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Ministry of Finance - Office of the Accountant-General
Government Internet Committee
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Author: Brian D. Negin, Adv

Introduction

The Internet is a new world, in which legal solutions from the ordinary world are not always fitting or useful. This is true for both the private and public sector alike. The Government Internet Committee seeks practical solutions to legal problems which arise subsequent to the use of the Internet by the government. I shall present you today with a sample of our work.

First, I shall discuss the special nature of the Internet world, and how it affects the handling of legal problems which arise within it. Against this background, I shall discuss the role of the legal advisor to the Government Internet Committee and present several legal issues that the Committee has dealt with. Finally, I shall add a few words on legal resources which deal with law and information technology.

The Internet and the Law

A. The Internet—A New World

Information technology has shaped and is continuing to shape a new reality known as the Internet, or, if you wish, Cyberspace.

This reality is like a new world, based on elements created by the human

imagination: computer bytes; protocols with initials such as TCP/IP, FTP, and HTML; and software languages with names like JAVA and ActiveX. In this world, we “surf” and “visit” sites by means of applications with names like Navigator and Explorer.

B. The Internet—A Tool that Creates Opportunities

It is typical of the Internet, however, that it fails to correspond fully to any one analogy. It is not just a new world. It is also, perhaps first and foremost, a tool created by people for people.

The Internet presents us with new opportunities that were unthinkable a decade ago: open government, commerce by means of virtual shops, and electronic publishing, to name only a few.

C. Law in the World of Cyberspace—Back to the Common Law

Human nature does not change in the world of Cyberspace; only the surroundings change. Familiar legal disputes and problems arise in Cyberspace, but the environment is foreign. Existing laws are poorly suited to this new reality, and the courts find it difficult to draw analogies from the ordinary world which are applicable in Cyberspace.¹

¹For example, should the law recognize an Internet address as property, like land, as Kenton K. Yee of the Yale University Faculty of Law argues in his article, “location.location.location” (http://lrc.law.warwick.ac.uk/jilt/intprop/97_1yee/default.htm)? Another example: Can one commercial entity prevent another commercial entity from referring people to its Internet site, by means of a link, without its consent? Can this entity also prevent the other from presenting its Internet site as part of the second site? These questions recently came up in American litigation: *The Washington Post Company et al. V. Total News Inc. et al.*, 97 Civ. 1190 (PKL), United States District Court, Southern District of New York, February 20, 1997, <www.ljx.com/internet/complain.html>. This suit ended in a compromise out of court on June 6, 1997. Under the terms of the compromise, reference to the plaintiffs’ sites will be allowed by means of links, but

In my opinion, the legal situation today is similar to the common-law era, in which the law developed in the absence of much legislation, by means of creative legal precedents based on life experience. Describing the development of the common law, the learned justice Oliver Wendell Holmes wrote in his book, *The Common Law*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

D. This Situation Affects All of Us

What Justice Holmes wrote then seems true today, and it is also relevant to lawyers in the civil service. In carrying out our duties, we shall have to find creative legal solutions to the legal problems that the information age presents. Lawyers at the Ministry of Justice—You will have to draft the legislation needed for and appropriate to the information age.²

State attorneys and state attorneys' offices—You will have to prosecute the perpetrators of computer and Internet crimes. The time will yet come when you shall also have to bring civil suits on behalf of the State or defend the State

their sites will appear in a new window, i.e., outside the frame of the referring site.

²For example, a report of the Knesset Subcommittee for On-Line Communications and Information, "How the State of Israel is Preparing for the Information Age," presents a legal and judicial review including a survey of legal issues that should be addressed. They include labor and social-security law, international trade law, finance law, contracts, jurisprudence, consumer protection, personal liberties, rights to

against actions brought against it concerning the use of the Internet and information technology.

And lawyers in the legal bureaus of government offices—You will have to oversee the use of the Internet by your offices and draw up the necessary contracts to create and operate Internet sites.

Role of the Legal Advisor to the Government Internet Committee

The Legal Advisor to the Government Internet Committee examines legal problems that arise subsequent to the governmental use of the Internet and offers practical solutions to these problems, some of which will be published as provisions of the Administrative Code.³ Because of the special complexion of the Internet, these solutions are based *inter alia* on intimate familiarity with Internet technology and with the customs of its use.

Up till now, several problems have been analyzed and solutions proposed, in the following areas: copyright in the context of building an Internet site, protection of copyright in the site, terms of use that regulate the use of an Internet site by the public, and use of the Internet as a working tool by office staff.⁴

The Committee's work continues. Additional legal issues on the agenda include the use of links, assigning domain names to public agencies, and regulation of relations between government offices and the Government Internet Service Provider.

I will now present several legal problems that the Committee has discussed and the

information, freedom of information, and protection of privacy.

³Solutions adopted by the committee will be shortly issued in the Administrative Code, *Sefer Minhah Kaspi* (Hebrew), (Chapter 5, "Miscellaneous," Part 3 [Communications], Subparagraph 4 [Internet]).

⁴See two documents and their appendices at the committee's Internet site and in the source booklet for this seminar: "Legal and Administrative Issues Pertaining to the Internet in Government Offices," and "Moral Rights in Building an Internet Site."

solutions that it has proposed and adopted.

Legal Issues Pertaining to Governmental Internet

A. Building the Internet Site of a Government Office

Only a few government offices⁵ currently disseminate information over the Internet. It is hoped that additional government offices will establish sites in the near future.⁶

Building an Internet site is complex, not only technologically, but also legally. This legal complexity derives from the fact that an Internet site includes many elements which are individually protectable under the law of copyright. Moreover, the site itself, as a collection of these works, constitutes a “work” which is protectable in its own right.

Consider, for example, the Knesset site, which was shown to us this morning by MK Michael Eitan.

The site includes, amongst others, the following elements: graphics, text, works of art by Marc Chagall (in which copyright is held by a third party), pictures, and video and audio excerpts. Underlying all of this is HTML code. All of these elements are protectable under the law of copyright.

In building an Internet site, therefore, one must keep in mind all of the different elements that will go into it.

⁵The Ministry of Finance (including the Income Tax Division and others), the Ministry of Foreign Affairs, the Ministry of Education and Culture, the Ministry of Industry and Trade, the Ministry of Religious Affairs, the Ministry of Health, the Central Bureau of Statistics, and the Government Advertising Bureau. Other public agencies include the National Insurance Institute, the Postal Authority, and various municipal authorities. The Ministry of Tourism has a site at www.infotour.co.il.

⁶Ministries that do not have Internet sites include Transport, Housing and Construction, Justice, Internal Security, Communications, and the Interior.

In this context, two categories of copyright must be considered:

The first is the commercial right under the 1911 Copyright Law, which gives the copyright holder the exclusive right to reproduce and disseminate the work.

The second is the moral right under Paragraph 4A of the Copyright Ordinance, which protects the rights of the creator in his/her work. Under the moral right, the creator is entitled to have his or her name attributed to his/her work, and that no changes may be made in the work that impinge on his/her reputation or dignity.

The moral right is personal and non-transferable, but it may be waived. The commercial right is transferable.

Thus, one who contracts for the creation of an Internet site from a private contractor, and takes measures to transfer all rights in the site to himself, will only receive the commercial rights, whereas the moral rights will remain with the creator.

In the ordinary world, this usually presents no problem. In a book, for example, credit is given to the illustrator, then the book is published. A given book is a static object. It will not change. The illustrations in it will not change. However, the world of the Internet is entirely different. An Internet site is dynamic. By its very nature an Internet site is constantly changing and being updated. At the most basic level, links to other sites must be kept up-to date. The more active an Internet site is, the more there is a tendency to augment it with additional subject areas and new features.

For example, on the Knesset site a new graphic element, designed by a new graphic artist, was added to the main page: a mouth and an ear, as you see here

on the transparency. The nature of this graphic element is different from that of the other elements designed by the origigraphic artist—the emblem of the State, books and documents, the Knesset building, and so on. I’ve been informed that the original graphic artist is arguing or argued that this change has injured his dor reputation, and has thus violated his moral right in his work.

How can a government office be protected to enable it to lawfully modify an Internet site?

It should be stipulated in the contract, apart from the transfer of copyright in the site to the commissioning office, that the creator of the site, including his/her employees, waives all moral rights in the site and its elements. In lieu of these moral rights, the sides should work out two additional matters in the agreement, on a contractual basis only:

- a. how the creator of the site will be given credit for his/her work;
- b. what limitations, if any, will apply in modifying the site.

This solution was adopted by the Government Internet Committee and will be expressed soon in provisions of the Administrative Code.⁷ A detailed analysis of the issue, with an example of the proposed solution, appears in a document entitled “Moral Rights in Building an Internet Site,” available both at the Committee’s Internet site and in the source booklet for this seminar.

B. Notice of Copyright and Terms of Use

Paragraph 18 of the Copyright Law, 1911,⁸ gives the State copyright in its

⁷Paragraph 5.3.4.9, Administrative Code, *Sefer Minhah Kaspi* (Hebrew).

⁸Paragraph 18 states: "Without prejudice to any rights or the special rights of the Crown, if any work has been prepared or published by His Majesty or any government

publications. Furthermore, these rights are recognized outside of Israel under international treaties such as the Berne Convention.

As we have seen above, many elements of an Internet site may enjoy copyright protection, and the office, in consultation with its legal bureau, should consider the extent to which it wishes to protect these rights. If the site includes works that are copyrighted by a third party, the office should obtain an appropriate license for their use and make an appropriate statement of copyright with respect to them.

Another matter to consider is the state's liability for damage that may be caused to those who "surf" the office Internet site. Internet sites, unlike other advertising media, are exposed to all sorts of mayhem—falling servers, power blackouts, cessation of service by the Internet provider, damage to sites, and damage to software by hackers, to mention only a few. The office should consider limiting its liability vis-a-vis the site's users in the event that such things should occur.

You can find a broad survey of this subject in a document titled "Legal and Administrative Issues Pertaining to the Internet in Government Offices."⁹ The conclusions expressed in this document were adopted by the Committee and will presently be published as provisions of the Administrative Code.¹⁰

I would like to mention that the sample terms of use attached to the aforementioned document- sample terms which will also constitute an

department, or in accordance with their instructions or under their inspection, be it before the date of this law or thereafter, copyright to the work will belong to His Majesty in consideration of any agreement with the author, and in this respect said copyright will be in effect for fifty years from the time the work is first published."

⁹Available on the Internet site of the Government Internet Committee and in the source booklet for this seminar.

appendix to the forthcoming Administrative Code provisions- are already being used today on several sites: those of the Knesset, the Foreign Ministry, the Ministry of Education, and the Central Bureau of Statistics.

C. *Use of the Internet by Office Employees*

Employees who use the Internet in their offices are subject to provisions of the law, of the Civil Service Code, of the Administrative Code, and of their offices' internal rules. The problem is that these provisions do not always correspond to the new reality of the Internet.

For example, Paragraph 6.13 of the Civil Service Code¹¹ discusses office correspondence in matters such as responsibility for correspondence, answering written inquiries, writing and preparing letters, and corresponding in foreign languages. These provisions also apply to electronic mail, *mutatis mutandis*.

Paragraph 62.1 of the Civil Service Code discusses management of records, including archiving procedures. However, this paragraph makes no reference whatsoever to archiving procedures for electronic mail. (It does relate to archiving procedures for facsimile transmissions printed on thermal paper.¹²)

Notably, the State Comptroller, in Report No. 44, p. 109 (1994),¹³ criticized

¹⁰Paragraph 5.3.4.4, Administrative Code, *Sefer Minhah Kaspi* (Hebrew).

¹¹Paragraph 61.3 deals with responsibility for correspondence (61.31), responding to written inquiries (61.32), writing and preparing letters (61.33), and correspondence in foreign languages (61.34).

¹²Paragraph 62.128 stipulates that a facsimile transmission meant to be kept for a lengthy period of time should be photocopied on regular paper or retyped.

¹³"Because of the rapid development of audiovisual and computerized media, the extensive use that state institutions and municipal authorities are making of them, and the support that they provide in producing them, valuable archival material that deserves safekeeping is being created; the [State] Archives [Office] has not taken action to gather and archive the material, and has not prepared the collections

the State Archives for “not having instructed the state institutions adequately in ways to handle computerized material and electronic mail. . . .” To this day, the matter has not been addressed, neither in the Archives Law nor in the Civil Service Code.

Paragraph 62.2 of the Civil Service Code discusses writing procedures, including the form a letter should take, based on the assumption that every official letter will be printed on paper, either by means of a typewriter or a word-processor.¹⁴ It does not address itself to correspondence by electronic mail and does not set forth a uniform style of official correspondence by means of electronic mail.

A further example is Paragraph 42.53 of the Civil Service Code,¹⁵ which regulates material published by state employees. Subparagraph 42.531 requires office staff to obtain permission before they publish anything connected with their work. This paragraph would also seem to apply to employees’ participation in a discussion group on work related matters, and would limit the use of discussion groups, contrary to the spirit of the Internet.

deposited in its archives for the use of interested parties.

The [State] Archives [Office] has not instructed the state institutions adequately in ways to handle computerized material and electronic mail, and has not taken preparatory action to receive and handle archival material of this kind. . . .”

¹⁴For example, Paragraph 62.222 states, “The original and all copies of an ordinary letter shall be written on 45-gram letterhead paper. Original records of representational nature shall be written on 60-gram letterhead.”

Paragraph 62.231 sets forth the manner of printing records, including width of margins and space between paragraphs.

¹⁵Consider Paragraph 42.532 in particular: “No employee shall publish publicly any matter connected with his official position, or with matters in which he deals *ex officio*, unless authorized to do so by the director-general of his ministry or by another employee empowered by the director-general to give said authorization, and only if said employee is given permission to publish [the material] publicly. (See also the provisions of Paragraph 42.541, which allow the authorizing official to stipulate, as a condition for authorization, that the material at issue be published in an official organ.)

The Administrative Code provisions that will soon be issued address themselves to these matters. They make it clear that the rules of the law and of the Civil Service Code also apply in the context of the Internet.¹⁶ In addition, they direct government offices to make appropriate arrangements for safeguarding of electronic mail like any other mail.¹⁷ The Administrative Code provisions also fill in lacunae, e.g., in details that employees must include in their office's electronic mail (name, department, name of office, and possibly, address and telephone number).

Legal Resources

I conclude my remarks with a few words on legal resources that you can consult to monitor developments in information technology and the law.

This field is evolving so quickly that printed books are almost useless in tracking its fascinating developments. The best sources are on the Internet itself. The Internet site of the Government Committee, <<http://www.itpolicy.gov.il>>, will refer you to Internet sites and documents pertaining to information law. We are trying to add new and relevant sites and documents, and will be pleased to receive your recommendations.

Furthermore, the source booklet for this seminar provides a bibliography of Internet sites on law and justice. I hope you find the list useful.

Conclusion

Information technology gives us new opportunities. However, it also presents us with

¹⁶Paragraph 5.3.4.20.3, Subparagraph B, Administrative Code, *Sefer Minhah Kaspi* (Hebrew).

¹⁷Paragraph 5.3.4.20.5, Subparagraph C, Administrative Code, *Sefer Minhah Kaspi*

legal challenges that require original and creative solutions. I hope today's seminar will further your understanding of the major issues in this field. I look forward to feedback from you concerning the matters I have presented here and to the legal material on the Committee's Internet site.

(Hebrew).