

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2002 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY¹

IIPA recommends that Egypt remain on the Priority Watch List.

The government of Egypt continues to engage in practices that keep legitimate foreign businesses out of Egypt. For example, Egypt's Ministry of Culture continues its practice of granting approvals to manufacture and distribute copyrighted works to known pirates and unauthorized distributors who have obtained "false licenses" from Taiwan, Indonesia, and elsewhere. Such government-sponsored piracy closes Egypt off as a legitimate market to the entertainment software, motion picture, and other copyright industries. Other market access barriers, such as unreasonably high customs valuations for the carriers of copyrighted goods, close the market of Egypt to legitimate copyright business. Piracy in Egypt continues to hurt U.S. copyrighted owners, but is devastating to the once-vibrant Egyptian creative community. Once one of the largest producers of movies and music in the Middle East and North Africa, Egypt's own creators have suffered from copyright piracy, losing millions of dollars in royalties every year due to piracy of their products.²

In 2002, the government of Egypt must discontinue the practice of issuing approvals to unauthorized distributors of all copyrighted goods (if necessary, by investigating and weeding out those in the Censorship Department who stubbornly continue to engage in this practice), and put into place an easy-to-use mechanism to ensure that unauthorized distributors no longer receive Ministry of Culture approvals. Second, while piracy persists, the Egyptian government's several responsible departments (the Ministry of Culture, Ministry of Interior, Ministry of Justice, Ministry of Supply and Trade, etc.) must find ways to work together to achieve deterrence in the market, through sustained raids and follow-up, including, where necessary, criminal actions against egregious pirates. The government must also deal adequately with market access barriers, including by lowering customs' import valuations of copyrighted goods in Egypt so they conform with generally regarded international practice. Finally, in 2002, Egypt must pass the new copyright law, if necessary, by severing it from the integrated IPR bill that now sits in limbo due to problems in other parts of the omnibus bill.

Estimated losses to most of the U.S. copyright industries in 2001 were \$64.7 million (without losses from the entertainment software industry, which were unavailable at the time of this report).

¹ For more details on Egypt's Special 301 history, see IIPA's "History" Appendix to this filing.

² See Francesco Guerrera, *Investors Rue Weak Patent Protection – Intellectual Property*, Financial Times, May 9, 2001 (stating that the government of Egypt is in favor of copyright protection in the entertainment and media sector, since Egypt's movie and music producers lose an estimated EP750 million, or approximately US\$161.3 million, a year in royalties for their products).

EGYPT: ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1996 - 2001

INDUSTRY	2001		2000		1999		1998		1997		1996	
	Loss	Level										
Motion Pictures	15.0	35%	15.0	35%	15.0	50%	11.0	50%	11.0	50%	11.0	25%
Sound Recordings / Musical Compositions ³	9.2	41%	12.0	48%	12.0	50%	12.0	50%	8.0	40%	5.0	25%
Business Software Applications ⁴	8.5	53%	10.0	56%	26.4	75%	8.7	85%	9.7	85%	16.9	89%
Entertainment Software ⁵	NA	90%	14.9	94%	6.2	65%	5.5	60%	5.1	55%	5.2	51%
Books ⁶	32.0	NA	30.0	NA	30.0	80%	26.0	80%	21.0	NA	20.0	NA
TOTALS⁷	64.7		81.9		89.6		63.2		54.8		58.1	

COPYRIGHT PIRACY IN EGYPT

Problem of Government-Sponsored “False Licensees” Needs Resolution

The government of Egypt still needs to resolve the problem experienced by some copyright industries of the Ministry of Culture endorsing pirates through granting approvals to unauthorized manufacturers and distributors of pirated product. For example, while the entertainment software industry received assurances earlier this year that known pirate distributors, who had obtained approvals from the government to distribute pirated product, would have those approvals revoked,

³ The 2001 losses due to sound recording/music piracy are to U.S. repertoire only, while the level of piracy is that for all repertoire. Egypt's market remains almost entirely pirate as to international repertoire; the level of piracy for international repertoire in 2001 continues to be a staggering 99%.

⁴ BSA estimates for 2001 are preliminary. In IIPA's February 2001 Special 301 submission, BSA's 2000 loss and level figures were not yet available. These numbers were finalized in mid-2001, and are reflected above.

⁵ IDSA loss estimates for 2001 are unavailable.

⁶ There were two devaluations of the Egyptian currency in 2001 (7% earlier in the year and 8% in December). Therefore, while estimated losses to U.S. publishers in Egypt increased to \$32 million in 2001, the loss number would have been higher had devaluation not occurred.

⁷ IIPA reported overall losses to the copyright industries at \$71.9 million in 2000. Since BSA finalized its numbers in mid-2001 (see footnote 5), the revised total loss number increases to \$81.9 million.

such assurances proved inadequate, as the same pirates continue in operation today in Egypt.⁸ Because the government of Egypt controls the approvals of production and distribution of these products, and is fully aware that the entertainment software companies involved are the true right holders (having been provided with ample evidence of the same), the government of Egypt can be considered a sponsor of this brand of piracy.

The solution to this problem is straightforward: decertify the licenses already granted to unauthorized producers/distributors of copyrighted goods in the many cases in which ample evidence has already been provided to the Ministry of Culture; and implement a system to check new applications with the relevant right holders. In cases in which right holders have informed the Ministry of Culture of the authorized distributors in Egypt, such notifications should be deemed conclusive as evidence that the material proposed to be distributed by that authorized distributor is legal, while absence of a license from the copyright owner (or submission of a license containing false or misleading information) should be sufficient to exclude that person from obtaining approval from the government.⁹ Part of the approval system put into place should provide for revocation of approvals issued by the Ministry of Culture if the applicant is found not to have the rights claimed in the application, if any false or misleading information is provided to the Ministry, etc.

Other Piracy Phenomena

Retail and other forms of piracy continue to hurt copyright owners in Egypt. Among the most serious piracy problems remaining in Egypt are the following:

- **Pirate Photocopying and “Reprint” Piracy.** Egypt is by far the worst pirate country in the Middle East for book publishers, as an estimated 60 to 75% of the Egyptian market for professional reference books (medical, engineering, etc.) is supplied with illegitimate product. In 2001, publishers again reported that piracy levels for English texts remained at a significantly high level and that the piracy of medical and scientific texts remained high.¹⁰ Although legitimate U.S. publishers continue to provide some of their books at deep discounts (sometimes as deep as 70-80%), their works continue to be pirated on a commercial scale in Egypt. Commercial “offset” and “reprint” piracy, illegal translations (local or imported), and plagiarism by some local academics (stealing whole sections of a book, including illustrations, and publishing them under their own names) are persistent pirate phenomena in Egypt. The quality of printing has improved dramatically in Egypt, and bound photocopies, pirates selling “illegal” subscriptions to new

⁸ Some companies have even been harassed by the pirates. One entertainment software right holder, after it realized that the Ministry of Culture would continue to condone the piracy of an egregious pirate videogame distributor (holding false licenses from abroad), sent a “cease and desist” notice to that unlawful distributor, only to be met with a harassment lawsuit for defamation.

⁹ IIPA notes that some pirates have figured out how to get “forged” licenses that appear to be from foreign right holders; the Ministry must be made accountable for ensuring that unauthorized sellers do not dupe them into issuing approvals, lest it allow for pirates to continue to dominate the markets in Egypt.

¹⁰ A recent anecdote involves a door-to-door salesman at hospitals, selling a medical reference book for EP60 (approximately US\$13), about 10% of the legitimate price (possibly with the support of the Medical Society).

reference books for professionals and students, and pirated “ESL” (English as a Second Language) materials can also readily be found.

- **Retail Piracy.** Rampant retail piracy of entertainment software (including by those who possess false licenses wrongly recognized by the Egyptian government), music, and motion pictures, in both analog and digital forms (including, more recently, on carriers like VCD and DVD) continues to cause great harm to U.S. (and Egyptian) copyright owners. Some console-based videogame platforms report 95% piracy in Egypt, while for the personal computer platform, the numbers are equally staggering, at 80%. Over 70% of the newest games are pirated. Most of the pirate games, including console-based games, are imported into Egypt (coming in from Malaysia, Thailand, Singapore and Russia, as well as re-imports from the United Arab Emirates and Saudi Arabia). Also, the industry has noted the appearance of cheap compilation “recordable CDs” (CD-Rs) on the streets in Egypt that are probably produced locally. Piracy of sound recordings and music, which has prevented the Egyptian market from developing over the years, is on the rise in Egypt. For the motion picture industry, pirate back-to-back videocassette copies, usually of poor quality, remain the chief form of piracy for that industry; such pirate copies are primarily used to provide greater variety of titles of rental product in video shops. Organized pirates are now packaging and labeling their product to resemble legitimate product, using forged invoices and “censorship” vouchers. Pirate copies are made from original cassettes or from imported VCDs and DVDs. Duplication generally is done in apartments that are rented for short periods, rather than directly in video shops. Pirate cassettes are also touted as an added service in banks and large companies.
- **Internet Piracy.** While not rampant, there is some piracy in Egypt occurring over digital networks, although most of it involves the distribution of “hard goods” pirated product (e.g., CDs and VCDs) as opposed to direct-download piracy on the Internet. One of the most notorious Internet pirates in Egypt today also happens to be the wrongful holder of many government approvals to manufacture/distribute in Egypt (even though he does not own the rights to do so). Internet piracy makes up about 2% of all game piracy in Egypt, including both CD “burning” and downloading of pirate “WAREZ” software from the Internet.
- **Business Software Piracy.** Continued unauthorized use of software in businesses (so-called corporate “end-user” piracy) and unauthorized loading of software onto a computer prior to sale (so-called “hard-disk loading”) hurts the business software industry in Egypt. Corporate end-user piracy occurs largely in small and medium-sized companies.

COPYRIGHT ENFORCEMENT IN EGYPT

SELECTED COPYRIGHT ENFORCEMENT STATISTICS 2000

CRIMINAL COPYRIGHT ENFORCEMENT STATISTICS	
ACTIONS	BUSINESS SOFTWARE APPLICATIONS
Number of Raids conducted	120 ¹¹
Number of cases commenced	NA
Number of defendants convicted (including guilty pleas)	7 (known) ¹²
Acquittals and Dismissals	NA
Number of Cases Pending	NA
Total number of cases resulting in jail time	3 ¹³
Suspended Prison Terms	NA
Maximum 6 months	NA
Over 6 months	NA
Over 1 year	NA
Total Suspended Prison Terms	NA
Prison Terms Served (not suspended)	0
Maximum 6 months	0
Over 6 months	0
Over 1 year	0
Total Prison Terms Served (not suspended)	0
Number of cases resulting in criminal fines	5
Up to \$1,000	0
\$1,000 to \$5,000	5
Over \$5,000	0
Total amount of fines levied	\$7,290

Enforcement Efforts Waned in 2001

In 2001, the government of Egypt took a much less proactive approach to enforcement against copyright piracy. The business software industry filed three cases, and after only nine months, a general manager of a company engaged in corporate end-user piracy was convicted, receiving a sentence of six months in prison; the case is currently on appeal. Two other cases are still pending (one with the prosecutor, the other awaiting a court ruling). Very few raids against pirate resellers or those engaged in "hard-disk loading" occurred in 2001, with a notable drop-off in effectiveness of Ministry of Culture

¹¹ Fifty of these criminal raids in 2000 were against pirate resellers, while 70 were against pirate end-users.

¹² Due to lack of transparency with respect to the end-user pirates, it is unknown how many cases of reseller piracy resulted in convictions, fines, or otherwise resulted in administrative remedies being meted out.

¹³ All three cases resulting in jail time in Egypt in 2000 are currently on appeal.

raids, except in Alexandria, where raiding has been quite effective.¹⁴ Educational campaigns by the Ministry have ceased, and the overall effect of raids is minimal because the Ministry of Culture in Cairo fails to take necessary legal steps against violators.

For the entertainment software industry, the police have refused to take raids against unauthorized distributors holding Ministry of Culture licenses, standing behind the government-sanctioned piracy. It is therefore all the more important that the government of Egypt take urgent steps to decertify the pirates holding false licenses (and the wrongly granted government approvals). For the motion picture industry, increased cooperation between industry, the Anti-Piracy Police and the Censorship Department under the Ministry of Culture has contributed to an increase in the number of raids against video piracy in recent years.

Cases actually brought to the courts move through at a snail's pace, leading to frustration for copyright owners who are unable effectively to enforce their rights, and making any result at the end of the process only a *de facto* cost of doing business for the pirates. For cases that have resulted in judgments being awarded to right holders, collections take an unreasonably long time in Egypt. Trainings conducted by the business software industry in 2000 with the Ministry of Justice have had little effect in improving efficiency in the courts with respect to copyright cases.

Government and Educational Software Management Successes in 2001 . . .

The Egyptian government (especially the Ministry of Communication and Information Technology) took some very positive steps in 2001 regarding protection of software. The government has worked with industry to legalize the usage of over 100,000 computers, and has brokered an agreement by college campuses to legalize the usage of 100,000 student computers. IIPA commends the government for having taken these initial positive steps with respect to governmental and educational software usage.

. . . But Small and Medium-Sized Corporate End-Users Still Use Illegal Software

Unfortunately, such successes were not achieved in fighting corporate end-user piracy by small and medium-sized businesses, as well as in private schools. Although the one successful conviction against an end-user in 2001 was a positive development (albeit the case is now on appeal), such successes are few and far between, and this does not amount to a coordinated concern over corporate end-user piracy in Egypt. For example, the Anti-Piracy Police continue to ignore end-user piracy as an enforcement concern. The Ministry of Culture in Cairo has taken to settling for legalization (or partial legalization) of raided entities, and refuses to take legal action against violators.

¹⁴ IIPA understands that there is a new IPR division in the Ministry of Economic and Foreign Trade, which will provide another avenue for copyright owners to lodge complaints about piracy. We are quite concerned that the leadership at the MOEFT is ill-equipped or ill-inclined to take the kinds of action necessary to defeat piracy in Egypt.

MARKET ACCESS ISSUES

Ad Valorem Import Duties Run Counter to International Practice

The copyright industries regularly face discriminatory *ad valorem* duties upon import into Egypt, namely, Egypt bases the import customs' valuation of CD-based goods on the invoice value of the product rather than on the value of the physical medium. The widespread and favored international practice would have the valuation of CD-based goods or videos premised on the value of the physical medium. Such *ad valorem* duties serve as a form of double taxation, since royalties are also subject to withholding, income and remittance taxes. The outcome is that legitimate sellers cannot price to the market, because they must take the additional duty into account when pricing. Pirates circumvent these duties, and thus, can always underprice in the market.

For the motion picture industry, duties and additional import taxes can represent approximately 70-87% of the value of a film print, whether duties are computed using the invoice value of the film or a specific duty of 120 Egyptian pounds per kilogram plus 5% (Egyptian Customs authorities use whichever method of calculation results in the highest yield).¹⁵ An additional sales tax (i.e., a tax on goods imported for sale in Egypt) began being levied in March 1992, which amounts to 10% of the value of imported films calculated as follows: the cost of the print, including freight charges, customs duties and other import taxes. Import costs are further increased by a release tax imposed on foreign films. Before a foreign film can clear Customs and be released in Egypt, it must obtain a censorship certificate from a Film Censorship Office within the Ministry of Culture. A release tax of 700 Egyptian pounds is levied upon issuance of the certificate. This discriminatory tax is not imposed on domestic films and should be removed. The U.S. recording industry similarly reports high import duties, significantly increasing the price of legitimate products and making it even more difficult to compete with pirates. The Egyptian government made no attempt to reduce these duties and taxes in 2001.

IIPA strongly urges Egypt to modify its practice so that the valuation of duties is based on the physical medium or a specific fee, such as by weight or foot, in line with the widespread, and favored, international practice.

Other Market Access Barriers

Certain other barriers effectively keep the U.S. recording industry (and other industries, as applicable) out of Egypt. First, there is the requirement that all song lyrics on locally-manufactured releases be translated into Arabic, significantly reducing the number of back-catalog items that

¹⁵ An example of a Customs duty calculation in Egypt for a typical print (20 kg weight) would reveal as follows:

Egyptian Pounds 120 per kilo:	LE2,400
Plus 5% tax (LE120):	LE2,520
Plus 10% value-added-tax (VAT) on the subtotal (LE252):	LE2,772
Total:	approximately US\$600

This calculation of LE2,772 represents 60% of a US\$1,000 print value.

companies can release in Egypt, and lengthening the “censorship approval” process (it should be noted that even in restrictive markets like Saudi Arabia, lyrics needn’t be translated into Arabic before release). Second, there is the requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt – a practice that effectively holds U.S. companies hostage to the interests of Egyptian importers. All in all, it can be said that the barriers facing record companies doing business in Egypt are as bad as, or exceed, the barriers faced in any other single market.

COPYRIGHT LAW AND RELATED ISSUES

Comments on Draft IPR Law Pertaining to Copyright

On June 15, 2001, Egypt’s People’s Assembly (*Majlis al-Sha'b*) passed a first reading of the draft copyright law (as well as the integrated IPR code). From there the draft IPR code proceeded back to the Advisory Council (*Majlis al-Shura*) for a “final read-through” (since the Advisory Council only advises on and does not pass legislation), from where it would proceed to the People’s Assembly for a final vote. IIPA understands that the draft remains bottlenecked somewhere between the Advisory Council and the People’s Assembly, in part because of concerns of other constituencies with provisions relating to patents and other IP areas. There are also political divisions within the government of Egypt, for example, the Ministries of Culture and Health, who relied on expert opinions to achieve the current draft, versus the Ministry of Higher Education and Scientific Research, and the Ministry of Technology, Supply and Internal Trade (as well as the People’s Assembly Legislative and Scientific Committees) who wish to ensure that the draft complies with all relevant international treaties.

IIPA has now had a chance to review the translation by the Ministry of Higher Education & Scientific Research of the draft approved on first reading at the People’s Assembly, and believes that the draft is sound in principle, made numerous improvements over the old law and previous drafts,¹⁶ and should be passed immediately (even if that involves severing it from the IPR bill), with some key last-minute revisions to bring the draft law into compliance with TRIPS. Some additional changes would

¹⁶ There are many strengths to the June 2001 draft. For example, the draft provides for a term of protection of “life plus 70” years as to works having a natural author (Draft Articles 158 and 159), 70 years from first publication or first making available to the public, whichever comes later, as to works in which the copyright holder is a legal entity (Draft Article 160), and 70 years from the end of the year in which the recording was “made or made public” for producers of sound recordings (Draft Article 165). In addition, exceptions to protection pertaining to computer programs (Draft Article 169(3)) have been narrowed, compared with the Advisory Council draft (which contained numerous exceptions that were overly broad and are Berne- and TRIPS-incompatible), and now comes much closer to comporting with international treaties requirements. The revised Article 169(3) now provides that it is permissible, without the authorization of the author to make

a single copy or a quotation of a computer program, with the knowledge of the legal owner of the program, [not] exceeding to [sic] the extent necessary for the use of the program within the limits of the purpose for which authorization was initially granted, for archiving purposes, or to replace a lost, destroyed or invalid original copy; in both cases, the original or adapted copy shall be destroyed upon expiration of the property title.

IIPA assumes that the translation inadvertently left out the word “not.” IIPA is also pleased to see the reinsertion in Article 179 (deleted in the Advisory Council draft) of the possibility of closure of an establishment in case of a conviction, for a period of “not more than six months.” Closure can be an extremely important enforcement tool, and for recidivists it may be vital to have this remedy available to make the enforcement systems adequate and effective.

ensure that Egypt becomes the first country in the Middle East to fully implement the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and would ensure that Egypt has a law truly reflective of modern trends of protection.

Necessary Changes (TRIPS)

Most important, at least the following major changes are needed to conform with TRIPS:

- **Inadequate Criminal Remedies.** The draft contains non-deterrent criminal penalties that are even weaker than those in the antiquated 1954 law. Draft Article 179 provides a sentence of “not less than one month” imprisonment and a fine (unchanged from the current law, which, after inflation, makes these fines totally inadequate) of 5,000 to 10,000 Egyptian pounds (US\$1,077 to \$2,154). While a minimum sentence of “one month” imprisonment constitutes a positive development, there is no set maximum sentence (as there is in the current law). In short, the fines are insufficient and non-deterrent and violate TRIPS Article 61, which requires remedies “sufficient to provide a deterrent,” and the lack of a maximum jail sentence may or may not be TRIPS-compatible, depending on how it is meted out in practice. The proposed fines would not even amount to a cost of doing business for commercial pirates in Egypt. Fines should be increased at least ten-fold, to LE50,000 to 100,000 (approximately US\$10,770 to \$21,540), to be doubled for recidivists, and should be made “per copy” rather than per title. Imprisonment should be set at from three months to three years (with mandatory imprisonment for recidivists). Such penalties would be closer to TRIPS standards.
- **Insufficient Remedy as to “Materials and Implements,” in Violation of TRIPS Articles 46 and 61.** Draft Article 177(3) in the draft is TRIPS deficient, in that it only permits the seizure of “materials” that “could be used only for” infringement. On the other hand, TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements the predominant use of which has been in the creation of the infringing goods” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements. Draft Article 177(3) must be amended to comply with TRIPS.
- **Lack of Express Provision for *Ex Parte* Civil Searches.** Draft Article 177 or another article of the draft must be amended to give judicial authorities the authority to “adopt provisional measures *inaudita altera parte* [without notice to the defendant] where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” in line with Article 50 of TRIPS.
- **Government-Sanctioned Sell-Off of Pirated Products.** Draft Article 178 provides that “the court president may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it,” and “the accrued revenue shall be deposited with the court’s treasury until the original dispute is settled.” This provision diverges completely from accepted practice and would violate Egypt’s TRIPS obligations. Article 46 of TRIPS requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the

channels of commerce in such a manner as to avoid any harm caused to the right holder, or . . . destroyed.” Clearly, sale in public auction would prejudicially harm the right holder. This provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted.

- **Presumptions.** The draft law does not provide expressly for presumptions of subsistence of copyright or for copyright ownership. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights, and Egypt’s draft law should be amended to include them.¹⁷
- **Overly Broad Compulsory License** The draft law contains a TRIPS/Berne-incompatible compulsory license for copying and translating works (TRIPS Article 9.1). The compulsory license in Draft Article 168 is not limited to literary works in printed form, and extends to computer programs and audiovisual works. Such a compulsory license is completely contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed by amendment, or deleted altogether.¹⁸
- **Personal Use Exception Should Be Limited to Analog Copy.** Draft Article 169(2) should be limited to a single “analog” copy, since allowing even a single “digital” copy would conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the author (and thus violate TRIPS Articles 9 and 13).
- **Inadequate Term of Protection for “Anonymous” Works.** The term of protection for “anonymous” works is too short (TRIPS Article 9.1 and Berne Article 7(3)), since Draft Article 161 provides for a term of protection for “anonymous” works of “one year only.” This term is easily fixable.
- **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right.** The moral rights provisions in the draft impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Draft Article 142(3) provides that the author may reject “any amendment for the work, which the author considers as distortion of his work,”

¹⁷ The following formulation might, for example, be appropriate:

In civil cases involving copyright or related rights, each Party shall provide that the physical person or legal entity whose name is indicated as the author, producer, performer or publisher of the work, performance or phonogram in the usual manner shall, in the absence of proof to the contrary, be presumed to be such designated right holder in such work, performance or phonogram. It shall be presumed, in the absence of proof to the contrary, that the copyright or related right subsists in such subject matter. A right holder or authorized person on his behalf may present evidence of the ownership or subsistence of rights by affidavit, which shall be presumed to be conclusive without the need to be present in court, absent specific facts to the contrary put forward by the defendant. Such presumptions shall pertain in criminal cases until the defendant comes forward with credible evidence putting in issue the ownership or subsistence of the copyright or related right.

¹⁸ The Egyptian government must confirm that, if it intended to avail itself of Articles II and III of the Berne Appendix, it has kept up its renewals of its declaration, under Article I of the Berne Appendix. Otherwise, Egypt is no longer entitled to avail itself of these provisions.

regardless of whether the author has transferred economic rights. In this form, this provision violates Berne Article 12, as it would undermine the exclusive adaptation right. The standard for rejection of a change must be objective, as set forth in the Berne Convention, not subjective, as set forth in the draft. The draft Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would appear to violate Berne Article 8, as it would impinge on an author’s exclusive translation right.

Needed Clarifications (TRIPS)

Other clarifications are needed to ensure that the law complies with TRIPS, for example:

- **Failure to Provide Express Point of Attachment for Owners of Neighboring Rights.** Article 187 of the draft provides express point of attachment for works, but not for the objects of neighboring rights. While we understand that the government of Egypt takes the position that the TRIPS Agreement is self-executing, and therefore, point of attachment is provided with respect to the owners of neighboring rights (as required for Egypt to comply with TRIPS Articles 14), it would be highly preferable to provide express point of attachment for the owners of neighboring rights. Egypt needs to clarify through amendments that works, sound recordings, producers of sound recordings, performers and broadcasters are provided with adequate point of attachment (i.e., that Egypt protects works, sound recordings, performers and broadcasters of countries that are members of international treaties to which Egypt is party).¹⁹
- **Unclear Retroactive Protection.** There is no provision in the draft ensuring that pre-existing works and the objects of neighboring rights (including sound recordings) receive full retroactive protection as required under TRIPS Articles 9.1 and 14, and Berne Article 18. Even though we understand that the government of Egypt takes the position that TRIPS and Berne are self-executing in Egypt, the absence of a provision for full retroactivity for TRIPS/Berne terms of protection may lead to confusion. Therefore, it would be highly preferable for Egypt to include an express provision for full (TRIPS- and Berne-compatible) retroactivity for all subject matter under the law.²⁰

¹⁹ The simplest way to fix Draft Article 187 would be to add the following phrase at the beginning:

The provisions in this Law shall apply to works, sound recordings, performers, producers of audiovisual works, and broadcasting organizations that are eligible for protection by virtue of and in accordance with any international treaty, convention or other international agreement to which Egypt is party.

²⁰ The simplest way to fix the retroactivity void in the Egypt draft would be to add a new article as follows:

The protection provided for under this Law applies also to a work, sound recording or performance in existence at the moment of the entry into force of this Law, and which are the subject of any international treaty, convention or other international agreement to which Egypt is party, provided that on such date the work, sound recording or performance has not yet fallen into the public domain in its country of origin and in Egypt through the expiry of the term of protection which was previously granted.

- **Non-Transparent Border Measures.** The draft law contains no provisions on border measures (TRIPS Articles 51-59). We are unaware of whether separate customs measures exist or are being drafted to provide TRIPS-level protection in the area of border measures.
- **Temporary Copy Exception.** Article 169(9) provides what IIPA hopes is a narrow exception for certain “ephemeral” copies, where such copy is made “during a digital transmission of a work,” or “in the course of a process of reception of a digitally stored work,” or “if the reproduction is made by a legal entitled person during the normal operation of the used hardware,” with the proviso that “such operation is made under a license granted by the copyright holder or by operation of the law.” While, like U.S. law, IIPA believes that Egypt should not provide an exception for temporary copies, if Egypt chooses to do so, the provision of Article 169(9) would be an acceptable approach, if the government of Egypt clarifies that the final clause, “provided that such operation is made under a license granted by the copyright holder or by operation of the law,” also covers the “transmission” and “reception” mentioned in the previous clauses. Otherwise, the net cast by this exception would be too broad and threaten to run afoul of Egypt’s international obligations.
- **Overly Broad Exceptions.** The draft law contains overbroad exceptions to protection (TRIPS Article 13). Draft Article 169 (on exceptions to protection) should include chapeau language limiting excepted acts to special cases, provided that such acts do not conflict with a normal exploitation of the work (or object of neighboring rights) and do not unreasonably prejudice the legitimate interests of the author (or right holder), in line with TRIPS Article 13.
- **Adequate Civil Damages.** Nowhere in the draft Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person’s intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt’s law remains deficient on provision of adequate civil remedies.²¹

²¹ The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

Where any of the rights conferred on the author in relation to his work under this Law has been infringed, the author shall be entitled to fair and adequate compensation. To qualify as adequate compensation, the infringer shall be liable for either of the following: (1) the actual damages suffered by him as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In determining the injury to the right holder, the Court shall look to the value of the infringed-upon item, according to the suggested retail price of the legitimate product or other equivalent measure established by the right holder for valuing authorized goods; (2) an award of statutory damages, if the copyright owner elects, at any time before final judgment is rendered, to recover these instead of actual damages and profits, for all infringements involved in the action with respect to any one work for which any one infringer is liable in a sum of not less than [X] and not more than [Y], as the court considers just. In a case where the court finds that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than [Z]. The amount of statutory damages awarded should be sufficiently high to deter future infringement and to compensate the copyright owner for the harm caused by the infringement.

Other Suggested Clarifications

- **Unreasonable Restrictions on the Ability to Freely Contract.** Draft Articles 148, 149 and 151 are restrictions on the ability to enter into freely-negotiated contracts, and should be deleted. Specifically, Draft Articles 148 and 149 contain transfer provisions that impose undue burdens on the freedom to contract, while Draft Article 151 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Inflexible Approach as to Performers' Moral Rights.** In Draft Article 153(1), the performer's right of attribution should permit the omission of the performer's name, if such is dictated by the manner of the use of the performance, and Draft Article 153(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers' reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **No Compulsory License for Broadcasts.** Draft Article 167 permits broadcasting organizations to use works without seeking authorization. This amounts to a compulsory license and should be deleted.
- **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works.** Draft Article 175(5) clearly does not apply to audio works (sound recordings) and therefore the word "audio" should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as "the natural or legal entity who produces the . . . audiovisual work, and undertakes the responsibility of such achievement," (draft Article 138(11)). Draft Article 175(5) provides that the producer "shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing," and "the producer shall be considered as the publisher, and will have the rights of the publisher . . ." Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.²² The producer of an audiovisual work should have the ability to exercise all the economic rights in that work without the further consent of the authors.
- **Misplaced Right of Publicity in Copyright Law.** Draft Article 176 appears to create a right of publicity in a person's likeness, and does not belong in a copyright law.

WIPO Treaties Implementation

²² The simplest formulation of the producer's rights would be as follows: "Unless otherwise agreed upon in writing, the producer shall be entitled to exercise all the economic rights in relation to the work and copies thereof."

IIPA is pleased to see that the draft copyright law attempts to implement key provisions of the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).²³ In particular, IIPA makes note of the following points with respect to Egypt's attempt in the June 2001 draft to implement the WCT and WPPT:

- The definition of "reproduction" in the draft means "making [one or more copies] of a work or a sound recording, in any manner or form, including permanent or temporary storage of the work or sound recording in an electronic form" (draft Article 138(9)), which implements Article 1(4) and the Agreed Statement to Article 1(4) of the WCT.
- The economic rights as to works (Article 146, clause 1 provides that authors have the "exclusive right to authorize or prevent any form of exploitation of the work"), and as to performers and producers of sound recordings (Article 155(1) provides that producers of sound recordings have the exclusive right to "prevent any exploitation of their recordings in any manner"), are broad enough that they may fully satisfy the WCT and WPPT.²⁴
- The attempted implementation of the requirement to prohibit circumvention of technological protection measures is commendable. Draft Article 179(5) may fall short of its mark with respect to prohibiting the trafficking in devices that circumvent technological protection measures used by copyright owners to protect their works in networked environments, but Draft Article 179(6) comes close to complying with the treaties with respect to acts of circumvention.²⁵

²³ Egypt's consideration of the treaties goes back at least to October 14, 1999, when the United States and Egypt issued a "Joint Statement Between The Government of The United States of America and The Arab Republic of Egypt Concerning Electronic Commerce," in which the Egyptian government agreed to the following statement:

Growth of electronic commerce depends on the adequate protection of intellectual property rights including industrial property rights and copyright. Egypt will positively consider signing [and] ratifying the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

²⁴ Specific enumeration, in Draft Articles 146, 154 and 155, is missing with regard to a "distribution" right (WCT Article 6, WPPT Articles 8 and 12) (although the term "making available" may encompass distribution); an importation right; and a retransmission right. With respect to compliance with WCT Article 8, while the draft broadly defines "communication to the public" (except for the use of the non-technology-neutral term "computer"), works are only given the right to control the "making the work available to the public in any manner, including through computers, internet, information networks, communication networks and other means of technology," while the term "communication to the public" is never mentioned. With respect to compliance with WPPT Article 14, Draft Article 155 gives producers of sound recordings a broad exploitation right, including the specifically enumerated right to make "a sound recording available to the public by wire or wireless means or through computers or any other means of technology." Thus, while the draft copyright law implements the different treaty rights in varying ways, the end result appears to be treaties-compatible as to both works and sound recordings with respect to transmissions over digital networks.

²⁵ In particular, in addition to prohibiting the manufacture and importation of circumvention devices, it should be prohibited to sell, offer to the public, otherwise traffic or provide a service in circumvention/circumvention devices. Second, coverage of devices should not be limited to those "specially designed or made" but rather should take into account other indicia of a circumvention purpose, such as whether the device, etc. is promoted, advertised or marketed to circumvent, or whether the device etc. has only a limited commercially significant purpose other than to circumvent, etc. Also, the definition of technological protection measure (left undefined in the draft law) should be broad enough to encompass both controls on access to a protected work as well as controls on the exercise of copyright or neighboring rights. It is also extremely important

Generalized System of Preferences

Egypt currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Egypt meets certain discretionary criteria, including whether it provides "adequate and effective protection of intellectual property rights." In 2000, \$26.3 million of Egyptian goods were imported into the U.S. duty-free, accounting for 2.8% of its total imports to the U.S. For the first 11 months of 2001, \$20.6 million of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 2.5% of its total imports into the U.S. Egypt should not continue to expect such favorable treatment at this level if it fails to meet the discretionary criteria in this U.S. law.

that a violation of Draft Article 179(5) or (6) is deemed independent of any other infringement that might occur under the law, and that all civil and administrative remedies available for copyright infringements also apply to violations of Draft Article 179(5) and (6).