

# EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Egypt be elevated to the Priority Watch List.

**Executive Summary:** In Egypt, what should be a shining economic success story of ingenuity and creativity in Egypt's rich creative industries, instead is a nightmare market for right holders, stunted by piracy, difficult bureaucracy, and almost unparalleled market access hurdles. Trade losses and piracy levels worsened in 2008 for most industries in Egypt.<sup>1</sup> Local Egyptian and U.S. right holders are equally hampered by piracy and other barriers, as the experiences of authors such as Alaa al-Aswany,<sup>2</sup> and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group (ACPD or "El Arabiya") and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country)<sup>3</sup> can attest. Due to a lack of return on investment, the music industry in Egypt faces job losses and lower output. In addition to the usual physical piracy that harms the markets for legitimate right holders, Internet usage exploded in Egypt in 2008, and technologies and techniques used for online piracy (including circumvention technologies) have made Internet piracy one of the key concerns for industry. The Intellectual Property Unit at the Information Technology Industry Development Agency has finally taken over matters related to business and entertainment software, a hopeful sign, and ITIDA has been helpful in pursuing actions against perennial piracy targets. Nonetheless, cases pursued at court are still marred by procedural and bureaucratic hurdles and unreasonable requests, and cases usually result in non-deterrent fines, and almost never imprisonment. The Ministry of Culture, which still has enforcement purview over books, motion pictures, and music, has been much less active, leaving book piracy, retail piracy of films, and recorded music piracy virtually unchecked in Egypt.

**Priority Actions Requested in 2009:** IIPA requests that the government of Egypt take the following actions in 2009, which would result in the most significant near term commercial benefits to the copyright industries:

### Enforcement

- Obtain effective court results in key cases, by expediting handling, decreasing bureaucratic hurdles and impossible documentary demands, and imposing deterrent judgments, including jail sentences served and deterrent fines.
- Develop a specialized cadre of IP prosecutors and judges to more effectively handle copyright cases.
- Build capacity to handle Internet piracy cases, including cybercrime police to deal with infringing sites, whether hosting, deep linking, peer-to-peer, bulletin board, or cyber locker.
- Stop pre-raid leaks and other irregularities among officers engaging in enforcement, including by securing pre-raid practices (i.e., not divulging location of raid, removing mobile devices from officers, etc.).
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions and ensuring universities adopt policies to use only legal copies of publications.
- Allow right holders to participate in anti-piracy investigations, including post-raid identification of pirated product.
- Establish at Egyptian Customs an effective mechanism to seize piratical imports at the point of entry, without guarantee amounts that are prohibitively expensive.

### Legislation and Market Access

- Ease onerous market access restrictions, which pirates do not have to contend with, including *ad valorem* duties on films imported into Egypt; *ad valorem* duties on sound recordings and entertainment software; sales taxes on imported goods; censorship certificate release fees imposed on foreign films only; a 10% sales tax on imports, and a 20% box office tax for theatrical motion pictures; a requirement that all song lyrics on locally manufactured releases be translated into Arabic; the absence of trading rights for foreign-invested enterprises; a discriminatory and GATT-

<sup>1</sup> The independent Creative and Innovative Economy Center (CIEC) estimated motion picture piracy in 2007 to be between 90% and 95% and losses to be as much as US\$90 million to that sector. Bertrand Moullier et al, *IP and Economic Challenges in the Egyptian Film Industry*, Creative and Innovative Economy Center (CIEC) at George Washington University, October 2007, at <http://www.law.gwu.edu/NR/rdonlyres/B1EDABB1-E920-4C22-AF94-CB1A0E295C0.pdf>.

<sup>2</sup> See Abdallah, *Alaa El Aswany*, Egypt Today, August 2004, Volume # 30 Issue 02.

<sup>3</sup> See Moullier et al, note 1.



inconsistent entertainment tax on foreign films; and a *de jure* discriminatory cap of five film prints for theatrical distribution for U.S. films.

- Amend the copyright law to remove burdensome registration and deposit requirements, which may violate the Berne Convention and TRIPS.
- Amend the copyright law and implementing decree to cure other TRIPS deficiencies and resolve ambiguities.
- Fully implement and accede to the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Establish mechanisms for service providers to cooperate with right holders against Internet piracy, including an expeditious way to remove infringing content, block piracy websites, and enforce against illegal file sharing.

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ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS)										
AND LEVELS OF PIRACY: 2004-2008 <sup>4</sup>										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Business Software	81.0	59%	72.0	60%	49.0	63%	45.0	64%	28.0	65%
Books	NA	NA	32.0	NA	31.0	NA	30.0	NA	30.0	NA
Entertainment Software	NA	NA	NA	NA	NA	NA	14.3	85%	NA	90%
Records & Music	NA	NA	15.0	75%	12.0	70%	9.0	60%	7.5	40%
Motion Pictures	NA	NA	NA	NA	NA	NA	NA	NA	NA	NA
TOTALS	81.0		119.0		92.0		98.3		65.5	

## PIRACY CHALLENGES IN EGYPT

**Internet Piracy:** Egypt now has 10.5 million users, representing 12.9% of the population, and 427,000 broadband connections, representing more than half of one percent, as of March 2008 (according to the International Telecommunications Union). Internet connectivity increased by 57% and broadband connectivity more than doubled in the past year, because of increased availability of services and lowering of subscription prices for Internet service. Thus, it is no surprise that Internet piracy has become a major issue in Egypt. Internet piracy comes in all forms, from websites advertising physical pirate product, to illegal download sites, deep link sites, peer-to-peer file sharing services, cyber-lockers, and bulletin board or forum websites. The music industry reports that 97% of all digital distributions of music in Egypt are pirate.

**Book and Journal Piracy:** Book and journal publishers continue to struggle in Egypt, with print piracy and illegal photocopying creating a difficult climate for legitimate sales. English language higher-education textbooks, English language teaching materials and books in translation fall prey to pirates routinely. Pirated higher-education textbooks, reference books and professional books are sold at stalls set up near university campuses, and the institutions are all too often complicit in the process, either through lecturers who encourage illegal photocopying or through bureaucratic and nontransparent adoption processes that give pirate enterprises the perfect cover. There are a few exceptions, most notably the Arabic Academy of Science and Technology in Alexandria, which has achieved an outstanding record of supplying legitimate texts. The piracy level for medical books is as high as 90%, and the vast majority of the market for other professional reference books such as engineering books is pirate. Local Egyptian publishers (like Sphinx, Shorouk, and Ahram), authors, and distributors are negatively affected almost to the same extent as foreigners.

**Retail Piracy Remains Severe, Including Some Imports:** All the industries continue to report that physical piracy in retail shops and street stalls remains a major problem in most major cities in Egypt, including Cairo, Alexandria, Giza, Mansoura, and Asyut. For example, the music industry reports that over 60% of physical distributions are pirate copies. The result for that industry is a 50% decrease in 2007 in sales volume, meaning record production companies decreased the number of artists they promoted, several record companies in Egypt went out of business, and of those

<sup>4</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2009 Special 301 submission at [www.iipa.com/pdf/2009spec301methodology.pdf](http://www.iipa.com/pdf/2009spec301methodology.pdf). BSA's 2008 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Egypt. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. For more details on Egypt's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

staying in business, only 14% released new albums in 2007. Pirates typically purchase only one legal version of the product and then make a huge number of illegal copies to sell. Illegally copied materials are sold in public places, like kiosks, shops, and on the sidewalks. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. Egyptian Customs authorities have not established an effective mechanism to seize such goods at the point of entry. Resellers of pirate software advertise these illegal products openly in trade magazines.

**Mobile Device Piracy:** Like Internet connectivity, mobile connectivity exploded such that by mid-2008, Egypt boasted 46% connectivity (according to Budde Communication).<sup>5</sup> Therefore, mobile device piracy has become an issue, in which downloaded music or other content is transferred directly to handheld devices, like MP3 players, memory sticks, iPods, and the like. The music industry also reports large-scale ring-tone piracy on the Internet, where ring-tones and “ring-tunes” are illegally made available for downloading.

**False Distribution Licenses:** The problem of pirates operating under the guise of being legally-licensed distributors persists as an issue in Egypt. This problem especially affects the entertainment software industry. In such cases, the pirate distributor obtains the pirated “product” from overseas, complete with fraudulent seals of approval and “license” documents purporting to prove the legitimacy of the product being imported. The Ministry of Culture has in the past even blessed such documentation, granting government sales licenses to the pirate based upon false documentation. This has occurred, notwithstanding that the U.S. right holder produced unassailable evidence proving that the pirate distributor had no rights. Progress against this form of piracy has been made, as the Ministry of Culture now refuses to approve and grant new distribution licenses, particularly to a notorious entity that has long been the subject of inquiry. However, in cases brought against often wily pirates, excessive and redundant documentation demands are being made of right holders (in anticipation of likely defenses). It is hoped that pending court cases involving false licensing will be dealt with in a proper manner, and that the key pirates utilizing this modus operandi will finally be put out of the piracy business.

**Business Software Piracy Rate Too High:** End-user piracy and retail piracy continue to harm the business software industry in Egypt. Retail establishments selling computers continue to offer illegal business and entertainment software unchecked. Imports of pirate software have become a serious concern, passing freely through the borders into Egypt. A study released in January 2008 by International Data Corporation demonstrated that a 10 point reduction in software piracy by 2011 would deliver nearly 1,747 new jobs in Egypt, US\$153 million in economic growth, and an additional US\$8 million in tax revenues for the governments of Egypt.<sup>6</sup>

## **ENFORCEMENT CHALLENGES IN EGYPT**

**Key Cases Result in Non-Deterrent Fines or Remain Unresolved:** IIPA has been monitoring several important cases in Egypt involving copyright piracy. Unfortunately, in IIPA’s experience, most copyright cases decided favorably to date in Egyptian courts have resulted in non-deterrent fines. For example, in what was reportedly the first lawsuit regarding Internet piracy in Egypt, a preliminary court decision was handed down in 2007 ordering the defendant to pay EGP10,000 (US\$2,700). Other cases for the business software industry and the recorded music industry remain pending.

IIPA welcomes the new spirit of cooperation exhibited by the Head of ITIDA, and notes that ITIDA appears to be actively pursuing cases involving entertainment software products with a newly found vigor. However, the cases brought so far, some which date back four years or more, have created some procedural hurdles which the right holders (the victims in these criminal cases) are finding it burdensome to overcome. In particular, ITIDA has become involved in a case industry has been watching over the past several years, arising out of actions initiated in 2005 against a distributor believed to be responsible for a substantial percentage of pirated entertainment software products in the Egyptian market. ITIDA is engaged in efforts to help in finally bringing the case closer to prosecution, but unfortunately, the prosecutors handling the case continue to make unreasonable demands for documents proving that the defendant company is not

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<sup>5</sup> See Budde Communication, *Egypt - Mobile Market - Overview & Statistics*, at <http://www.budde.com.au/Research/2854/Egypt - Mobile Market - Overview Statistics.aspx?r=51>.

<sup>6</sup> Business Software Alliance and IDC, *The Economic Benefits of Lowering PC Software Piracy: Egypt*, January 2008, at [http://www.bsa.org/~media/Files/idc\\_studies/bsa\\_idc\\_egypt\\_final%20pdf.ashx](http://www.bsa.org/~media/Files/idc_studies/bsa_idc_egypt_final%20pdf.ashx).

authorized to distribute the subject entertainment software products in Egypt. The latest development is a request to register distribution contracts (of legitimate distributors) in accordance with Article 185 of the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the government has indicated that failure to register the distribution agreements with the legitimate distributors will prejudice its case. Not only is the question of who does hold legitimate distribution rights irrelevant to the question of whether the defendant has distribution rights, but the victim company has already provided documentation on numerous occasions proving that it owns valid copyrights in the products in question, and that without dispute, the defendant has no right to distribute entertainment software anywhere in the world, much less in Egypt. Moreover, the issue of the defendant's purported distribution rights is not relevant in a case in which the right holder has shown proof of copyright ownership, and mere product examination clearly confirms that the products are pirated. Finally, the Berne Convention's no formality rule requires copyright protection not to be contingent on meeting any formality. If this case cannot go forward without registering the victim's distribution contracts, it may be questioned whether Egypt's laws comply with the longstanding Berne no formality rule.

IIPA is encouraged to see ITIDA so actively involved, but is troubled by the latest requests. IIPA looks forward to continued progress on the pending cases. At the same time, IIPA must point out that victim right holders continue to encounter challenges in enforcing and protecting their copyrights.

**Deposit and Registration Formalities:** In several infringement cases, ITIDA has noted that a victim company's failure to file formal deposit copies of the works involved and other documentation in line with Article 184 of the Copyright Law of Egypt is inconsistent with Egyptian law. As has been noted in previous IIPA submissions (and as discussed below), Article 184 outlines onerous deposit requirements, whereupon failure to deposit can lead to imposition of administrative penalties. In these cases, it is apparent that ITIDA would have preferred for the victim/rights holder to deposit copies of the works at issue, and notes that without so doing the rights holder risks the merits of the case. We understand that the Egyptian government has taken the position that deposit under Article 184 is not a prerequisite for copyright protection. However, if failure to adhere to these deposit formalities impacts criminal enforcement of the copyrights at issue, this could invoke Egypt's international obligations under the Berne Convention and the TRIPS Agreement.

**Special Prosecutors and IP Judges Should be Enlisted in Egypt:** The court system in Egypt has been difficult to navigate for right holders for many years, with slow-moving cases characterized by bureaucratic hurdles, non-expert prosecutors or judges, and in general, non-deterrent sentences. IIPA urges the government to consider developing a specialized core of prosecutors familiar with intellectual property rights cases, and a specialized core of judges to handle such cases. This core of prosecutors and judges would understand the urgency with which copyright piracy matters must be dealt, to avoid leaks or disappearance of evidence, which has become increasingly easy given the advent of digital technologies. As for Internet piracy cases but also for other cases, the judicial system should encourage the use of IP or IT specialists or experts. In a recent case involving a right holder seeking preliminary injunctive relief to stop clear-cut piracy, the judge failed to refer to an expert and failed to impose a deterrent result due to his lack of understanding of the nature of the violation and the remedy needed. Most cases that do result in positive judgments end with non-deterrent results, usually a fine of EGP5,000 (US\$1,350), although in some rare instances, the proper penalty of EGP5,000 per work is being meted out. In many cases, judges simply think a criminal fine is inappropriate in a copyright violation case. A specialized core of IP prosecutors and judges would, IIPA believes, help resolve this problem of lack of awareness and consideration for the seriousness of piracy as an offense against the state. Another problem that could be resolved by a new core of IP trained judges is the lack of transparency in the court system. To date, court decisions simply have not been published expeditiously. The transparency problem is worse in cases initiated by the government, as there is simply no means to follow the progress of such cases. IIPA understands that a new Law on Economic Courts was adopted and enters into force in early 2009. IIPA is unaware whether this law, which apparently does relate somewhat to intellectual property cases, will accomplish any of the proposed improvements or resolve any of the problems mentioned herein.

**Internet Enforcement Mechanisms Need to be Developed and Implemented:** To date, service providers in Egypt have not cooperated well with right holders seeking to protect their rights. Since Internet usage has now exploded in Egypt, it is time that the government implemented mechanisms to ensure such cooperation. First, service providers should be reminded that they can be held liable for copyright infringement occurring over their services if they directly infringe. Second, it should be established that service providers have responsibilities that extend beyond their own direct conduct to those of their subscribers. If necessary, the Copyright Law should be amended holding service providers accountable for

direct infringement or facilitating the infringement of third parties, and setting into place a structure to promote responsibility among ISPs, such as a requirement to comply with notices to take down infringing materials, and mechanisms to ensure service providers assist right holders seeking to enforce their rights against subscribers who may be engaged in activities like peer-to-peer file sharing, deep linking, uploading, downloading, providing access to cyber lockers, and the like. Mechanisms should be in place to provide information to right holders wishing to pursue action against specific instances of Internet piracy. As with other crimes, the information will normally be in the hands of the service providers so it is important that they be made to cooperate with investigations into Internet piracy. Given the seriousness with which the government of Egypt takes the issue of cybercrime, and that Egypt was the host of the convention which adopted the November 27, 2007 Cairo Declaration on Cybercrime (see discussion below), it should be possible to implement a workable approach. IIPA makes note of the activities of the Information and Internet Crime Department at the Ministry of Interior, and that peer-to-peer file sharing is already an activity prohibited by the Copyright Law.

**Book Piracy Efforts Should be Aimed at Legalizing University Practices in Addition to Traditional Enforcement:** IIPA notes that, in order to truly tackle the unlawful print reproduction and photocopying that are supplying Egypt's university campuses, the Ministries of Education and Higher Education should make a point of launching a campaign to legalize published materials used on college campuses in 2009. It is inexcusable that state-funded universities would allow pirate businesses to run unfettered under their watchful eyes. IIPA notes that at present, public state-funded universities are taking no responsibility for renting out space to stores that turn into pirate enterprises. Indeed, industry reports indicate that the University of Cairo has raised rents in the past two years, such that only pirate enterprises could afford to stay. Public university employees and staff proved to be involved in soliciting pirated or illegally photocopied books also do not fear or suffer any consequences. There are apparently even employees of the universities that provide the shops with the books, informing them of the number of students, and helping them to sell the pirate copies at the university.

**Need to Include Right Holders in Investigation to Avoid Tainted Results:** There have been instances in which clearly pirate material has been deemed "genuine" by the Ministry of Culture simply because right holders were not given the opportunity to inspect the goods, in which case it would easily have been determined that the product was pirated. ITIDA and MOC should regularly invite copyright owner assistance in ascertaining the legitimacy of suspect product. In addition, as documented above, in some cases, the question may come down to the authenticity of documents purporting to identify particular companies as the authorized distributor of copyright products in the country. Again, in such cases, right holders should be consulted as a matter of course.

**Business Software Raids Commence:** The Business Software Alliance has noted some good cooperation of the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior in carrying out raids against retail establishments that offer pirated business software. The industry has reported that MOI runs raids based on complaints by right holders and sometimes on an *ex officio* basis. BSA also reports that ITIDA raids have targeted business software as well.

## **MARKET ACCESS ISSUES**

Market access barriers in Egypt make it one of the most restrictive and uninviting markets in the world for legal copyright businesses. The Egyptian government imposes an incredible array of market access barriers on legitimate businesses.<sup>7</sup> Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. These market access barriers should be removed so that legitimate businesses have a better chance in the battle against piracy in Egypt. These include:

- **Discriminatory *ad valorem* Duties:** The copyright industries have historically faced discriminatory *ad valorem* duties upon importing their products into Egypt. For motion pictures, the *ad valorem* duty has been as much as 46% of the value of a film, i.e., 32% for a copy of the movie, 12% on posters and 2% on the movie reel upon import into Egypt, and there have reportedly also been similar *ad valorem* duties imposed on sound recordings and entertainment

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<sup>7</sup> To the extent any of these problems has, in the opinion of the government of Egypt, been resolved, the government should be urged to provide proof, such as any written regulations or other measures resolving the issue raised.

software (for example, the import duty on finished music CDs has reportedly been 32% of the total value – cost according to invoice plus freight charges).

- **A 10% Sales Tax:** An additional sales tax (i.e., a tax on goods imported for sale in Egypt) has been levied since March 1992, which amounts to 10% of the value of imported films calculated as follows: for films, the cost of the print, including freight charges, customs duties and other import taxes; for music and games, an extra 10% sales tax is added to the import duty. An Egyptian official claims that the 10% sales tax was repealed two years ago, but sources indicate this is still being charged on films. There is reportedly also a 20% box office tax for theatrical motion pictures.
- **A Censorship Certificate Release Fee:** Import costs are further increased by a release tax imposed on foreign films that is not imposed on domestic films.
- **Arabic Lyrics Requirement:** There is a requirement in Egypt that all song lyrics on locally manufactured releases be translated into Arabic, significantly reducing the number of back-catalog items that companies can release in Egypt, and lengthening the “censorship approval” process.
- **Failure to Afford Trading Rights:** The requirement that a commercial entity be 100% Egyptian-owned in order to import products into Egypt effectively holds U.S. companies hostage to the interests of Egyptian importers.
- **GATT-Inconsistent Entertainment Tax:** Egypt also maintains a discriminatory and GATT-inconsistent entertainment tax on foreign films. Specifically, right holders must pay a 20% box office tax on non-Arabic language films, while the tax for Arabic-language films is only 5%.
- **Five Film Print Cap:** Only five prints of any major U.S. film title may be imported into Egypt for circulation around Egypt. IIPA understands from a recent report that in some rare instances, this cap has been relaxed to eight or nine prints, but compared with the unlimited number of prints allowed for Egyptian films, this relaxation does little good for film distributors trying to enjoy the market in Egypt. The film print cap is further exacerbated by the narrow time window for theatrical distribution of films in Egypt, due to frequent theater closures for holidays, etc.

## TRAINING AND PUBLIC AWARENESS

Capacity building must continue for Ministry of Interior officials, prosecutors, and judges, in training on copyright law and basic enforcement issues such as preservation of evidence, preparing dossiers for prosecutors, and running the criminal case. IIPA suggests that programs such as those funded by U.S. government should include judicial training, targeting each phase of preparing a criminal copyright case. IIPA also recommends that programs like those formerly offered under the auspices of USAID grants should raise awareness of Egyptian enforcement officials, Customs officials, prosecutors and judges of the great commercial harm caused by piracy, raise awareness of Internet piracy issues, the relation to cybercrime, and the importance of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty. Such programs should also provide technical assistance in terms of establishing a core of specialized IP prosecutors and judges. In 2008, IIPA members continued to be involved in awareness campaigns and planning of a series of seminars, training sessions and broadcasting of specialized programs aimed at training relevant government officials and raising public awareness.

## COPYRIGHT LAW AND RELATED ISSUES

**Amend Law to Remove Burdensome Registration and Deposit Requirements, Which May Violate Berne Convention and TRIPS:** A major problem faced by the industry recently involves the burdensome registration requirements under Articles 184 and 185 of the Copyright Law. ITIDA had previously indicated that these deposit requirements, though not necessary for copyright protection to attach, are nevertheless useful, presumably for enforcement purposes. However, the information sought under the registration/deposit procedure is too burdensome. For example, under the current law, a right holder has to deposit two copies of the product, a printout in the case of computer software (whether business or entertainment) and the last ten pages of the source code, a printout of the main or initial screens of the program upon boot up, a description of the program, its characteristics, programming language and operating systems necessary to run it. In addition, under the statute, the right holder must also submit all contracts related to the licensing or authorization for commercial exploitation by a third party. All of this information must be submitted translated into Arabic. These deposit requirements seem to go beyond the required essential information to clearly identify the owner of the copyright in the work, and in seeking non-essential information, impose unnecessary burdens on right holders seeking to protect their rights in Egypt. Further, while the government insists the requirement is not a bar to

copyright protection as such, to the extent failure to meet these requirements eviscerates right holders' legitimate interests, the requirements may rise to the level of a prohibited formality under the Berne Convention and the TRIPS Agreement. As noted above, several of the cases recently decided or still pending are being affected by these onerous requirements.

**2006 Decrees Established ITIDA Jurisdiction Over Business and Entertainment Software, But Some Lack of Clarity Remains:** On May 11, 2006, Decree No. 3286/2006 was issued by the Ministry of Justice, indicating that the Intellectual Property Unit at the Information Technology Industry Development Agency is the enforcement authority which is empowered to take immediate action in case of software copyright infringements, including entertainment software as well as business software. ITIDA placed an advertisement in the press subsequent to the issuance of the Decree, announcing they were responsible for software copyright, calling on businesses to register software products and work permits, and asking them to comply with copyright laws in the use of software. ITIDA, as noted above, has become engaged in conducting raids involving vendors of pirated entertainment software products and in working on some important cases.

**2002 Law and Implementing Regulations Leave Some Gaps in Protection:** Copyright law in Egypt is governed under the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the 2005 Implementing Decree, Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005). The Copyright Law and the Implementing Decree, while suitable to enforce against copyright piracy in general, left unresolved some TRIPS deficiencies, other ambiguities in protection, and important gaps for protection recommended by IIPA in order to modernize protection. In addition, while the Copyright Law partially implemented the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, the government should now seek to fully implement and accede to those treaties, following along with many of its regional neighbors. The following recounts some of the key deficiencies.

- **Criminal Remedies:** The Copyright Law contains very low criminal penalties which appear not to meet the TRIPS test of criminal penalties available that are sufficient to provide a deterrent to further infringements. Specifically, Article 181 provides a prison sentence of "not less than one month" and a fine of EL5,000 to 10,000 (US\$1,350 to \$2,700). The minimum sentence of "one month" imprisonment is welcome, but there is no set maximum jail term (as there was in the old law), potentially rendering this provision much weaker than it was previously. Fines on their face appear insufficient to provide a deterrent. IIPA understands that the fine is supposed to be imposed "per work" or "per title," and that in a couple of cases, this calculation method has been employed. Fines should be increased, and, for example, should be doubled for recidivists (as of now a recidivist receives the mandatory minimum jail term and the maximum fine).
- **Remedy as to "Materials and Implements."** Article 179(3) in the Code is TRIPS deficient, in that it provides for the seizure of "materials" that are "serviceable" "only" for infringement. 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.
- **Ex Parte Civil Searches.** Article 179 does not provide judicial authorities with the clear express 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," as required by TRIPS Article 50. The copyright industries are considering a test in the courts, but in the meantime, the law should be amended to expressly provide for the availability of this vital measure.
- **Government-Sanctioned Sell-Off of Pirated Products Violates TRIPS.** Article 180 provides that "the court 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 from accepted practice and is out of step with Article 46 of TRIPS, which 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."

- **Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of copyright ownership (as required by TRIPS) or subsistence of copyright. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights. The law must be amended to comply with TRIPS.<sup>8</sup>
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings.** There is no provision in the Code 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.<sup>9</sup>
- **Civil Remedies.** Nowhere in the Egyptian law is there provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Code provides for some “cautionary measures,” including “[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then distraint this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. 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.<sup>10</sup>
- **Requirement of Translation into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and must be deleted.
- **Broad Compulsory License.** Article 170 of the IP Code contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed or deleted altogether. The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.
- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.

<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> 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 [have] 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.

- **Border Measures as Required by TRIPS, Including Ability to Interdict and Take *Ex Officio* Actions.** The 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. IIPA understands that a new customs law is being drafted or under review.
- **Article 171 Exceptions.** The law contains exceptions to protection which are broad and may be in questionable conformity with TRIPS Article 13. Preferably, Article 171 (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. The Implementing Decree (Article 10) makes an attempt to limit the computer program exception in Article 171(3).
- **Restrictions on the Ability to Freely Contract.** Articles 150, 151 and 153 are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Broad Moral Rights Provision.** The moral rights provisions in the Code impinge on exclusive rights, in violation of TRIPS and Berne (TRIPS Article 9.1, Berne Articles 8 and 12). Article 142(3) provides that the author may reject “any amendment in the work, which the author considers as changing or distortion of his work,” 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 Code. The 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 violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Performers’ Moral Rights Provision.** In Article 155(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 Article 155(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.
- **Exclusive Rights for Producers of Audiovisual Works.** Article 177(5) clearly should not apply to 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” [Article 138(11)]. Article 177(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.<sup>11</sup> 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.

Unfortunately, the Implementing Decree creates additional problems. For example, Articles 11-16 appear to codify a registration (“recordal”) and deposit requirement in Articles 184-86 of the IP Code. These requirements may not in practice interfere with the exercise of rights (since the law expressly states that registration is not a prerequisite to protection), but certainly impose burdens on right holders, since failure to register/deposit places a right holder in direct violation of the IP Code and subject to fines. Articles 184-186 should not apply to foreign right holders if Egypt is to live up to its international obligations. Article 187, dealing with registration of businesses engaged in the distribution of copyright materials, is another potentially onerous and costly burden on legitimate businesses, which has the perhaps unintended

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<sup>11</sup> 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.”

but certain consequence of further insulating pirates, who will not pay for such registrations. Article 17 of the Implementing Decree and the Table set forth an elaborate schedule of charges to legitimate businesses dealing in copyright materials.

**Cairo Declaration against Cybercrime 2007:** In late November 2007, the Council of Europe convened an Arab regional conference on cybercrime, at which 400 participants from around the region and other countries discussed using the COE Convention on Cybercrime as a model to guide the development of national legislation on cybercrime.<sup>12</sup> One of the end-results was adoption of the Cairo Declaration on Cybercrime, dated November 27, 2007. IIPA hopes that the Declaration will result in Egypt leading the way to adopt legislation to meet the requirements of the COE Cybercrime Convention (2001).<sup>13</sup> The Declaration:

- Expresses appreciation for “efforts underway in Egypt and other countries of the Arab region with regard to the strengthening of cybercrime legislation,” and notes that “Egypt and other countries of the Arab region may want to consider accession to this treaty in order to allow them to fully cooperate against transnational cybercrime.”
- States that “[t]he Budapest Convention (2001) on Cybercrime is recognized as the global guideline for the development of cybercrime legislation ... Countries of the Arab region are encouraged to make use of this model when preparing substantive and procedural laws.”
- Notes that “[c]riminal proceedings against cybercrime require specific skill and resources,” that “[c]ountries of the region are encouraged to set up specialized units for cybercrime investigations, as well as ensure that prosecutors and judges are sufficiently trained,” and that “[l]aw enforcement need to cooperate with service providers in the investigation of cybercrimes [and] service providers and law enforcement need to develop procedures, routines and capabilities to cooperate effectively with each other within clearly defined limits.”

**Customs Decision Proposed in 2007:** Decision No. 770/2005 issued by the Minister of Foreign Trade & Industry to enforce provisional measures for copyright was reportedly being revised last year. The Ministry and the Customs Administrative realized that the guarantees provided for (25% of the shipment value) in order to be granted a seizure order were too high. IIPA is unaware of whether the revised Decision was issued.

## GENERALIZED SYSTEM OF PREFERENCES

Egypt currently participates in the GSP trade program, offering duty-free imports of certain products into the United States from developing countries. In order to qualify for such unilaterally granted trade preferences, the United States Trade Representative must be satisfied that Egypt meets certain discretionary criteria, including that it provides “adequate and effective protection of intellectual property rights.” During 2007, \$61.5 million worth of Egyptian goods, or 2.5% of Egypt’s total imports into the United States, enjoyed duty-free treatment under the GSP code. During 2008, almost \$56.8 million worth of Egyptian goods, or 2.4% of Egypt’s total imports into the United States, enjoyed duty-free treatment under the GSP code. Egypt must meet the discretionary criteria in this U.S. law if it expects to enjoy favorable treatment for these imported goods.

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<sup>12</sup> The Conference was held under the auspices of HE Prof. Dr. Ahmed Fathy Sorour, Speaker of Parliament of Egypt, and opened by HE Dr. Tarek Kamel, Minister of Communication and Information Technology. It was organized by the Egyptian Association for the Prevention of Information and Internet Crimes and supported by the Information Technology Industry Development Agency (ITIDA), the Council of Europe, the United Nations Office on Drugs and Crime, Microsoft, Ain Shams University, IRIS, EASCI and other partners.

<sup>13</sup> Article 10 of the COE Cybercrime Convention (2001) (“Offences related to infringements of copyright and related rights”) provides,

1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright, as defined under the law of that Party, pursuant to the obligations it has undertaken under the Paris Act of 24 July 1971 revising the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system.

2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of related rights, as defined under the law of that Party, pursuant to the obligations it has undertaken under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty, with the exception of any moral rights conferred by such conventions, where such acts are committed willfully, on a commercial scale and by means of a computer system.

3 A Party may reserve the right not to impose criminal liability under paragraphs 1 and 2 of this article in limited circumstances, provided that other effective remedies are available and that such reservation does not derogate from the Party’s international obligations set forth in the international instruments referred to in paragraphs 1 and 2 of this article.