

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2004 SPECIAL 301 REPORT

SAUDI ARABIA

EXECUTIVE SUMMARY

Special 301 Recommendation: Saudi Arabia should remain on the Watch List and USTR should conduct an out-of-cycle review to determine if the copyright law has been implemented properly to protect all U.S. works and sound recordings in line with international standards, and to review enforcement efforts for transparency and effectiveness in reducing piracy rates.

Overview of Key Achievements/Problems: The enforcement system in Saudi Arabia is one of the least transparent in the world. Raids taken in recent years have not had a deterrent effect on piracy in the Kingdom. Right holders receive only spotty information about raids (usually in the form of aggregate statistics), are not permitted to cooperate with authorities to identify and catalog (for inventory purposes) the seized product, and have no ability to verify final disposition of seized items. Judicial results have to date never been publicized, and fines imposed are low and non-deterrent. Illegal redistribution of pay television services without authorization continues to occur in compounds. While the Ministry of Information has conducted raids against many compounds, confirming illegal redistribution and resulting in seizure of smart cards, none of the pirates has been penalized or stopped. Book piracy remains a major problem. The new Saudi copyright law strengthens penalties available in piracy cases, and may give hope for greater transparency in the administrative and judicial system. Unfortunately, it fails to meet the basic minimum standards of the TRIPS Agreement and fails to fully meet the standards set by the two WIPO “digital” treaties (the WCT and WPPT). The new law also fails to protect sound recordings (and musical works) adequately—an egregious deficiency—and while the Saudi government has indicated that U.S. sound recordings are protected, TRIPS-compatible (and preferably WPPT-compatible) implementing regulations must be issued as soon as possible to confirm that sound recordings are protected. Saudi Arabia would like to join the WTO, and the United States and Saudi Arabia signed a Trade and Investment Framework Agreement (TIFA) in July 2003. Saudi Arabia must live up to its commitments and bring its copyright system up to adequate standards—both substantive and enforcement—before it should be rewarded with favorable trade treatment and WTO accession.

Actions to be taken in 2004

- Issue implementing regulations to the new Saudi copyright law to provide for TRIPS-compatible (and WPPT-compatible) protection for sound recordings and musical works.
- Allow right holders to send experts to “cooperate” with authorities to identify pirate copyright product and verify final disposition of seized items.
- Raid more compounds engaging in unauthorized redistribution of pay television services, and report results from raids, including imposition of penalties and cessation of illegal activities.
- Continue sustained inspections and raids (including by officials of Ministries of Information and Interior) on retail establishments, storage areas, distribution hubs, and duplication sites, and move up the chain toward sources of production (i.e., importers, distributors, duplication sites).
- Improve overall transparency in the enforcement, prosecutorial, and judicial processes,

including informing right holders of judicial processes, and information or announcements regarding copyright infringement actions and outcomes for each specific case.

- Intercept pirate imports at the borders through a more robust customs enforcement program.
- Order universities to regulate procurement practices with respect to purchase of authorized copies of books (and other copyrighted materials).
- Continue to follow up on enforcement of the software usage directive.

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

SAUDI ARABIA
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	20.0	40%	20.0	35%	30.0	45%	40.0	65%	40.0	65%
Records & Music	16.0	40%	16.0	42%	12.0	42%	8.0	40%	12.0	45%*
Business Software ⁴	NA	NA	13.3	50%	16.4	52%	17.7	52%	31.8	64%
Entertainment Software ⁵	64.0	83%	NA	NA	115.7	83%	28.0	NA	20.2	59%
Books	14.0		14.0	NA	14.0	NA	14.0	NA	14.0	NA
TOTALS	NA		63.3		188.1		107.7		118.0	

COPYRIGHT PIRACY IN SAUDI ARABIA

Optical Disc Piracy: Notwithstanding some large-scale enforcement actions over the past couple of years, the piracy situation in Saudi Arabia remains serious. Optical discs (CDs, VCDs, DVDs, CD-ROMs, and "burned" CD-Rs) of a cornucopia of copyrighted content (videogames and entertainment software, music, movies, business software, and published materials) are available for retail sale in Saudi Arabia; music piracy is being imported from Pakistan and Indonesia. Saudi Arabia ranks last in the Gulf region in terms of piracy of console-based videogames (over 90% of console-based games are pirate, while games for personal computer are 75% pirate). Such pirate products are sold openly in retail markets and *souqs*. Console-based videogames are imported from Malaysia and transshipped through Dubai (UAE), while personal computer-based (PC) games

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

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 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.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report.

apparently are coming from Russia, Syria, and Pakistan.⁶ Cartridge-based games continue to be imported from Taiwan and China. CD-R “burning” (in which a street vendor will offer to produce pirate product on demand) is on the rise. Some large retailers are selling legitimate PC games, but most other retailers still sell pirate PC games. Ironically, games which the Saudi authorities would not permit to be sold in the market due to content concerns (i.e., they are censored) are sold openly by pirates in Saudi Arabia. It is also commonplace for PC assemblers and resellers to load all types of software on PCs sold both to consumers and to small- and medium-sized businesses. Relatively small quantities of pirate music CDs are available for sale in the Kingdom.

Pay Television Piracy: Illegal distribution of “Pay TV” (i.e., cable television) signals on compounds was the main piracy concern in Saudi Arabia for the audiovisual sector in 2003. The Kingdom’s prohibition against cinemas makes the pay TV market particularly lucrative, and almost all of the residential compounds in Saudi Arabia illegally redistribute pay TV signals without authorization [the compounds are able to obtain a smart card from the market that is intended for a Direct-to-Home (DTH) subscription and then to use this card to provide pay TV services to hundreds of homes in the compound through their own internal cabling system]. Ministry of Information (MOI) raids in 2003 went after illegal distribution of pay TV signals in many compounds (including Lotus, Al Basateen Village, Sierra Village, Shurbatly), and the Minister has personally condemned the practice of illegally distributing pay TV signals. Unfortunately, these actions have not had a deterrent effect since none of the compounds has been penalized (except for the seizure of the smart cards) and they all continue to engage in this illegal activity.

Book Piracy: Saudi Arabia’s publishing market is deeply hindered by piracy. Pirate commercial offset prints as well as illegally photocopied books, including textbooks, English language and teaching (ELT) materials, and other materials continue to be available. There is evidence that pirate editions are being produced locally in Saudi Arabia (where there is a sizeable domestic printing industry). Some universities, especially in the Central and Eastern Provinces, have regulated purchase practices (i.e., they “buy centrally,” which means that all the adoptions within a university are collated by its purchasing department which runs an on-campus bookshop). The Western Province has seen improvement in 2003, with increased procurement near King Abdulaziz University of Jeddah. Others do not “buy centrally,” which invites pirate photocopies to take the place of legal purchases. The Saudi government should work in 2004 to regularize the procurement practices of books within all the universities so that they can be responsible academic citizens. It should also carry out enforcement actions against illegal offset printing as well as illegal photocopying to bring piracy levels down.

End-User Piracy of Software and Government Illegal Use of Software: The unlicensed use of software in a business setting (so-called “end-user” piracy) continues to be a problem in large, medium and small enterprises in Saudi Arabia. In 2003, the Ministry of Information continued implementing its License Certification Program, whereby businesses are required to demonstrate that they use only legal software as a requirement to obtain or keep their business licenses. IIPA understands that MOI was to make repeat visits to see if the 2,500 companies previously visited have actually followed through and legalized their software usage. By contrast, despite the fact that the country’s leadership has repeatedly instructed all government departments and agencies to legalize their use of software, government entities continued to use illegal copies of software with impunity. Part of the reason for this is the complexity of still-existing procurement procedures that

⁶ Almost all PlayStation2[®] consoles on the market have been modified to allow the play of pirate entertainment software.

limit the ability of IT divisions of government entities to buy software as needed. Inadequate allocation of resources for software acquisition and low prioritization for software purchases also make legalization difficult. Despite all the challenges, public tenders seem to indicate a movement in the right direction.

Internet Piracy: Internet piracy, namely, download and peer-to-peer sharing of copyrighted materials over the Internet, is slowly rising in Saudi Arabia, but since the Internet is under strict control of the government, Internet piracy has not yet become a substantial problem.

COPYRIGHT ENFORCEMENT IN SAUDI ARABIA

Lack of Transparency Stifles the Saudi Enforcement System from the Raid to the Final Result

In 2003, the Ministry of Information and the Ministry of Interior continued to conduct raids on retail establishments, distributors, warehouses, and duplication labs.⁷ Such efforts have made some inroads against day-to-day piratical operations and resulted in those operations moving underground.⁸ However, most raids and investigations are initiated by right holders, rather than *ex officio* by the Ministries. In addition, raids are generally carried out on small-time retail operations (although there have been some notable exceptions), and fail to uncover or deal with the major sources of piracy in Saudi Arabia.

Unfortunately, the raids run in recent years, even against larger warehouses, have accomplished little due to the absence of deterrent penalties and the lack of transparency in the Saudi enforcement system. The Saudi government needs to ensure the application of deterrent penalties and to urgently implement some reforms to address the difficulties arising due to lack of transparency, including the following:

- Inform right holders of all enforcement activities being carried out or planned.
- Permit right holders to send experts to cooperate with authorities to identify, inspect, inventory, catalog, and analyze pirate copyright product that has been seized in a raid/action.
- Provide specific, on-time raid reports and investigation reports to right holders, including data on seized materials (case-by-case reporting rather than aggregate).
- Order destruction of pirated goods, and permit experts or right holder representatives to witness destruction or final disposition of goods seized.
- Impose deterrent sentences on pirates under the new law's stricter penalty provisions, and provide specific reports on status of cases against individuals or companies, including results of cases, jail sentences, fines imposed, and compensatory damages awarded.
- Publicize results of raids, and subsequent prosecutions/cases.

⁷ For example, authorities seized close to 1.2 million pirate units in January 2003 from three warehouses. Unfortunately, due to lack of post-raid transparency, we are unaware of the final disposition of the product; meanwhile, the industry reports that product availability of pirate PlayStation® and PlayStation2® did not abate after the raids.

⁸ For example, the recording industry reports that 311 raids were carried out in 2003, yielding seizures of over 200,000 pirate cassettes, over 37,500 pirate music CDs, and over 18,000 pirate "burned" CD-Rs. The motion picture industry group carried out 205 audiovisual raids in 2003, resulting in the seizure of 161,504 pirate videocassettes, 9,420 pirate VCDs, and 38,664 pirate DVDs.

The Government Must Continue Raiding with Focus on Larger Targets and Sources of Piracy

In addition to the above reforms to provide greater transparency in the enforcement system, the Saudi government should continue with the successful raiding carried out, especially in 2002, including by: raiding more compounds engaging in unauthorized redistribution of pay television services; reporting results from raids, including imposition of penalties and cessation of illegal activities; and continuing sustained inspections and raids (including by officials of Ministries of Information and Interior) on retail establishments, storage areas, distribution hubs, and duplication sites, and moving up the chain toward sources of production (i.e., importers, distributors, duplication sites).

Much of the pirate material is coming in at the borders, and the Saudi authorities must make greater strides in 2004 in intercepting pirate imports through a more robust customs enforcement program. The entertainment software industry reports that many of the pirated factory-produced PC games (so-called silver discs) are shipped from Russia, and through Pakistan and Syria.

Regarding book piracy, the Saudi government could make the greatest strides in 2004 by ordering universities to regulate procurement practices to ensure purchases of authorized copies of books (and could address piracy of other copyrighted materials on university campuses as well), following up where necessary to ensure that those universities comply with the law.

The “Breach Committee” and “Board of Grievances” Must be More Transparent and Mete Out More Severe Penalties for Piracy

A major shortcoming in the Saudi enforcement system has been the secretive way in which copyright cases are handled and kept close after a raid is conducted. The Ministry of Information has closely guarded any data on administrative penalties it issues and rarely announces the amounts of fines and penalties applied for copyright law violations in specific cases. The new copyright law, discussed below, establishes a “Breach Review Committee” (BRC) under the Ministry of Information, “staffed by up to three members, two of whom must be a legal advisor and Sharia advisor” (Article 25(1)), and deems that serious crimes shall be referred to a “Board of Grievances” (BG) which shall also apparently have appellate jurisdiction over the decisions of the BRC. The BRC has substantial authority to determine infringement, mete out warnings, criminal penalties, suspensions of business licenses, fines of up to SR100,000 (US\$26,665), etc. Only cases in which the BRC recommends that the offender be punished by a jail sentence or a fine exceeding SR 100,000 or revoke a business license must be referred to the BG by the Minister of Information. IIPA has enormous hopes for this BRC and the BG, and would consider it a major achievement if the BRC and BG reporting mechanisms regarding ongoing proceedings and results in specific cases were to be regularized and made transparent. In appropriate cases, copyright owner representatives stand ready to assist the BRC in the development of cases (through forensic and other analysis of evidence), and greater transparency will permit right holders to be compensated, as the new law provides, for damage they have suffered as a result of infringements. It is also crucial that the BRC use its authority under the new copyright law to mete out substantial penalties and damage awards in order to deter further infringements and compensate right holders for losses due to piracy.

COPYRIGHT LAW AND RELATED ISSUES IN SAUDI ARABIA

The New Copyright Law Is TRIPS-Incompatible and Fails to Protect Sound Recordings and Musical Works

The new Saudi Arabia Copyright Law was reportedly published in the official gazette on September 19, 2003 and goes into effect on March 19, 2004. The law was approved by the Shoura Council and was signed by the King in February 2003. The law represents a step backward, particularly with respect to sound recordings, notwithstanding some improvements on the 1990 law (many of which were intended to bring the law closer to compliance with the TRIPS Agreement).

That said, the following improvements have resulted from passage of the law:

- **Increase in Criminal Penalties:** Maximum criminal penalties are increased. Fines are up to SR250,000 (US \$66,670) and prison terms are up to six months, which can be doubled for recidivists.
- **Enumerated Exclusive Rights:** The law contains a more complete list of the exclusive rights of copyright owners at least as to works (including TRIPS-compatible rights like a rental right (Art. 9(1)(4)).
- **Catch-All Infringement Provision:** Infringing activities (Art. 21) are set forth with more specificity than in the 1990 law (including a “catch-all” in Article 21(11)).
- **Greater Enforcement Authority Expressed:** Certain enforcement provisions appear to grant greater authority to the Saudi government to enforce against businesses/premises engaged in piracy, e.g., they allow temporary closure of an establishment or suspension of a business’ “privilege to participate in functions, occasions, exhibitions” (Articles 22(1)(3) and 22(6)).

Nonetheless, several TRIPS deficiencies remain, including, among other structural problems, the following:

- **Protection of Sound Recordings and Musical Works:** It is unclear whether and how sound recordings and musical compositions are protected under the Saudi law (i.e., without passage of implementing regulations).
- **Retroactivity:** IIPA takes the position that the 1990 law and Saudi’s adherence to the UCC in 1994 did not afford retroactive protection by law. Thus, Article 20 of the new law is TRIPS-incompatible because it does not by its terms provide a full term of life plus 50 years or 50 years of protection retroactively for existing works/sound recordings as required by TRIPS.
- **Non-Deterrent Remedies/Penalties:** While the maximum penalties were increased, the minimum penalty under the new law can be a mere warning—which is totally non-deterrent (TRIPS Article 61); not even a minimum fine is mandated.
- **No *Ex Parte* Civil Searches:** There is no express provision for *ex parte* civil search orders (TRIPS Article 50).
- **Seizure Provisions (Goods, Tools and Implements) TRIPS-Incompatible:** The provisions on seizure of infringing goods were weakened compared with the previous law, and fail to meet the TRIPS standard (TRIPS Articles 46 and 61).

- **No Costs or Attorneys Fees:** There is no express provision for the award of costs or attorney fees in civil cases (TRIPS Article 45).
- **No Border Enforcement in Copyright Law:** There are also no provisions regarding border enforcement, namely, the ability of authorities to suspend the release of suspected infringing goods into the channels of commerce, and to order the destruction or disposal of infringing goods (TRIPS Articles 51, 59); the Saudi government should provide other statutes that may address this deficiency.

In addition, it is highly unfortunate that the government of Saudi Arabia has failed to take the opportunity, within the context of this law revision, to enact standards of protection needed to provide healthy electronic commerce in Saudi Arabia, and to provide proper levels of protection for copyrighted materials in the digital environment. In particular, the law fails to fully meet the standards set by the two WIPO “digital” treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). While the law adds certain provisions which appear intended to take into account the WCT and WPPT, other provisions are either left out or appear to be incomplete. For example:

- **Communication to the Public Right:** The communication to the public right has been expanded to include digital communications (“information service”) but does not expressly include the right of “making available” which is key to encompass the “upload” of a work to the Internet, for example (and coverage of sound recordings remains unclear).
- **Protection of Temporary Reproductions:** The law also fails to confirm that the reproduction right includes coverage of temporary reproductions, and to provide an express distribution right.
- **Prohibition Against Circumvention of Technological Protection Measures:** The provisions prohibiting the circumvention of technological protection measures appear fairly broad, although unlawful circumvention is deemed to be an “infringement of the rights protected by this Law” instead of as a separate violation, which raises the concern over whether copyright exceptions are applicable to the offense of circumventing a TPM (exceptions that would eviscerate the rule).

Notwithstanding that there is some more work to be done to fully implement the WCT and WPPT, Saudi Arabia should take the important next step of joining these treaties which are the latest international standards for copyright protection.

Most disappointing is the Saudi law’s failure to deal adequately with protection for sound recordings. We understand that the Saudis were reluctant to acknowledge protection of “musical works” for religious reasons, and this is why the term “musical work” has never appeared in the Saudi law. The term “audio work” was added in the 2003 law, and a broad reading might suggest that sound recordings are protected as works, as “audio works” and/or as “works ... prepared for broadcast.” Moreover, the 1990 law and the 2003 law are both ambiguous as to point of attachment for sound recordings. The Saudi government may indicate that protection of foreign sound recordings as works continues due to Saudi Arabia’s continued adherence to the UCC, which it joined in 1994.⁹ It must be confirmed that U.S. sound recordings remain protected in Saudi Arabia

⁹ It was not until July 1, 1994 (when Saudi Arabia acceded to the Universal Copyright Convention (UCC)) that foreign works, including U.S. works, were first protected in Saudi Arabia. The U.S. and the IIPA had been pressing Saudi Arabia

under the new law as works and that the producer (the natural or legal person who takes the initiative to make the original audio work and bears the cost and responsibility for it) is deemed the owner of the economic rights.

United States and Saudi Arabia Sign Trade Investment Framework Agreement

On July 31, 2003, the United States and Saudi Arabia signed a Trade Investment and Framework Agreement (TIFA). This TIFA sets the stage for continual talks and contact on various economic issues, including intellectual property rights. Recital 13 indicates that Saudi Arabia recognizes “the importance of providing adequate and effective protection and enforcement of intellectual property rights and the importance of adherence to international intellectual property rights standards.” Article 4 permits the parties to discuss what further “agreements relating to . . . intellectual property rights . . . would be desirable.” Finally, Article 5 contains a consultation mechanism by which intellectual property issues can be raised by the United States. We would encourage the United States to continue to engage Saudi Arabia to address the problems and issues addressed in this report through the use of the TIFA mechanism.

Saudi Arabia Joins the Berne Convention

On December 11, 2003, the government of Saudi Arabia deposited its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works, 1971 (Paris) text (the Berne Convention will become effective in Saudi Arabia on March 11, 2004). IIPA understands that the Saudi government attempted, in its Instrument of Accession, to add a reservation for “works that are contrary to Islamic law.” However, WIPO’s “Notification of Accession” does not include the reservation, as WIPO has made an official determination that such a reservation is not permissible under the Convention. We understand that WIPO has informed the Saudi Permanent Mission of this. We would point out that a reservation of this sort is impermissible under the Berne Convention, since nothing in the Berne Convention allows the complete nonrecognition of rights or would permit Saudi Arabia to deny protection for entire classes of works that must be protected under Berne. Such a denial of protection would also be TRIPS-incompatible. IIPA hopes to be able to confirm soon that Saudi Arabia protects all works and subject matter in accordance with the Berne Convention and in a TRIPS-compatible way.

to amend its law and join the Berne Convention, but because it did not wish to make the required amendments, Saudi Arabia chose the UCC as the point of attachment for the protection of foreign works. The Saudi government has also stated unequivocally that its law extends protection to sound recordings as “works” under the UCC. To clarify any ambiguity, Saudi should join the Geneva Phonograms Convention; if it then joins the WTO, that agreement itself expressly requires protection for sound recordings from UCC member countries as well, retroactive for a full TRIPS-compatible term of protection.