

# INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

## 2008 SPECIAL 301 REPORT

### EGYPT

**Special 301 Recommendation:** IIPA recommends that Egypt remain on the Priority Watch List.

## EXECUTIVE SUMMARY

The copyright community has for several years held out hope that the government of Egypt would come to recognize that a strong copyright system is in its interests. Unfortunately, the enforcement infrastructure remains under-funded and staffed by some who are less than enthusiastic about taking the steps necessary to eliminate piracy and foster legitimate growth of the copyright industries.<sup>1</sup> Worse yet is the lack of enthusiasm exhibited by the Ministry of Culture which simply does not make combating piracy a priority, and instead appears content to protect those engaged in illegal distribution of foreign copyright materials. Problems in the enforcement system abound, from the highest levels of key government agencies, to courts which do not view copyright piracy as a commercial crime, to the police who are reluctant to take actions against commercial piracy and permit pirates to thrive. On top of the piracy woes, market access barriers in Egypt make it one of the most restrictive and uninviting markets in the world to legal copyright businesses. With the growth of Internet connectivity in Egypt, IIPA hopes that the government will move to foster opportunities in the creative industries rather than douse their forward progress.

## PRIORITY ACTIONS REQUESTED IN 2008

- **Ensure That ITIDA Takes Full Responsibility for Entertainment Software Issues, That Government Licenses Based on False Documentation Are Revoked, and That Those Operating Under Previously Issued Government Licenses Are Brought to Justice:** According to Ministry of Justice Decree No. 3286/2006, the Intellectual Property Unit at the Information Technology Industry Development Agency (ITIDA) 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. While the Business Software Alliance (BSA) is pleased with ITIDA's activities to date, there remains some uncertainty as to the enforcement authority of ITIDA over entertainment software versus that of the Ministry of Culture. IIPA hopes this uncertainty is finally clarified in 2008, and that ITIDA can expand its resources and activities, with such efforts to include increased involvement in initial investigations of IPR infringement cases.
- **Tackle Book and Journal Piracy Effectively:** 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, and books in translation fall prey to pirates routinely. The Egyptian Ministry of Information must take sustained enforcement actions against book piracy, and the Egyptian Ministries of Education and Higher Education must get involved to instruct universities to use only legal copies of publications.
- **Allow Right Holders to Participate in Investigation of Piracy:** IIPA understands that even after successful raids, the Ministry of Culture is essentially thwarting enforcement efforts by ruling that products which are so obviously pirated are nevertheless, in their view, "genuine" (though such determinations appear to have been based on false licenses). The failure to include right holders'

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<sup>1</sup> At the same time, it is ironic that some within Egypt wish to impose a kind of super copyright protection on ancient Egyptian antiquities. See Egypt to attempt to copyright Pharaonic antiquities, International Herald Tribune, December 27, 2007, at <http://www.iht.com/articles/ap/2007/12/27/africa/ME-GEN-Egypt-Copyright-Antiquities.php>.

experts in identifying pirated product is the cause of this problem, although there is evidence suggesting undue influence as well.

- **Increase Deterrence at Court:** The Egyptian courts are notoriously slow and bureaucratic. They also mete out penalties that utterly fail to deter copyright piracy, instead slapping pirates on the wrist with fines that do not even amount to the cost of doing business. The Minister of Justice should step in to introduce judicial reforms in the copyright area, through training and through the assignment of specialized IP judges to copyright cases. By doing so, the Minister could increase the ease with which *ex parte* orders and injunctions are issued in piracy cases and ensure that courts are meting out deterrent penalties, including high fines and jail sentences in piracy cases.
- **Ease Onerous Market Access Restrictions:** The Egyptian market is one of the most closed in the world to foreign right holders, imposing an incredible array of market access barriers. Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. They include: *ad valorem* duties upon import into Egypt of films, and *ad valorem* duties on sound recordings and entertainment software, sales tax on imported goods (10% of value of imported films and sound recordings); a censorship certificate release fee imposed on foreign films only; a 20% box office tax for theatrical motion pictures; a requirement that all song lyrics on locally manufactured releases be translated into Arabic; no trading rights (i.e., the requirement that an import entity be 100% Egyptian-owned); a discriminatory and GATT-inconsistent entertainment tax on foreign films (20% box office tax on non-Arabic language films; the tax for Arabic-language films is only 5%); and a cap of five film prints that may be imported into Egypt for any major U.S. title. These market access barriers should be lifted, and at least some of these violate Egypt's current international obligations.
- **Amend Copyright Law (and to the Extent Necessary, the new Implementing Decree) to Cure TRIPS Deficiencies, and Implement and Accede to the WIPO Internet Treaties.**

For more details on Egypt's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

EGYPT ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY (IN MILLIONS OF U.S. DOLLARS) AND LEVELS OF PIRACY: 2002-2006 <sup>2</sup>										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Business Software <sup>3</sup>	49.0	60%	49.0	63%	45.0	64%	28.0	65%	34.0	69%
Books	32.0	NA	31.0	NA	30.0	NA	30.0	NA	25.0	NA
Entertainment Software <sup>4</sup>	NA	NA	NA	NA	14.3	85%	NA	90%	NA	90%
Records & Music <sup>5</sup>	15.0	75%	12.0	70%	9.0	60%	7.5	40%	8.0	45%
Motion Pictures	NA	NA								
<b>TOTALS</b>	<b>96.0</b>		<b>92.0</b>		<b>98.3</b>		<b>65.5</b>		<b>67.0</b>	

<sup>2</sup> The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at [www.iipa.com/pdf/2008spec301methodology.pdf](http://www.iipa.com/pdf/2008spec301methodology.pdf).

<sup>3</sup> BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Egypt, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.bsa.org/globalstudy/>. 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. BSA's 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

<sup>4</sup> ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

<sup>5</sup> The piracy level for sound recordings reflects not only physical piracy but also the growing effect of Internet piracy – still at 95% – and its increasingly devastating impact on the recording industry in Egypt.

## **PIRACY AND ENFORCEMENT UPDATE**

**Entertainment Software Piracy – Still No ITIDA Engagement:** Pirate entertainment software dominates the domestic market in Egypt, due to lack of effective enforcement and border controls, and due to the existence of government licenses previously issued by the Ministry of Culture to known pirate distributors based on false documentation.

With the transfer of jurisdiction for enforcement of copyright in software to the Intellectual Property Unit at the Information Technology Industry Development Agency (ITIDA) of the Ministry of Communication and Information Technology, IIPA hopes that more vigorous enforcement against piracy of video game products will commence and that government sales licenses will no longer be issued based upon false documentation.<sup>6</sup> However, there remain problems with sales licenses previously issued by the Ministry of Culture (MOC). As MOC still has not issued written confirmation that these fraudulently procured licenses were wrongly issued and that, in any event, such licenses do not establish the authenticity of pirated product, pirates continue to rely on those licenses to legitimize their activities. Indeed, the MOC itself has issued findings that pirated product is genuine based solely on the sales licenses it issued and the underlying false documentation.

A case initiated by an ESA member in 2005 is at an impasse for this very reason. Unfortunately, the Egyptian company at issue in that case continues to engage in the sale and distribution of pirated video game product, seemingly immune from prosecution. While the MOC has indicated that sales licenses are no longer being issued to this company,<sup>7</sup> it remains reluctant to clearly state that the documents used to secure the prior licenses are fraudulent. It appears that the prosecutor in this matter has again sought MOC's expert opinion on the authenticity of the products involved in this action and the licensing documents on which the defendant relies to establish legitimacy. However, there is no indication that MOC will make different determinations than it has in the past. This matter has proceeded in this most circuitous fashion for a number of years and does a great disservice to legitimate publishers and Egypt's legal regime.

With respect to future enforcement efforts, ITIDA should take immediate jurisdiction over anti-piracy enforcement actions for entertainment software as mandated by a 2006 government decree.<sup>8</sup> The lack of clarity in this area is detrimental to the industry's parallel efforts to improve the market situation for legitimate video game products. Furthermore, ITIDA should invite copyright owner assistance in ascertaining the legitimacy of suspect product and the authenticity of documents purporting to identify particular companies as the authorized distributor of video game products in the country.<sup>9</sup>

Another problem faced by the industry is 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, a right holder has to deposit two (2) copies of the product, a print out of the first and last ten (10) 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, the right holder must also submit all contracts related to the

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<sup>6</sup> IIPA notes that the Information Technology Industry Development Agency (ITIDA) is now responsible for and has produced several technical reports in software and entertainment software copyrights cases before the Egyptian Courts.

<sup>7</sup> The company reportedly appealed MOC's refusal to grant the sales licenses to the National Council, which is apparently a unit in the Justice Ministry, arguing it is permitted to import such products under Egypt's parallel importation rule. However, it must be made clear that this matter does not implicate parallel imports, which obviously pertain only to legitimate products. Rather, this situation clearly involves pirated video game products which cannot be the subject of legitimate commerce or trade between countries.

<sup>8</sup> In 2007, ITIDA contacted one ESA member for support in a pending action involving pirated game product. The publisher provided ITIDA with supporting information and documents, including declarations, U.S. copyright registrations, product identification manuals and copies of authentic games. ITIDA later advised the publisher's representative that an official decision has been issued in regard to this case but no further details were available.

<sup>9</sup> By inviting right holder support in this manner, the government can avoid situations in which a pirate distributor can continue to openly and notoriously sell counterfeit and pirated products on the basis of fraudulently obtained sales licenses.

licensing or authorization for commercial exploitation by a third party. All of this information must be submitted in Arabic. Some of the information, for example, the licensing contracts, are not particularly germane to the purpose of copyright registration. 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 an unnecessary burden 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 TRIPS Agreement.

**Book and Journal Piracy:** Egypt is one of the region's worst book and journal piracy markets and unfortunately some of Egypt's vast printing infrastructure is used for pirate means instead of bolstering the economic and legitimate industry. 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.<sup>10</sup> 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 product.

**Business Software Raids Commence:** 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. Egyptian Customs has not established an effective mechanism to seize such goods at the point of entry. Resellers of counterfeit software advertise these illegal products openly in trade magazines.

The Business Software Alliance notes continued 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 reports that MOI conducts around 150 raids each month, some based on complaints by right holders and some run on an *ex officio* basis. In 2007, industry notes that response times have improved in initiating such raids. While some improvements were noted by the BSA, IIPA members still note an overall lack of knowledge of piracy issues, and oversights in carrying out specific raids, and therefore recommend training of MOI officials in how to run a successful raid, preserve evidence for prosecution, developing prosecutors' dossiers. IIPA also recommends sessions to interact with prosecutors and judges on criminal copyright enforcement, to sensitize them to the large commercial harm caused by piracy. BSA also reports that ITIDA officers have conducted raids against software and entertainment software piracy in addition to MOI.

**Music Piracy Severe, With Internet Piracy Rates Climbing:** The music industry continues to experience high piracy rates, exacerbated by increasing Internet piracy. Piracy represents 97% of all digital distributions in Egypt and over 60% of physical distributions. The result is that sales volumes decreased overall in 2007 (by 50% in the physical realm), meaning record production companies decreased the number of artists they promote. Several record companies in Egypt went out of business, while of those staying in business, only 14% release new albums in 2007. As in previous years, the music industry reports sporadic enforcement actions in Egypt. IIPA knows of ten raids against music piracy in 2007, leading to ten criminal cases which are currently being adjudicated at court.

**Internet Piracy and Mobile Device Piracy Hit Egypt:** Internet usage in Egypt grew by 20%, to a total of 6 million users by 2007, or a 7.5% Internet penetration rate.<sup>11</sup> Broadband connections doubled,

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<sup>10</sup> 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.

<sup>11</sup> See The World Factbook, Egypt, at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> (reporting 6 million Internet users as of 2006 and 5,363 separate Internet hosts as of 2007. See also Internet World Stats, at <http://www.internetworldstats.com/stats1.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Neilsen/NetRatings, ITU, and other trustworthy sources. See also Internet World Stats, Egypt, at <http://www.internetworldstats.com/middle.htm#lb> (reporting that there were 205,500 broadband Internet connections as of September 2007, according to the International Telecommunications Union).

from 100,000 in 2005 to 205,500 as of September 2007. As a result of this increased connectivity and a significant reduction in ADSL subscription prices, Internet piracy, in the form of peer-to-peer file sharing, bulletin board or forum websites, or directly transferred between users, has become a major problem in Egypt. The music industry estimates a 70% increase in pirate downloads over the Internet year-on-year. Mobile device piracy has also become an issue, in which downloaded music (and other content) files from the Internet are transferred directly to handheld devices, like MP3 players. 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. IIPA also understands that there may be as many as 400 Internet cafés, none of which are using licensed software. IIPA believes the Egyptian authorities should conduct awareness-raising activities, license the Internet cafés and run inspections on them to combat illegal downloading therein. 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\$1,800); IIPA has no further details, however.

**Courts Do Not Function Effectively to Deter Piracy:** A lack of deterrent penalties on the books, weakness in law enforcement, and slow litigation processes hinder judicial enforcement of copyright in Egypt. For cases that have resulted in positive judgments being awarded to right holders, the sentences are almost always non-deterrent, usually a fine of EL5,000 (US\$900).<sup>12</sup> Since collections also take an unreasonably long time in Egypt, pursuing civil cases becomes impractical in most instances. Lack of transparency in the court system is a major concern, as court decisions do not get 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.

Capacity building must continue for Ministry of Interior officials, prosecutors, and even 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.

## **MARKET ACCESS ISSUES**

Egypt is one of the world's most restrictive markets when it comes to trade in copyrighted materials. Problems have included:<sup>13</sup>

- **Discriminatory *ad valorem* Duties:** The copyright industries regularly face discriminatory *ad valorem* duties upon import into Egypt. Egypt bases the customs' valuation of imported 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. 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 undercut the legitimate price in the market. For motion pictures, the *ad valorem* duty can be 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 are reportedly also similar *ad valorem* duties on sound recordings and entertainment 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

<sup>12</sup> IIPA understands that there may now be some sentences in which the proper fine, of EL5,000, is being meted out per work rather than as a maximum fine. If so, this would be a positive development; however, we understand that many judges and officials in Egypt still believe the EL5,000 fine is too high.

<sup>13</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.

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; this tax should be removed.

- **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. This discriminatory tax should be removed.
- **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 — 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-Print (Film) Cap:** Only five prints may be imported into Egypt for any major U.S. film title.

## **TRAINING**

Industry continued to provide and participate in training in 2007. In 2008, industry and government, including those offered by USAID, should focus on

- raising awareness of Egyptian enforcement officials, Customs officials, prosecutors and judges of the great commercial harm caused by piracy,
- raising awareness of Internet piracy issues, the relation to cybercrime, and the WIPO Treaties, the WCT and WPPT, and
- providing technical assistance in terms of establishing specialized IP courts.

## **COPYRIGHT LAW AND RELATED ISSUES**

**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>14</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>15</sup> The Declaration includes the following among other statements:

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<sup>14</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>15</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

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- 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.”
- The Declaration 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.”
- The Declaration 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.”

#### **2006 Decrees Establish ITIDA Jurisdiction Over Business and Entertainment Software:**

There were two developments regarding the Intellectual Property Law No. 82/2002 in 2006. First, Prime Minister Decree No. 2202 was issued on November 26, 2006. This Decree introduced amendments to the schedule of fees related to the deposit of the works and other authorizations sought from the Ministry of Culture. Second, Decree No. 3286/2006 was issued by the Ministry of Justice on May 11, 2006, amending the powers of ITIDA. These Decrees are said to have solidified ITIDA’s jurisdiction over business and entertainment software copyright issues.<sup>16</sup>

**New Customs Decision Proposed in 2007:** Decision No. 770/2005 issued by the Minister of Foreign Trade & Industry to enforce provisional measures for copyright is reportedly being revised. 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 is too high.

**2002 Law and Implementing Regulations Leave Some Gaps in Protection:** The 2002 Intellectual Property Law and the 2005 Implementing Decree<sup>17</sup> appear to provide a reasonable basis to enforce the law and uphold the rights of copyright owners against piracy, whether of domestic or foreign materials. However, the Law and the Implementing Decree left some TRIPS deficiencies and other ambiguous provisions and failed to incorporate other changes recommended by IIPA in the past in order to create a truly modern copyright regime. The following recounts some of the key deficiencies and describes, where applicable, how the Decree deals with these issues. Where there is no mention below, the Implementing Decree did not address the issue raised.

- **Criminal Remedies:** The Code 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\$900 to \$1,800). The minimum sentence of “one month” imprisonment

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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.

<sup>16</sup> ITIDA placed an ad in the press, 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.

<sup>17</sup> Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005).

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 to be imposed “per work” or “per title,” and that in a couple of cases, this calculation method has been employed. If so, this is a positive development. 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 only permits 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 examining this provision and considering a test in the courts, but in the meantime, the law should be amended to clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **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 TRIPS. 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.”
- **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>18</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 it 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

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<sup>18</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.

practices. It must be fixed or deleted altogether.<sup>19</sup> The 2005 Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.

- **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.
- **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>20</sup>
- **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).
- **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

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<sup>19</sup> 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.

<sup>20</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.

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>21</sup>

- **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.
- **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.
- **Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.
- **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>22</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

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<sup>21</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.

<sup>22</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."

perhaps unintended 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.

## **GENERALIZED SYSTEM OF PREFERENCES**

Egypt currently participates in the GSP trade 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 that it provides "adequate and effective protection of intellectual property rights." During the first 11 months of 2007, \$56.9 million worth of Egyptian goods (or 3.7% of Egypt's total exports to the U.S.) entered the U.S. under the duty-free GSP code. Egypt should not continue to expect such favorable treatment at this level when it fails to meet the discretionary criteria in this U.S. law.