

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2001 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY¹

IIPA recommends that Kuwait be elevated to the Priority Watch List, due to worsening piracy (pirate CDs and videos with new movies not released in Kuwait, sale of “smart cards” that allow unauthorized viewing of satellite channels, etc.) and the failure to implement and enforce the 1999 copyright law to provide a deterrent to such piracy. While IIPA recognizes the Kuwaiti government’s passage of a new copyright law in late 1999, along with commencement of enforcement actions in early 2000 (including those against pirate resellers and unauthorized end-users of business software as well as several video duplication plants) as positive steps, unfortunately, promised amendments needed to bring the law into compliance with TRIPS, along with sustained raiding needed to provide a deterrent to further infringement, have not been forthcoming. The failure of Kuwaiti authorities to enforce the law to date leaves Kuwait as one of the worst pirate countries in the Gulf region. The seriousness of the piracy situation in Kuwait is summed up by two recurring anecdotes: one, pirate street vendors continue to set up stalls right in front of legitimate video retail outlets; and two, street vendors sell their illegal pirated cassettes right in front of police cars without fear of any sanction.

The Kuwaiti Copyright Law was passed into law by the National Assembly on December 14, 1999 and went into effect on February 9, 2000. The law provides the basis for enforcement against rampant piracy in Kuwait, but remains TRIPS-incompatible in certain respects, and must be fixed or Kuwait will remain in violation of its international obligations. The Kuwaiti Ministry of Information carried out its first raids against video duplication and software piracy in January and February 2000, and there was some additional raiding against software piracy in 2000. Nonetheless, concerted and sustained raiding must continue against piracy of all copyrighted goods; without such an approach, Kuwait will undoubtedly remain largely a pirate market with unacceptably high piracy rates. Publicized raids, followed by fines and punishments meted out on infringers, would go a long way to reducing the piracy levels. Industry estimates that trade losses to the U.S. copyright-based industries due to copyright piracy rose to \$23.2 million in 2000.

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

ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1995 - 2000

INDUSTRY	2000		1999		1998		1997		1996		1995	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	8.0	85%	8.0	85%	7.5	85%	7.0	70%	7.0	70%	7.0	70%
Sound Recordings / Musical Compositions ²	3.0	50%	1.0	45%	3.0	50%	3.0	50%	2.5	46%	NA	NA
Business Software Applications ³	9.7	79%	10.5	81%	5.3	88%	5.9	88%	10.1	90%	6.7	91%
Entertainment Software ⁴	NA	NA	3.1	82%	3.7	85%	3.5	85%	3.5	85%	3.5	85%
Books	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	23.2		25.1⁵		22.0		21.9		25.6		19.7	

COPYRIGHT PIRACY IN KUWAIT

Kuwait Remains a Pirate Market, Despite Some Enforcement in Early 2000

The passage of the new Copyright Law in December 1999 and raids by the Ministry of Information in January and February 2000 provided hope that sustained enforcement was beginning in Kuwait, after years of unfettered piracy. Unfortunately, the raiding largely stopped (except for some raiding against business software piracy), and the law has not been properly implemented. Hence, Kuwait remains a pirate market, replete with:

- pirate video cassettes being sold openly in the streets for 1 KD with complete impunity and often in front of retail outlets and next to police cars.
- pirate release of VCDs of movies showing theatrically (called "pre-release" as these movies are not yet authorized for video release) and audio CDs still being offered to Kuwaiti wholesalers at low prices from sources in China or Southeast Asia, flooding Kuwaiti markets;
- parallel imports of large quantities of U.S. motion pictures in digital formats such as VCD, LaserDisc and DVD, many coming from Asia;

² The loss figures reported for music and sound recordings are U.S. only. The percentage figures represent the overall piracy level for music and sound recordings (including Arabic, Indian and international repertoire). The piracy level for international repertoire was 70% in 1999, up from 65% in 1999 (while Indian repertoire piracy is over 90%).

³ BSA loss numbers for 2000 are preliminary. In IIPA's February 2000 Special 301 submission, BSA's 1999 loss figure of \$9.4 million was also reported as preliminary, while no level figure was reported at that time. These numbers were finalized in mid-2000, and are reflected above.

⁴ IDSA estimates for 2000 are preliminary.

⁵ In IIPA's 2000 Special 301 submission, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait were over \$24.0 million. Because of the adjustment to reflect BSA's final 1999 loss statistics (see footnote 3), estimated total losses to the U.S. copyright-based industries in Kuwait in 1999 are raised to \$25.1 million.

- hardware to play Zone 1 DVDs (not authorized for sale in Kuwait) that has become readily available;
- book piracy in Kuwait dominated by unauthorized copies originally intended for the Indian market, and some pirate photocopying in universities, mainly if books do not arrive on time;
- pirate videocassette operations well known to us and the Kuwaiti authorities, that duplicate, distribute and supply pirate and “pre-release” videos;
- pirate retail shops selling under the counter or on demand from stocks sold door to door:
 - all types of unauthorized compilation CD-ROMs, including copies of top-end engineering programs, video games, and routine business software applications available openly on the streets;
 - an *a la carte* menu of free preloaded software suiting the customer's preferences, with purchase of a new computer;
 - pirate videos (including in the Farwamia and Fahaheel districts in Kuwait City), selling movies for 1KD (US\$3.50) per cassette (and advertising with pirate movie posters for movies not even released in Kuwait or on videocassette);
 - pirate sound recordings of international repertoire (95% on audiocassette, reproduced locally), including pirate CDs (being offered to Kuwaiti wholesalers for as little as US\$1.20) from CD-Rs locally replicated or imported, mainly from Pakistan (which has recently replaced Asia a principal source for pirated CDs)..
- business software end-user piracy (local sources indicate that both government and the vast majority of leading businesses, for example, the largest banks, trading houses and service sector companies, are highly pirate and uninterested in licenses) and hard-disk loading piracy, making legitimate market size only a fraction of that of neighboring markets of a similar size (e.g., UAE);⁶
- piracy of entertainment software (including videogame console CDs, cartridges, personal computer CDs and multimedia products);

It should be noted that none of these forms of piracy is unique to Kuwait; indeed, other countries in the Gulf have all suffered from similar phenomena at one point or another. Those countries, unlike Kuwait, have for the most part, recognized the importance of strong copyright protection and made the decision to enforce copyright in the market. Kuwaiti authorities, if they have the will to do so, can easily commence a sustained enforcement campaign, running and publicizing raids, seizing production equipment and pirated copies that are ruining Kuwait's market, and fining and (where warranted) imprisoning known commercial pirates. Such a sustained enforcement campaign is virtually guaranteed to lower piracy levels in Kuwait, improve market conditions for legitimate copyright industries (which in turn look to contribute to the Kuwaiti economy by providing tax revenues and other benefits), and address the main concerns in this report. The legitimate copyright companies, furthermore, will cooperate with censorship authorities and adhere to standards set in Kuwait, in direct contrast to unregulated piracy operators who encourage the illegal distribution of uncensored product. IIPA

⁶ Kuwait has an estimated installed base of more than 162,000 personal computers. A paltry 2,000 legal operating systems were sold with the 35,000 computers were sold in Kuwait between September 1999 and September 2000.

encourages and urges the Kuwaiti government to take the steps Kuwait's neighbors have already taken or are in the process of taking.

Rampant Smart Card Piracy Decimates the Legitimate Market for Audiovisual Works in Kuwait

In addition to the more traditional forms of piracy noted above, Kuwait's market suffers from a pervasive and highly damaging form of piracy: wide scale smart card and CAM ("Conditional Access Module") piracy in which end-users buying the smart cards may watch popular satellite channels without a legal subscription. Pirates in Kuwait openly sell illegally hacked smart cards and CAMs in the satellite stores at severely discounted prices, giving illegal access to premium channels for as little as 10 KD (around \$33). These pirates engage in sophisticated hacking techniques, using computers, smart mice, specialized computer programs, and select websites, in order to upload onto smart cards the circumvention keys necessary to provide illegal access to premium channels. The entire process takes as little as four minutes and customers literally line up in queues to receive the illegal subscription. The pirates also openly sell hacked CAMs which allow consumers to view all of the premium movie channels without paying a subscription price. Revenues for the satellite broadcast platforms have fallen drastically (over 30%), resulting in losses of millions of dollars. Again, as with the other more traditional forms of piracy noted above, the problem of smart card piracy can be sent underground if the Kuwaiti government decides it has the will to attack this brand of piracy. Although the Kuwait government has taken some limited actions against the satellite pirates, there has yet to be one satellite pirate charged with violating the copyright law. In the interim, illegally coded smart cards and CAMs are sold openly and with impunity.

COMMENCEMENT OF COPYRIGHT ENFORCEMENT IN KUWAIT

Raiding Not Sustained, Infringers Let Off Without Fines or Other Penalties

The year 2000 began promisingly enough, with raiding activity from the Ministry of Information aimed at pirate software resellers, a couple of companies loaded with pirate software, one pirate end user (unauthorized user of software in a business) at the end of the year, pirate video duplication plants, and several shops engaged in smart card piracy. The raids netted some seizures of pirates copies of videocassettes (over 200,000) and software (worth U.S.\$2.9 million), along with videocassette recorders (110) and several computers involved in the piracy. In the case of the software reseller raids, no one was fined and no store was shut down, and in the case of the companies raided, once the pirated software was removed from the computers seized, those computers were returned to the pirates. In the case of the video duplication plant raids, there has yet to be a single pirate charged with violation of the copyright law. None of the seizures have resulted in pirates being criminally charged and subsequently applied with deterrent penalties.

Unfortunately, these raids represent the total Kuwaiti enforcement activity in the year 2000, notwithstanding the fact that industry representatives have continuously provided Kuwaiti authorities with numerous detailed leads about piratical activities (whether video duplication or end-user piracy of software in businesses). In addition, despite numerous attempts to get the Kuwaitis to fine or otherwise impose penalties on the pirate sites raided, the Kuwaiti government has demonstrated time and again its unwillingness to take follow-up action against the targets of the initial raiding. Indeed, industry representatives have been told by the Ministry of Information that the it considers its work done once raids are completed. At the same time,

certain eager investigators in the Ministry of Information have indicated their willingness to conduct more raids and have asked for additional training to answer their technical questions about Internet sites and how smart card piracy of satellite signals works.

Overall, the paltry level of raiding and the Kuwaiti government's attitude toward enforcement cannot adequately address the problem of rampant piracy in Kuwait. Even the raids run by the Ministry of Information required colossal efforts on the parts of industry representatives, and Ministry of Information officials refused to mete out deterrent fines against blatant pirates. In some cases, the ministry even returned seized equipment to the pirates. These inadequate efforts on the part of the Kuwaiti government over the past year have resulted in piracy levels shooting back to the high levels that existed before the passage of the copyright law.

Establishment of Inter-Ministerial Task Force on Enforcement a Positive Development

One positive development in 1999-2000 was the establishment of an inter ministerial task force to tack the piracy problem in Kuwait. The task force is made up of the Ministry of Information (Ghanas Al Adwani), the Ministry of the Interior (the police) (Lieutenant Colonel Mahmoud Al Tabakh), the Ministry of Commerce (Abdullah Al Kalaf), the Public Prosecutors' Office (Usama Al Babteen), and Customs (Mohamed Al Sulaiti). While IIPA sees the establishment of this task force as a positive development with the potential to bring about coordinated enforcement efforts necessary to deter piracy, it appears that to date the group has not effectively revved up enforcement activities, and may in fact be hindering enforcement in Kuwait.

One problem caused by the group is the apparent bureaucratizing of enforcement in Kuwait. For example, Director Ghanas recently informed industry that the Ministry of Information may no longer raid street vendor pirates, but may only check videocassettes seized by the police to verify that they are pirated. Instead, industry representatives have been told that actual raiding comes under the responsibility of the Ministry of Interior (the police) under Lieutenant Colonel Mahmoud Al Tabakh. Once a raid has been conducted, the public prosecutor apparently cannot move forward without a report from the Ministry of Information, and as the Ministry has been extremely slow in producing these reports, most cases are stalled indefinitely. IIPA urges the task force to work together to assist industry in effectively enforcing copyright in Kuwait, rather than using the force to erect roadblocks that would further hinder enforcement efforts. The task force's efforts should aim at streamlining, not hindering, the processes of raiding, seizing pirated product along with materials and implements used in the infringement, evidence-gathering for prosecutors, and actual prosecutions of those caught in the act of commercial piracy.

Some of the key elements agreed to by the task force upon its formation in late-1999 (and progress made to date on these initiatives) include:

- technical training for MOI, police and customs on effective copyright enforcement, namely, how to run investigations and raids and how to identify pirate product (a training seminar for the Ministry of Information, the Ministry of the Interior (Police) and the Public Prosecutors' Office was held on February 12, 2001, and one was held for Customs on February 13); over 70 officials have been trained on the means of effectively enforcing copyright;

- a training for judges and lawyers on the importance of copyright protection and deterrent penalties (this training has not to our knowledge yet been arranged);
- active government press statements warning pirates of its intent to enforce the copyright laws, highlighting the consequences to be faced for continuing to violate the copyright law (including a TV ad campaign) (the Ministry of Information released an ad in the papers at its own expense on August 2, 2000, warning against illegal copying of copyrighted works, but has not allowed industry to re-release the ad, even at industry's expense);
- the initiation of at least three key and comprehensive raids against major pirates, including retail outlets and supporting duplication sites (as noted above, several enforcement actions were commenced in 2000, but there has been no follow-up);
- systematic inspections of all shops that sell copyright materials, including video and audio shops, computer shops and game retailers, booksellers, and organizations that may engage in the unauthorized use of copyrighted materials (including business software); these inspections should be carried out at least once every six months or earlier in specific cases if necessary, at any time, day or night, to introduce the element of surprise in conducting such unannounced inspections;
- publication of the raid results, including who was raided, what was seized, and the possible penalties to be levied, including in the Kuwait-based and international media;
- imposition of deterrent fines and penalties, including imprisonment and heavy fines, in accordance with Section 42 of Kuwait's copyright law.

Procedural and Market Access Barriers Remain

There remain some procedural barriers and market access restrictions that have made operating in Kuwait burdensome. For example:

- Before the passage of the copyright law, the motion picture industry has over the years resorted to antipiracy protection from the Ministry of Information's censorship department by asking that it verify copyright authorization before giving censorship approval for a title. Unfortunately, the censorship fee of KD20 (U.S.\$65) per title is a heavy burden that distributors face in trying to market and protect their products. The censorship fee should be sharply reduced and limited to new titles only.
- The motion picture industry's television divisions have been pressured by the Undersecretary of the Ministry of Information in Kuwait to cease direct sales to Kuwait TV, and instead to hire Kuwaiti agents as middlemen. This attempt to control the sales practices of the motion picture industry in Kuwait constitutes an unreasonable restraint on the ability of the motion industry to enter into voluntary contractual or business agreements.
- An unfair import duty has been imposed on business software; these import duties should be done away with immediately.

COPYRIGHT LAW AND RELATED ISSUES

Kuwait Failed to Introduce Promised Amendments to Fix TRIPS Violations in Copyright Law

While IIPA commends the Kuwaiti government, including the Amir himself and the National Assembly, for taking the badly needed step of passing the Kuwaiti Law on Intellectual Property Rights (1999) ("Copyright Law") in December 1999 (effective February 9, 2000), IIPA remains concerned that the Kuwaiti government has failed to introduce promised amendments in the 2000 Assembly sessions to fix TRIPS deficiencies and other ambiguities, including those noted below. Without amendments, Kuwait's law will remain in violation of TRIPS. In particular, IIPA notes the following non-exhaustive list of deficiencies or ambiguities in need of explicit clarification or amendment by the Kuwaiti government (note: IIPA does not address in this non-exhaustive list "in-practice" enforcement deficiencies, as those are addressed, albeit non-exhaustively, in the previous sections of this report):

Substantive Deficiencies

- **Innovativeness Requirement for Works?** Article 1 of the Copyright Law provides protection to authors of "innovative" works; such an "innovativeness" requirement is inconsistent with TRIPS Article 9.1. It is our understanding that the word used in Article 1 of the Kuwaiti Copyright Law means something akin to "innovative" or "new." Berne Convention Article 2 does not limit the works to be protected to those that are "innovative" or "new," and, for example, provides that the expression "literary and artistic works" include "every production in the literary, scientific and artistic domain. . . ." The term "innovative" in the Copyright Law should simply be replaced by the word "original."
- **Exclusive Rights Limited to Financial Exploitation?** Under the Copyright Law, the right holder is given the exclusive right "to exploit his writing financially," in express violation of TRIPS Article 9.1, which requires that the exclusive rights be granted to an author regardless of whether the exploitation is financial in nature or not. The Berne Convention, as incorporated by reference into TRIPS, does not limit the exercise of exclusive rights to exploitations carried out for financial gain. By adding the word "financially" to Article 4 of the Copyright Law, Kuwait appears to limit the ability of an author to authorize or prohibit the unauthorized use of works when there is no financial gain, in violation of the TRIPS Agreement. The word "financially" should be deleted from Article 4.
- **Unclear Retroactive Protection.** Article 44 of the Copyright Law makes the law applicable to works (for which there is point of attachment under Article 43) that "exist on the date on which [the Copyright Law] shall enter into force," making it unclear whether the law provides full retroactive protection for works (including sound recordings), performances and broadcasts, consistent with TRIPS Article 9.1 (incorporating Berne Convention Article 18 into it) and 14.6. Kuwait must clarify that works (including sound recordings), performances and broadcasts are protected retroactively with their full TRIPS-compatible terms of protection (TRIPS articles 9.1 and 14.6).
- **Protection for Sound Recordings.** IIPA understands that protection for sound recordings has been effectuated by protecting "audio-visual broadcasting works" in Article 2(6) of the Copyright Law (also translated as "work[s] prepared for radio" in the Kuwaiti

National Assembly's "Explanatory Memorandum to the Draft Law on Intellectual Property Rights") as the functional equivalent of what is understood in the TRIPS Agreement as a sound recording or phonogram. Protection of sound recordings/phonograms (which are not specifically mentioned by those names in your law) as audiovisual broadcasting "works" or as radio "works" under the Berne Convention means that Kuwait would comply with its TRIPS Article 14 obligations. IIPA seeks confirmation that the foregoing is a correct interpretation of the Copyright Law of Kuwait.

- **Unclear Panoply of Exclusive Rights for Sound Recordings.** IIPA seeks confirmation that Article 25 of the Copyright Law was not meant to apply to sound recordings/phonograms. Article 25 provides that the producer of a "work prepared for the radio . . . shall be considered as a publisher and shall be entitled to all the publisher rights," which, unless "publisher rights" refers to all the exploitation rights of Article 4 of the Kuwaiti Copyright Law, including those specifically enumerated in Article 5, would be inconsistent with TRIPS Articles 14.2 and 14.4, which requires member countries to provide producers of phonograms with at least the rights to authorize or prohibit "the direct or indirect reproduction of their phonograms" and "the commercial rental to the public of originals or copies of their [phonograms]."
- **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works.** The panoply of exclusive rights for producers of audiovisual works in Article 25 of the Copyright Law is unclear. The Article provides that the producer "shall be considered as a publisher and shall be entitled to all the publisher rights," and also that

[t]he producer shall act -- during the agreed term of exploitation -- on behalf of the authors of the work and their respective successors. He shall negotiate -- on their behalf -- the agreements on presenting and exploiting the work, without prejudice to the rights of the literal and musical works authors, unless if it shall be otherwise agreed upon in writing.

Kuwait 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. Vesting all economic rights in an audiovisual in the producer significantly enhances the ability to commercialize works in all release windows and improves the economic viability of an industry, which benefits all groups that contribute to the success of an audiovisual work.

- **Unclear National Treatment for WTO-Member Works and Sound Recordings.** Kuwait must confirm that Article 43 of the Copyright Law binds Kuwait to protect works (including sound recordings) of "international conventions implemented in the State of Kuwait," including works of WTO member states, and that such protection is provided as required under the TRIPS Agreement, namely, in line with the principle of national treatment. IIPA understands, but seeks confirmation, that by the first clause of Article 43, which states, "[w]ithout prejudice to the provisions of the international conventions implemented in the State of Kuwait," Kuwait considers the TRIPS Agreement to be self-executing in Kuwait. The explanatory memorandum contains a statement with regard to Article 43 which does not appear in the law proper, namely, "[t]he writings of foreign authors, nationals of countries which deal similarly with the writings of Kuwaiti authors" shall be protected under the law. This appears to propose a reciprocity provision, which would place Kuwait in violation of its obligation under the WTO to protect works and sound recordings under the principle of national treatment. The fifth excerpt regarding Article 43 in the explanatory memorandum is irrelevant to the question of how WTO member works are to

be treated in Kuwait, but might be relevant to how Kuwait protects works of non-WTO, non-WIPO members. To ensure that the law is not ambiguous on this point, references to this fifth clause of Article 43 in the explanatory memorandum should be deleted.

- **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Etc.** Article 43 of the Kuwaiti Copyright Law fails explicitly to provide point of attachment for: 1) Kuwaiti or WTO members' performers or broadcasters; 2) foreign unpublished works (performances or broadcasts); and 3) works of WTO members who are not members of WIPO. While, as noted above, IIPA seeks confirmation that Kuwait considers the TRIPS Agreement as self-executing, which would mean Kuwait does protect WTO member performers and broadcasters, it would be highly preferable to expressly provide such point of attachment in the law, to avoid possible confusion among jurists. If TRIPS is not self-executing in Kuwait, then Kuwait is in violation of its TRIPS obligations, specifically, Articles 9.1, 14.1, 14.3, and 14.5-14.6.
- **Inadequate Term of Protection for Computer Programs.** The Kuwaiti Copyright Law fails to provide computer programs with at least a TRIPS-compatible term of protection. By doing so, the law also fails to comply with TRIPS Article 10.1, which provides that computer programs must be protected "as literary works" as that term is understood in the Berne Convention (1971). Article 7(1) of the Berne Convention, incorporated by reference into TRIPS through Article 9.1, deals with "Term of Protection," and subsection (1) of that Article, subtitled "Generally" (and understood to apply to "literary" works), requires protection for the "life of the author" plus fifty years after his death. Article 17(2)(3) of the Kuwaiti Copyright Law is incompatible with TRIPS in this regard.
- **Inadequate Term of Protection for Compilations of Data.** Article 17(2)(3) of the Kuwaiti Copyright Law provides for a term of protection of "fifty years as from the end of the calendar year during which the work was published" for "database works," making the provision incompatible with TRIPS Article 9.1, which requires that the term of protection for works for which there is an author be at least "the life of the author and fifty years after his death" and TRIPS Article 10.2, which provides that "[c]ompilations of data or other material . . . which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."
- **Berne-Incompatible Compulsory License.** Article 14 of the copyright law amounts to an unacceptable compulsory license in violation of the Berne Appendix (and TRIPS Article 9.1).
- **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right.** The moral rights provisions exceed what is provided for in Article 6*bis* of the Berne Convention, and arguably nullify the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1.
- **Overly Broad Exceptions.** Several exceptions, including a "personal use" exception, arguably violate TRIPS Article 13, by failing to meet the well-established "tripartite" test of the Berne Convention. At least, Kuwait must reexamine this exception to ensure that the exception is limited to a single analog copy, and would not permit the use of digital copies in a way that would conflict with a normal exploitation of the work or unreasonably prejudice the legitimate interests of the right holder.
- **Lack of Express Rental Right for Sound Recordings and Computer Programs.** There is no express rental right for sound recordings and computer programs; IIPA seeks clarification

from the Kuwaiti Government that Article 4, clause 2, does in fact include a TRIPS-compatible rental right.

Enforcement Deficiencies (On Their Face)

- **Lack of Express Provision for *Ex Parte* Civil Searches.** The Kuwaiti Copyright Law does not expressly provide for civil *ex parte* search orders. TRIPS Article 50 requires that Kuwaiti judicial authorities have the authority “to adopt provisional measure *inaudita altera partes*” (outside the hearing of the defendant).
- **Insufficient Remedy As to “Materials and Implements,” in Violation of TRIPS Articles 61.** Article 42 of the Kuwaiti Copyright Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, requiring criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.”
- **Inadequate Criminal Remedies.** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately U.S.\$1,600) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half]” for recidivists”), may be incompatible with TRIPS Article 61, which requires remedies “sufficient to provide a deterrent,” unless such maximums are regularly meted out.
- **Need to Penalize End-User Pirates.** In October 2000, the Ministry of Information, in association with the District Attorney’s office, conducted a criminal search of an end user; the company was unable to produce licenses for the software used. The evidence gathered was used to file a criminal complaint; unfortunately, the case is still pending because the Ministry of Information has not delivered the necessary report to the office of the Public Prosecutor. IIPA looks forward to the speedy resolution of this case, and to the imposition for the first time of criminal penalties on an end user, which would demonstrate, in practice, that Kuwait criminalizes the intentional unauthorized use or copying of computer programs in a business setting, as required by TRIPS.
- **Non-Transparent Border Measures.** The Kuwaiti Copyright Law does not explicitly provide, for example, that competent authorities, administrative or judicial, are given the authority to order the “suspension by the customs authorities of the release into free circulation” of infringing goods, a TRIPS requirement. Kuwait must confirm that its laws (either the Copyright Law or separate laws) are compatible with TRIPS Articles 51-59 regarding special requirements related to border measures.

The Kuwaiti government reportedly plans to submit amendments to address not only TRIPS issues but other operational issues they have encountered that might require a legislative fix. Such a package was reportedly to be submitted to the Cabinet at the end of 2000, but IIPA has received no further word on the filing of amendments. It is hoped that the list of specific issues provided above will spark the amendment process, and that the Kuwaiti government will take seriously its immediate international obligations by fixing the law in line with the comments provided herein.

WIPO Treaties

In addition to addressing the deficiencies laid out above, Kuwait should take the opportunity presented by amendments to implement the WIPO “Internet” treaties, the WIPO

Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). As Kuwait, like the rest of the GCC countries, looks to the future post-oil economy, its new crop of leaders must surely recognize that the development of Kuwait's information economy will be key to its sustained economic development, and implementation of the treaties is essential to the establishment of the proper legal framework for a sound digital economy. The WIPO treaties require effective legal remedies against the circumvention of technical measures used by content owners to protect their property from theft and mutilation. This legal framework that permits content owners to provide for the security of their property online is essential for successful electronic commerce.