

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2003 SPECIAL 301 REPORT

EGYPT

EXECUTIVE SUMMARY¹

Egypt should remain on the Priority Watch List. Egypt passed its new IPR Code in 2002. Progress has been made in the fight against government licensing of pirate distributors of copyrighted works, resulting in less government-sanctioned piracy in Egypt. The government has taken positive steps to legalize software usage in its agencies and in educational institutions. Courts remain backlogged, and the few case results there are remain non-transparent. The Police and the Ministry of Culture remained largely ineffective in deterring piracy.

Egypt was elevated to the Priority Watch List in 1997 and has remained there ever since.

Egypt has long been noted as a market essentially closed to U.S. right holders, due to enormous trade barriers – piracy being the chief one. While many barriers remained in place in 2002, several improvements in Egypt were noted. First, the new IPR Code provides a firm basis for the protection of works and producers of sound recordings, and allows for immediate enforcement against pirates. Second, it appears the government of Egypt is moving away from the damaging practice of granting licenses (from the Ministry of Culture’s censorship department) to pirate distributors, which resulted in huge damage, as pirates ruled the market, and enforcement officers refused to act on behalf of the true right holders. Third, purview over business and entertainment software will move to the Ministry of Communications and Information Technology (MCIT), a very positive change for copyright owners in those sectors. Still, more work needs to be done with multiple agencies to increase the number of raids (although IIPA notes the establishment of a new computer crimes division at the Ministry of Interior as another very positive development). The court system, while meting out some strong criminal sentences, reversed one conviction in 2002 in a non-transparent manner.

Required actions for 2003:

- Derecognize further licenses granted to those without authorization to reproduce/distribute right holders’ product in Egypt. Continue working with right holders to verify titles.
- Take enforcement actions against illegal distributors of pirate product or false licensees, and against all corporate end-users of business software. Increase raiding by all government agencies, with particular emphasis on improving Ministry of Culture and Police activities.
- Improve court functionality and transparency. The Egyptian judiciary should be encouraged to use its existing authority to issue *ex parte* orders and injunctions. Transparency remains a problem with the judiciary. Consider establishment of a specialized IPR court.
- Implement the new copyright law swiftly, through amendments and implementing regulations:
 - Fix Section 148, which on its face violates TRIPS (places in the public domain any work not translated into Arabic within three years of publication).
 - Increase minimum and maximum fines in the new law to provide deterrence.
 - Fix remaining TRIPS deficiencies and complete implementation of WIPO “Internet” treaties.

¹ For more details on Egypt’s Special 301 history, see IIPA’s “History” Appendix to this filing.

EGYPT
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1998 - 2002²

INDUSTRY	2002		2001		2000		1999		1998	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	NA	NA	15.0	35%	15.0	35%	15.0	50%	11.0	50%
Records & Music ³	8.2	35%	9.2	41%	12.0	48%	12.0	50%	12.0	50%
Business Software Applications ⁴	NA	50%	14.5	58%	10.0	56%	26.4	75%	8.7	85%
Entertainment Software	NA	NA	NA	90%	14.9	94%	6.2	65%	5.5	60%
Books ⁵	28.0	NA	32.0	NA	30.0	NA	30.0	80%	26.0	80%
TOTALS⁶	36.2		70.7		81.9		89.6		63.2	

COPYRIGHT PIRACY IN EGYPT

Piracy harms both U.S. as well as Egyptian copyright owners.⁷ The following snapshot describes the types of piracy causing the most egregious harm to U.S. companies trying to do business in Egypt:

- **Pirate Distribution by False Licensees.** One of the most damaging forms of piracy in Egypt in recent years has been the production and distribution of pirate product by those claiming to have (but not having) licenses to engage in those activities from the copyright owner. Often

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2003 Special 301 submission, and is available on the IIPA website (www.iipa.com/pdf/2003spec301methodology.pdf).

³ The piracy rate for international products is roughly 70%. The local industry also suffers from high piracy rates – roughly 50%.

⁴ BSA's estimated piracy losses 2002 are not available, and levels are preliminary; both will be finalized in mid-2003. In IIPA's February 2002 Special 301 filing, BSA's 2001 estimates of \$8.5 million at 53% were identified as preliminary; BSA finalized its 2001 numbers in mid-2002, and those revised figures are reflected above. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflects losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁵ Losses to the Association of American Publishers due to piracy in Egypt were \$28 million, compared with \$32 million in 2001. The change reflects 40% currency devaluation.

⁶ In IIPA's 2002 Special 301 report, IIPA reported overall 2001 losses to the copyright industries at \$64.7 million in Egypt. Since BSA reported its numbers in mid-2002 (see footnote 4), the revised total loss number increased to \$70.7 million.

⁷ See Francesco Guerrera, *Investors Rue Weak Patent Protection – Intellectual Property*, Financial Times, May 9, 2001 (stating that the government of Egypt is in favor of copyright protection in the entertainment and media sector, since Egypt's movie and music producers lose an estimated EP750 million, or approximately US\$161.3 million, a year in royalties for their products). Further, a study completed by AC Nielsen in 2002 shows that the Egyptian Government loses some \$83 million every year in customs and local taxes losses due to software piracy.

presenting false licenses, sometimes from piracy havens in Asia, these wily pirates obtained approvals from the Ministry of Culture's censorship department, then pirated with impunity in the market. During these times, right holders could not even get the police or other enforcement organs to go after blatant piracy, reasoning that they had permits from the government of Egypt; in this way, the government of Egypt was sponsoring piracy. After several years of sustaining devastating losses due these pirates' activities in Egypt, in 2002, the authorities in Egypt undertook some welcome efforts to solve/reduce the problem. Specifically, IIPA understands that some of the licenses (production or distribution) granted to pirates have been revoked, and the government of Egypt has pledged that no more will be issued. IIPA further understands that the Ministry of Culture is now accepting documentation regarding exclusive licensees of right holders, and is proceeding to deny licenses to other third parties on the basis of that documentation. These are all positive steps. Now, implementing regulations must be issued to set in stone how applications for permits will be handled, to ensure that fraud never leads to issuance of licenses again. Further, the government, especially Customs, must be vigilant to ensure that known pirate distributors (particularly those that previously held licenses fraudulently) do not take steps to circumvent the revocations, by illegally importing pirate product into Egypt. Also, some of those entities and individuals who had licenses revoked continue to pirate; the Egypt authorities should take swift action against them.

- **Pirate Photocopying and “Reprint” Piracy.** Egypt is one of the worst pirate countries in the Middle East for book publishers. Estimates of losses range from 30% for higher education textbooks to 90% for medical texts.⁸ A vast portion of the Egyptian market for professional reference books (medical, engineering, etc.) is supplied with illegitimate product.⁹ Although legitimate U.S. publishers continue to provide some of their books at deep discounts (sometimes as deep as 70-80%), their works continue to be pirated on a commercial scale in Egypt. Commercial “offset” and “reprint” piracy is rampant, as evidenced by the fact that U.S. publishers routinely receive requests for free supplementary teaching materials from lecturers in areas (such as Upper Egypt and the Delta) where there is no legitimate distribution of texts. Illegal translations (local or imported) and plagiarism by some local academics (stealing whole sections of a book, including illustrations, and publishing them under their own names) are persistent pirate phenomena in Egypt. The quality of printing has improved dramatically in Egypt, making the pirate product in some cases virtually indistinguishable from the legitimate product. Bound photocopies, pirates selling “illegal” subscriptions to new reference books for professionals and students, and pirated “ESL” (English as a Second Language) materials can also readily be found. Illegal copies of books are routinely sold at stalls set up near university campuses. Recent complaints against such establishments in Cairo, October City and Minya City, have yielded action by the police in closing down the stalls, as well as two cases against the dealers. These types of enforcement efforts must be continued and augmented. Enforcement of the laws remains especially weak on university campuses.¹⁰ Massive imports from India and East Asia continue to harm the market as well, and exports from Egypt to other Arab countries, including Libya, are increasingly problematic.

⁸ 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.

⁹ An anecdote from 2001 involves a door-to-door salesman at hospitals, selling a medical reference book for EP60 (approximately US\$13), about 10% of the legitimate price (possibly with the support of the Medical Society).

¹⁰ Officials have refused to enter university campuses for anti-piracy activities due to political sensitivities. The Egyptian government needs to work more closely with university officials in order to ensure that students and lecturers are complying with copyright obligations.

- **Retail Piracy.** Retail piracy of entertainment software, business software, music, and motion pictures (including, more recently, on digital carriers like VCD, DVD, and CD-ROM) continues to cause great harm to U.S. and Egyptian copyright owners. Some console-based videogame platforms report 95% piracy in Egypt, while for the personal computer platform, the numbers are equally staggering, at 80%. Over 70% of the newest games are pirated. Most of the pirate games, including console-based games, are imported into Egypt from Malaysia, Thailand, Singapore, and Russia, as well as re-imports from the United Arab Emirates and Saudi Arabia. Also, the industry has noted the appearance of cheap compilation “burned” CD-Rs on the streets in Egypt that are probably produced locally. Piracy of sound recordings and music, which has prevented the Egyptian market from developing over the years, is on the rise in Egypt. One problem unique to the software industry involves the unauthorized loading of software onto a computer prior to sale (so-called “hard-disk loading”).
- **Internet Piracy.** While not rampant, there is some piracy in Egypt occurring over digital networks, although most of it involves the advertising on the Internet of “hard goods” pirated product (e.g., CDs and VCDs). Internet piracy makes up about 2% of all game piracy in Egypt, including both CD “burning” and downloading of pirate “WAREZ” (a term used to indicate illegal software) software from the Internet.
- **Corporate End-User Piracy of Software.** The largest losses to the business software industry accrue due to the unlicensed use of software in businesses (corporate “end-user” piracy, e.g., when a corporation buys one copy of computer software and loads it onto multiple computers in a company). Corporate end-user piracy occurs largely in small and medium-sized companies, which also happens to be the core customers of the business software industry in Egypt. By failing to pay for software they use, businesses unduly injure the software industry, while getting a free-ride as to the skills, efficiencies, and know-how provided by the software. Swift and serious focus to this particular problem is needed in 2003.

COPYRIGHT ENFORCEMENT IN EGYPT

Once again in 2002, enforcement in Egypt proved to be very much of a mixed bag. The change in responsibilities over protection of business and entertainment software to the Ministry of Communications and Information Technology bodes well for those industries, but still leaves other industries saddled by the largely ineffective Ministry of Culture. The Ministry of Interior’s new Computer Crimes Unit has also proven a successful addition for enforcement against business software piracy. Overall raiding remains largely stagnant compared with 2001, and case decisions remain few and far between (although IIPA notes that a managing director of a leading pirate reseller was sentenced to two months imprisonment with labor in September 2002).¹¹ A significant development continues to be efforts on the part of the government of Egypt (through the MCIT) to legalize software usage by the government, educational institutions, and home users. Further work is needed on the critical issue of enforcement against corporate end-user piracy of business software.

¹¹ This case arose from a criminal complaint in March 2001, leading to a raid and prosecution brought to the Criminal Court of the Nasr City suburb. Of the three cases filed by the Business Software Alliance in 2001, one resulted in an acquittal, the district attorney shelved another, and in a third, a six month jail term meted out to the general manager of a company engaged in corporate end-user piracy, was dropped and the conviction is being appealed. BSA filed five more cases in 2002, two with the new Ministry of Interior Computer Crimes Unit and three with the Anti-Piracy Police. These were positive steps forward.

Raiding and Follow-Up More Effective Under MCIT and MOI Watch ...

With authority over business and entertainment software copyright in the process of moving to the Ministry of Communications and Information Technology (MCIT),¹² it is hoped that enforcement against all forms of business software piracy (retail, hard-disk loading, and end-user) and piracy of entertainment software will improve in 2003. MCIT clearly understands the benefits of rigorous protection of intellectual property rights to the growth of information technology in the Egyptian market. Further, since the formation of the Computer Crimes Unit (CCU) at the Ministry of Interior, raiding activity has commenced (two reseller raids were conducted in 2002) after two successful test purchases.¹³ The CCU has demonstrated its knowledge of difficult copyright and technical computer issues. We are hopeful that the CCU will be actively involved in future anti-piracy work in Egypt.

...But Not Under the MOC or the Police

The Ministry of Culture and the Anti-Piracy Unit of the police department remained largely uninterested in enforcement against piracy in 2002. MOC took very few actions against pirates in 2002, despite its large-scale presence in Egypt. None of the actions taken by the business software industry through the MOC in 2002 resulted in deterrent fines or sentences. On another unfortunate note, MOC shut down the intellectual property educational campaign. In 2001, that campaign had helped raise awareness among consumers throughout the country about the value of IP and the importance of purchasing legal software. IIPA encourages the MOC to reenergize this initiative and to focus resources to targeting business use of software. Police engagement in 2002 was almost non-existent. No actions were taken by the police against corporate end-user piracy of business software. The Anti-Piracy Unit refused to conduct test purchases in reseller cases filed by right holders, insisting on traditional “visits” to the sites, which traditionally yield no evidence of piracy.¹⁴

Government and Educational Software Management Successes Continued in 2002 . . .

In IIPA’s 2002 Special 301 report on Egypt, it was noted that the Egyptian government took some very positive steps, including the legalization of usage of over 100,000 computers in the government, and brokering an agreement by college campuses to legalize the usage of 100,000 student computers. In 2002, MCIT developed and executed a new initiative to get computers to the public – the “Economic PC Initiative.” Under the initiative, the MCIT aimed to sell 1 million computers to individual users. The PCs were offered for the price of less than \$15 per-month installments on the purchaser’s phone bill. MCIT worked closely with computer software companies to ensure that these computers would only include licensed software. MCIT is to be commended for

¹² While the change in authority has occurred, an Executive Order/Regulation is still under development, and until these are issued, the shift will not be entirely complete.

¹³ This was the first time the MOI had done a test purchase and indicates a very positive step forward in MOI’s efforts. Test purchases are critical to anti-piracy efforts against retail vendors. The Computer Crimes Unit’s willingness to engage in such activity is paramount to success of the program. One of the MOI raids resulted in a successful monetary settlement.

¹⁴ No action has been taken by the Anti-Piracy Unit in two cases filed with the Unit on October 26, 2002. A third case filed in May 2002 resulted in no action taken, as the Police claimed there was insufficient information that a copyright violation took place. In these cases, requests to make test purchases were denied, the Police preferring to make visits to the sites, where stocks are not kept.

its efforts to date, which have resulted in sales of many personal computers. The Ministry of Education (MOHE) is engaged in a similar program to get PCs to students, providing 100,000 PCs loaded with licensed software to university students in Egypt. Reportedly, MCIT and MOHE have renewed agreements with software companies and will continue to work with software companies to license software for student PCs at home in 2003. This high level of cooperation with the Ministries is unprecedented in the region and deserves strong praise.

. . . But Enforcement Against Small and Medium-Sized Corporate End-Users Not Forthcoming

Unfortunately, IIPA continues to note that successes were not achieved in fighting corporate end-user piracy by small and medium-sized businesses. For example, while the Anti-Piracy Police have made commendable efforts to address the issue of retail piracy, end-user piracy has not been given proper prioritization. The MOC's record against corporate end-user piracy is particularly disturbing, as it usually settles for "legalization" by a company, or, worse yet, a mere warning to the company, rather than taking raids and seeing end-user piracy cases forward to prosecution. The MOI has not run any raids against corporate end-user piracy, although IIPA hopes that MOI will begin to pay more attention to this severe problem in 2003.

Courts Remain Backlogged, Results Are Mixed

Copyright owners obtained some positive court decisions in 2002, including some prison sentences and fines imposed on reseller pirates. However, in at least one case, the Court of Appeals acquitted a reseller pirate that had been convicted in the lower court, and since a written judgment has been unavailable, the reasoning behind the acquittal remains unclear.

The court system is marred by structural defects from initial raid to judgment. At the initial stages of a copyright case, judges have proved unwilling to issue *ex parte* orders in relation to actions involving corporate end-user piracy of business software. TRIPS requires the availability of such orders, both in the law (there is no express provision for such orders) and in practice. Absent execution of *ex parte* searches against end-user piracy, and given the government's less-than-stellar performance against end-user piracy in 2002, Egypt remains an impossible enforcement environment to combat corporate end-user piracy of business software. Copyright cases brought in Egypt continue to move at a snail's pace, leading to frustration for copyright owners who are unable effectively to enforce their rights. Lack of transparency in the court system is a major concern. Court decisions are not published expeditiously, meaning parties are kept in the dark as to the reasoning behind a decision. The situation is worse in cases initiated by the government, as there is simply no means to follow such cases. Lack of transparency hinders right holders as they cannot track sentencing results or the reasoning behind court decisions. For cases that have resulted in positive judgments being awarded to right holders, collections take an unreasonably long time in Egypt.

IIPA members and the U.S. government conducted judicial training in 2002, including one session held in December 2002 for 75 Egyptian judges, and one session in January 2003 in which judges were present (as well as other copyright officials). Such training, it is hoped, reinforces the notion that copyright piracy is a serious offence, with real victims (namely, the copyright owners, the authors and artists, both foreign and Egyptian, who lose their livelihoods and/or opportunities due to piracy, the government, which loses tax revenues, and the like), and emphasizes the judicial mechanisms that are required by international obligations, such as *ex parte* searches, adequate compensatory damages, injunctive relief, and imposition of criminal penalties including jail time (actually served) and deterrent fines.

MARKET ACCESS ISSUES

***Ad Valorem* Import Duties Run Counter to International Practice**

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

For the motion picture industry, duties and additional import taxes can represent approximately 70-87% of the value of a film print, whether duties are computed using the invoice value of the film or a specific duty of 120 Egyptian pounds per kilogram plus 5% (Egyptian Customs authorities use whichever method of calculation results in the highest yield). An additional sales tax (i.e., a tax on goods imported for sale in Egypt) began being levied in March 1992, which amounts to 10% of the value of imported films calculated as follows: the cost of the print, including freight charges, customs duties and other import taxes. Import costs are further increased by a release tax imposed on foreign films. Before a foreign film can clear Customs and be released in Egypt, it must obtain a censorship certificate from a Film Censorship Office within the Ministry of Culture. A release tax of 700 Egyptian pounds is levied upon issuance of the certificate. This discriminatory tax is not imposed on domestic films and should be removed. The U.S. recording industry similarly reports high import duties, significantly increasing the price of legitimate products and making it even more difficult to compete with pirates. The Egyptian government made no attempt to reduce these duties and taxes in 2002.

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

Other Market Access Barriers

Certain other barriers (aside from those described above, including, most importantly, piracy) effectively keep the U.S. recording industry (and other industries, as applicable) out of the market in Egypt. First, there is the requirement that all song lyrics on locally-manufactured releases be translated into Arabic, significantly reducing the number of back-catalog items that companies can release in Egypt, and lengthening the "censorship approval" process (it should be noted that even in restrictive markets like Saudi Arabia, lyrics needn't be translated into Arabic before release). Second, 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. All in all, it can be said that the barriers facing record companies doing business in Egypt are as bad as, or exceed, the barriers faced in any other single market in the world.

COPYRIGHT LAW AND RELATED ISSUES

Egypt's new IPR Code, including what essentially is a discarding and an overhaul of the 1954 Copyright Act, was signed into law on June 2, 2002 (effective date June 3). The law provides

the basis for protection of U.S. works and sound recordings, and allows for immediate enforcement against copyright infringement and copyright piracy. The Code also clearly extends the protection of copyright to the digital environment, including protection of temporary copies, broad exclusive rights of exploitation that appear to encompass digital communications and transmissions over digital networks, and attempted implementation of other key provisions of the WIPO "Internet" treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), including provisions prohibiting the circumvention of technological protections employed by copyright owners to protect their rights. The final version of the Code also ended up with exceptions with respect to software that come closer to compliance with international norms. Another positive aspect of the new law includes the reshuffling of responsibilities for enforcement of business and entertainment software to the Minister of Communication and Information Technology (MCIT), which will hopefully allow for stronger enforcement against software piracy in Egypt. IIPA is pleased that the Egyptian government has taken this step of passing the new IPR Code. It is sincerely hoped that the passage of the 2002 IPR Code will usher in a new era of strict enforcement of copyright, leading to deterrent results against piracy in Egypt, lowering of piracy levels, and the resultant commercial gains that will accrue to U.S. as well as all other (including Egyptian) right holders.

Comments on IPR Code Chapter Pertaining to Copyright

At the same time, IIPA must express its disappointment that most of the improvements noted in the draft that passed a first reading of the People's Assembly in June 2001 were not included in the Code as finally passed.¹⁵ In addition, IIPA notes that the government of Egypt has never acknowledged the need to increase criminal penalties, which, in the IPR Code, remain at 1954 levels (without any adjustment for inflation), that is, totally non-deterrent. The law also fails to comply with TRIPS in several other concrete ways, and fails to fully implement the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). IIPA encourages the government of Egypt to make the necessary changes to become the first country in the Middle East to fully implement the WIPO treaties.

Necessary Changes to Comply with TRIPS

- **Increase Criminal Remedies.** The Code contains non-deterrent criminal penalties. Article 181 provides a sentence of "not less than one month" imprisonment and a fine of EL5,000 to 10,000 (US\$905 to \$1,810). While a minimum sentence of "one month" imprisonment constitutes a positive development, there is no set maximum jail term (as there was in the old law), potentially making this provision much weaker as carried out in practice (for example, if only the statutory minimum, and no higher sentence, is regularly imposed). Fines on-their-face are totally insufficient and non-deterrent (TRIPS Article 61 requires remedies "sufficient to provide a deterrent"). IIPA understands that the fine is to be imposed "per work" or "per title." For pirates dealing in high-end commercial software, for example, the fine would not even amount to a cost

¹⁵ For example, one key improvement in the June 2001 draft, namely, the protection of works for life of the author plus seventy (70) years, protection of sound recordings for 70 years from the year in which the recording was "made or made public," and protection for 70 years from first publication or first making available to the public as to works in which the copyright holder is a legal entity, was replaced by "fifty (50) years" at the last minute by a legislator. This is highly disappointing since the government of Egypt itself touted the protection of "life plus 70" and "70 years" in its answers to TRIPS Council questions in June 2001. Also deleted from the final Code was an article providing for the possibility of closure of an establishment in case of a conviction, for a period of "not more than six months." Closure can be an extremely important enforcement tool, and for recidivists it may be vital to have this remedy available to make the enforcement systems adequate and effective. That this provision was removed is highly disappointing.

of doing business, and would be well worth the risk. Fines must be increased and doubled for recidivists (as of now a recidivist receives mandatory minimum jail term and maximum fine), and, as opposed to “per work” should be meted out “per copy.” Imprisonment should be set at from three months to three years (with mandatory imprisonment for recidivists). Such penalties would be closer to TRIPS standards. The GOE must implement tougher penalties through implementing regulations to satisfy TRIPS.

- **Provide TRIPS-Compatible 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. On the other hand, TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements the predominant use of which has been in the creation of the infringing goods” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements. Implementing regulations should confirm that Article 179(3) will be read as compliant with TRIPS, namely, that the language “serviceable” “only” does not conflict with the “predominant use” standard of TRIPS, and should also confirm the availability of forfeiture and destruction as required by TRIPS.
- **Expressly Provide for *Ex Parte* Civil Searches.** Article 179 appears not to 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 implementing regulations should clarify the availability of this vital measure, in line with Article 50 of TRIPS.
- **Delete Provision Allowing for Government-Sanctioned Sell-Off of Pirated Products.** 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 completely from accepted practice and violates Egypt’s TRIPS obligations. Article 46 of TRIPS requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or . . . destroyed.” Clearly, sale in public auction would prejudicially harm the right holder. This provision amounts to a government-sanctioned sell-off of pirated products, and must be deleted.
- **Provide Modern, TRIPS-Compatible Presumptions.** The law does not provide expressly for presumptions of subsistence of copyright or for copyright ownership. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights, and Egypt’s implementing regulations must be amended to include them in order to comply with TRIPS.¹⁶

¹⁶ 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

- **Repeal Provision Requiring Translation Into Arabic.** Section 148 of the Code requires translation of all literary works into Arabic within three years of publication, or it is deemed in the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s international obligations, is highly prejudicial to all right holders, including U.S. publishers, and it must be deleted.
- **Repeal Overly Broad Compulsory License.** Article 168 of the 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 completely contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed by implementing regulations, or deleted altogether.¹⁷
- **Repeal Overly 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.

Provisions Which Must Be Clarified to Confirm TRIPS Compliance

- **Confirm The Egypt Provides Full Retroactive Protection.** 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.¹⁸

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.

¹⁷ 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.

¹⁸ 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.

- **Confirm that Egypt Provides 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.
- **Confirm Narrow Scope of Temporary Copy Exception.** Article 171(9) provides what IIPA hopes is a narrow exception for certain “ephemeral” copies, where such copy is made “during digital broadcasting or receiving digitally stored work,” with the proviso that such copying is performed “through normal operations used by the rightful owner.” IIPA believes that, like U.S. law, Egypt should not provide an exception for temporary copies. Barring that approach, Article 171(9) appears to be fairly narrow, since it requires the person availing himself of the exception must be “the rightful owner.”
- **Confirm that Article 171 Exceptions Are Subject to Berne “Tripartite” Test.** The law contains overbroad exceptions to protection (TRIPS Article 13). 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.
- **Confirm That the IPR Code Provides Adequate Civil Damages as Required by TRIPS.** 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.¹⁹

¹⁹ The following suggested text would provide a TRIPS-compliant framework for compensatory damages:

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

Other Suggested Clarifications

- **Delete Provisions That Unreasonably Restrict 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.
- **Amend 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.
- **Delete Compulsory License Provision for Broadcasts.** Article 169 permits broadcasting organizations to use works without seeking authorization. This amounts to a compulsory license and should be deleted.
- **Clarify Panoply of 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.²⁰ 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.
- **Delete Right of Publicity.** Article 178 appears to create a right of publicity in a person's likeness, and does not belong in a copyright law.

WIPO Treaties Implementation

IIPA is pleased to see that the copyright law attempts to implement key provisions of the most recent WIPO treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).²¹ In particular, IIPA makes note of the following points with respect to

²⁰ 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."

²¹ Egypt's consideration of the treaties goes back at least to October 14, 1999, when the United States and Egypt issued a

Egypt's attempt to implement the WCT and WPPT:

- **Temporary Copy Protection.** The definition of reproduction in the Code means “making one or more copies of a work or a sound recording via any means or any method or form, including permanent or temporary electronic storage of the work or sound recording” [Article 138(9)], which appears to implement Article 1(4) and the Agreed Statement to Article 1(4) of the WCT.
- **Economic Rights, Including Communication to the Public/Making Available.** The economic rights as to works (Article 147, clause 1) provides that authors have the exclusive right “to grant license or prohibit any exploitation of his/her work by any means”, and sound recordings (Article 157(1) provides that producers of sound recordings have the exclusive right to “ban any exploitation of their recordings by any way without prior written license”), are broad enough that they may fully satisfy the WCT and WPPT.²²
- **Protection Against Circumvention of Technological Protection Measures.** The attempted implementation of the requirement to prohibit circumvention of technological protection measures is commendable. Articles 181(5) and (6) fall short of WIPO treaties' requirements in a few ways. Specifically, while Article 181(6), the prohibition on the act of circumvention, applies to both access controls and controls on the exercise of exclusive rights, Article 181(5) which prohibits preparatory acts with respect to circumvention “devices” etc. only goes to so-called “copy controls” but not access controls. Second, the law does not clarify whether the prohibition on devices extends to component parts. Third, a commercial purpose test (“for the purpose of selling or renting”) is imposed on the prohibition of devices, which is WIPO treaties-inconsistent, as is the apparent requirement that the act of circumvention be done “with bad faith.” Other indirect proof methods, such as how a device is marketed, or whether there is a commercially significant use of the device other than to circumvent, are not included in the provision. Finally, it is absolutely essential that the law provide for administrative and civil remedies. In many cases involving circumvention, speedy injunctive relief is the surest way to mitigate damage being caused by circumvention. Unfortunately, the Egypt Code only provides for criminal penalties.

Implementing Regulations Must Make Further Clarifications/Changes

Under Article 3 of that Code, “executive regulations” of the law were to be issued within one month of the “effective date.” In addition, according to Article 3, “competent ministries within their competent jurisdiction shall issue the decrees implementing this law.” While the deadline has come and gone, IIPA still views the “executive regulations” as an important opportunity to deal with many of the issues raised above, to resolve longstanding problems faced by the copyright industries in

“Joint Statement Between The Government of The United States of America and The Arab Republic of Egypt Concerning Electronic Commerce,” in which the Egyptian government agreed to the following statement:

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

²² Specific enumeration, in Articles 147, 156 and 157, is missing with regard to a “distribution” right (WCT Article 6, WPPT Articles 8 and 12). Also unclear whether the Code complies with WCT Article 8 and WPPT Articles 14 and 15, although it appears the drafters tried to comply. Specifically, the term “public transmission” is defined in a way that may comply with WCT Article 8, but authors of works receive a right of “public display to the public” which it is unclear is intended to cover exactly the same right. With respect to compliance with WPPT Article 14, Article 157 gives producers of sound recordings a broad exploitation right, including the specifically enumerated right to “display these works via computers or other mediums of communication.”

Egypt, and to clarify some other issues.

- **Resolve ‘False Licensee’ Problem.** A mechanism should be established in the regulations to deal explicitly with the problem of pirate distributors obtaining permits from the government to reproduce and sell in Egypt. Such a mechanism would require the Minister of Culture to ensure that applicants for permits to produce or distribute copyright material in Egypt have the authorization of the right owners. Such a mechanism should also require the applicant to identify the right owner and to provide documentary evidence that the applicant is authorized to reproduce or distribute such material. Refusals to issue a permit or suspensions of permits should be based on any circumstances that reasonably give rise to suspicion that the documents may be incomplete or fraudulent. In addition, the Minister should refuse to issue a permit or suspend a permit if the right owner informs the Minister that another party has exclusive rights in Egypt or that the specific applicant is not authorized. The Minister should also take necessary steps to verify the authorization of the applicant as documented in any contract or license as regards to the commencement or expiration of the license, the territorial scope of the license, the identity of the licensee, as well as the nature and the quantities of goods involved. It is vital that such provisions punish applicants who provide false or misleading information in the application documents, submit an application without having obtained the authorization of the right owners, or provide other false documentation, false contracts, or false licenses in support of an application. IIPA suggests fines in the amount of 10,000 Egyptian pounds; an applicant that violates the regulation should also be barred from re-applying for five years.
- **Explicitly Confirm Criminalization of Corporate End-User Piracy of Business Software.** Article 147 of the IPR Code provides broad rights in respect of computer programs, namely, "the right to grant license or prohibit any exploitation of his/her work by any means." The regulations must now confirm that the language in Article 181(7), namely, that it is an offence to breach "any literary or financial right of the author . . . stated by this law" includes the unauthorized use of software in a business setting (i.e., "end-user piracy" of business software).²³ Failure to criminalize end-user piracy would implicate Egypt's TRIPS (Article 61) obligations.
- **Adopt Proper Government Software Management Procedures.** The government of Egypt should make legal software use a priority, to comply with its international obligations to protect software, to set an example for private industry, and to appropriately manage software technology, which is critical to active participation in the information age. The U.S. recognized the importance of government leadership in combating end-user piracy when President Clinton issued Executive Order 13103 on September 30, 1998, which required all Federal government agencies (as well as third parties who do business with government) to use only legal, authorized software. This very significant Presidential Order is currently being implemented within the U.S. government and serves as a model for other governments around the world. Over 27 nations, including China, Korea, Philippines, Taiwan, Thailand, Ireland, France, Czech Republic, Spain, U.K., Greece, Hungary, Bolivia, Chile, Colombia, Paraguay, Jordan, Kuwait

²³ One way to confirm that corporate end-user piracy of business software is deemed a criminal offence would be to explicitly confirm that exclusive rights under copyright in software include the right to authorize the use of software in a business setting. The following proposed language would achieve this result:

The exclusive right in Article 147(1) of the IPR Code, which grants authors and their heirs the right to grant license or prohibit any exploitation of his/her work by any means, shall include the right to grant license or prohibit the use of software in a business setting, and shall be actionable under Articles 179 and 181(7).

and Turkey have already joined the United States by issuing government legalization decrees from their top executive levels and, in so doing, have signaled their intent to become global leaders in the field of technology management. It is time for Egypt to consider doing the same; the regulations provide the mechanism for making this momentous announcement.²⁴

Generalized System of Preferences

Egypt currently participates in the U.S. GSP program, offering duty-free imports of certain products into the U.S. from developing countries. In order to qualify for such unilaterally granted trade preferences, USTR must be satisfied that Egypt meets certain discretionary criteria, including whether it provides “adequate and effective protection of intellectual property rights.” In 2001, \$21.7 million of Egyptian goods were imported into the U.S. duty-free, accounting for 2.5% of its total imports to the U.S. For the first 11 months of 2002, \$21.3 million of Egyptian goods entered the U.S. duty-free under the GSP program, accounting for 1.7% of its total imports into the U.S. Egypt should not continue to expect such favorable treatment at this level if it fails to meet the discretionary criteria in this U.S. law.

²⁴ The following proposed text could be adopted verbatim in the regulations:

Each agency [of the government of Egypt] shall work diligently to prevent and combat computer software piracy in order to give effect to copyrights associated with computer software by observing the relevant provisions of international agreements in effect in Egypt, including applicable provisions of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights, the Berne Convention for the Protection of Literary and Artistic Works, and relevant provisions of Egyptian law, including the IPR Code.

1. Each agency [of the government of Egypt] shall adopt procedures to ensure that the agency does not acquire, reproduce, distribute, or transmit computer software in violation of applicable copyright laws.
2. Each agency [of the government of Egypt] shall establish procedures to ensure that the agency has present on its computers and uses only computer software not in violation of applicable copyright laws.

These procedures may include:

- a. preparing agency inventories of the software present on its computers;
- b. determining what computer software the agency has the authorization to use; and
- c. developing and maintaining adequate record keeping systems.

3. Contractors and recipients of [Egyptian government] financial assistance, including recipients of grants and loan guarantee assistance, should have appropriate systems and controls in place to ensure [Egyptian government] funds are not used to acquire, operate, or maintain computer software in violation of applicable copyright laws. If agencies become aware that contractors or recipients are using [Egyptian government] funds to acquire, operate, or maintain computer software in violation of copyright laws and determine that such actions of the contractors or recipients may affect the integrity of the agency's contracting and [Egyptian government] financial assistance processes, agencies shall take such measures, including the use of certifications or written assurances, as the agency head deems appropriate and consistent with the requirements of law.

4. [Egyptian government] agencies shall cooperate fully in implementing this order and shall share information as appropriate that may be useful in combating the use of computer software in violation of applicable copyright laws.