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Intellectual Property Rights, Explicit Content, Public Policy and Everything in Between

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On 7 August 2018 a magistrates' court in Israel issued a ruling discussing the question of whether relief ought to be granted to pornographic filmmakers claiming infringement of their rights. The ruling held that despite copyrights existing in pornographic films the court would not, for reasons of public policy, enforce these rights in a dispute between pornographic filmmakers and owners of websites that have links permitting viewing of these films. Though this ruling dealt with copyright law, it is consistent with similar caselaw with respect to trademarks, where trademarks which include profanity and which would harm public policy have been prescribed as impermissible.

The Copyright Law protects that which it defines as work and it does not require exceptional creativity or artistry for one to be afforded the right of protection. Nor does the law set down provisions as to the substantive value of the work afforded protection; indeed, the law has extended its protection to cases where pornographic filmmakers have appealed to courts. For example, in *Harpaz v. Hashashua*[1], the district court sustained the motion brought by makers of a pornographic film, holding that it falls within the scope of a cinematic work entitled to legal protection, and it issued an injunction order that would disallow the film from being viewed on websites without permission from the film's copyright owners; the court here was not required to examine the quality of the film's content.

Be that as it may, in the ruling the magistrates' court handed down earlier last month in the *Sex Style*[2] case it was held that despite the author having copyrights in the pornographic film, the court would not, on public policy grounds, assist in enforcing the copyrights in the film against one who runs a website that has links to such film.

There was no dispute in that case that the plaintiff owns the rights to the films and the parties did not dispute that the films were glaringly pornographic and not just erotic or art films.

The court held that pornographic films of the type discussed are obscene subject matter according to Article 214 of Israel's Penal Law, and thus illegal, further ruling that the distribution of these films is contrary to public order. The court made a distinction between a moral judgment of pornographic work and a judgment of its consequence, namely whether the films presented before it is harmful to society; it observed that the objectification of a human body and the degradation and harsh disrespect of women harms women's equal status and encourages violence against them and perpetuates a social hierarchy that keeps women from achieving social equality. The court did not deny that the plaintiff owned copyright in the film but nonetheless refused to grant the plaintiff the relief it sought, on the basis of public order considerations, as the judge refused to grant incentives to the creation of pornographic films, such as the ones presented to him.

Indeed, morality considerations are not alien to intellectual property. When it comes to trademarks for instance, under the very law, the trademarks registrar has the power not to permit registration of a trademark that may harm public policy.

As an example, in a case with an application to register the trademark DE-PUTAMADRE (Spanish vulgar slang which means 'I feel very good' or something is 'very cool'), the trademarks registrar refused initially to register this mark on public order grounds; following a proceeding held before it, however, arguing that when examining application of public policy rules the trade's natural development and changing social norms in the market should be taken into account, he agreed to register the expression as a trademark inasmuch as it pertains to apparel and footwear. It is worth noting that in contrast to the trademarks registrar in Israel, the application to register this mark was rejected in several other countries, including the United States, though was allowed in some others.

In the case of the trademark LA MAFIA SE SIENTA A LA MESA (lit. 'the mafia takes a seat at the table'), the European registration of a trademark owned by a Spanish restaurant chain, which included the word mafia in Italian and alongside it a red rose, was revoked. In that case the European Intellectual Property Office sustained the Italian government's petition and determined that the mark promotes the crime organization known as the Mafia. This decision was also upheld in the appeal filed to the court where it was ruled that the word mafia is known around the world as a reference to a criminal organization that engages in crimes such as physical violence, money laundering, corruption and so on, activities contrary to principles the European Union is based on, and that the word carries particularly negative connotations in Italy, an EU member, where the Mafia caused it in particular various security damages.

Another well-known case from the United States, where the trademark was allowed, concerns a trademark of an American football team, the Washington Redskins. The trademark was registered after various proceedings in the framework of which a group of Native Americans had lodged an opposition against the mark alleging that it is disparaging.

In 2017 the US Supreme Court ruled that trademarks are private, non-governmental expressions, and in January 2018 the Federal Court of Appeals ruled that the decisions revoking the registration of the Redskins football team's trademark would themselves be overturned.

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[1] CF 1932.07 Harpaz v. Hashashua published on 29 March 2012.

[2] CF 28541-08-17 Sex Style Ltd v. Abultbul published on 7 August 2017