

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

DISPUTE SETTLEMENT

The U.S. government's negotiation of regional and bilateral free trade agreements (FTAs) offers an important opportunity to persuade our trading partners to further modernize their copyright laws and enforcement regimes. The FTAs have set new global precedents in copyright protection and enforcement, providing further impetus to e-commerce and to global economic growth and employment. However, these beneficial impacts of the FTAs will not be realized unless the obligations they create are rigorously fulfilled in the national laws of our trading partners. The U.S. government should be generous with advice and technical assistance in helping our FTA partners to fully implement the terms of the FTAs; but the U.S. government also should not hesitate to invoke the dispute settlement procedures of the respective FTAs when FTA partners fail to live up to the obligations they have undertaken and which constitute the commercial benefits of the deals for U.S. copyright industries. In this section of the report we identify outstanding FTA implementation issues with several of our partners – Bahrain, Jordan, Morocco, and Singapore – which we believe could be the basis for dispute settlement proceedings unless they can be promptly and satisfactorily resolved on an informal basis.

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The United States-Morocco Free Trade Agreement went into force on January 1, 2006. A review of the Morocco Copyright Act, Law No. 2-00 on Copyright and Related Rights (of February 15, 2000), as amended in 2005, has revealed some significant compliance issues with the FTA, and there are other compliance issues as noted. While for the most part the legislation meets the FTA tests, the government of Morocco should work swiftly to resolve any remaining issues. The following are among the key issues.

- **Failure to Join the WIPO Internet Treaties [FTA Article 15.1.2(g) and (h)]:** Morocco agreed to join the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) upon the coming into force of the U.S.-Morocco FTA. However, the government of Morocco has failed to date to submit accession legislation and to deposit its instrument of accession with WIPO in Geneva as to either treaty. This failure must be remedied. Other countries in the region are looking to accede; it would indeed be ironic if a regional neighbor were to accede before Morocco did, despite the fact that Morocco is obligated to do so bilaterally.
- **Anti-Circumvention and Technological Protection Measures (“TPMs”) [FTA Article 4(13)]:** Article 65(e) prohibiting the circumvention of TPMs is missing the “has only a limited commercially significant purpose or use other than to circumvent” prong of the three part test for proving an unlawful purpose. Omitting this objective criteria from the factors by which a device or service can be judged illegal leaves a major gap in legal protection of technological protection measures which must be remedied for Morocco to comply with the FTA.
- **Definitions of “broadcasting” and “phonogram” Should be Made FTA-Compatible [FTA Article 15.7.5]**

- **Unclear Coverage of Parallel Imports [FTA Article 15.5.2]:** Morocco agreed to protect against unauthorized parallel imports under Article 15.5.2 of the FTA.¹ Unfortunately, in the 2005 amendments, no change was made to Article 10 (“Economic Rights”) which provides the exclusive right to import copies of [a] work.” Article 50 provides performers with a right to control the “import of a fixation of [a] performance” and Article 51 provides phonogram producers with a right to control “the import of copies of [a] phonogram with a view to their distribution to the public.” In addition to confirming that the exclusive rights as to imports include parallel imports, IIPA also recommends that the phrase in Article 51, “with a view to their distribution to the public,” be deleted, as the phrase creates ambiguity as to the scope of exclusivity of the import right as to phonogram producers.
- **Internet Retransmissions of Television Signals Not Expressly Prohibited [FTA Article 15.5.11(b)]:** Article 15.5.11(b) of the FTA requires Morocco to ensure that “retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal” is not permitted. Article 10 of the Copyright Law provides an exclusive “broadcast” right (which does not expressly include retransmission) and a “communication” to the public right. It is not clear therefore that the Moroccan law satisfies the FTA. One way to meet the requirement is to add “including the retransmitting of television signals, whether terrestrial, cable, or satellite, on the Internet, without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal” to Article 10(i) (“communication to the public”) of the existing Copyright Law, or to add this language to the definitions (e.g., of “broadcasting”).
- **Temporary Reproduction – Overly Broad Exception Should be Narrowed [FTA Article 15.5.11(a)]:** The FTA requires Morocco to confine exceptions and limitations to “certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.” The exception for temporary reproductions in Article 13 is overly broad and should be narrowed. For example, it would conflict with a normal exploitation of a work and prejudice the interests of right holders if it is deemed that a pirate copy would be equally subject to this exception.² In addition, the conditions to qualify for the exception should be cumulative, unlike the Morocco approach in which meeting any one of the conditions will suffice.

¹ Article 15.5.2 of the FTA provides

Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the importation into that Party's territory of copies of the work, performance, or phonogram that are made without authorization, or made outside that Party's territory with the authorization of the author, performer, or producer of the phonogram.

² The current exception in Article 13 reads:

[T]he temporary reproduction of a work shall be permitted provided that this reproduction:

(a) takes place in the course of a digital transmission of a work or act designed to make a work stored in digital form perceptible;

(b) is carried out by a natural person or legal entity authorized, by the copyright owner or by the law, to carry out the said transmission of the work or act designed to make it perceptible;

(c) is of an accessory nature to the transmission, takes place as part of normal use of the material and is automatically deleted without allowing the electronic recovery of the work for purposes other than those specified in subparagraphs (a) and (b) of this Article.

- **Ex Officio Enforcement Authority at the Border [FTA Article 15.11.23]:** The FTA requires that “competent authorities [in Morocco] may initiate border measures *ex officio*, with respect to imported, exported, or in-transit merchandise suspected of infringing an intellectual property right, without the need for a formal complaint from a private party or right holder.” There is nothing in Morocco’s copyright law that authorizes *ex officio* action.
- **Criminal Penalties Too Low to Deter Piracy [FTA Article 15.11.26(b)]:** The minimum fine in the Morocco law is US\$1,138 or US\$2,276 for a recidivist, which is quite low, given the FTA requirement to “provide a deterrent to future infringements, consistent with a policy of removing the infringer’s monetary incentive.” The maximums of US\$11,138 to US\$22,760 (for recidivism) are higher. There are no mandatory minimum prison sentences (since imprisonment can be substituted by a fine alone), and jail times are from two to six months, or four to twelve months for recidivism, again, quite low and it is questionable whether they “provide a deterrent.”
- **Seizure Provisions Do Not Comply with FTA [FTA Articles 15.11.9 and 15.11.26(b)(ii)]:** The FTA requires seizure of items “suspected” to be infringing, but the Morocco Copyright Law (Article 64.3(1)) specifically requires that the items be “made in violation” of copyright. The phrase “suspected to have been” should be added before “made” to comply with FTA Articles 15.11.9 and 15.11.26(b)(ii). It is also necessary to establish sampling as required by FTA Article 15.11.26(b)(ii), namely, that “items that are subject to seizure pursuant to any such judicial order need not be individually identified, so long as they fall within general categories specified in the order.” Preferably, this would be expressly provided for in the law, but in the least, confirmation should be sought as to how Morocco implements the sampling provision.
- **Offenses for Trafficking in Counterfeit Labels and Illegal Documentation Missing from Morocco Law [FTA Article 15.11.27]:** The Morocco law contains no provision to prohibit “knowingly trafficking in counterfeit labels affixed or designed to be affixed to: a phonogram, a copy of a computer program, documentation or packaging for a computer program, or a copy of a motion picture or other audiovisual work,” or “knowingly trafficking in counterfeit documentation or packaging for a computer program” as required by Article 15.11.27 of the FTA.

IIPA has proposed that the exception be revised to read as follows:

[T]he temporary reproduction of a work shall be permitted provided that this reproduction:

(a) **is incidental and an integral part** ~~takes place in the course of a digital transmission of a~~ **legal copy of a work in a network between third parties by an intermediary** or act designed to make a **legal copy of a** work stored in digital form perceptible; **and**

(b) **or transmission or viewing** is carried out by a natural person or legal entity authorized, by the copyright owner or by the law **of Morocco**, to carry out the said **reproduction, transmission, or viewing** of the work or act designed to make it perceptible; **and**

(c) is of an accessory nature to the transmission, takes place as part of normal use of the material and is automatically deleted without allowing the **possibility of using** ~~electronic recovery~~ of the work for purposes other than those specified in subparagraphs (a) and (b) of this Article.