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ISRAEL INFORMATION TECHNOLOGY AND NEW MEDIA LAW: 2009 YEAR IN REVIEW

In this annual update from Meitar's Information Technology, New Media and Licensing Group, we present what we consider to be five of the most important developments during 2009 in Israeli law impacting e-commerce and technology companies. As always, we welcome any comments or feedback.

If you have any questions regarding the matters in this legal update, please contact the following attorneys or call your regular Meitar contact.

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Content

The Premier League Loses Big: Streaming of Sport Events is a "Fair Use"

The District Court in Tel Aviv delivered in September what was undoubtedly the most significant, wide-ranging and controversial Internet legal case of 2009 decided in Israel. In the philosophical, learned and highly ideological 67-page decision of The Football Association Premier League Ltd. v. John Doe, which contains over 70 citations to law review articles and cases in Israel, the United States, Canada, England and Spain, the Court determined that the live streaming of football (soccer) matches by a website, which did not charge viewers and did not have advertising, was a fair use and not a copyright infringement. If this case is followed internationally, this could have enormous implications on the economics of sports broadcasting.

The Facts: The plaintiff, the English Premier League, is the world's most widely watched sports league, and has combined club revenues exceeding $3 billion. The defendant, Livefooty.com had been streaming the league's football (soccer) matches free of charge, and without advertising. The games were only available to viewers during the time the game was being played. The Premier League approached the Israeli court with a request to expose the identity of the owner of the website and then claimed that Livefooty's actions infringed the Premier League's copyrights in the international broadcasting of football matches. This wide-ranging opinion addressed (1) jurisdiction of Internet disputes, (2) the standards for disclosing the identity of the operator of a website, (3) whether streaming sports events violates the copyright owner's broadcast rights, and (4) whether streaming sports events is a "fair use".
This article reviews and comments on each of these issues.

1. Jurisdiction

Based on the above facts, Judge Michal Agmon-Gonen of the Tel-Aviv District Court gave a detailed decision, which included a review of Israeli and foreign case law and academic literature. The first question that the Court addressed was whether Israeli courts had jurisdiction over this matter. The only connection to Israel is that Livefooty.com's servers were, or formerly were, in Israel. The judge determined that jurisdiction was appropriate if "the site's activities or content were directed and targeted to Israel (beyond the possibility that users in Israel would see the content like all users in the world)." Despite the fact that the site was in English, and no content was in Hebrew or directed to Israel, the judge decided, based on the past or present server location in Israel, that she would assert jurisdiction.

Comment: Although the connection with Israel was weak, the judge was correct in stating that the site was not really directed at any particular place in the world, so why was Israel any worse than any other place to adjudicate? While such a standard may lead to forum shopping, the basis for Internet jurisdiction has often been tenuous, particularly for sites that have viewers who do not have a clear geographic concentration. In this case, there really is no reason that courts in England or the U.S., for example, would have any more right to hear this complaint, as the identity of the defendant was not known.

2. Revealing the identity of the site's operator

The court next turned to the standard for revealing the identity of a site's operator. The court explained that for cases of defamation there is often a more compelling reason to protect the anonymity of the speaker than in the case of a copyright infringement. Nevertheless, in this case, the Court held that the identity would only be revealed if two relatively difficult conditions were fulfilled: first, that the plaintiff presented proof that there was a high probability of an infringement; and second, that the infringement was particularly serious.

Comment: Although the second part of the test — that the infringement be very serious — is unusual and not especially easy to apply, it is justified. As support, the Court contrasted the now-famous take-down notice received by YouTube related to the Dancing Baby video, which had a Prince song in the background and a total of 28 views. Anonymity on the web is a legitimate and important value in a democratic society. To reveal the identity of someone for every infringement could be construed as an excessive intrusion into the values of anonymity.

3. Is streaming considered broadcasting?

In order to determine whether there was an infringement and, therefore, whether to reveal the operator's identity, the Court focused on whether the streaming of the football games was an infringement of the broadcast right, one of the exclusive rights of a copyright owner under the new Israeli Copyright Act. The court focused on the statutory language, which states that broadcasting is transmission "by wire or wireless means" of sounds and/or images to the public. The court interpreted this section narrowly and believed that the legislators' intent was to preserve the public domain. Therefore, the statute's failure to mention transmission by internet or computer, two technologies well known when the law went into force in 2008, meant that these were not to be considered "broadcasts," and, therefore, Livefooty's streaming of the football matches was not a copyright infringement.

Comment: This is a stunning and tortured reading of the Copyright Act. The common sense reading of the broadcast right is that it is technology-neutral and covers any transmissions to the public, whether by wire or wireless means — i.e., any means. As the "making available" right of the copyright owner is quite narrowly drafted in the new Copyright Act (it is limited to making available a work "from a place and at a time chosen" by the public), this would mean that any Internet transmissions that are not downloadable or permanently available to users are not an infringement of the copyright owner's right.

4. Fair Use

In the final part of the decision, Judge Agmon-Gonen interpreted and applied the Fair Use Doctrine in a highly elastic manner, stating that even if streaming is broadcasting, Livefooty's streaming of the football games is "fair use".

As a reminder, under both Israeli and U.S. copyright laws, the copyright owner holds the exclusive right to make certain uses in a copyrighted work or to allow others to do the same. The Fair Use Doctrine is an exception to such exclusive right, as it allows using a copyrighted work without the approval of the copyright owner. Fair use typically includes use of a copyrighted work for research, criticism, instruction or news reporting. The Fair Use doctrine balances the rights of authors on the one hand and those of users on the other hand. As an outspoken advocate of users' rights, Judge Agmon-Gonen was of the opinion that the courts must be attentive to the digital reality and should therefore construe the Fair Use doctrine broadly as a right (rather than just as a defense to a claim of copyright infringement) in order "not to transform the whole nation into copyright infringers.' Characterizing fair use as a right, rather than a defense, has many implications, including which party has the burden of proof.

The court rightly noted that the new Copyright Act made a significant change to the Fair Use doctrine. Whereas the old Copyright Act included a closed list of "allowed uses," the new Act adopted the model of the US Copyright Act and included an open list of uses, giving the courts room to set additional uses. Consequently, Judge Agmon-Gonen came to the conclusion that the Fair Use doctrine should be construed broadly.

The Copyright Act has a 4-part test for whether the use is fair. Under the first part ("the purpose and character of the use"), the Court focused on whether Livefooty.com was a for-profit site. In addition, the Court explained at length the cultural importance for viewers of all social classes being able to watch football matches for free, sprinkling the opinion with such soaring quotes as: "Sport is increasingly understood by many national and international bodies as having unique, universalistic qualities that both transcend differences in civilizations, and which may even be harnessed to heal intersocietal wounds." Concluding that the site was not commercial and that watching football was an important social

value, the Court accepted Livefooty.com's claim that streaming live football matches free of charge is fair use and therefore does not constitute a copyright infringement. The court championed the need to make sporting events accessible to the general public and not only to the wealthy classes who can afford a costly cable subscription.
Under the second part of the test ("the character of the work used"), the Court postulated that video footage of a sporting event is not the type of creative activity that is at the center of copyright law, but rather at the margin, and is therefore not deserving of the same level of protection as other copyrighted works.
As to the third and fourth tests ("the scope of the use" and "the impact of the use on the value of the work and its potential market"), the Court emphasized that Livefooty.com's broadcasts are of a lower quality and, therefore, not likely to have a significant negative financial effect on the market value of the broadcasting rights of football matches.
Based on the above, the Court concluded that the Fair Use Doctrine is applicable and that Livefooty.com is not a copyright infringer. The court consequently rejected the Premier League's request to expose the identity of the Livefooty.com's owner.

Update and Comment: As could be expected, the decision ignited a stormy debate between the supporters and the critics of the Court's decision.
Two months following the District Court's decision, the Premier League appealed to the Israeli Supreme Court. Premier League claimed that the lower court's decision supports digital piracy, undermines the notion of broadcasting rights in sports events, and may very well cause the downfall of the whole sports industry due to loss of critical income. Premier League further claimed that Livefooty.com is a commercial website, and therefore the District Court's factual analysis is simply erroneous.
The appeal remains pending at the Supreme Court and is expected to be decided during 2010.
While the Court's opinion is an eloquent statement for "user's rights" under copyright law, and while the Premier League's "Chicken-Little" claims that "the sky is falling" are exaggerated, there seems to be little doubt that this case misapplied the broadcasting rights of copyright holders and the Fair Use Doctrine. The focus in copyright jurisprudence over the last two decades has been to protect as fair use works that are transformative, that add something to a work, or that make a different, valuable use of a copyrighted work. Parodies are classic examples of fair use (such as 2 Live Crew’s rap music parody of *Pretty Woman*, which was the subject of the 1994 US Supreme Court case of *Campbell v. Acuff-Rose Music*), or the copying of photographs for use in a video search engine (*Perfect 10 v. Amazon*). In this case, Livefooty.com did nothing to transform or improve the Premier League's broadcast. Livefooty.com simply pirated the broadcast and undermined the Premier League's rights in its copyrighted work. There is no reason why fair use ought to encourage or protect such use. Livefooty.com's use was not educational or scientific. It blatantly copied the entire broadcast, which clearly undermines the Premier League's market for its broadcast. In our view, Livefooty.com's streaming violated the Premier League's broadcast right and also should not be considered to be a fair use.

The Score is Tied at 2-2: Initial Judicial Decisions under the new Israeli Spam Law

On December 1, 2008, a new Israeli law regulating commercial solicitations, including spam, went into effect. The law, Amendment 40 to the Communications Law (Bezek and Broadcasting) 2008 (the “Spam Law”), regulates the practice of sending commercial marketing materials to recipients without their consent by way of email, fax, automatic phone dialing systems or text messaging. The Spam Law establishes a general rule that an Israeli advertiser may not send commercial communications via such technologies without obtaining the advance written permission of the recipient. The recipient may revoke that permission at any time.
The Spam Law’s scope is quite broad. It covers “any commercial message intended to encourage the purchase of a product or service, or to encourage spending money in any other way." The Law includes both civil and criminal penalties for non-compliance, including personal liability for officers and those in charge of the marketing or advertising activities of a company. Furthermore, individuals may sue and collect up to 1,000 NIS in exemplary damages for every spam message they have received, even without proving any actual damages.
The courts are actually directed to be sympathetic to plaintiffs, in the sense that courts are NOT to consider the damage (or lack thereof) caused to the recipient. Rather, the Court should consider the following factors in determining the amount of exemplary damages to be awarded a plaintiff: (a) the deterrent value of an award; (b) encouraging recipients to enforce the law; and (c) the extent of the violation.

A year has passed since the Spam Law became effective. During this period, there have been a significant number of claims under the law, as the Israeli courts were repeatedly presented with plaintiffs demanding statutory damages for alleged Spam.
In the past year, two requests for class action certification were filed. The first was directed against “Walla” – a popular Israeli portal – and “Bezeq International” – a popular ISP and a shareholder of Walla. According to the plaintiff, Walla and Bezeq International sent advertising materials by email without ever receiving prior written consent of the recipients. The class action, seeking damages of NIS 840 million, was also directed personally against directors of Walla and Bezeq International.
The second class action was filed against the prominent Israeli job search engine “AllJobs” and sought damages of NIS 70 million. AllJobs had apparently sent unapproved advertising materials by email to as many as 70,000 people and is being asked to pay each recipient the maximum statutory damages of

NIS 1,000.
The courts are still reviewing both class action certification motions. It should be noted that only if the court indeed decides to certify the class will the case enter into the evidentiary stage (in which the plaintiffs still bear the burden of proof).

In addition, this year the Israeli Small Claims Courts handed down several judgments for statutory damages under the new law. The first case was *Pasternak v. Smile Media Inc. - P1000*, which resulted in an order against the popular online sales website P1000 to compensate a plaintiff that received dozens of advertising messages via email. The court accepted the plaintiff's version of the facts, according to which P1000 ignored his requests to discontinue sending him advertising messages. Nevertheless, as most of the messages were sent before the Spam Law entered into effect, the Court ordered P1000 to pay the plaintiff NIS 2,000 – representing the maximum statutory damages for the two messages that were sent after the Spam Law came into effect.
A few months later, in the case of *Bauman v. S.T Supertrade Ltd.*, the Small Claims Court ordered an Israeli company to pay statutory damages of NIS 6,000 to a plaintiff who was unable to remove himself from the company's mailing list despite several attempts to do so. In a further Small Claims Court decision, an Israeli public relations company, Barkin Communication Ltd., was ordered to pay NIS 11,000 for 22 spam messages sent to the plaintiff's workplace email address. The court accepted the company's reasoning that the spam messages were not sent for commercial reasons, but were due to a technical failure, and ordered it to pay half the maximum statutory damages for each message. Following the decision, the Israeli District Court rejected the company's request for an appeal, stating that the Small Claims Court's decision was well argued.
In contrast to the above cases, in two separate decisions (*Teller v. Tradeline Information and Communication Services Ltd.*, and *Ben-Yehuda v. Walla Shopmind Ltd.*), courts rejected claims under the Spam Law when they were of the opinion that the plaintiffs were not acting in good faith. The court explained that before legal proceedings are initiated, the potential plaintiff must first make a good faith effort to inform the sender of spam messages that he is not interested in receiving them.

Comment: Based on the judgments that have imposed meaningful fines against spammers in 2009, we expect an increase in 2010 in both the number and extent of these claims. Moreover, as class actions present a far greater threat to Israeli businesses than small claims actions (due of course to the huge statutory damages theoretically possible), the courts' prospective decisions in the Walla and AllJobs cases are expected to have a considerable effect on the behavior of potential spammers and potential plaintiffs.

Proposed Electronic Commerce Law Withdrawn

After much anticipation and years of consultations following an initial draft law was circulated in 2005, the government finally proposed the Electronic Commerce Law in January 2008. The proposed law set forth the principles intended to govern, and create greater certainty in, various aspects of electronic commerce, including the validity of electronic documents, presumptions in connection with sending and receiving electronic massages, liability of Internet Service Providers ("ISPs") for infringing material, and ISP obligations concerning user privacy and confidentiality.
Perhaps the most controversial provision was the issue of ISP liability. It is important to realize that the definition of "ISPs" was very broad: it included any website provider, not just those which are providing commercial access to the Internet. The proposal included provisions that minimized the risk to ISPs with respect to the Internet services they provide, as well as third party content that they host on their sites. Chapter 5 of the proposed law limited the civil liability of ISPs in cases of third party infringement. In particular, Section 10 set forth a "Notice and Takedown" procedure, derived from the U.S. Digital Millennium Copyright Act, but providing much wider coverage. Unlike the DMCA, which only grants immunity from monetary claims for copyright infringements (such as those against video-uploading sites YouTube and Veoh), the proposed Israeli law, like the European Union Directive on Electronic Commerce, 2000/31/EC, granted immunity for any type of infringement by user-generated content. This would include infringement of intellectual property rights (copyright, trademark or patent infringement, or disclosure of trade secret) or material that is defamatory or violates an individual's privacy rights. According to the proposed procedure, an ISP would not be held liable for infringing third party content if: (a) it was not aware, at the time the material was uploaded, that the material or its distribution are prohibited or constitute an infringement of intellectual property rights; (b) the third party uploading the infringing material did not act on behalf of the ISP; and (c) upon receipt of a complaint that the material or its distribution constitute an infringement of intellectual property right, the ISP acted expeditiously to remove the material or disable access to it.
After lengthy legislative deliberations and public discussions, the proposed law was eventually withdrawn by the Ministry of Justice.

Comment: There is a clear need for an electronic commerce law in Israel. The lack of clear statutory guidance, particularly in the area of ISP liability for third party content, as well as the validity of electronic messages and agreements, creates great uncertainty. The result is that courts, as will be seen from a summary below of two cases in this area in 2009, are setting various and conflicting standards. Moreover, the current status is even more problematic, since cases that were decided before the withdrawal of the proposal already referred to it and relied on it, stating in each case that the particular decision "represents the legislator's intent to provide ISPs with a high level of protection in cases of third party infringing content".

Courts Regulating ISP Liability in Light of Failure to Enact Electronic Commerce Law

As discussed above, in light of the failure to pass the proposed Electronic Commerce Law, courts have been deciding on their own issues relevant to operators of websites. We discuss below two important cases decided this year that address different facets of online liability for defamatory comments posted by users – when is a site liable for these defamatory comments (*ynet v. Rami Mor*), and when is a search engine liable for links to defamatory content (*Leviev v. Google*).

1. ISPs and Defamation: ynet v.Rami Mor

On September 13, 2009, the Magistrate Court rejected a request for dismissal of a claim submitted against ynet- one of Israel's leading news portals.The court held that ynet could be liable for negligent handling of a request to remove defamatory comments from its site.
The plaintiff, Rami Mor, is a holistic therapist. He claimed that an internet forum operated by ynet contained defamatory statements about him made by another forum user. Examples were: "Rami Mor is a fraudster, and exploits people and their troubles; he has no effective remedies. None of his remedies are proven; he does it all for the money."
ynet deleted the defamatory comments from the forum promptly upon receiving notice from Rami Mor, but the comments were still available in the ynet database for almost two more months and were therefore available if users searched the site. In such a factual situation, was ynet liable?

First, the Court considered whether internet sites, such as ynet, should be considered to be a "means of communication" under Section 11 of the Defamation Law.Under this section, "means of communication" such as newspapers, radio and television bear "editor liability" for items communicated to the public. This imposes on them a heightened level of liability. The court concluded that internet sites like ynet do not select or filter the articles and certainly not the talkbacks that were at issue in this case. Therefore, the Court held that internet sites should not be subject to heightened liability.
Second, the Court examined whether ynet could be liable for negligence under Section 35 of the Tort Ordinance. The first question the Court analyzed was did ynet owe a duty of care to the plaintiff? The court stated that when potential damage can be expected, such a duty exists, unless there are policy considerations that militate against holding a site liable.
The court then examined the policy arguments for holding ISPs liable for third party defamatory content. On the one hand, the Court believed that ISPs (a) are the ones who are in the best position to screen the content; (b) are more accessible as defendants than some anonymous poster; and (c) typically have a deeper pocket than the individual posting the defamatory content. On the other hand, requiring ISPs to review talkbacks for defamatory content is impractical economically, imposing unrealistically high costs on operators. The result would be that holding ISPs liable would create a "chilling effect" on freedom of speech, as ISPs will necessarily control third party content or eliminate talkbacks entirely.

In the absence of relevant legislation, the Court noted with regret that it is up to the courts to balance the protection of an individual's reputation, such as that of Rami Mor, against the freedom of speech for self expression of third parties using online platforms, such as ynet's forums.
The court concluded that it would be impossible for ISPs to monitor the quantity of content uploaded by third parties, and that monitoring such content would most likely create a "chilling effect," which would ultimately increase the cost of using internet services and would limit the freedom of speech. In addition, the Court recognized the difficulty of adopting the Notice and Takedown procedure in the context of defamation claims, since it is often not clear whether a statement is defamatory. It noted that the procedure can easily be exploited by those who want to quash speech that is critical of them.

Despite its reservations, the Court accepted that notice-and-takedown is the best approach for defamation claims and set forth a 3-part test, based on the 2002 holding in *Borochov v. Elishai*, as to the situations in which site operators might be liable:
First, the person complaining of the defamatory comments must specifically request removal of the comments.
Second, the site is required to remove the comments only if they are, without a doubt, defamatory.
Third, the operator is liable only if it has the reasonable ability to prevent the defamatory comments.
The court noted that without any legislation in place, and in order to achieve greater legal certainty, the Court must examine the reasonable time period for an ISP to remove defamatory content and the measures that should be used in such process.
Holding: The court concluded that it could not dismiss the claims as ynet requested because there is a factual question of whether ynet was negligent for failing to remove the content from its search engine and database for a period of almost two months.

Comment: The court noted that the lack of clear time periods for removing content is an important reason why there needs to be legislation addressing this issue. The legislation should set forth the time

periods in which sites must remove content.
While the Court held that internet sites would not be liable for the heightened standards applicable to newspapers, radio or TV since they do not select the news in the same way, it is not clear why this logic would necessarily apply to defamatory comments in articles written by the site's employees or editors, in contrast to talkbacks, which was the case here.
Finally, this case is an example of how Israeli sites have much higher potential liability for defamation than US sites, which have immunity from liability under Section 230 of the Communications Decency Act from defamatory comments posted by users.

2. Search Engine Liability: Leviev v. Google

In *Yigal Leviev v. Google Israel Ltd.*, the Israeli Magistrate Court rejected a defamation claim brought by the plaintiff, Yigal Leviev against Google.
The plaintiff, a former journalist, complained that when he queried Google's search engine by entering his name, the first result that appeared was a link to an article containing defamatory content - accusations of Leviev's criminal activity.
As in *ynet v. Rami Mor*, the Court first considered whether a search engine should be included as a "means of communication" under Section 11 of the Defamation Law and subjected to increased liability. In categorically rejecting inclusion of the search engine as a "means of communication", the Court noted that search engines, unlike website operators, have no ability to review content on the site and that the entire search process is automatic. A search engine's purpose is limited to the presentation of links to various internet pages, which were edited and published by third parties. In addition, the Court considered it important that Google adopted a Notice and Takedown procedure and removed the allegedly defamatory search result, even before the claim was made.
The court reviewed the law in the United States, Europe and England regarding website liability for defamatory comments posted by third parties and also discussed at length the proposed Israeli Electronic Commerce law. Relying heavily on the proposed Israeli law, the Court said that because the search engine process is automatic, it could not know whether the content violated the rights of third parties, and therefore it was not liable for linking to the infringing content.
The court noted, of course, that the website that published the defamatory content should be the proper address for claims of defamation.

Comment: This well-reasoned decision is an important case making clear that search engines are not liable for infringing material to which they link, as long as they remove links when there is a complaint. The rationale should provide for broad exemptions for liability for search engines, which is definitely a positive result. Nevertheless, while the removal of such links by Google and other search engines is understandable, the unfortunate result will be that search engines will often choose to take the conservative position and remove posts, rather than maintaining links to material that may be controversial and appropriate to remain posted and available to the public. This is particularly true since, unlike some obvious copyright infringements, it is not necessarily a simple matter to determine whether material is defamatory.

Liability of Cell Phone Companies for Third Party Content

On March 16, 2009, the District Court, in the case of *Rothschild v. Partner*, approved a request for a class action against a dating services website named "Pupic" and two of Israel's leading cellular operators - Partner and Cellcom (the "Operators").
The plaintiffs, requesting NIS 56 million in damages, claimed that Pupic had falsely registered thousands of cellular customers to its dating services without ever receiving their consent. Furthermore, according to the plaintiffs, following such false registration, Pupic had sent them daily update SMSs, each costing 5 NIS. The fee for the SMSs was collected via the plaintiffs' cell phone accounts.

1. Operators' obligation to provide value added services

In order to understand the court's reasoning, it should be clarified that according to the Operators' governmental license, they are each required to provide its customers with cellular communication services, as well as value-added services – such as web-access, e-mail, MMS, etc. In order to provide customers with value-added services, each Operator contracted with third party content aggregators on a revenue sharing basis. Cellular customers therefore had access to Pupic's services through the third-party content aggregators.
To complete the picture, Pupic also independently sent cellular customers SMS invitations to register for its services. A customer had the option to accept the invitation by clicking the link in the SMS, inserting a unique code into a registration form on the Pupic website, and clicking to accept the Pupic Terms of Use. Once the registration was complete, the subscriber began receiving daily SMS updates, each costing 5 NIS. Although the registration process appeared well-conceived to only permit registrations by individuals who were truly interested in the service, Pupic apparently regularly signed up individuals who were not interested in the service and who had not consented to such service.

2. Should the Operators be liable for third party content?

The District Court readily accepted the plaintiffs' claim that Pupic sent the SMS updates without receiving the plaintiffs' consent, as Pupic was unable to provide any evidence whatsoever of such consent being granted. In addition, the Court stated that the plaintiffs could "pierce the corporate veil" and proceed personally against Pupic's owners.

The second part of the Court's opinion revolved around the question of whether also to find the Operators liable for Pupic's unlawful behavior.

The Operators claimed in their defense that since the content was provided by a third party (Pupic), the Operators were not required to monitor it. In the Operators' view, they were merely conduits transferring third party content to customers and collecting payment for such content. The Operators further referred to the fact that when signing a cell phone customer agreement, each customer knowingly and explicitly agreed that the Operator would not be liable for third party content. Moreover, the agreements between the third party content aggregator and the Operators also included provisions relieving the Operator from liability for the third party content.

After weighing the Operators' claims, the District Court concluded that there is a reasonable basis for holding the Operators liable for the damages Pupic caused. The court explained that the Operators are the ones obligated under the terms of their governmental license to provide customers with value-added services and the fact that the Operators contract with third parties to fulfill such obligations does not diminish their own responsibility to ensure that the services are adequately, and not deceptively, provided.

3. <u>Operators' financial interest in third party content</u>

Another important fact that the Court emphasized was that the Operators de facto had a financial interest in the transaction between Pupic and the customers, due to their revenue sharing arrangements with the content providers. In other words, the Operators received a part of the consideration collected from their customers for the services Pupic offered. The Court further noted that the fact that the customers entrusted the Operators with access to customer bank accounts or credit cards gave rise to an affirmative duty of care on the part of the Operators, according to which they were expected to take reasonable measures to prevent unlawful customer billings. Moreover, according to the Court, the Operators -- and not the customers -- are the ones with the access and resources to monitor the billing process of third party content.

Based on the above, the Court approved the plaintiff's request for class action certification against the Operators. It should be noted that during these preliminary proceeding, the Court does not decide the case, but rather, among other things, considers whether the class action has reasonable chances for success. If the Court does find that the class action has reasonable chances and it fulfills other criteria set out in the Israeli Class Action Law, the request is approved.

4. <u>Settlement and market implications</u>

In the Pupic case, a few months after the Israeli Court approved the class action, the Operators reached a NIS 5 Million settlement with the plaintiffs. While the settlement may have spared the Operators from a binding, adverse court decision, the Court's reasoning remains firm and abiding – there is a reasonable basis for placing liability for third party content on cell phone operators.

<u>Comment:</u> At the moment, the Pupic decision's implications on the cellular market remain uncertain. However, as the popularity of value-added services increases and the market share for smart phones increases, this decision may change the way that operators handle the registration and payment for third party content provided to their customers. They may well only deal with aggregators who have deep pockets (so that the indemnification provisions in the agreements have some actual economic value to operators) and may directly oversee the subscribers' registration process. The fact that cell phone operators, as well as Internet service providers for that matter, remain exposed to liability for third party content (and for failures — such as those by Pupic — in managing an honest registration process itself) increases market uncertainty and may very well be rolled over to the customer in the form of higher fees.

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