

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Kuwait should be elevated to the Priority Watch List.

Overview of Key Problems: Kuwait ranks worst in the Gulf region for retail optical disc piracy; most industry sectors report piracy levels well in excess of 50%. Such piracy levels reveal an enforcement system which cannot on its face be said to meet the requirements of TRIPS. Except for a couple of raids against business software piracy, and some aggressive activity to curtail cable piracy, virtually no enforcement actions were taken against piracy in 2003 despite specific industry requests to do so. An Interministerial Task Force formed in 2002 has had no coordinating effect on enforcement activities. The Kuwaiti government is aware of shipments of pirate materials coming into Kuwait and the locations of suspected warehouses and pirate retailers, but has done nothing, leaving tens of thousands of pirated products to be freely sold on the streets. Kuwait's law remains TRIPS-incompatible and the government has not indicated any intention to fix the law or further modernize copyright protection. The record industry notes the October 2003 opening of a local Virgin Megastore, which should give authorities yet another reason to fight piracy. On the other hand, because of the severity of the audiovisual piracy problem, legitimate distributors of filmed entertainment in Kuwait are seriously questioning their continued presence in the country. Kuwait just signed a Trade and Investment Framework Agreement (TIFA) with the United States and wants a Free Trade Agreement (FTA). Such negotiations should not commence without the Kuwaiti government taking actions to demonstrate its seriousness about eliminating piracy of copyrighted materials from the country.

Actions to be taken in 2004

- Make public declarations at the highest level of the Kuwaiti government that piracy will not be tolerated in Kuwait.
- Run concerted and sustained raids against piracy of all copyrighted goods, including, in conjunction with police, against residences and warehouses being used as sources of piracy, and including raids against corporate end-user piracy of business software.
- Publicize raids in order to achieve a deterrent effect.
- Prosecute infringers (including distributors, resellers, end-users, dealers in unauthorized "smart cards," producers, etc.), resulting in deterrent sentences, including jail times (not suspended but actually served) and severe fines.
- Amend the copyright law to bring it into line with the TRIPS Agreement, establish an adequate legal framework for electronic commerce by protecting copyright in the digital environment, and join the WIPO "Internet" treaties.

For more details on Kuwait's Special 301 history, see IIPA's "History" appendix to this filing.¹ Please also see previous years' country reports.²

¹ <http://www.iipa.com/pdf/2004SPEC301HISTORICALSUMMARY.pdf>.

KUWAIT
ESTIMATED TRADE LOSSES DUE TO PIRACY
(in millions of U.S. dollars)
and LEVELS OF PIRACY: 1999 – 2003³

INDUSTRY	2003		2002		2001		2000		1999	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Motion Pictures	12.0	95%	10.0	95%	9.0	85%	8.0	85%	8.0	85%
Records & Music ⁴	3.0	55%	3.4	64%	NA	70%	3.0	70%	1.0	65%
Business Software ⁵	NA	NA	4.7	73%	4.5	76%	6.6	80%	10.5	81%
Entertainment Software	NA	95%	NA	NA	NA	85%	NA	NA	3.1	82%
Books	2.5	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS⁶	NA		20.6		16.0		20.1		25.1	

COPYRIGHT PIRACY IN KUWAIT

Kuwait Remains a Pirate Market for Optical Discs

Most optical discs of copyrighted materials sold in Kuwait are pirated. The motion picture industry continues to report a 95% piracy rate for its materials, and all industry sectors reporting optical disc piracy data report piracy levels at well above 50%. Pirate optical discs (DVDs, VCDs, CDs, CD-ROMs and “burned” CD-Rs) have become the dominant carrier in the Kuwaiti market and hundreds of thousands of units of pirated movies, music, business software, and entertainment software are openly sold on the streets and in the *souqs*. Large quantities of uncensored, pirate VCDs and DVDs (many of which have not yet been released in the theaters or on video) are flooding Kuwait from Asia,⁷ and home-produced “burned” CD-Rs, are becoming more widely available. Audio CDs of international repertoire are sold by Kuwaiti wholesalers for as little as US\$1.20, and are mainly sourced from Pakistan. Unauthorized compilation CD-ROMs, including copies of top-end engineering programs, entertainment software, and routine business software applications, are openly available on the streets. Cartridge-based entertainment software is also widely available in the market, mostly imported from Asia. Pirates even blatantly use entertainment software publisher brands and trademarks in their advertising.

Other problems include corporate end-user piracy (unlicensed use of software by a business) and the illegal loading of an *à la carte* menu of business software tailored to the customer's preferences onto a hard disk prior to sale (so-called “hard-disk loading” piracy). In addition, some individuals in Kuwait continue to illegally retransmit television programming,

² <http://www.iipa.com/countryreports.html>.

³ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2004 Special 301 submission at <http://www.iipa.com/pdf/2004spec301methodology.pdf>.

⁴ The piracy level figures from 1999-2002 are for “international” repertoire. The overall piracy level for the same period remained roughly 50%.

⁵ BSA's 2003 piracy statistics were not available as of February 13, 2004, and will be made available in the near future and posted on the IIPA website at <http://www.iipa.com/>. BSA's statistics for 2003 will then be finalized in mid-2004 and also posted on the IIPA website. BSA's trade loss estimates reported here represent losses due to piracy which affect only U.S. computer software publishers in this country, and differ from BSA's trade loss numbers released separately in its annual global piracy study which reflect losses to (a) all software publishers in this country (including U.S. publishers) and (b) losses to local distributors and retailers in this country.

⁶ In IIPA's 2003 Special 301 report, IIPA estimated that total losses to the U.S. copyright-based industries in Kuwait were \$15.9 million. IIPA's revised loss figures are reflected above.

⁷ For the entertainment software industry, pirate copies of Nintendo's GameBoy Advance[®] games are all apparently imported from Asia.

including U.S. motion picture titles, to residences without authorization of the right holders (“cable piracy”).

In contrast to some of the other industry sectors, book publishers report a modest degree of success in the Kuwaiti market. U.S. publishers report a high ratio of legitimate sales to known student adoptions at universities and are pleased at the relatively transparent ‘adoption’ (procurement/purchase) processes in universities in Kuwait. University purchasing departments tend to publicize lists of adopted textbooks and numbers of texts required, allowing booksellers to bid for the supply contracts, providing a straightforward mechanism for tracking legitimate sales by publishers. Nonetheless, some book piracy issues remain in Kuwait. Piracy of English language teaching materials continues unabated, and editions of academic texts intended for the market in India pour across the borders.⁸ In addition, publishers report the presence of pirate editions coming into Kuwait from Iran and Jordan. Publishers also report some continued illegal photocopying in universities.

COPYRIGHT ENFORCEMENT IN KUWAIT

The Kuwaiti government carried out very little enforcement activity against copyright piracy in 2003. Sparse raiding was carried out by the government only after immense pressure was applied by the industries, the U.S. government, and local Kuwaiti companies. Kuwaiti Customs carried out three raids on retail outlets in Kuwait city and seized a total of 3,000 audiocassettes,⁹ and intercepted 10 shipments at the airport which resulted in the total confiscation of 26,010 pirated audio CDs. Most CDs seized at the airport came by plane from Indonesia. The government also took some enforcement actions in 2003 involving piracy of business software and cable piracy. The Business Software Alliance was successful in securing 12 reseller raids from the Ministry of Information in 2003.¹⁰ The Ministry of Information also conducted three inspections of companies in 2003 to determine whether there was corporate end user piracy of business software (the inspections apparently revealed no illegitimate software usage, but the actions were non-transparent).¹¹ The Kuwaiti authorities raided 15 cable pirate operations in 2003, seizing all supporting dishes, decoder boxes, and cables; these cases were transferred to the public prosecutor for criminal litigation.

The rare cases that have been brought to court have not gone particularly well. The industries were happy to report one conviction for copyright piracy in 2002, but the fine was the paltry maximum of 500 Kuwaiti Dinars (US\$1,700), and no imprisonment was imposed – hardly a deterrent to further infringement. The Kuwaiti courts did not sentence any violator to prison nor close any shop or company dealing with illicit software in 2003. One case against one of the largest commercial groups in Kuwait for unlicensed software usage remains pending after three years.

⁸ Publishers are growing increasingly concerned about possible transshipment of pirated editions of books from India to neighboring countries such as Bahrain and Iraq.

⁹ It remains the case that the Mojil complex at Abdullah Mubarak Street in Kuwait is replete with piracy and should be cleaned up.

¹⁰ See, e.g., *Kuwaiti raid on software pirates*, Feb. 27, 2003 (Kuwaiti Ministry of Information raided two resellers in Kuwait City and seized three PCs loaded with pirated software); and *Kuwaiti authorities raid four companies dealing in pirated software*, June 4, 2003, at <http://www.menareport.com/story/TheNews.php3?action=story&sid=250874&lang=e&dir=mene> (Ministry of Information in Kuwait conducted raids against four companies using illegal software, resulting in the seizure of 53 PCs loaded with pirated software).

¹¹ The Ministry of Information claims that inspections are ongoing throughout the year and that it seizes illegal software on a regular basis. However, there is no way to confirm this information, as MOI does not reveal the number of raids nor the quantities of confiscated CDs.

While IIPA had great hopes that officials in the Ministry of Information would follow through on verbal commitments made to address the blatant piracy situation, those officials have done little to stem the tide of piracy in Kuwait. An Interministerial Task Force was set up with great fanfare in late 2000,¹² but virtually no progress has been made to combat piracy. By February 2002, MOI reported that it had sent 79 cases for prosecution (meeting its stated target of 45 copyright piracy cases for 2001), but the results from those cases were quite disappointing, with four acquittals, four non-deterrent fines, only seven cases in which materials were confiscated in addition to a fine, and an overwhelming 64 cases still being considered by the prosecutor or awaiting decision or sentencing.

MARKET ACCESS BARRIERS

In the absence of genuine copyright enforcement in Kuwait, local licensees and distributors of audiovisual works have sought some limited “anti-piracy protection” from the Ministry of Information’s “Censorship Department” by asking that it verify copyright authorization before giving censorship approval for a title. MPA has continued to provide certificates confirming the distribution arrangements of its member companies for the Ministry of Information’s use in this process. However, using this process as a main line of defense against piracy is costly, since the censorship fee of KD34.5 (US\$117) per title is prohibitively expensive. This fee should be reduced and limited to new titles only. For the business software industry, there is a four percent (4%) customs duty which should be eliminated. Finally, the government of Kuwait should lower or eliminate entirely the fee it imposes on each satellite receiver imported into Kuwait (the current fee, KD100 (US\$339), is 100 times more expensive than that in other Gulf countries (which generally charge the equivalent of US\$3.30).

COPYRIGHT LAW AND RELATED ISSUES

Decree by Law No. 5 of the Year 1999 with Regard to Intellectual Property Rights (which went into effect on February 9, 2000) governs copyright protection in Kuwait. As a member of the World Trade Organization (WTO), Kuwait must comply with its obligations under the TRIPS Agreement. The copyright law, however, remains TRIPS-incompatible in many ways, and contains other problems and ambiguities.¹³ The Kuwaiti government promised the U.S.

¹² The Task Force originally comprised the Ministry of Information (Sheikha Rasha Naif Al-Sabbah, and Ms. Manal Baghdadi, Legal Affairs Controller), the Ministry of Interior (under Lieutenant Colonel Mahmoud Al Tabakh), the Ministry of Commerce (under Abdullah Al Kalaf), the Public Prosecutors’ Office (under Usama Al Babteen), and Customs (under Mohamed Al Sulaiti), under the auspices of His Excellency Sheikh Ahmad Al-Fahd Al-Sabah, Minister of Information, and under the direction of Assistant Under Secretary, Sheikh Mubarak Duaij Al-Sabah.

¹³ See complete analysis in 2003 Special 301 Report for Kuwait, at <http://www.iipa.com/rbc/2003/2003SPEC301KUWAIT.pdf>. For example, the copyright law needs to:

- Provide full retroactive protection for works, including sound recordings, and performances consistent with TRIPS.
- Confirm that Article 43 binds Kuwait to protect foreign copyrighted materials (including sound recordings) in accordance with the principle of national treatment. It should be confirmed that the fifth excerpt of the Explanatory Memorandum regarding Article 43 is meant to confirm protection on the basis of national treatment, and does not impose material reciprocity, which could violate TRIPS.
- Confirm protection of sound recordings under the law (probably as “audio-visual broadcasting works” in Article 2(6)). Confirm that Article 25 does not apply to sound recordings, since that provision does not provide TRIPS-compatible exclusive rights to producers of sound recordings.
- Narrow or delete a Berne-incompatible compulsory license in Article 14.
- Confirm that performers and broadcasters are protected under the law as required by TRIPS.
- Replace the term “innovative” in Article 1 with the word “original.”
- Delete the word “financially” from Article 4.
- Confirm that Article 6 (moral rights) does not impinge on the exclusive adaptation right, thereby violating TRIPS.

government in 1999 (in the context of bilateral discussions largely related to Special 301) that it would pass amendments to fix TRIPS deficiencies in early 2000, but this never occurred. The government of Kuwait should swiftly amend the law to comply with TRIPS, and should also modernize its law to establish an adequate legal framework for the protection of copyright in digital environments, including by fully implementing and then acceding to the WIPO “Internet” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Kuwait wants a Free Trade Agreement with the United States; the IPR chapter of that Agreement must: (a) be TRIPS-plus; (b) include in specific terms obligations which would meet the requirements of implementing the WCT and WPPT; (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy; and (d) contain specific commitments with regard to combating optical disc piracy through regulations on production and strict enforcement.

United States and Kuwait Sign Trade and Investment Framework Agreement (TIFA)

In a step that is expected to be a precursor to announcement of negotiations toward a free trade agreement, on February 6, 2004, U.S. Trade Representative Robert Zoellick and Kuwaiti Minister of Commerce and Industry Abdullah Al Taweel signed a Trade and Investment Framework Agreement (TIFA). The TIFA sets a framework for stronger intellectual property rights protection and enforcement. It also establishes a United States-Kuwait Council on Trade and Investment in which high level officials from each country will meet periodically to advance trade and investment issues.

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- Narrow the “personal use” exception in Article 8, through amendment or explanatory memorandum, to ensure that it does not allow anyone to copy complete books without authorization, and is limited to analog form.
 - Provide an express rental right for sound recordings and computer programs, or confirm that Article 4(2) which provides a broad exploitation right, includes a rental right.
 - Amend the law to expressly provide for *ex parte* civil searches as required by TRIPS.
 - Amend Article 42 so it can comply with Articles 46 and 61 of TRIPS with respect to seizure/forfeiture/destruction of copyright materials, materials and implements.
 - Amend the law to strengthen criminal penalties, including deterrent minimum and maximum fines (double for recidivists), and mandatory imprisonment in willful piracy cases (and for recidivists) in order to comply with TRIPS.
 - Affirm that unauthorized use of business software in a business setting is a crime. Resolution of the pending end-user case with imposition of criminal remedies would be a first step toward confirming this TRIPS-compatible remedy.
 - Confirm that Kuwait has laws providing TRIPS-compatible border measures. If not, Kuwait must immediately enact such measures to comply with TRIPS Articles 51-59.
 - Amend Article 25 so that the producer of an audiovisual work has the exclusive rights under copyright. Vesting economic rights in an audiovisual work in the producer enhances the ability to commercialize works and improves the economic viability of the industry, which benefits all groups that contribute to the success of an audiovisual work.

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