>126</sup> He argued that intellectual property law (the explicit term used) is an example of the law addressing new needs. He cited the 1911 Imperial Copyright Act, but most of the article addressed Jewish law.

##### 5. *Popular and Professional Press*

Another source of information about copyright law was the press. Reports on the activities of the HAA regularly appeared in the Hebrew press, but copyright law hardly featured in its meetings during the 1920s.<sup>127</sup> During the 1930s and onwards, copyright issues were occasionally reported in the press, on general matters,<sup>128</sup> specific local cases,<sup>129</sup> or foreign cases of special interest, such as the copyright disputes in the U.S. over Hitler's book.<sup>130</sup> These

---

125 ZE'EV FALK, THE INTELLECTUAL PROPERTY IN ISRAEL LAW — SOURCES AND INQUIRIES ON AUTHORS' AND INVENTORS' RIGHTS (1947) (Hebrew). "Israel Law" in the title refers to Jewish law, rather than the law of Israel, which had not yet been established at the time.

126 Falk researched jurisprudence, Talmudic law, comparative and international law. See Michael Korinaldi, *Comments to Ze'ev Falk's Biography*, in MEMORIAL BOOK TO PROFESSOR ZE'EV FALK — ARTICLES IN JEWISH SCIENCES AND CONTEMPORARY ISSUES 13 (2005). Falk was also a poet, which might explain his interest in the field of copyright, which was not his usual research engagement. Telephone interview with Mrs. Miriam Falk (May 18, 2009).

127 An exception was a comment made by Tchernovitch at the Authors' Convention in December 1928 that the British Government was planning to enact a Copyright Act. See *Authors' Convention*, HA'ARETZ, Dec. 14, 1928, at 3. As discussed earlier, such an act already existed as of 1910 (the Ottoman Act), and in British forms as of 1920.

128 See, e.g., Yishayahu Pavzger, *On the Legal System in Palestine*, HA'ARETZ, Feb. 9, 1926, at 2 (Hebrew) (explaining the Mandatory legal system and positing copyright law as an example of copying British laws in their entirety).

129 See for example the *Palestine Post's* report on the case of the Telegraphic Agency, *In the Courts*, *supra* note 48; *Grand Cafe Fined — Use of Copyright Music*, PALESTINE POST, Oct. 19, 1933, at 2; *Writer's Copyright Ruling*, PALESTINE POST, May 26, 1943, at 3 (reporting the case of Ahad Ha'am's heirs); *Rights to Use of Ancient Letters*, *supra* note 94 (reporting the case of Azuz).

130 See 'Kampf' over 'Mein Kampf,' PALESTINE POST, Jan. 12, 1939, at 5; *Hitler's*

reports were usually brief and some of them assumed a certain familiarity with the idea of copyright law.

The literary journals, read mostly by the "industry" and the intellectuals, reported news about copyright cases in other countries. *Moznayim* was one such literary review, published by the HAA from 1930 onwards: it reported news about a French plagiarist who was banned from any literary activity; a Danish judicial decision that authors have lending rights; changes in U.S. copyright law and proposals to amend it; printing rights of the Bible in England; a copyright dispute between O'Neal and Lewis in New York; an authors' convention in London that discussed copyright law; an authors' convention in Paris about translators' rights; a publishers' convention; and the Rome Convention.<sup>131</sup> These short reports familiarized the local literary circles with the idea of copyright law.

\* \* \*

Taken together, these elements of the legal field provide one explanation for the delay in the practical implementation of copyright law in Palestine: the local legal field was not able to handle such cases, at least until the 1930s. Another explanation is the irrelevance of the law's substantive rules to the needs of the local cultural community and the use of alternative methods to address them until the 1930s, to which I now turn.

## II. THE CULTURAL FIELD

This Part identifies the "copyright needs" of the emerging literary field in the *Yishuv* in the 1920s. British copyright law did not address these needs. The solution was found in social norms.

### A. The Emergence of the Cultural Field

The Old *Yishuv* had been religious rather than nationalistic. It had a relatively small cultural field, focusing on religious works. A few printers published mostly unoriginal texts. Theater, music, sculpture and painting were rare.

---

*Copyright in America*, PALESTINE POST, June 25, 1939, at 4 (probably referring to *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306 (2d Cir. 1939)).

<sup>131</sup> See respectively, MOZNAYIM, June 4, 1930, at 15; MOZNAYIM, Aug. 28, 1930, at 16; MOZNAYIM, Feb. 26, 1931, at 22; MOZNAYIM, Mar. 12, 1931, at 15; MOZNAYIM, May 21, 1931, at 16; MOZNAYIM, June 4, 1931, at 16; MOZNAYIM, June 25, 1931, at 16; MOZNAYIM, July 30, 1931, at 16; MOZNAYIM, Sept. 3, 1931, at 15.

Radio, television and cinema did not yet loom on the horizon. The New *Yishuv*, by contrast, was more secular. The Zionist immigrants were driven by national aspirations and passion.<sup>132</sup> They had fresh ideas and intellectual enthusiasm. The literary was the first substantial cultural field to emerge.

Zohar Shavit, a leading scholar of the literary life of the Jewish community during the Mandate, pointed to the gradual demise of the Hebrew literary centers in Europe and the rise of a new literary center in Palestine.<sup>133</sup> The measures to evaluate the emergence of a "literary center," or, to use Bourdieu's term, a cultural field,<sup>134</sup> are the operation of publishers, the publications of literary and other periodicals, authorial activity, and the emergence of an audience.

The 1920s saw the third and fourth waves of immigration. Among the new arrivals to Palestine were already acclaimed authors, the leading figure being Haim Nachman Bialik. Anita Shapira describes them as a much esteemed cultural elite.<sup>135</sup> Six major Hebrew publishers moved their business from Europe to Palestine (1923-38). Several new publishing houses were established within a few years. The Jewish population and the reading audience grew substantially. Thus, a market was formed and a literary field thrived. As Shavit has documented, original Hebrew books appeared in growing numbers; classic literature (mostly English, Russian and German) was translated into Hebrew; six daily newspapers and dozens of periodicals were published. The HAA was formed, not without difficulties. The first attempt, in 1921, had high aspirations, but achieved rather little. The second attempt, in 1926, was more successful. Other than the organization itself, the main activity was a weekly journal, *Ktuvim*, which served as a focal point for literary life.<sup>136</sup>

The relocation and consolidation of several literary centers from Europe into a single center in Palestine also meant that the interdependence between the local authors and their foreign audience shifted direction. Hebrew authors located in Palestine wrote for the local audience as well as the Hebrew-reading audiences in Europe and America; a few Hebrew authors located in the latter places published in Palestine.<sup>137</sup>

---

132 For the contrast between the Old and New *Yishuv*, see YEHOShUA KANIEL, CONTINUATION AND CHANGE — THE OLD YISHUV AND THE NEW YISHUV DURING THE FIRST AND SECOND ALIYAH (1982) (Hebrew).

133 SHAVIT, *supra* note 100.

134 See PIERRE BOURDIEU, THE FIELD OF CULTURAL PRODUCTION (1993).

135 ANITA SHAPIRA, NEW JEWS OLD JEWS 127 (1997) (Hebrew).

136 See SHAVIT, *supra* note 100.

137 For the relationship between the local literary center and the centers in Europe and America, see Zohar Shavit, *The Mutual Relationship Between the Centers*

A note is requisite at this point, as these shifts have legal implications. The transition of authors and publishers to Palestine meant that different laws applied to the works. The international distribution and the demand (though unstable) for Hebrew works outside Palestine further complicated transactions and the applicable laws. A case in which a work was first published in Germany, later translated into Hebrew or republished in Palestine and then copied by an American publisher or newspaper, was not uncommon.

The Hebrew language played an important role in the local cultural field.<sup>138</sup> Zionism revived Hebrew, updated it, and within a generation managed to turn it into the dominant language spoken by the Jews in Palestine. The emphasis on Hebrew was a powerful incentive to write in it; works in foreign languages were controversial. The importance of classic works was recognized, but they posed competition to the project of reviving Hebrew. The solution was translation: "[T]he variety of translations forces the reader to engage in Hebrew literature."<sup>139</sup> Gradually, Hebrew became the dominant spoken language; reading was a popular form of entertainment and translations were the only way to enable access to the classic works.<sup>140</sup> Moreover, the immigrants spoke many different languages: Yiddish, Russian, Polish, German, and more. Thus, Hebrew served as a common denominator. Translation served yet another purpose: it provided work for the publishers and translators. Several publishers dealt exclusively with translations. The Eretz-Israel office of the Jewish Agency initiated a large scale translation project, which engaged many authors during the 1910s. The project came to a halt by the end of World War I.<sup>141</sup> Translations and international transactions raised legal issues, which I shall discuss shortly.

In the meantime, Tel Aviv, then a small neighborhood of Jaffa, saw a dramatic expansion during this wave of immigration and enjoyed the status of an autonomous municipality. Cultural life boomed. But, nevertheless, copyright was not yet part of this scene.

---

*in Europe, Eretz Yisrael, and the United States, in THE HISTORY OF THE JEWISH COMMUNITY IN ERETZ YISRAEL SINCE 1882 — PART I — THE CONSTRUCTION OF HEBREW CULTURE IN ERETZ YISRAEL 73 (Zohar Shavit ed., 1989) (Hebrew) [this volume hereinafter THE CONSTRUCTION OF HEBREW CULTURE].*

138 For a discussion, see Rafel Nir, *The Status of Hebrew Language in the Process of National Revival*, in THE CONSTRUCTION OF HEBREW CULTURE, *supra* note 137, at 31.

139 Michael Assaf, *On Translations*, DAVAR, Saturday Supp. June 7, 1929, at 4, 4.

140 See SHAPIRA, *supra* note 135, at 131.

141 See Zohar Shavit, *The Development of Hebrew Publishing in Eretz Yisrael*, in THE CONSTRUCTION OF HEBREW CULTURE, *supra* note 137, at 199, 206-10, 213-15.

## B. The Image of the Hebrew Author

The dynamic 1920s crystallized the image of the author. It was an image composed of a mixture of romanticism and nationalism, individuality and collectivism. To better understand the author's image, it is helpful to look at its local reference point, that of the *Halutzim* (Hebrew for pioneers.)

The image of the *Halutz* (the singular form of "*Halutzim*" — a pioneer) was that of a productive, energetic Zionist who drained the swamps and constructed new settlements. The *Halutzim* were members of the first three waves of immigration, especially the second and third. The *Halutz* was adventurous and rebellious (as compared to his/her parents' generation, who remained in Europe). This was the "New Jew," constructed as the negation of the old Jew.<sup>142</sup> The *Halutz* was part of a collective, with its socialist-communitarian emphasis. The image of the passionate *Halutz* captured the imagination of generations to come and served as the protagonist of a leading narrative in the *Yishuv*.<sup>143</sup>

By contrast, members of the fourth wave of immigration (1924-28) were mostly city dwellers. The dominant group among the fourth wave was middle-class and urban. Their bourgeois image stood in sharp contrast to the image of the *Halutz* and was disliked by the previous immigrants.<sup>144</sup>

Many of the authors were members of the fourth wave, but they assumed the role of mediators between the country and the city, between the practical and the intellectual Zionists. The authors were active in creating the image of the New Jew, the *Halutz*; they were the narrators of the new Hebrew narrative.<sup>145</sup> The image of the author was thus closely tied to the national Zionist ideology.<sup>146</sup> Authors considered themselves to be acting on behalf of the national collective. Individuality, a dominant characteristic of the image of the romantic author, was replaced by an intellectual mission on behalf of the collective.<sup>147</sup> The authors were passionate about their role in the Zionist project and proud of it. They had a strong sense of responsibility towards the

---

142 See SHAPIRA, *supra* note 135, at 168, 185, 194-96.

143 For the passion of the *Halutzim*, see BOAZ NEUMANN, *LAND AND DESIRE IN EARLY ZIONISM* (2009) (Hebrew).

144 See ORIT ROZIN, *DUTY AND LOVE: INDIVIDUALISM AND COLLECTIVISM IN 1950S ISRAEL* 181-82 (2008) (Hebrew).

145 See SHAPIRA, *supra* note 135, at 174.

146 For a discussion, see Ya'akov Shavit, *The Status of Culture in the Process of Creating a National Society in Eretz Yisrael: Basic Attitudes and Concepts*, in *THE CONSTRUCTION OF HEBREW CULTURE*, *supra* note 137, at 9.

147 For the notion of the romantic author, see *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter

collective. Authors engaged in the lively public discourse and in politics on all levels. Indeed, many of them saw themselves as the parallels to the *Halutzim*: while the latter cultivated the land, they cultivated the spirit. This image of the Hebrew author played an important role in the emerging Hebrew culture.

Peter Jaszi was first to show how the romantic image of the author penetrated into the law in Britain and the U.S.<sup>148</sup> The Hebrew author, by contrast, was not reflected in copyright law. That is no surprise: copyright law in Palestine was a foreign, British body of law, imposed on a non-English culture. The Hebrew image, an amalgam of individualistic romanticism and socialist Zionism, was channeled into evolving social norms.

### C. Local Needs and Social Control

Within the *Yishuv*, the main copyright-related issues in the 1920s were the author-publisher relationship, moral rights, international transactions and foreign infringements. None of these were addressed in Palestine's copyright law (though contract law and rules of choice of laws could apply). This Section discusses the local legal needs and the non-legal solutions that were adopted to address them. In a nutshell, the solution was the public assertion of rights, social policing and, when necessary, public shaming.

#### 1. Commercial Relationships

The authors, publishers and booksellers had frequent disputes. Recurring issues included payments that were not fully paid on time (or not paid at all), new uses of existing works and omissions of attribution. The authors complained by sending letters. The examples that follow draw a picture of market norms: authors were paid for their writings, for translations of their works, and also for their work as translators. The payment was viewed as remuneration for their labor, not for licensing the copyrighted work. The transactions were not framed in terms of copyright and ownership, but rather conceived as service contracts. However, in some cases where there was no contract, it was clear that copyright infringement occurred.

Bialik, the dominant literary figure of the 1920s who was also a publisher, was particularly attuned to his rights and royalties. Upon learning that some of his poems had been translated to English and a collection of

---

Jaszi eds., 1994); Lionel Bently, *R. v. The Author: From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1 (2008).

<sup>148</sup> Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship,"* 41 DUKE L.J. 455 (1991).

them published in London, he wrote to the publisher, emphasizing that the publication was unauthorized and demanding 10 percent of the book's price and a copy of the book.<sup>149</sup> In another case, Bialik agreed to a French translation and publication for 10 percent of the market price, but insisted that the translator should have "a poetic taste" and sufficient knowledge of both languages.<sup>150</sup> When writing poems for *Eden*, a children's Hebrew newspaper published in New York, he kept emphasizing the importance of immediate payments.<sup>151</sup> Bialik's dealings were common amongst authors, though no one else enjoyed a similar prestige.

When disputes broke out and letters proved ineffective, i.e., when the market norms were not followed, the unhappy authors turned to social norms by way of public notices. *Ktuvim*, the main literary journal of the late 1920s, served as the public billboard. It acted as a focal point for both literary debates and adjunct debates about the functioning of the field. The social norm of public shaming was quite effective. The stream of complaints strengthened in the second half of the 1920s, when economic recession replaced the quick growth of the previous years and payments declined.<sup>152</sup>

Saul Tchernichovsky was one of the most esteemed poets of the time. During the 1920s he failed to find a job in Palestine as a physician and spent most of the time in Berlin (until he finally immigrated in 1931). While there, Tchernichovsky translated *Le Malade Imaginaire* by Moliere into Hebrew, for publication in book form. But the translation found its way to the theater stage without his permission and without him having been paid. In a letter published in *Ktuvim*, the physician/translator described the events at length. The Eretz-Israel Theater's managers ignored his letters at first and then responded in vague terms. Tchernichovsky wrote:

---

149 Letter from Bialik to S.G. (Mar. 6, 1925), in 3 LETTERS OF H.N. BIALIK 23 (P. Lachover ed., 1938) (Hebrew) [this volume hereinafter LETTERS] (no. 427). A month later Bialik wrote again, dissatisfied with the answer he'd received (which is unknown), and demanding that 50 percent of the payment be made immediately and the rest within three months. See Letter from Bialik to S.G. (Apr. 30, 1925), in LETTERS, *supra*, at 28 (no. 435).

150 Letter from Bialik to I.H. Kastel (July 20, 1925), in LETTERS, *supra* note 149, at 49 (no. 461).

151 Letter from Bialik to Eden Board (May 26, 1924), in LETTERS, *supra* note 149, at 5 (no. 407); Letter from Bialik to Eden Board (Sept. 15, 1924), in LETTERS, *supra* note 149, at 15 (no. 419); Letter from Bialik to Bat-Sheva Grabelsky (June 24, 1925), in LETTERS, *supra* note 149, at 46 (no. 457); Letter from Bialik to Eden Board (Aug. 17, 1925), in LETTERS, *supra* note 149, at 59 (no. 473).

152 See discussion in SHAVIT, *supra* note 100, at 99.

I am sure that those who supervise the scenes, those who arrange the chairs, the cleaners of the hall, those who designed the advertisements, printed them and posted them — all received their salary. But the author? His work is up for grabs. Anyone who is interested in it gets it.<sup>153</sup>

Interestingly, pertinent to this discussion and quite uniquely among his colleagues, Tchernichovsky referred to copyright law: "I know that an English protection act for literary material applies in Palestine. But Mr. Gnessin [the Theater's manager] and the [theater's] Board know, and the actors all know, that as long as I am in Berlin, I can do nothing to them."<sup>154</sup> He then declared that he was prohibiting the use of his translation. The response was published within two weeks. Gnessin explained that he had received the material and could not have known that the translator had not given his consent. He then apologetically explained that he was no longer with the theater, that while there he had been the artistic manager rather than the administrator, and, in any event, he promised to pay the sum that he had committed to pay himself, well, as soon as he could.<sup>155</sup>

The Eretz-Israel Theater left many translators unhappy. K. Silman was upset when the theater refused to provide him with more than two free tickets to a play he himself had translated. For Silman, this was the last straw. His public letter listed all the wrongs: that his permission to use his translation in the play had not been sought, that he had not been paid for the translation, and, finally, that he had not received the tickets ("not that I missed much," he added). But then he pulled out the joker: "[T]he educated public should know that the Theater provides tickets only to those who write positive commentaries or none at all," but not to those who criticized it.<sup>156</sup> This public exposure was the author's revenge.

Authors frequently complained about publishers who did not pay them. Anger and hunger produced wonderful letters, perhaps proving that the romantic author was not a myth. An author who gave his signature only as "D." wrote in a public letter about a contract he'd signed with a publisher and the subsequent breach of contract:

Hungry, bitter, you stroll to the publisher, like a poor person in the city park, and beg: give me something, at least for lunch! "No, and

---

153 Saul Tchernichovsky, Letter, KTUVIM, Dec. 31, 1926, at 6.

154 *Id.*

155 M. Gnessin, *Reply to Tchernichovsky*, KTUVIM, Jan. 14, 1927, at 4.

156 K. Silman, Critique, KTUVIM, Sept. 25, 1927, at 5.

tomorrow neither" . . . In the three corners of our house we pressed together, the four of us; two made a living at the expense of the third who received support, and I and my brother drew on "one poem a month."

Today we have market relationships. The theater, books and bread are bought for money. We have private capital — labor market; five degrees of economy. With us, the battle of the classes continues in a different form. And now, the author is hungry again. He again makes his living from a "poem a month." He writes poems, good poems, but the publishers are market institutions who surrender to the market forces.<sup>157</sup>

The romantic author, then, realized that he had to adjust to the new ideology of the free market. The understanding that a public notice might be more efficient than a lawsuit teaches us perhaps that the authors' economic intuitions were not so bad after all.

Another telling incident involved two publishers: Avraham Shtibl, whose international press had a Palestine branch, published a letter, saying that he had learned that another publisher, the "Committee for Publishing Ansky's Writings," intended to publish a book on the destruction of Polish Jewry, in Hebrew. Shtibl then announced that he had bought the Hebrew translation rights from the author for 10,000 rubles in 1916.<sup>158</sup> This could have been a complicated case: was it Palestinian (English) law that would have been applied? Perhaps Russian law? Did the latter include translation rights at the time? However, copyright law was not mentioned and no case was ever initiated.

This was not an isolated incident. The *Mitzpe Press* was quick to inform other publishers of its recent purchase of the Hebrew translation rights of Upton Sinclair's *Oil!*. The public note explained that following the publication of the book in Poland, they had the sole right to the book, which

---

<sup>157</sup> D., *Some Happenings*, KTUVIM, Aug. 30, 1928, at 3.

<sup>158</sup> Avraham Shtibl, Letter, KTUVIM, Dec. 3, 1926, at 5. Apparently, nineteenth-century copyright law in Prussia and Austria provided the author or publisher with one year of exclusivity as to the translation of the literary work if they explicitly reserved the right to do so in the title page of the original work. *See, e.g.*, Austrian Copyright Act, 1846, § 5(c), *reprinted in* Primary Sources on Copyright (1450-1900) (Lionel Bently & Martin Kretschmer eds., 2008), <http://www.copyrighthistory.org> (search "Austrian Copyright Act 1846"; then follow hyperlink). Thanks to Friedmann Kawohl for drawing my attention to this point. I have found no direct evidence as to a possible connection between this norm and the Hebrew publishers' norms.

was soon to be published in Hebrew.<sup>159</sup> Shortly thereafter, *Ktuvim* reported that *Mitzpe* had sued *Moriya Press* for publishing the book without the author's permission.<sup>160</sup> However, it is unclear whether such a suit was indeed filed. No other indications of such a suit were found.

## 2. Attribution and Integrity

Failure to attribute works to their authors and unauthorized changes to the works were recurring issues. This was the case with Tchernichovsky, mentioned above. In the absence of moral rights in Palestine's copyright law, the best method was that of a public notice, which had a dual role: assertion of authorship and shaming of the publisher who had failed to attribute the work. Several examples follow.

Avigdor HaMeiri, an author, poet, and the founder of the satirical theater *HaKumkum (The Kettle)*, and later one of the founders of Acum, the Hebrew Performing Rights Association, published the following notice in *Ktuvim* in 1927:

Last week I sent *Ktuvim* a letter, in which I forbade anyone to use my song *Hi, Hi, Na'alayim (Shoes)* in front of an audience, with the music of Mr. Weinberg, since the song has already been the public's domain with the music of the composer, Mr. Engel.<sup>161</sup>

Phrased in contemporary copyright law terms, HaMeiri permitted the public performance of his work only in a particular way, as put to music by one composer and not another. While in contemporary terms this demand can be phrased as a condition for a license to publicly perform a work, it is better understood as a concern for the integrity of the work, in the eyes of the author. The former legal contention builds on material rights, the latter on moral rights.

A. Ben-Shemer published a short note in *Ktuvim*, asserting his rights as a translator of a play, complaining that his name had been omitted from advertisements and that this amounted to deceiving the public, which might think that the play was originally written in Hebrew. Finally, he did receive his payment.<sup>162</sup> Another example is that of Nachum Gutman, the famous illustrator of the time (who was also a prolific artist, author and costume

---

<sup>159</sup> News, KTUVIM, Nov. 7, 1929, at 4.

<sup>160</sup> See News, KTUVIM, Nov. 28, 1929, at 4.

<sup>161</sup> Avigdor HaMeiri, Letter to the Editor, KTUVIM, Aug. 20, 1927, at 6. The letter further complained that *Ktuvim* edited his original letter by replacing the explicit prohibition with a politer request.

<sup>162</sup> A. Ben-Shemer, Letter to the Editor, KTUVIM, June 29, 1927, at 4.

designer). He publicly complained that publishers deleted his signature from the illustrations he had made and did not attribute them to him.<sup>163</sup>

The guardians of moral rights were not only the offended authors themselves. Authors at large kept an open eye and reported cases of omissions, thus establishing a social norm of attribution. Parnass wrote about a new educational book, *Language and Country*, praising it for its use of local content. But then he found that the book contained local songs and extracts from short novels, without providing any attributions. The students who use the book, he commented, were entitled to know who wrote what. He concluded that it was an abuse of authors' rights.<sup>164</sup> He also complained about the "wonderful" amendments to the original material, to its detriment, in his opinion. Once again, the public letter was effective and the editor of the book, Dr. Fania Shergorodska, was quick to respond, providing somewhat lame excuses: she wrote that due to her recent immigration to Palestine, the production of the book had met with some difficulties, the omission of names being one of them. She had prepared a list of the authors, but it had been lost. She had managed to recall some but not all the names and mentioned in the book that the full list would follow. As for the accusation of tampering with the integrity of the material, the editor explained that "the author's dignity lies where he published," and that given the attribution (which was missing . . .), the reader could refer to the full text.<sup>165</sup> Parnass responded, dissatisfied, that there is a moral defect in the editor's behavior, commenting that the material was the private property of the authors.<sup>166</sup>

Attribution norms were also asserted in the reverse manner, when the true identity of an anonymous or pseudonymous author was exposed. In a short article Z. Fischman complained about several cases in which the identity of authors had been revealed.<sup>167</sup> For example, the editor of a bibliographic list signed his work with his initials. When the list was republished by one of the publishers, the initials were replaced with a full name. Fischman also complained that in the republication of an article, another publisher replaced the initials of the author Y.R. with the full last name: "Y. R(amon)."

Thus, the publishers, who were the main users of copyrighted material,

---

163 Nachum Gutman, *About Illustrations*, KTUVIM, May 22, 1928, at 2; see also GRACIELA TRAJTENBERG, *BETWEEN NATIONALISM AND ART* 24 (2005) (Hebrew), who views this incident as an example of the romantic image of the modernist author.

164 B. Parnass, *Authors' Abuse*, KTUVIM, Jan. 2, 1930, at 4.

165 F. Shergorodska, *Reply to 'Authors' Abuse'*, KTUVIM, Jan. 16, 1930, at 4.

166 B. Parnass, *Reply*, KTUVIM, Jan. 16, 1930, at 4.

167 Z. Fischman, *About Revealing Pseudonym*, KTUVIM, Sept. 9, 1926, at 2.

were under a form of social policing, and when they failed to meet their obligations, the court of public opinion rather than the court of law was sought.

### 3. *International Transactions*

Two issues involving international law bothered the local literary community. The first was translations, the second, Hebrew books first published in Europe and then reprinted in Palestine. Questions of choice of law were raised in the following decade regarding the music industry, but unlike the well-organized music industry, the players in the literary field were unable, it seems, to find adequate solutions.

The organized project of the Jewish Agency to translate classics during the 1910s seems not to have concerned itself with the copyright of the translated works.<sup>168</sup> Indeed, some of the copyright laws in Europe allowed translation without seeking permission.<sup>169</sup> As for local laws, although the Ottoman Act that was in place at the time explicitly provided legal protection for translations,<sup>170</sup> there are no indications that it was familiar to local authors or lawyers. During World War I, the small Jewish population was preoccupied with survival. Even if there had been any desire to request permission, tracing the copyright owners and examining the validity of copyright — what today we would call copyright clearance — required a legal expertise which local lawyers were unlikely to have had.

From a formal legal point of view, Palestine as such was not a member of the Berne Convention until the application of the 1911 Act in 1924. I have found no documented complaints from foreign copyright owners until a much later period, and then relating to none else than Prime Minister Winston Churchill in 1941.<sup>171</sup>

---

<sup>168</sup> See Shavit, *supra* note 141.

<sup>169</sup> For example, the Copyright Act for the German Empire of June 11, 1870, provided the authors with a limited right to control the translation of their work, if the work was published in several languages within a window of two years and if the author reserved the right. See the English translation, Copyright Act for the German Empire (1870), in Primary Sources on Copyright (1450-1900), *supra* note 158 (search "Copyright Act for the German Empire (1870)"; then follow hyperlink). By contrast, the English Copyright Act, 1886, 49 & 50 Vict., c. 33, provided a right of translation for ten years; the Copyright Act of 1911 equated the translation right to that of other elements of the copyright. The Berne Convention required translation rights.

<sup>170</sup> See *supra* note 12 and accompanying text.

<sup>171</sup> A Tel Aviv publisher translated Churchill's speeches into Hebrew and sold them under the title: "Winston Churchill, War Leader". On the eve of the new Jewish year of 5702, a confidential telegram sent by the Secretary of State to the Mandate

The immigration of authors who had already published in Europe and the relocation of several presses to Palestine raised complex legal questions: Which law applied? Was it the foreign law at the place of publication or the law of Palestine, the place of republication? If the foreign law had changed in the meantime, which version thereof should apply? During the 1920s the issue was not raised in court. Contracts were made and books were published with or perhaps without permission. When disputes did break out, the solutions were not found in the Copyright Act of 1911: the judges applied the foreign law, especially German law.<sup>172</sup>

#### 4. *Social Norms*

What can we learn from these incidents of the 1920s? First, they indicate that the literary field did indeed face some legal issues and that the players in the field — authors and publishers — did not turn to the formal copyright law. The legal field was not yet ripe for that development, and the litigious instincts were perhaps mellower than they currently are. Moreover, the law itself was unable to solve most of the issues discussed here. Instead, solutions were sought first through private letters and then, if necessary, by public notices, which had the dual function of asserting rights and shaming.

Was this private ordering effective? How should we measure its success or failure? My impression is that the social norms were a viable option for the 1920s, the decade of books. One indication of that is the fact that more than one author and publisher turned to *Ktuvim* and that the accused occasionally responded. That is no surprise: the players in the field were a close-knit

---

government in Jerusalem reported the publication of the book, as announced in the Jewish Chronicle. The Secretary wrote: "Company has not obtained Prime Minister's permission to publish extracts from his letter(s) and speech(es). Please consider whether there has been infringement of copyright and telegraph your comments." A prompt investigation in Palestine found that the publisher had obtained the right through a chain of assignments. See Confidential Telegram of the Sec'y of State to the High Comm'r (Sept. 23, 1941) (ISA, M698/13, doc. 13a); Letter from the Pub. Info. Office to the Attorney Gen. (Oct. 3, 1941) (ISA, M698/13, doc. 13); Letter from the Solicitor Gen. to the Pub. Info. Officer (Oct. 7, 1941) (ISA, M698/13, doc. 14); Confidential Telegram from the High Comm'r to the Sec'y of State (Oct. 10, 1941) (ISA, M698/13, doc. 15).

<sup>172</sup> The cases of Ahad Ha'am's heirs and *Margolin v. Schocken* illustrate this point. See CA 332/43 *Ossorguine v. Hotza'ah Ivrit Ltd.* [1944] 11 PLR 419; CrimC (TA) 5657/37 *Margolin v. Schocken et al.* (Sept. 16, 1937) (Gnazim, file 20787/4). The arbitration over Herzl's writings in 1936 also referred to the German law rather than to the local copyright law, and the later dispute over Herzl's writing in the 1950s once again turned to German law. See CC (Jer) 139/50 *Hotza'ah Ivrit v. World Zionist Organization* (CZA S5/12455).

community. They all knew each other on a personal basis. They were part of the same milieu. They were also repeat players: all published with the same publishers, read each others' works and responded to them. Thus, social norms were the local response to the local needs. The foreign/international option was *de facto* rejected.

### CONCLUSION

A popular contemporary argument about copyright globalization is that it often imposes external norms that do not accord with local needs. The case of copyright law in Mandate Palestine provides an early illustration of this complaint, though with its own variation. The foreign law and the local needs were not in conflict. Social norms and private ordering provided sufficient answers to the local needs, and the formal law was mostly ignored until the 1930s. The introduction of the law was a culmination of an emerging international framework, general Imperial interests, Palestine-specific interests and the nature of copyright, and perhaps also the personal background of Norman Bentwich. The British law replaced a somewhat obscure Ottoman legislation, but it took awhile until it became a relevant factor. The foreign law was hardly known and in any case did not suit the needs of the *Yishuv's* cultural field until the 1930s. The gap was filled by turning to alternative avenues, such as market norms (contracts) and social norms (public shaming).

As the 1920s drew to a close, the *Yishuv* grew substantially, and tensions with the Arab population and the British government grew. The literary field was no longer the central player in the wider cultural field. The 1930s saw the introduction of new technologies, namely radio and the talking movies. *Moznayim*, *Ktuvim's* successor, no longer hosted public shaming notices. Perhaps not surprisingly, that was when the British law was finally set in motion.