

# EGYPT

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2013 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Egypt remain on the Watch List.<sup>1</sup>

**Executive Summary:** IIPA recognizes the ongoing political situation in Egypt warrants attention, and hopes that as the situation stabilizes the government can get back to the important work of improving the business climate for creative industries in the country. With legitimate copyright businesses launching in the Middle East (along with phone offerings such as the iPhone5), IIPA sincerely hopes the Egyptian government will work to ensure an adequate legal and enforcement framework exists to deal with piracy.<sup>2</sup> Unfortunately, local Egyptian and U.S. right holders remain hampered by piracy and other barriers.<sup>3</sup> Photocopy and print piracy, enterprise end-user piracy of software, and piracy of music, software, games, and movies, continued to cause losses to copyright owners in 2012. Unfortunately, the situation worsened in 2012 due to the current political instability and poor economic climate and outlook. This said, there are some bright spots upon which momentum must be built. The establishment of the Economic Courts in 2008 was a positive development, as decisions have been stronger than the judgments of the previous commercial courts. Nevertheless, trial procedures need to be quicker and sanctions stronger to deter piracy and have the result of reduced piracy levels. The shift in jurisdiction for software to the Ministry of Communications and Information Technology's "Information Technology Industry Development Agency" (ITIDA) has also been positive, and relations with ITIDA remain good, but results of any enforcement actions (increasingly sporadic) have been mostly non-deterrent fines. The Ministry of Culture, which still has enforcement purview over books, music, and motion pictures, remains largely inactive. One bright spot in 2012 is the improved relationships with the new management of the Copyrights & Artistic Works Investigation Unit of the Ministry of Interior (MOI). We understand this Unit takes *ex officio* actions against various types of copyright piracy, including book, film, software, and cyber café piracy, which is sorely needed in a climate in which it is difficult for right holders to operate.

The United States and Egypt signed a Trade and Investment Framework Agreement on July 1, 1999, and there has been movement toward deepening the trade relationship; IP has continued to be one of the key issues for engagement. In late January 2012, USTR Ron Kirk and Dr. Mahmoud Eisa, Egyptian Minister of Industry and Foreign Trade announced a Joint Statement declaring their intention to pursue steps to promote the U.S.-Egypt Trade and Investment Partnership and provide opportunities for job creation. The Joint Statement notes that U.S. and Egyptian officials would finalize an Action Plan to realize the individual elements of the partnership including "protecting intellectual property rights and promoting innovation."<sup>4</sup> It is hoped that the enforcement, legislative, and market access issues raised in this filing can be properly addressed through the U.S.-Egypt relationship.

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<sup>1</sup>For more details on Egypt's Special 301 history, see Additional Appendix available at <http://www.iipa.com/pdf/2013SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.

<sup>2</sup>Noelle Manalastas, *Apple Opens iTunes Store in Middle East, Unveils iPhone 5 Release Date*, Al Arabiya News, December 5, 2012, at <http://english.alarabiya.net/articles/2012/12/06/253621.html>.

<sup>3</sup>The experiences of authors such as Alaa al-Aswany, and the local Egyptian film market duopoly of the Arabic Company for Production and Distribution Group and El Mottahida (which suffer from piracy, cultural burdens, narrow theatrical windows, and a dearth of screens in the country) can attest to the perils of piracy for local creators. See Abdallah, *Alaa El Aswany*, Egypt Today, August 2004, Volume No. 30 Issue 02.

<sup>4</sup>United States Trade Representative, *U.S. Trade Representative Kirk, Egyptian Minister of Industry and Foreign Trade Eisa Adopt Joint Statement on a Trade and Investment Partnership*, January 25, 2012, at <http://www.ustr.gov/about-us/press-office/press-releases/2012/january/us-trade-representative-kirk-egyptian-minister-ind>.



## **PRIORITY ACTIONS REQUESTED IN 2013**

### **Enforcement**

- Draw upon recent success of MOI IP Unit to build an enforcement unit within ITIDA to act to reduce software piracy.
- Continue nurturing “Economic Courts” with specialized IP judges, emphasizing speed and deterrent sentencing in piracy cases, and take steps to develop core of specialized IP prosecutors and judges (including training).
- Tackle book and journal piracy, both illegal reprints and photocopying, by taking sustained enforcement actions against pirate production and distribution, and ensuring universities adopt appropriate use and copyright policies for students and faculty.
- Fully implement laws and decrees (such as Law No. 118/1975, Decree No. 770/2005, and other measures) to seize piratical imports and exports, without “guarantee” amounts that are prohibitively expensive.
- Take a more active approach to legalization of software usage by publicly-owned companies, including easing rules related to obtaining evidence with regard to the illegal practices of such companies.

### **Legislation and Market Access**

- Issue draft Border Measures Regulations to give Customs *ex officio* right to detain pirated and counterfeit goods, and lower the onerous official fees required of right holders to seize suspected pirated and counterfeit products.
- Amend the law to provide that enforcement authorities shall destroy pirated and counterfeit products.
- Amend copyright law and implementing decree to cure TRIPS deficiencies, resolve ambiguities, and fully implement and join WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).
- Adopt pre-established (statutory) damages to address the problem of low compensatory damages.
- Adopt rules easing the obtaining of an *ex parte* civil search (a TRIPS requirement).
- Launch and execute a public awareness campaign on the importance of copyright protection, the dangers of piracy, and the consequences of engaging in piracy, including end-user software piracy.
- Launch additional awareness sessions for technical enforcement authorities, prosecutors and judiciary so they are each fully aware of the importance of their roles in creating a strong IP system in Egypt.
- Ease onerous market access restrictions which close the Egyptian market to legitimate copyright companies.

## **PIRACY UPDATES IN EGYPT**

Previous reports have discussed the piracy challenges faced in Egypt in depth. The following sections provide brief updates to the piracy situation in Egypt.

**Software Piracy:** The unauthorized use of software by enterprises and retail piracy continue to cause serious harm to the software and IT industries in Egypt. The software piracy rate in 2011 was 61%, an increase over the previous several years, representing a commercial value of unlicensed software in the country of \$172 million.<sup>5</sup> Piracy is prevalent among publicly owned companies, small and medium enterprises (SMEs), especially private sector medical clinics, law offices, auditing firms, etc., and consumers. Reducing piracy in Egypt would bring positive benefits to the Egyptian economy. A study released in 2010 by IDC and BSA found that reducing the PC software piracy rate in Egypt by 10% over four years would generate US\$254 million in GDP, US\$33 million in additional tax

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<sup>5</sup>BSA | The Software Alliance’s 2012 Global Software Piracy Study, conducted with two leading independent research firms, IDC and Ipsos Public Affairs, measured the rate and commercial value of unlicensed PC software installed in 2011 in more than 100 markets. In 2011, the software piracy rate in Egypt was 61%, representing a commercial value of unlicensed software of US\$172 million. These statistics follow the methodology compiled in the Ninth Annual BSA and IDC Global Software Piracy Study (May 2012), <http://portal.bsa.org/globalpiracy2011/index.html>. The BSA study covers piracy of all software run on PCs, including desktops, laptops, and ultra-portables, including netbooks. It includes operating systems, systems software such as databases and security packages, business applications, and consumer applications such as games, personal finance, and reference software. It also takes into account free software, open source software, and software as a service if it is paid for. It does not cover software that runs on servers or mainframes and routine device drivers, free downloadable utilities such as screen savers, and software loaded onto tablets or smartphones. The methodology used to calculate this and other piracy numbers are described in IIPA’s 2013 Special 301 submission at <http://www.iipa.com/pdf/2013spec301methodology.pdf>.

revenues and 1,978 new IT jobs. The benefits would be even greater if this reduction was achieved in two years, which would yield US\$338 million in GDP and US\$44 million in additional tax revenues.<sup>6</sup>

**Book Piracy Continues to Hinder the Development of Legitimate Publishing Industry in Egypt:** Publishers report that print piracy continues to hinder the development of the local legitimate publishing market. Pirate enterprises in Egypt profit from unauthorized printing of English language higher-education textbooks, English language teaching (ELT) materials, best-sellers, and books in translation, which are also being exported to Northern Africa. Local Egyptian publishers, Egyptian authors, and Egyptian distributors are as negatively affected as foreign publishers. Unauthorized photocopying of ELT course books at universities and piracy of key ELT trade titles, particularly grammar titles and dictionaries, continues to be a significant problem.

**Retail Piracy Remains Severe, Including Some Imports:** Physical piracy in retail shops and street stalls has been a major problem in recent years in most major cities in Egypt, including Cairo, Alexandria, Giza, Mansoura, and Asyut. Retail establishments selling computers have reportedly offered illegal software and games. Imports of pirate software and imports of counterfeited trademark labels such as hard disks, computer spare parts, and mobile accessories have been detected, which are then transshipped into other markets in the Middle East. China is a source for many counterfeit and pirated goods detected in Egypt. Resellers of pirate software have advertised these illegal products in trade magazines. Egyptian Customs authorities are apparently poised to set up a mechanism for better handling of infringing import and export cases to seize such goods at the point of entry or exit.

**Pirate DVD Channels/Rogue Stations:** The motion picture industry has reported previously that at least three free-to-air channels in Egypt broadcasting on the NileSat and NorSat satellite have been telecasting films acquired from pirate DVD stores without authorization from or payment to the applicable right holders. The independent film and television industry (IFTA) has indicated previously that the channels involved are reported to be Panorama Action, Top Movies and Time Movies. This form of broadcast piracy is becoming increasingly prevalent in the region, and the Egyptian government should take immediate steps to cease these broadcasts of pirated materials, whether under the Copyright Law or business licensing provisions, since the entities involved should be subject to license revocation for showing unauthorized materials from an unlawful source.

## **ENFORCEMENT UPDATES IN EGYPT**

**ITIDA Needs to Become More Effective and Active Unit in Addressing Piracy:** The industries have noted that, notwithstanding positive relationships with ITIDA, they have been less proactive in the past year in addressing piracy concerns. ITIDA has administrative enforcement authority and thus can do much good in wielding its authority in order to deter piracy. As a general rule, private investigations in Egypt are prohibited, which makes it incumbent on ITIDA to run normal checks of the market and address piracy effectively through administrative actions, seizure and destruction of pirated goods, materials and implements used in the production or dissemination of piracy, and deterrent level administrative remedies actually imposed.

**Need Effective Approaches to Address Book Piracy:** Enforcement against print piracy has been inconsistent over the years, although publishers have reported some good cooperation in pursuing isolated cases through the Copyrights & Artistic Works Investigation Unit of the MOI in Cairo. Most enforcement actions occur on the basis of complaints, not *ex officio* actions. IIPA is aware of the Egyptian government's report indicating that the "Contact Point Organization for IPR has contacted all universities and higher academies, requesting them to provide copies of the original books circulated in their studies."<sup>7</sup> The government further notes, "[t]hese copies are used to compare between the original and seized items to detect the existence of piracy," and noted that many universities

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<sup>6</sup>BSA and IDC, *Piracy Impact Study: The Economic Benefits of Reducing Software Piracy: Egypt*, 2010, at [http://portal.bsa.org/piracyimpact2010/cps/cp\\_egypt\\_english.pdf](http://portal.bsa.org/piracyimpact2010/cps/cp_egypt_english.pdf).

<sup>7</sup>Submission from the Government of Egypt to the Government of the U.S. Concerning the USTR Special 301 Report of the Year 2012, February 27, 2012 (on file with IIPA).

welcomed this. Yet, legalization efforts are spotty. Some faculty members only allow students to register who have a book receipt for a legitimate purchase. Others appear to encourage or condone illegal photocopying. In order to meaningfully tackle the unlawful print reproduction and photocopying that supply university campuses, the Ministries of Education and Higher Education should encourage universities to adopt appropriate use and copyright policies to ensure that only legitimate or original copies of books are used in the university setting. At present, public state-funded universities are taking no responsibility for ensuring that on-campus stores, presumably subject to a lease agreement with the university, do not engage in infringing activity. Unfortunately, it appears that some university employees provide the shops with the books, informing them of the number of students, and helping to sell the pirate copies to students.

In addition to book piracy in the university setting, piracy of school books (Elhi) is also of significant concern to publishers. While most school books are published and supplied by the Ministry of Education, international and local publishers are authorized to supply English Language Teaching (ELT) books (subject to MOE approval). The ELT books are sold to private schools and the experimental schools (state schools that teach math and science in English). Unfortunately, pirate enterprises are printing unauthorized copies of the best-selling ELT titles and selling directly to the school. As the pirates have invested nothing in the development and production of the ELT materials, they of course sell below market price (already reduced to serve the Egyptian market) to the private schools, which unfortunately, have not seen fit to refuse to do business with the pirates. Publishers have sought assistance from the MOE in addressing this specific issue, but the MOE has been less cooperative.

**Software Enforcement Remains Spotty in Egypt Due to Lack of ITIDA Enforcement Unit:** The software industry notes good relationships with the Copyrights & Artistic Works Investigation Unit of MOI in carrying out raids, including *ex officio* raids, against retail establishments that offer pirated software and corporations using unlicensed software. While relations with ITIDA are good, the lack of an enforcement unit within ITIDA has hindered its ability to take meaningful actions to address software piracy. Several fundamental problems persist, however, in the enforcement system in Egypt: 1) the lack of an enforcement unit inside ITIDA to take copyright raids; 2) the lack in general of deterrent sentencing even by the more active Economic Courts; 3) low compensatory damages, which could be assisted by the adoption of pre-established (statutory) damages; 4) the lack of an effective destruction remedy in the Customs Regulations; 5) the unwillingness of authorities in general to seek legalization of software usage by publicly-owned companies, and difficulties obtaining evidence with regard to the illegal practices of such companies; 6) overall difficulties in obtaining sufficient evidence in Egypt to warrant an *ex parte* civil search (a TRIPS requirement); and 7) the lack of police interest in piracy cases unless there are visibly large amounts of piracy or counterfeiting (hence, Internet cases and enterprise end-user piracy cases often get short shrift). A new hurdle emerging to enforcement in Egypt is that suspects are claiming their use of illegal software is for “personal use.” Enterprises should not be able to use this excuse to escape enforcement under the law, since the nature of enterprise end-user piracy is the unfair enrichment obtained by using software without paying for it, which provides the user with an unfair commercial advantage over those who pay for their software.

A couple of additional problems are worth noting. First, the industry has identified some banks and hospitals which are using unlicensed software. However, due to the rigid criminal procedure rules which would require confiscation of hardware, and due to the essential nature of their operations, the problem of end-user piracy in these organizations is largely ignored. In addition, the software industry has experienced the problem of seized pirates and counterfeit products being put up for sale in auction by the Egyptian government/District Attorney. This is a practice that as a general rule would violate Egypt’s international obligations (for example, under Article 46 of the TRIPS Agreement). Finally, the industry notes enforcement hurdles, e.g., too many enforcement authorities must approve a copyright infringement action, thus discouraging right holders from coming forward to bring cases.

**Establishment of Economic Courts a Welcome Development, Must Avoid Onerous Burdens:** IIPA applauded the establishment of new Economic Courts in 2008 (under Law No. 120 (2008)), under which civil and criminal copyright cases are to be handled by specially-trained judges. The Egyptian government has expressed the

hope that these courts would promote “speedy judgments rendered.”<sup>8</sup> Industry reports that some of the more recent decisions of the Economic Courts have been stronger than those under the commercial courts previously. The Egyptian government’s 2009 Special 301 Submission reported five criminal case results from 2008-09, four involving “imprisonment of infringers,” which the Submission notes “constitutes a new trend in Egypt’s judicial efforts in deterring piracy.”<sup>9</sup> The 2012 submission of the Egyptian government notes 388 copyright cases between July 1, 2010 and June 30, 2011, and 273 cases between July 1, 2011 and December 31, 2011. However, no results of these cases are discussed, and it is unclear whether the case lists overlap (i.e., some of the 388 remain pending and are therefore included in the 273). Right holders note that in general results in court cases are non-deterrent, and look for improvements with regard to calculations of damages and court costs/attorneys’ fees in civil cases, and the need for deterrent sentences including imprisonment and fines in criminal cases. They note that prison sentences are usually suspended during the Appellate Court proceedings. Courts should not impose bureaucratic documentary hurdles to effective judicial enforcement, or other hurdles which could, if allowed to deny protection altogether, amount to inconsistencies with Egypt’s current international obligations.<sup>10</sup> Problems in the past have included the Egyptian government accepting false licenses to deny claims by the legitimate right holder of unauthorized distribution.<sup>11</sup> It would also help right holders if the new courts shared court decisions in a more transparent manner by publishing them expeditiously.

### **Police and Courts Must Adjust to Address Internet Piracy Cases and Deal with Electronic Evidence:**

Emerging issues include dealing with electronic evidence and with Internet piracy cases. IIPA members report a general lack of police interest in piracy cases unless there are visibly large amounts of piracy or counterfeiting. As a result of this, it has been very difficult to raise significant interest in Internet cases. A recent hurdle reported could hinder efforts to address Internet piracy in Egypt or, indeed, any case involving electronic evidence. Apparently the Economic Courts are taking the position that unless an authorized certificate is obtained from ITIDA confirming the

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<sup>8</sup>See Arab Republic of Egypt (Mona El Garf, Advisor, Minister of Trade and Industry), *USTR Section 301 Report for the Year 2009 Submission by the Arab Republic of Egypt*, February 2009, submitted to regulations.gov (on file with IIPA). The Submission indicated that the Shura Council and the People’s Assembly approved Law No. 120 for the Year 2008, establishing economic courts. According to the Ministry submission,

“These specialized courts will have jurisdiction over cases involving a number of economic laws, including the intellectual property rights law. These courts will ensure specialized judges trained in these legislations hear IPR cases and speedy judgments rendered. The courts will decide on both the criminal aspect of IPR cases as well as the civil remedies.”

<sup>9</sup>The cases listed are:

- “Case No.14 for the year 2009, in which the court gave a sentence of imprison[ment] for 6 months.”
- “Case No. 9172 for the year 2008 in which the court gave a sentence of imprison[ment] of a year plus a fine of 5000 Egyptian Pounds [US\$905].”
- “Case No.14532 for the year 2008, in which the court gave a fine of 15,000 Egyptian Pounds in addition to a sentence of pre-civil remedy of 5001 Egyptian Pounds[US\$905].”
- “Case No.9171 for the year 2008 in which the court gave a sentence of imprison[ment] for 3 months plus a fine of 5000 Egyptian Pounds [US\$905].”
- “Case No. 20039 for the year 2008 in which the court gave sentence of imprison[ment] for 6 months plus a fine of 5000 Egyptian Pounds [US\$905].”

<sup>10</sup>In several infringement cases in 2008 and 2009, ITIDA has noted that a victim company’s failure to file formal deposit copies of the works involved and other documentation in line with Article 184 of the Copyright Law of Egypt is inconsistent with Egyptian law. As has been noted in previous IIPA submissions (and as discussed below), Article 184 outlines onerous deposit requirements, whereupon failure to deposit can lead to imposition of administrative penalties. In these cases, it is apparent that ITIDA would have preferred for the victim/right holder to deposit copies of the works at issue, and notes that without so doing the rights holder risks the merits of the case. IIPA understands that the Egyptian government has taken the position that deposit under Article 184 is not a prerequisite for copyright protection. However, if failure to adhere to these deposit formalities impacts criminal enforcement of the copyrights at issue, this could be inconsistent with Egypt’s international obligations under the Berne Convention and the TRIPS Agreement. The Berne Convention imposes a “no formality” principle in Article 5, by requiring copyright protection to be afforded without regard to any formality. The Egyptian government wrote in its February 2009 Special 301 Submission,

“With regard to depositing and registering software, ITIDA confirms that the copyright protection is automatic according to the Egyptian law. So the author is protected automatically without any formalities. Our system is completely compliant with Berne convention and TRIPS agreement without having any inconsistency. The process of depositing or registration will help in establishing evidence if there is any dispute. It is not by any mean a barrier nor a condition for protection, and this is very clear in article (184) of the Egyptian IPR law (Law 82 of 2002).”

The Ministry pointed to “Cases No. 9040 and No. 28896 Year 2007” as evidence that registration was not required since convictions were achieved in those cases without registration. IIPA appreciates this clarification of the issue and hopes that in all cases, documentary requirements and deposit requirements, the latter which are spelled out in the law, are never used to deny copyright protection. See Government of Egypt, 2009 *Section 301 Report*, *supra* note 8.

<sup>11</sup>There have been past instances in which clearly pirate material has been deemed “genuine” by the Ministry of Culture, leading to further delays in investigations leading to legal proceedings. ITIDA and MOC should regularly invite copyright owner assistance in ascertaining the legitimacy of suspect product. In some cases, the question may come down to the authenticity of documents purporting to identify particular companies as the authorized distributor of copyright products in the country. Right holders can quickly dispense of such questions.

authenticity of an email address or website IP address, the document is deemed inadmissible as evidence. It is critical that electronic evidence be admitted in order to effectively address copyright cases in the modern age.

## **MARKET ACCESS ISSUES**

There remain several market access barriers in Egypt which make it more difficult for foreign right holders to operate in the market. For example, foreign movies are subject to a 46% import tax and are also subject to discriminatory sales and box office taxes. Pirates and counterfeiters do not have to contend with such restrictions, so legitimate right holders are further disadvantaged in the market. These market access barriers should be lifted.

## **COPYRIGHT LAW AND RELATED ISSUES**

**Legal Framework Should be Established to Protect Authors and Artists in the Online Space:** As of December 2012, Egypt had 22 million Internet users.<sup>12</sup> Egypt also has more than 1.8 million fixed broadband subscriptions as of the end of 2011.<sup>13</sup> The music industry in Egypt has suffered the ill effects of unlawful distribution models deployed on the Internet in Egypt. These models include illegally hosted content, deep linking sites, streaming sites, P2P services, BitTorrent, and auction sites which are being used for infringement of copyright.<sup>14</sup> The government has reportedly worked with ISPs on a code of ethical conduct to encourage ISPs to take affirmative action against cybercrimes, child pornography, and IP online crimes; however, the latest Special 301 report from the Egyptian government makes no mention of progress toward this laudable end. IIPA members have been encouraged in recent years by the Ministry of Interior Cyber Crime Unit's measured responses to local sites offering illegal copyright content based on complaints. Problems appear to exist in terms of enforcement with foreign sites, since authorities are unclear what the laws are in Egypt with respect to infringements originating outside the country. The laws should be amended to provide the proper legal framework for the Internet environment. The work with ISPs to establish guidelines in the form of a code of conduct is commendable, and it is hoped that a fair and effective legal framework for dealing with both hosted content (e.g., notice and takedown) and non-hosted infringements (e.g., providing incentives to cooperate) can be developed.

**Customs Measures to Deal With Unauthorized Imports and Exports on an *Ex Officio* Basis Would Be Welcome Improvement:** Egypt's 2009 and 2012 Submissions to USTR regarding the Special 301 process indicated that Egyptian Customs is putting into place a mechanism to deal with infringing imports and exports.<sup>15</sup> The 2012 Submission notes,

“[t]he Ministry of Industry and Foreign Trade is currently amending Chapter (9) of the Executive Regulations of the Import/Export Law, which includes the provisions of the IP Border Measures. The draft border regulations addresses the destruction of illicit counterfeited products, in addition to

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<sup>12</sup>*Egypt's Internet Users Increase by 30 Pct, Facebook Users Reach 12 Mln: Report*, Ahram Online, Thursday 20 Dec 2012, at <http://english.ahram.org.eg/NewsContent/3/12/60982/Business/Economy/Egypt-Internet-users-increase-by-pct-Facebook-u.aspx> (citing Madar for Research and Development *Information and Communications Technology Report*).

<sup>13</sup>International Telecommunication Union, Fixed Broadband Subscriptions 2000-2011, at <http://www.itu.int/ITU-D/ict/statistics/material/excel/Fixed%20broadband%202000-2011.xls>, accessed on January 10, 2013.

<sup>14</sup>The independent segment of the film and television industry (IFTA) reports that online (as well as physical) piracy remain a significant export constraint in Egypt for independent producers and distributors, the majority of which are small to medium-sized businesses. Independent producers and distributors confirm that DVD sales have been particularly impacted since pirated digital copies are routinely offered for free online and with the same quality viewing experience that a DVD can provide. Piracy severely undermines and may permanently damage legitimate distribution networks essential to reaching consumers in Egypt and leaves little confidence for investment in intellectual property.

<sup>15</sup>Specifically, the 2009 Submission noted,

“In 2005, the Minister of Foreign Trade and Industry issued the Ministerial Decree No. 770/2005 Issuing the Executive Regulations To Implement Import and Export Law no.118/1975 as well as Inspection and Control Procedures of Imported And Exported Goods. Chapter 9 of These Regulations provided the rules governing the application of Border Measures. Competence of border measures is divided between Trade Agreements sector (TAS) under Ministry of Trade and industry and the Customs Authority. The former is competent for receiving complaints, inspection and decision making, while the latter is responsible for implementing these decisions.” See Government of Egypt, 2009 *Section 301 Report*, *supra* note 8.

cutting down the required payment needed as a guarantee by the IPR right holder as a condition to file his complaint to the competent authorities. The draft provides customs officials with the authority to act upon their own initiative (Ex Officio).”

IIPA welcomes the initiative of the government to try and effectively stop pirate imports and exports, and looks forward to the issuance of these amendments to the Executive Regulations of the Import/Export Law, and their implementation in practice.

**Cairo Declaration on Cybercrime:** Computer-based infringements are on the rise in Egypt, whether Internet-based piracy or end-user piracy of software. Thus it is crucial that the government of Egypt deal with such copyright infringement as a species of cybercrime. In November 2007, Egypt hosted an Arab regional conference on cybercrime convened by the Council of Europe, at which 400 participants from around the region and other countries discussed using the COE Cybercrime Convention as a model to guide the development of national legislation on cybercrime.<sup>16</sup> One of the end results was the 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>17</sup> The Declaration notes 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,” and 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.”

**2002 Law and Implementing Regulations Leave Some Gaps in Protection:** Copyright law in Egypt is governed under the Intellectual Property Law No. 82/2002 of Egypt (Copyright Law), and the 2005 Implementing Decree, Prime Minister Decree No. 497 for the year 2005 (effective by Issue No. 12, Official Gazette, March 29, 2005). The Copyright Law and the Implementing Decree contain some inconsistencies with Egypt’s international obligations, many of which have been discussed in previous filings. The laws also did not fully implement the WCT and WPPT, which Egypt should implement and join. The following is a non-exhaustive list of some important changes that should be sought in amendments:

- **Ensure Registration and Deposit Are Voluntary:** Articles 184 and 185 contain registration and deposit provisions for copyright. ITIDA has indicated that these deposit requirements, though not necessary for copyright

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<sup>16</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 ITIDA, the Council of Europe, the United Nations Office on Drugs and Crime, Microsoft, Ain Shams University, IRIS, EASCIA and other partners.

<sup>17</sup>Article 10 of the COE Cybercrime Convention (2001) (“Offences related to infringements of copyright and related rights”) provides,

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

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

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

protection to attach, are nevertheless useful, presumably for enforcement purposes. While the February 2009 Egyptian government Submission indicates that there have been criminal convictions obtained without deposits, the law indicates deposit is mandatory, subject to administrative penalties for failure to deposit. As such, amendments should be sought to make the system (of registration and deposit) voluntary. While the government insists the requirement is not intended as a bar to copyright protection as such, to the extent failure to meet these requirements deny copyright protection and the ability to enforce rights, the Copyright Law should be amended to ensure registration and deposit are voluntary.

- **Criminal Remedies Are Too Low:** The Copyright Law contains very low criminal penalties which appear not to meet the TRIPS test of criminal penalties available that are sufficient to provide a deterrent to further infringements. Specifically, Article 181 provides a prison sentence of “not less than one month” and a fine of EL5,000 to 10,000 (US\$750 to \$1,500). The minimum sentence of “one month” imprisonment is important, 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 also appear insufficient to provide a deterrent. IIPA understands that the fine is supposed to be imposed “per work” or “per title,” and that in a couple of cases, this calculation method has been employed. Fines should be increased, and, for example, should be doubled for recidivists. As of now a recidivist receives the mandatory minimum jail term and the maximum fine.
- **Civil Remedies:** Nowhere in the Egyptian law is there a provision for adequate compensatory damages, as required by Article 45 of TRIPS. Only Article 179 of the Copyright Law provides for some “cautionary measures,” including “[c]alculating the revenue of [illegally] exploiting the work or performance or sound recording or broadcast, then distraint this revenue in all cases,” although it is unclear whether this is intended to cover all civil damages. TRIPS requires the courts to have the authority to award “damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity,” and in appropriate cases, suggests the availability of “recovery of profits and/or payment of pre-established damages,” even where the infringer did not knowingly (or with reasonable grounds to know) engage in the infringing activity. Egypt's law remains deficient on provision of adequate civil remedies.<sup>18</sup>
- **Ex Parte Civil Searches:** Article 179 of the Copyright Law does not expressly provide judicial authorities with authority to “adopt provisional measures *inaudita altera parte* (without notice to the defendant) where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed,” as required by TRIPS Article 50. The copyright industries are considering a test in the courts, but in the meantime, the law should be amended to expressly provide for the availability of this vital measure.

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<sup>18</sup>The following suggested text would provide a TRIPS-compliant framework for compensatory damages (with a placeholder for a proper determination of the appropriate statutory damages to make available):

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; or (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.

- **Remedy as to “Materials and Implements”:** Article 179(3) in the Copyright Law is TRIPS deficient, in that it provides for the seizure of “materials” that are “serviceable” “only” for infringement. TRIPS Article 46 requires that judicial authorities shall have the authority to “order that materials and implements *the predominant use of which has been in the creation of the infringing goods*” be (seized and) disposed of, and Article 61 provides, in appropriate cases, for the seizure, forfeiture and destruction of such materials and implements.
- **Government-Sanctioned Sell-Off of Pirated Products Violates TRIPS:** Article 180 provides that “the court may support a sequester with a view to republish the [allegedly infringing] work, sound recording, broadcasting program, as well as, exploiting or offer copies of it,” and “the accrued revenue shall be deposited with the court’s treasury until the original dispute is settled.” This provision diverges from accepted practice and is out of step with Article 46 of TRIPS, which requires Egypt to give the judicial authorities “the authority to order that goods they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or ... destroyed.”
- **Modern, TRIPS-Compatible Presumptions:** The law does not provide expressly for presumptions of copyright ownership (as required by TRIPS) or subsistence of copyright. Such presumptions are crucial to the ability of copyright owners to effectively exercise their rights. The law must be amended to comply with TRIPS.<sup>19</sup>
- **Ambiguous Protection for Pre-Existing Works/Sound Recordings:** There is no provision in the Copyright Law 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>
- **Requirement of Translation into Arabic:** Section 148 of the Copyright Law requires translation of all literary works into Arabic within three years of publication; if not, they are deemed to fall into the public domain. This is an extremely disturbing development. This unprecedented provision violates Egypt’s TRIPS and international obligations, is highly prejudicial to all right holders, including U.S. publishers, and must be deleted.
- **Broad Compulsory License:** Article 170 of the Copyright Law contains a compulsory license for copying and translating works. It is not limited to literary works in printed form, and apparently extends to computer programs and audiovisual works. Such a compulsory license is contrary to international law and would be devastating to the copyright industries if the Egyptian government allows for such practices. It must be fixed or deleted altogether. The Implementing Decree (Articles 4 and 5) failed to resolve this issue and leaves in place a Berne- and TRIPS-incompatible compulsory license.

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<sup>19</sup>The following formulation might, for example, be appropriate:

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

<sup>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.

- **Compulsory License Provision for Broadcasts:** Article 169 permits broadcasting organizations to use works without seeking authorization. This compulsory license should be deleted.
- **Article 171 Exceptions:** The law contains exceptions to protection which are broad and may be in questionable conformity with TRIPS Article 13. Preferably, Article 171 (on exceptions to protection) should include “chapeau” language limiting excepted acts to special cases, provided that such acts “do not conflict with a normal exploitation of the work [or object of neighboring rights]” and “do not unreasonably prejudice the legitimate interests of the author [or right holder],” in line with TRIPS Article 13. The Implementing Decree (Article 10) makes an attempt to limit the computer program exception in Article 171(3).
- **Restrictions on the Ability to Freely Contract:** Articles 150, 151 and 153 of the Copyright Law are restrictions on the ability to enter into freely-negotiated contracts, and should be abolished. Specifically, Articles 150 and 151 contain transfer provisions that impose undue burdens on the freedom to contract, while Article 153 is an unreasonable restriction on the ability for an author to enter into arrangements that might include future works under a private contractual agreement.
- **Broad Moral Rights Provision:** The moral rights provisions in the Copyright Law 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 Copyright Law. The Article also provides that “amendment in translation shall not be regarded as infringement, unless the translator fails to indicate points of deletion or change, or abuses the reputation and status of the author.” This would violate Berne Article 8, as it would impinge on an author’s exclusive translation right.
- **Performers’ Moral Rights Provision:** In Article 155(1), the performer’s right of attribution should permit the omission of the performer’s name, if such is dictated by the manner of the use of the performance, and Article 155(2) should qualify the kinds of changes made by a right holder that would be objectionable (i.e., changes that would be prejudicial to the performers’ reputation), and provide that it is not prejudicial to the performer for right holders to make modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer.
- **Exclusive Rights for Producers of Audiovisual Works:** Article 177(5) clearly should not apply to sound recordings and therefore the word “audio” should be stricken from this article. Also, the panoply of exclusive rights for producers of audiovisual works is unclear. The producer is defined as “the natural or legal entity who produces the ... audiovisual work, and undertakes the responsibility of such achievement” [Article 138(11)]. Article 177(5) provides that the producer “shall be considered as representative of the authors and successors in exploiting this work, without prejudice to the rights of the author of literary or musical works, unless otherwise agreed upon in writing,” and “the producer shall be considered as the publisher, and will have the rights of the publisher ....” Egypt should reverse this presumption, such that the producer of audiovisual works shall be presumed to have the exploitation rights unless otherwise agreed upon in writing.<sup>21</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.

The Implementing Decree to the 2002 Law created some additional issues. For example, 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 could, if abused, have the unintended but certain

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<sup>21</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.”

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

## **GENERALIZED SYSTEM OF PREFERENCES**

Egypt enjoys preferential trade benefits under the Generalized System of Preferences trade program. Among the criteria the President must take into account in determining whether a country should continue to be designated as a GSP beneficiary country are “the extent to which such country is providing adequate and effective protection of intellectual property rights,” and “the extent to which such country has assured the United States that it will provide equitable and reasonable access to the markets ... of such country.” 19 USC 2462(c)(4) and (5). During the first eleven months of 2012, nearly US\$55.4 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or more than 1.9% of Egypt’s entire imports into the U.S.<sup>22</sup> The Egyptian government needs to continue to endeavor to meet the adequate and effective test under the statute to remain eligible to receive favorable treatment under the GSP program.

## **TRAINING AND PUBLIC AWARENESS**

Training and public awareness remains an important part of sensitizing officials to the harms of piracy and educating the public as to the positive effects of protecting intellectual property in Egypt. In 2012, the U.S. Chamber of Commerce in Egypt held several meetings with various business owners and representatives from the U.S. State Department in an attempt to address IPR issues. Software companies have engaged by 1) providing product identification training for the Copyright & Artistic Works Investigation Unit of MOI and ITIDA officials during April and May, 2012; 2) participating in “Consumer Action Day,” in which journalists gave extensive coverage on IPR-related issues to increase awareness for end-users of copyrighted products; and 3) participating in IPR awareness sessions for students and universities during February and March 2012, and for software partners in October 2012. In 2013, software companies plan to provide copyright training, in the form of product identification training, for the Copyright & Artistic Works Investigation Unit of MOI and ITIDA in March 2013.

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<sup>22</sup>During 2011, more than US\$48.6 million in imports to the U.S. from Egypt enjoyed duty-free treatment under the GSP Program, or more than 2.5% of Egypt’s entire imports into the U.S.