

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2005 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Kuwait should remain on the Priority Watch List.

Overview of Key Problems in 2004: Only one in twenty (5%) U.S. motion picture videos sold in Kuwait is legitimate; the rest are pirated. The entertainment software industry experiences similarly devastating piracy, with business software and recorded music not far behind. Retail piracy as well as pirate optical disc distribution centers and duplication sites continue to be the primary concern of legitimate copyright owners in Kuwait. Other problems include end-user piracy (which is a major concern, particularly for the business software industry) and more recently, Internet piracy. Websites with clear links to Kuwait, including 6arab.com, are illegally distributing thousands of Arabic music tracks worldwide. Estimated losses to the U.S. copyright industries in 2004 due to piracy in Kuwait were at least \$45 million.

In 2004, the Kuwaiti government (primarily the Ministry of Commerce and the Public Department of Customs) began making overtures to industry to identify more targets, indicating an increased awareness that the piracy situation will need to be resolved in order for Kuwait to achieve its trade objectives with the United States, namely, removal from the Priority Watch List and the eventual commencement of negotiations toward an FTA. While the copyright industries are heartened that certain entities within the government of Kuwait have apparently decided they need to take concerted action to curtail piracy, the steps taken thus far at the retail level have been far from what is needed to reduce piracy levels for most industries. For example, IIPA and its members/affiliates supplied the government of Kuwait with at least 55 retail targets. Some of these targets have recently been raided — a promising sign. IIPA remains unconvinced, however, that the Ministry of Information (under the leadership of Ghanas Al Adwani) is capable or willing to exert the kind of sustained effort required to defeat piracy for most copyright owners in Kuwait (with book piracy being an exception).¹ Raiding small retail targets once is not a formula for beating back entrenched piracy in Kuwait. In addition, such actions do nothing to eliminate the key distribution and duplication centers of pirate optical discs, to stop end-user piracy of business software, Internet piracy, or other piracy phenomena.

On a positive note, IIPA commends the cooperation of Kuwaiti authorities in fighting book piracy and supporting the publishing industry in legalizing universities' adoption policies. IIPA also commends actions by the Public Department of Customs (under the Ministry of Finance), which have been very effective even in the face of growing imports from Pakistan and Malaysia, as well as many recent raids taken by Ministry of Commerce officials, and actions taken by the Ministry of Information against cable piracy.

¹ IIPA notes that the policy/legal section of the MOI, headed by Sheikha Rasha Al-Sabbah, has been very helpful. The MOI has other good personnel but ill-suited leadership that disrupts real progress.

Challenges for 2005:

- Greater prioritization and devotion of resources by the Ministry of Information, leading to sustained and repetitive raiding against chief targets, including retail, end-user, and where found through investigation, perpetrators of Internet piracy.
- Establishment of a specialized IPR unit within the Kuwait police force.
- Greater prioritization of IP crime within the Ministry of Interior to ensure systematic involvement of the Police, and provision of *ex officio* authority, especially against sources of piracy.
- Issuance of public declarations at the highest level of the Kuwaiti government that piracy will not be tolerated in Kuwait.
- Sustained raids, which are publicized in order to achieve a deterrent effect.
- Prosecution of infringers (including distributors, resellers, end-users, dealers in unauthorized “smart cards,” producers, etc.), and imposition of deterrent sentences, including jail times (not suspended but actually served) and severe fines.
- Amendment of the copyright law to bring it into line with the TRIPS Agreement, establishing an adequate legal framework for electronic commerce by protecting copyright in the digital environment, establishing deterrent penalties including minimum mandatory sentencing (including deterrent fines, closure, and imprisonment, with increased penalties for recidivists), and join the WIPO “Internet” treaties.

For more details on Kuwait’s Special 301 history, see IIPA’s “History” appendix to this filing.² Please also see previous years’ country reports.³

KUWAIT										
Estimated Trade Losses Due to Copyright Piracy										
(in millions of U.S. dollars)										
and Levels of Piracy: 2000-2004⁴										
INDUSTRY	2004		2003		2002		2001		2000	
	Loss	Level								
Motion Pictures	12.0	95%	12.0	95%	10.0	95%	9.0	85%	8.0	85%
Records & Music	8.0	65%	3.0	55%	3.4	64%		70%	3.0	70%
Business Software⁵	24.0	68%	24.0	68%	4.7	73%	4.5	76%	6.6	80%
Entertainment Software⁵	NA	NA	NA	95%	NA	NA	NA	85%	NA	NA
Books	1.0	NA	2.5	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS	45.0		41.5		20.6		16.0		20.1	

² <http://www.iipa.com/pdf/2005SPEC301HISTORICALSUMMARY.pdf>.

³ <http://www.iipa.com/countryreports.html>.

⁴ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2005 Special 301 submission at <http://www.iipa.com/pdf/2005spec301methodology.pdf>.

⁵ BSA’s final 2003 figures represent the U.S. software publisher’s share of software piracy losses in Kuwait, as compiled in October 2004 (based on a BSA/IDC July 2004 worldwide study, found at <http://www.bsa.org/globalstudy/>). In prior years, the “global” figures did not include certain computer applications such as operating systems, or consumer applications such as PC gaming, personal finance, and reference software. These software applications are now included in the estimated 2003 losses resulting in a significantly higher loss estimate (\$40 million) than was reported in prior years. The preliminary 2003 losses which had appeared in previously released IIPA charts were based on the older methodology, which is why they differ from the 2003 numbers in this report.

⁶ ESA’s reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry “losses.”

COPYRIGHT PIRACY

Kuwait Remains Primarily a Pirate Market for Most Industry Sectors

Piracy continues to thrive in Kuwait, as hundreds of thousands of pirate optical discs (DVDs, VCDs, CDs, CD-ROMs, “burned” CD-Rs, and, increasingly, DVD-Rs) of movies, music, business software, and entertainment software are openly sold in retail stores, on the streets, and in the *souqs* each month. Imports continue from South (mainly Pakistan) and Southeast Asia. Distributors operate with impunity, supplying retail stores and street vendors alike. Increasingly, domestic piracy ventures are “burning-to-order” at storefronts, or “burning” content onto recordable discs and distributing those to street vendors. Retail stores continue to maintain large stocks of pirate product (often sold not in the open but “under the counter” or by retrieving pirate titles off-site). Large numbers of street vendors openly display and sell pirate discs (“burned” CD-Rs and, increasingly, burned DVD-Rs). These products often involve uncensored, unreleased titles (i.e., pre-theatrical release date and/or pre-video release date). Pirate DVDs in particular have been entering the country from Asia,⁷ including Pakistan, in large quantities since 1998. 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. Pirated entertainment software products, on all platforms (i.e., console, PC and cartridge-based games) continue to be imported from Asia. Pirates even blatantly use entertainment software publisher brands and trademarks in their advertising.

A relatively new but troubling phenomenon in Kuwait is Internet piracy. Several websites operate in Kuwait which offer to “burn” pirate content for sale. More nefarious is direct peer-to-peer downloading of pirate copies of music and other copyrighted materials. As of February 2005, there were several websites with links to Kuwait illegally distributing thousands of Arabic music tracks worldwide. Of these, a site called “6arab.com” is the most notorious. The site owner is a Kuwaiti national, and while using evasive techniques such as employing servers in several different locations, there is no question but that he could be brought into court in Kuwait for copyright piracy, and that there are undoubtedly instances of illegal upload or download from Kuwait. This illegal distribution inflicts substantial financial damage on the legitimate recording industry (including legitimate licensees from the Middle East like afaqchat.com) and seriously affects investment in developing markets and new repertoire in the Middle East. The Kuwaiti government has not done enough to shut this piracy down.

Other major 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, nearly one in eight cable TV subscribers (especially in the Asian neighborhoods) receives unauthorized transmissions of TV broadcasts, including unauthorized broadcasts of some of the latest U.S. motion picture titles (“cable piracy”). Internet café piracy has also become a problem, with café owners installing unlicensed or pirated entertainment software onto café computers. There are now approximately 300 Internet cafés in the country.

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

In stark contrast to some of the other industry sectors, book publishers report much 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. While isolated incidents of photocopying still take place in universities and require continued monitoring, the tendering system in the universities under the direction of the Ministry of Higher Education works to prevent any significant supply of pirated or illegally photocopied textbooks in Kuwait. The publishing industry compliments the Kuwaiti authorities on this success, which serves as a model for the region.

COPYRIGHT ENFORCEMENT

The story of Kuwait copyright enforcement in 2004 is a tale of three ministries (or more). Industry continues to receive good cooperation from the Public Department of Customs (Ministry of Finance) intercepting pirated shipments at the borders, many coming from either Pakistan or Southeast Asia. The Ministry of Commerce and Industry stepped up efforts in late November/early December 2004 with some impressive raids. On the other hand, the Ministry of Information enforcement unit remains sorely lacking in its ability and perhaps its will to stamp out piracy, taking only sparse enforcement actions in 2004, notwithstanding the copyright industries’ repeated and detailed requests, including detailed information with exact names and locations of suspected pirates (IIPA provided at least 42 suspect targets, and IFPI provided another 13 targets, in October 2004). The Ministry of Interior (the police) and even Customs remain unable to take *ex officio* action necessary to defeat piracy in Kuwait; the increased presence of locally produced pirate CD-Rs highlights the greater need for the police to become involved.

In fact, Kuwait should establish a specialized IPR unit within the police in order to have a permanently operational law enforcement body with trained officers that can carry out immediate raids as and when information about piracy becomes available. Such a unit could mirror a similar unit within Customs and become the focal point of industry training and assistance. Finally, Kuwait needs to demonstrate that it is willing to deal with Internet piracy in Kuwait, by working actively to shut down Kuwaiti-run websites offering pirated materials for sale or unauthorized download, and working to hold liable those responsible. These websites pose a very serious danger to legitimate right holders that must be dealt with through the takedown of the offending sites. IIPA remains cautiously optimistic that overtures made by the Kuwaiti government to industry indicate that the government has made the decision to solve the piracy problem, but is experiencing problems trying to implement its new-found policy. It remains the case that only sustained inspections, investigations, and raids, i.e., multiple raids against the same targets within a short period of time, will significantly reduce piracy in Kuwait. Such raids must in turn be followed with the prosecution of, and where appropriate the imposition of sufficiently deterrent penalties against the offending parties.

It is critical that Kuwaiti law enforcement officials inform right holders of the status and results of raids, i.e., informing right holders of the type and quantity of products seized, whether the offending parties have been arrested and whether proceedings have been instituted against those arrested. While the increase in frequency of raids is a promising development, this raiding activity must be sustained and also proceed to prosecution as otherwise there will be no gains made against reducing the prevalence of pirated products in the market.

Ministry of Information and Lack of *Ex officio* Police Action Remain Major Choke Points

The Ministry of Information (MOI) has taken very little action against the street vendors, retailers, distributors, importers and illegal duplication facilities that continue to feed the pirate industry. Ministry of Information actions taken in 2004 were limited to small shops, and were not sustained. After dozens of potential raid sites were supplied by various industries, and then again by IIPA (in October 2004), very few actions have resulted (for example, in October 2004, the MOI informed a local industry group that only one of six suspected targets given to MOI was found to be engaged in piracy, resulting in the seizure of 1,200 pirate VHS cassettes/DVDs, and that the other shops were found to be clean; repeat investigations need to be run to truly weed out piratical activities).⁸ In addition, MOI officials appear unwilling (or unable) to raid beyond the retail shop, despite the fact that detailed information about the exact location and modus operandi of the pirate storage facilities has been made available to the MOI. Pirates in Kuwait have become savvier in recent years, and often keep “clean shops” (i.e., shops that do not contain the evidence of piracy) and store pirated materials offsite from the shop. It is imperative that the MOI officials take steps to uncover pirated materials being stored near the shops. It is also very important that the MOI takes action against end user piracy.

Police Not Systematically Involved in Copyright Enforcement

The police only become involved in copyright enforcement at the request of the Ministry of Information. However, in order to establish an effective IP protection regime in the country, the police need to be more systematically involved in copyright enforcement, as only they have the resources and the expertise to investigate the complete piracy chain to the source of piracy. Police involvement is crucial because of the need for investigations into the entire supply and distribution chain of pirates,⁹ their availability 24 hours a day, 7 days a week,¹⁰ and the stronger message that such involvement sends to the pirates (involvement of the police has also proven to be successful in other countries).¹¹

Kuwaiti Customs Continues to Cooperate

Given the MOI's lack of sustained enforcement actions, the copyright industries continued to rely in 2004 on the Public Department of Customs under the Ministry of Finance for

⁸ For example, on May 2, 2004, a list of 15 targets (six video retail shops, four entertainment software shops and five business software shops) was submitted to MOI by a copyright owner alliance in Kuwait, along with the evidence of pirate product purchased in each of the shops. Unfortunately, the MOI was only able to confirm copyright infringement in 2 of the 15 targets (one entertainment software and one business software shop with minimal seizures).

⁹ The police are well equipped to lead anti-piracy operations and weed out the supporting distribution network. For example, where CDs are being illegally smuggled into Kuwait, centrally stored in warehouses and then distributed to smaller caches that are used to replenish street vendors, the MOI is not the best equipped (or even empowered) to investigate the complete piracy chain leading to subsequent raids, arrests, etc. against the up or down chain. The police, on the other hand, have the expertise to conduct interviews with street vendors, investigate, obtain intelligence, arrest other affiliated parties, operate undercover, and only the police have the authority to conduct raids in homes and warehouses that are suspected of containing illegally copyrighted material.

¹⁰ In IIPA's members' experience, only the police have scheduled 24-hour patrols throughout all of Kuwait. The MOI does not have the resources (even if they have the authority) to dedicate to constant street patrols in all parts of the Kingdom.

¹¹ In IIPA's experience, police involvement in battling piracy immediately sends a strong deterrent message to pirates. The United Arab Emirates is a good example of a country in which police involvement directly created a deterrent in the market, driving out piracy and bringing piracy rates down to some of the lowest in the Middle East.

enforcement against copyright piracy. Customs commenced a dedicated IPR unit in 2004, and has already participated in training with industry. Several key actions occurred in 2004, including a major operation in April against importers resulting in a seizure of about 100,000 pirate discs, a raid in May resulting in seizure of about 21,000 CDs and DVDs (movies/games and music) and the arrest of three persons, and another raid in May against a retail outlet and its separate storage areas resulting in the seizure of 17,500 pirate DVDs and in the arrest of a number of Asian immigrants.¹² As recently as October 2004, there was a seizure of a shipment of pirated entertainment software for the console platform imported from Malaysia. In a raid of major significance in December 2004 (based on an industry tip), Kuwaiti Customs uncovered the first “multi DVD-R” burner facility in the Middle East. In that last raid, five DVD-R duplication towers, each with six high speed burners (a total of 30 DVD-R burners) were seized. It is believed that six employees operated those burners, churning out huge quantities of pirate music, movie, games and software discs per week to supply to local retailers; at the facility, large quantities of discs and color copies and prints of the labels were found in storage, ready for distribution.

Ministry of Commerce Shows Improvement in Late 2004

Also as a result of MOI inaction, industry has sought, and received, support from the Ministry of Commerce and Industry in 2004. In raids concluded by MOC against 30 targets in the first half of 2004, seizures of over 40,000 pirate/counterfeit CDs resulted. In late 2004, two series of raids by MOC occurred in Kuwait City. On November 30, MOC claims to have conducted a first series of raids was conducted against 12 shops located in the Hawalli area, and on December 5, a second series of raids was conducted against 18 shops located in the Al-Wataniah market. Overall, MOC claims that the raids resulted in the seizure of 193,000 pirate items, including pirate discs, VHS cassettes and music cassettes, 6 computers, 30 VCRs, 2 DVD burners, 12 catalogues showing hundreds of inlays of available titles, 4,000 inlays, and the arrest of at least 30 individuals, mostly from Asia. Our latest information is that MOC officials are completing internal procedures, after which time MOC has asserted that most of the defendants will be prosecuted criminally. However, private sector representatives have not been invited to participate in the follow-up to these raids. The correctness of this information can, therefore, not be confirmed. This indicates that the enforcement system in Kuwait should be made more transparent.

Some Progress Against Cable Piracy

The Ministry of Information has taken aggressive action against cable pirates. Since 2001, over 15 cable pirate operations have been raided and all supporting dishes, decoder boxes, and cables have been seized. These cases were transferred to the public prosecutor for criminal action, but no deterrent penalties have been imposed in these cases.

Interministerial Task Force Remains a Non-Factor

An Interministerial Task Force was created in late 2000, and certain activities since then have aimed to increase enforcement coordination and coordination with the private sector (e.g., the Kuwait government/Private Corporation Workshop in mid-2002), but this structure has had no positive coordinating or long-term impact on piracy or enforcement activities in Kuwait. Such an anti-piracy task force should consist of key representatives from all requisite sectors of the

¹² The scope of piracy in Kuwait is increasingly international. In 2004, seized pirated goods originated from Indonesia, Malaysia, and Pakistan.

government charged with IPR enforcement (Finance/Customs, Ministry of Information, Ministry of Commerce and Industry, Ministry of the Interior/Police, etc.). The task force should operate under a centralized plan which provides for responsibilities, objectives, and time frames. The task force should routinely meet with rights holders to address specific needs and to ensure that an effective IPR regime prevails in the country.

It is particularly important, given IIPA's and its members' increasing awareness, that the Ministry of Information has obstructed efforts to achieve greater enforcement in Kuwait, that pressure be brought to bear on all the Ministries to bring MOI into the fold on the issue of strong copyright enforcement. Even with Kuwait poised to pass an improved law (see discussion below), IIPA believes that the reality of enforcement through the MOI will not be enhanced without greater pressure on the establishment of a meaningful interministerial process in Kuwait.

IIPA understands that the Ministry of Information has created a special internal committee whose main objectives will be to set up practical mechanisms for officials of the MOI concerning the raids to be conducted and the targets they should achieve monthly, amending the existing law, and making progress in the Trade and Investment Framework Agreement with the United States. IIPA hopes that this mechanism can lead to real progress in eradicating piracy in Kuwait.

One example of a specific need is that of systematic involvement of Customs and Police, including providing them with the ability to act *ex officio*. We seek confirmation that Customs can make seizures on an *ex officio* basis without MOI personnel present; we understand this may be being done for one industry but not others. The street vendor pirates have so aggressively established themselves in the market that legitimate distributors cannot compete; the police need to become involved in copyright enforcement against street vendors or with investigations against sources of piracy. Another consistent need is for deterrent sentencing, including imprisonment in appropriate cases. The task force should advocate strengthening the laws to include minimum mandatory sentencing, including mandatory imprisonment for recidivists, and should ensure that the courts routinely issue deterrent sentences by following such mandatory minima.

MINISTRY OF EDUCATION POLICIES A SUCCESS

The Ministry of Education deserves praise for continued enforcement, administration and oversight of a highly transparent tendering system for book adoptions at the university level. The processes applied in Kuwait are a model for the region, ensuring adoption and use on campus of legitimate textbooks and fair competition among genuine publishers for university contracts. In addition, Ministry and university policies are effective in preventing the type of rampant photocopying so often found in university settings throughout the globe. The publishing industry commends these efforts and encourages the continued monitoring and encouragement of these effective de facto anti-piracy measures.

MARKET ACCESS BARRIERS

The Ministry of Information's fee for "censorship" certificates is too high, at KD20 (US\$68.50) per title.¹³ These fees make it more difficult (than it already is due to overwhelming

¹³ In the absence of strong copyright protection/enforcement, local licensees and distributors of audiovisual works must resort to seeking limited anti-piracy protection by asking that MOI verify copyright authorization before giving approval for a title.

piracy) for legitimate licensees to compete with pirates. 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 Ministry of Information should lower or eliminate entirely the fee it imposes on each satellite receiver imported into Kuwait (the current fee, KD100 or US\$342, is 100 times more expensive than that in other Gulf countries, which generally charge the equivalent of US\$3.30). The high fee impairs the development of the legitimate “pay TV” industry.

COPYRIGHT LAW AND RELATED ISSUES

IIPA has reviewed the 2004 draft copyright law being considered by the government of Kuwait (“Draft Law”), that we understand would replace Kuwait Decree No. 66 (1999) (effective February 9, 2000). IIPA is pleased that the government of Kuwait plans to enact a new law, since the 1999 Decree was TRIPS-deficient in some ways, and contained other problems/ambiguities.¹⁴ IIPA’s preliminary conclusion is that the Draft Law would resolve many but not all of the TRIPS deficiencies we previously identified from the 1999 Decree. The Draft Law would also partially implement the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but may not implement all aspects of these treaties adequately.

¹⁴ See complete analysis in 2003 Special 301 Report for Kuwait, at the website <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.
- 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.

For example, we conclude that the Draft Law would insufficiently protect against the unlawful circumvention of technological protection measures.¹⁵

IIPA understands from the Kuwaiti government that it has reviewed our comments and plans to revisit the draft and make necessary changes in order to comply with all related international conventions and treaties, including TRIPS, the WCT and the WPPT. IIPA is very pleased to have been able to provide this guidance.

Improvements Over 1999 Decree

- **Increased criminal penalties:** The Draft Law would result in an increase in criminal penalties and fines and the introduction of new mandatory minimum fines, although, as discussed below, there remain no mandatory minimum prison sentences, even in cases of recidivism, and the penalties and fines, while above the levels in the 1999 Decree, remain non-deterrent.¹⁶
- **Exclusive communication to the public/making available rights:** The Draft Law would result in the addition of a WCT-compatible exclusive “communication to the public” right which includes the “making available right” for works, and in the inclusion of a WPPT-compatible exclusive right of “making available” for producers of sound recordings and WPPT-compatible rights for performers (performers receive a “communication to the public” right and a separate “making available” right). Broadcasts or other communications to the public of sound recordings, however, are not dealt with in the Draft Law; adequate rights for producers of sound recordings should be provided (see below).
- **Rental and distribution rights:** The Draft Law would result in the addition of TRIPS- and WCT/WPPT-compatible “rental” rights for sound recordings, computer programs (and audiovisual works), and WCT/WPPT-compatible rights of “distribution” for works, sound recordings, and performers.
- **Omissions of restrictive provisions, easing restrictions on ability of right holders to freely contract:** The Draft Law would result in the removal of certain provisions from the 1999 Decree that provided overly broad moral rights (from Article 5), and the removal of certain provisions that imposed unreasonable restrictions on the ability of right holders to freely contract (Article 31 of the 1999 Decree was carried forward into the Draft Law as Article 16).

¹⁵ It should be noted as background that Kuwait, while an original member of the WTO, has joined neither the Berne Convention nor the Geneva (phonograms) Convention. 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). As part of President Bush’s announced proposal for creating a Middle East Free Trade Area, the TIFA may lead to negotiations toward a Free Trade Agreement. The IPR chapter of an FTA with Kuwait would need to: (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.

¹⁶ Based on the current Decree 64/1999 (Article 42), pirates could receive a sentence of up to one year imprisonment, or a fine of up to KD500 (US\$1,500), or both. Because of such non-deterrent penalties, the Ministry of Commerce and Industry has therefore had to resort to seeking prosecution of pirates under the Trademark Law, to obtain fines of between KD500 (US\$1,712.80) and KD3,000 KD (US\$10,277).

- **Temporary reproductions:** While not providing explicit protection for temporary copies, protection for which is vital in the digital environment, the addition in Article 25 of the Draft Law of a relatively narrow exception for certain temporary copies occurring in network transmissions between third parties by an intermediary suggests that the drafters intend to protect temporary copies. A minor revision can provide for express protection of temporary copies under the reproduction right in the Draft Law, and further narrowing of the exception in Article 25 will be needed to ensure that Kuwait's law complies with TRIPS and the well-established Berne three-part test for exceptions.
- **Ex parte relief and provisional measures:** Article 45 adds the possibility of *ex parte* civil searches and provisional relief that comes closer to meeting Kuwait's TRIPS obligations. Nonetheless, the law must be further refined to avoid violating TRIPS, especially with regard to undue burdens or costs, time limits and delays. In addition, such relief must be "available" in practice in addition to being part of the law on the books.
- **"Circumvention" of technological protection measures:** Article 51(c) and (d) add a new violation for the trafficking in devices that circumvent, and the act of circumventing, technological protection measures used by copyright owners to protect their works. The provisions do not, however, fully meet the requirements of the WCT and WPPT. Some minor changes could improve these provisions enormously. See discussion below.
- **Rights management information:** Article 51(e) and (f) would protect rights management information (another feature of the WCT and WPPT).
- **Confiscation/destruction provisions:** Article 51 includes a new provision on the confiscation/destruction of infringing goods and tools and implements used in the infringement that comes closer to meeting the prevailing TRIPS standards (TRIPS Articles 46 and 61).
- **Civil compensation:** Article 51 provides for civil compensation for damages, although there is no specification as to the measure of damages (i.e., whether they include lost profits), whether statutory damages are available, or whether attorney's fees or costs can be recouped. The sparse nature of the provision leaves it open to interpretation that would be incompatible with TRIPS, and should be further revised prior to passage to make it more comprehensive. See discussion below.
- **Customs provisions added:** Articles 52-53 provide for Customs to stop shipments suspected of containing infringing goods, and would bring Kuwait's law closer to compliance with TRIPS. Nonetheless, these provisions may need to be amended somewhat, particularly to ensure that the requirement to provide sufficient information about each infringing product and the "fee" to be paid not unreasonably deter the authorities from acting against piratical imports/exports. *Ex officio* enforcement authority should also be added for Customs to be able to adequately carry out its job.
- **Point of attachment:** Article 68 provides for clear point of attachment for works, sound recordings, and performers on the basis of international treaties to which Kuwait is party (TRIPS). However, nowhere is point of attachment also provided for other copyright owners (e.g., by way of transfer of rights).

Substantive Law Deficiencies/Issues

- **Reproduction right:** In the networked digital environment, the right to make and use temporary copies of all kinds of works is attaining ever-increasing economic significance, and indeed in some cases will become the primary means of legitimate exploitation of copyrighted materials. Temporary copies must be protected to fully comply with the major copyright treaties and to effectuate protection for the digital age.¹⁷ Unfortunately, nowhere in the Draft Law is “reproduction” properly defined, so the reproduction right found in Article 5(a) of the Draft Law, while setting out the kinds of fixations that are covered, is technology-specific and fails to provide expressly for protection of temporary copies. Because of a lack of a definition as to works, performers are left with a skeletal right to “copy their fixed performance” and producers of sound recordings with an undefined right to “copy their sound recordings” (Articles 37 and 38 respectively). Defining reproduction as “the direct or indirect, temporary or permanent reproduction, by any means and in any form, in whole or in part, of a work, sound recording or performance fixed in a sound recording including any permanent or temporary storage of the work in electronic form” would resolve the problem.
- **Treatment of sound recordings (exclusive right of communication to the public/making available/broadcast):** Article 38 of the Draft Law includes a WPPT-compatible exclusive right of “making available” for producers of sound recordings, but producers of sound recordings are not given exclusive rights with respect to the broadcasting and communication to the public of sound recordings. Producers of sound recordings should be granted exclusive rights to control the dissemination of their products over the Internet, including an exclusive broadcast and communication to the public right including all forms of wire and wireless transmissions. Such rights are necessary to permit sound recording producers to effectively fight piracy and develop new business models for consumers.
- **Circumvention of technological protection measures:** The Draft Law provides some protection (both criminal and civil) against the act [Article 51 (d)] of circumvention of, and the trafficking in devices that circumvent [Article 51(c)], technological protection measures. Unfortunately, the Draft Law does not provide WCT- or WPPT-compatible protection, including the following noted deficiencies:
 - Protection should extend to technological protection measures that control access to works, as well as those that control the exercise of exclusive rights subject to copyright protection. The Draft Law apparently limits the TPMs covered to those “used to prevent infringement on copyright or neighboring rights.” This deficiency could be cured by adding the phrase “used to control access to a work or object of neighboring rights, or” before the phrase “used to prevent infringement on copyright or neighboring rights.”
 - Protection should extend to circumvention services in addition to devices in Article 51(c).
 - Coverage should extend to component parts of circumvention devices (at present the Draft Law only covers “equipment, method, specially made or designed tool”).

¹⁷ As WIPO has explained, this agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention extends to reproduction “in any manner or form”; therefore, a reproduction may not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor may it be excluded from the concept of reproduction just because it is of a temporary or transient nature.

- There is no definition of technological protection measures (we propose that technological protection measures be defined as “any technology, device, or component that, in the normal course of its operation, controls access to a protected work or sound recording, or protects any copyright or neighboring rights”).
- The Draft Law imposes a knowledge requirement as to the trafficking in devices, and a “bad intent” requirement as to acts of circumvention, which result in inadequate coverage. The *mens rea* standards should be removed, and as to devices/services, objective criteria should be set forth for determining whether a device or service has an improper purpose.¹⁸
- The Draft Law does not, but should, provide that it shall not be required “that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications or computing product provide for a response to any particular technological measure,” so long as such product does not otherwise violate the anti-circumvention provisions.
- **Certain exclusive rights not expressly provided for:** The Draft Law does not expressly provide in Article 5(c) for “rebroadcast” rights or retransmission rights, as provided for under Article 11*bis* of the Berne Convention (and incorporated by reference into the TRIPS Agreement). The Kuwaiti government should confirm that retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet shall be unlawful without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal; if the current draft does not contain such coverage, language should be added to do so.
- **Computer programs (Article 1):** Article 1 protects computer programs “whether in source code or [object code].” We consider this to be an outmoded definition which should be modernized. It would be better to amend this provision to protect “computer programs as literary works, and regardless of the mode or form of expression of the computer program.”¹⁹ In addition, leaving computer programs as a separate category of work permits ambiguity as to whether the intent of the drafters is to comply with TRIPS Article 10.1.
- **Exceptions to protection:** The Draft Law (Chapter 6 as to works, and Article 41 as to producers of sound recordings and performances) contains many exceptions to protection, some of which may not comport with TRIPS/Berne Convention standards. The well-established Berne three-step test (or its variants in Article 13 of TRIPS, Article 10 of the WCT and Article 16 of the WPPT) should be adopted expressly for all exceptions in the Draft

¹⁸ For example, the device or service should be deemed to be illegal if it:

- is promoted, advertised or marketed for the purpose of circumvention of a technological protection measure,
- has only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
- is primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

¹⁹ Protecting computer programs as literary works is a TRIPS requirement, as well as a requirement of the WCT and WPPT. Article 10.1 of TRIPS states “[c]omputer programs, whether in source or object code, shall be protected as literary works under the Berne Convention.” Article 4 of the WCT clarifies that “[c]omputer programs are protected as literary works within the meaning of Article 2 of the Berne Convention,” and that “[s]uch protection applies to computer programs, whatever may be the mode of their expression.” In addition, the Agreed Statement concerning Article 4 states “[t]he scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.” The most natural and clearest approach, therefore, is to protect computer programs explicitly as literary works.

Law (Chapter 6 as to works, and Article 41 as to producers of sound recordings and performances).²⁰ Included in the specific exceptions that are of concern are the following:

- Article 24 provides for a broad private copy exception. Such an exception, to survive scrutiny under the three-step test, and in light of technological developments, must derive from a legal source, be made by the person (not a third party) availing him or herself of the exception, be limited to analog form, be made strictly for private and personal uses, and be limited to uses not resulting in profit or other financial gain. In addition, in other countries, a proviso is always found limiting such copies to those that pass the Berne three-step test. The Kuwaiti law must add the three-step test. Lacking all of these safeguards, the exception should be deleted.
- Article 25 provides for an exception for certain temporary reproductions. As noted above, this exception appears to confirm that temporary copies are in general covered under the reproduction right in the Draft Law, which is a positive development, although such coverage should be made explicit. However, it appears that the exception proposed in Article 25 is too broad to pass muster under the three-part test. We propose the following redlines to the current draft text to make it palatable under international treaty standards:

A transient copy may be made of a work without the permission of the author if all of the following conditions are met:

The copy has to be merely incidental and an integral part of a transmission in a network between third parties by an intermediary, or within the context of an operation that allows the digitally stored legal copy of a work to be viewed.

The copying, transmission and viewing needs to be carried out by person who is authorized to do so, from the right owner or by law; and,

The copying needs to be undertaken within the normal context of operation of used equipment, whereas the copy shall be deleted automatically without the possibility of using said copy for any reason other than what is mentioned in the two paragraphs above.

- Article 30 appears to impinge on the exclusive “communication” right in Article 5 as to the works concerned.
- Article 31, Clause 2, appears to be an attempt to provide an exception for decompilation of a computer program for purposes of providing interoperability, but the exception as drafted is over broad and in violation of TRIPS and Berne (as, for example, it would impinge on the exclusive adaptation and translation rights, as well as the right to

²⁰ Thus, a chapeau should be added preceding Article 24, namely, “The limitations or exceptions to exclusive rights set forth in Articles 24 through 35 shall be confined to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.” In addition, a proviso should be added to Article 41 after the phrase “without the permission of the right holder” as follows: “provided, such activities are confined to certain special cases that do not conflict with a normal exploitation of the performance or sound recording and do not unreasonably prejudice the legitimate interests of the performer or the producer of sound recordings.”

produce derivative works). The EU Computer Programs Directive is instructive as to how Kuwait might consider redrafting Article 31 to bring it into compliance with international standards.²¹

- Article 32 would impinge on the exclusive public performance right (cf. Berne Convention Article 11 as to dramatic and musical works) and is Berne- and TRIPS-incompatible (e.g., it would permit performances of a play without permission and without compensation to the right holder, even if an admission fee is charged).
- Article 33 provides what we believe may be a faulty translation of the Berne Article 11*bis*(3) "ephemeral recordings" exception. This should be clarified and confirmed. The provision appears to be broader than that permitted by the Berne Convention since it does not seem to include the two conditions prescribed in Berne Article 11*bis*(3) for the archival exception: neither not speaks of "official archives," nor of "exceptional documentary character." Thus, it appears the provision would also need to be amended in order to pass muster under the Berne Convention/TRIPS.
- The Article 34 and 35 compulsory licenses are Berne- and TRIPS-incompatible, and Article 34 also fails to satisfy the Berne Appendix with regard to reproductions and translations. Article 34 must be curtailed to meet the stringent requirements of Berne and TRIPS, and the word "publish" must be deleted. Article 35, which appears to grant the Kuwaiti government a perpetual compulsory license in Kuwaiti works not published by the heirs, is extremely prejudicial to the interests of Kuwaiti authors and should be deleted.
- Article 41 would allow, without authorization or payment to the relevant right holders, the "copy[ing] for the purposes of scientific research" any performance, sound recording, or broadcast. This blanket exemption is overly broad, goes well beyond what would be permissible under the Berne three-step test, e.g., as applied to sound recordings and performances in the WPPT, and must be deleted or much more narrowly tailored to pass muster under international treaties. Article 41 also would allow, without authorization or

²¹ Specifically, Article 6 of the EU Computer Programs Directive provides as follows:

1. The authorization of the right holder shall not be required where reproduction of the code and translation of its form . . . are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:
 - (a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;
 - (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and
 - (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.
2. The provisions of paragraph 1 shall not permit the information obtained through its application:
 - (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
 - (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
 - (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.
3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

payment to the relevant right holders, the “use in scientific activities within educational institutions” of any performance, sound recording, or broadcast. This blanket exemption to copyright is similarly over broad and should be deleted, unless it can be much more narrowly tailored to meet international standards.

- Article 54 is TRIPS-incompatible and must be revised prior to passage. Perhaps inadvertently, the article would as currently formulated permit acts regarding importation of infringing and pirated copies of copyrighted materials. For example, Clause 1 provides an exception as to importation of pirated copies. It must be revised, or better yet, deleted. Even if the exceptions in Article 54 were revised so that it is clear the exception only applies to legal copies of copyrighted materials, any exception as to importation of personal copies must be limited to the physical person bringing a single copy of any work/sound recording/broadcast for strictly personal and non-commercial purposes. In addition, and more importantly, no exception of this sort should be provided unless an exclusive importation right is afforded to copyright owners in works and sound recordings. Otherwise, these exceptions are unacceptably broad.
- **Term extension (Articles 30 and 31):** The Draft Law retains term of protection that is life plus 50 years for most works (audiovisual works are protected 50 years from publication or completion if not published within 50 years of completion), and 50 years from publication for sound recordings (or from fixation if not published within 50 years of fixation). Kuwait should follow the modern trend (more than 70 countries have or have committed to greater than TRIPS minimum terms), which is to protect works for life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings.
- **Moral rights (Article 4):** Article 4 of the Draft Law contains a long list of moral rights, some of which go beyond those found in Article 6*bis* of the Berne Convention. For example, the right to “prohibit any distortion or other amendments to the work” goes beyond what is provided for in the Berne Convention and represents at its core an impingement upon the exclusive adaptation right, i.e., if the adaptation right has been transferred, the right holder should have the ability to “amend” a work without regard to the moral rights, unless, as the Berne Convention provides, the amendment constitutes a “distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” The Draft Law tests the bounds between the moral right and the exclusive right, and in our view, goes beyond what is permissible to be consistent with the Berne Convention and TRIPS. Similarly, the moral right to “withdraw” the work from circulation, even when copyright has been transferred, so long as there are “serious and legitimate reasons,” goes beyond the Berne Convention, and could impinge on exclusive rights guaranteed to a copyright owner under Berne and TRIPS. This provision should be deleted. Finally, if there is a provision allowing for the State to “administer” moral rights in case there are no heirs; this provision should also be deleted, and instead, moral rights should be transferable after the death of the author and should have no longer duration than that for economic rights.²²
- **Co-authorship, authorship in collective works, audiovisual works:** Provisions on co-authorship, authorship in collective works, and provisions on rights in audiovisual works stemming from the 1999 Decree are unduly complicated and confusing, and fail to take into account the most efficient business practices and distribution models that help copyright owners to fully enjoy their rights. For example:

²² There is an analogous provision as to moral rights of performers in Article 36(2), which likewise should be deleted.

- Article 7, Clause 2, which restricts the ability of a joint author to exercise exclusive rights without the consent of all the other joint authors, constitutes an undue impingement of a joint author's rights.
- Articles 9-12 create confusing and complicated provisions with relation to the authorship/ownership of audiovisual works, casting doubt on the ownership and exclusive rights of producers of audiovisual works. Article 9 lists five authors of films (plus the author of pre-existing work) who are considered "partners" (which we believe means "co-authors"). Article 10 gives these authors the "collective right to display" the work, but in Article 12, the "producer" is made the "representative" of the "partners" ". . . with regard to the exploitation rights in the work, unless otherwise agreed in writing." This complicated formula should be simplified by providing a rebuttable presumption of transfer of rights of the authors and the performers to the producer. Alternatively, Articles 9-12 can be deleted, and Article 13 (collective works) can be made expressly applicable to films, which would have an effect similar to a presumption of transfer to the producer.
- **Parallel import protection:** The Draft Law does not, but should, provide an exclusive right to authorize or prohibit the importation into Kuwait of copies of works, sound recordings, and performances fixed in sound recordings, even where such copies were made with the authorization of the author, performer, or producer of the phonogram (i.e., parallel import protection). In order to confirm such protection, Article 54 also needs to be amended to ensure that the border measure exception applies only to goods imported into Kuwait with the authorization of the right holder that they be distributed in Kuwait (see comments above regarding these exceptions).
- **Point of attachment for non-natural author copyright owners:** Since the Draft Law defines "author" as a natural person, Article 68 (international application) needs to be amended to provide point of attachment for right holders, since authors are able freely to assign their financial rights under the Draft Law. Otherwise, the point of attachment provisions will be deficient.
- **National treatment:** Kuwait must protect all WTO members' works/performances/sound recordings in accordance with the principal of national treatment (i.e., must protect WTO members' works on a par with the level of protection afforded to Kuwaiti works/performances/sound recordings). Given that the 1999 Decree contained material reciprocity in both the law and explanatory notes, this is an issue of concern that must be resolved in the Draft Law to ensure that Kuwait complies with TRIPS.
- **Government legalization of software and other copyrighted works/sound recordings:** Nothing in the Draft Law addresses the need to provide that all government agencies must use legitimate software and adequately manage government software usage. IIPA is interested to know if such implementation exists in other laws, regulations or decrees; otherwise, provisions should be added to the Draft Law to address this need.
- **Protection of encrypted program-carrying satellite signals:** The Draft Law does not, but should, make it a criminal offense to manufacture, assemble, modify, import, export, sell, lease or otherwise distribute a tangible or intangible device or system, knowing or having reason to know that the device or system is primarily of assistance in decoding an encrypted program-carrying satellite signal without the authorization of the lawful distributor

of such signal; or willfully to receive or further distribute an encrypted program-carrying satellite signal knowing that it has been decoded without the authorization of the lawful distributor of the signal. In addition to criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.

- **Collective management (Article 59):** It should be confirmed that the phrase “associations or companies” referred to in Article 59 of the Draft Law refers to associations or companies that engage in the voluntary collective management of rights, and that the provisions of Article 59 only apply when right holders have voluntarily entrusted such associations and companies with collective management responsibilities.
- **Folklore:** Article 61 requires further thought and refinement to make it workable in Kuwait. The current draft does not make it clear that folklore is drawn from the existing public domain, so that protection will in no way impinge upon existing copyright protection. It is also probable that protection as described in Article 61 as currently drafted would result in a usurpation of copyright largely from Kuwaiti authors. It is at least necessary to narrow the definition to ensure that creations (i.e., works derived from folklore) are not subject to folklore protection but are protected under copyright. If such subject matter is unprotectable (i.e., lacks originality), it should not be protectable as folklore. It is also unclear how ownership by the Kuwaiti government will help Kuwaiti authors and artists.
- **Right of publicity (Article 62):** Clause 1 of Article 62 appears to establish a right of publicity (like the one found in U.S. trademark law); its appearance in the Draft law is misplaced. Clause 2 of Article 62, on the other hand, amounts to an overly broad exception to copyright protection, namely, it impinges on a copyright owner’s ability to prohibit an individual from using his/her likeness, since the presumption, absent an agreement to the contrary, is that the individual has the ability to use the creation without the authorization of the right holder. This constitutes an overly broad exception to protection which must be deleted or curtailed.

Concerns Regarding Enforcement Provisions

- **Criminal penalties, while improved over 1999 Decree, are still too low:** Article 51 provides for some improvements over the 1999 Decree, for example:
 - The Draft Law provides for minimum fines and/or prison sentences (minimum US\$1,705 and/or three months in prison).
 - The maximum fines and prison sentences for first-time offenders are doubled from the 1999 Decree (maximum US\$6,820 and/or one year in prison).
 - Both minimum and maximum fines and prison terms are doubled for recidivists (up to US\$13,640 fine and two years in prison).

Nonetheless, the penalties remain far too low, and as such, will not provide a deterrent to further infringements as required by TRIPS. There is no minimum imprisonment, even for recidivists. The maximum sentence of two years in prison pales by comparison with other jurisdictions (e.g., the United Kingdom has a maximum prison sentence of 10 years, while France’s maximum sentence is 5 years). The minimum fine is at least ten times too low to provide a deterrent (minimum fines should be at least KD5,000 or

US\$17,128, while maximum fines should be at least KD20,000 or US\$68,512). First-time offenders should be made subject to mandatory imprisonment (suggested one month) and shop-closure (suggested two weeks); recidivists should be subject to mandatory three-month imprisonment and shop closure of one month; third-time offenders should have their trade licenses revoked and be subject to maximum fines and imprisonment. TRIPS Article 61 requires the availability (and imposition) of “monetary fines sufficient to provide a deterrent.” Again, maximum fines, even for recidivists, will not on their face deter a highly lucrative pirate in the Kuwaiti market. With regard to specific offenses, the knowledge requirement in Article 51(b) is somewhat confusing; it should be clarified that the knowledge requirement relates to the “offering” to infringe [not infringement itself, since Article 51(b) may only result in the predicate but separate act to the act of infringement].

- **Seizure, forfeiture, destruction in criminal cases and *ex officio* action in criminal cases:** The Draft Law should ensure that judges may order the seizure of suspected counterfeit or pirated goods, any related materials and implements that have been used in the commission of the offense, any assets traceable to the infringing activity, and any documentary evidence relevant to the offense. The Draft Law should also ensure that items that are subject to seizure pursuant to any such judicial order need not be individually identified so long as they fall within general categories specified in the order. In addition, judges must be able to order the forfeiture of any assets traceable to the infringing activity and, except in exceptional cases, order the forfeiture and destruction of all counterfeit or pirated goods, and, at least with respect to willful copyright or related rights piracy, materials and implements that have been used in the creation of the infringing goods. The Draft Law should ensure that such forfeiture and destruction shall occur without compensation of any kind to the defendant. Finally, the Draft Law should ensure that authorities (including the Police, Customs, or the MOI) may initiate legal action *ex officio*, without the need for a formal complaint by a private party or right holder.
- **Criminalizing end-user piracy of software or other copyrighted materials:** Article 51 does not expressly criminalize the unauthorized use of software or other copyrighted materials in a business setting. Such “end-user” piracy accounts for the majority of damage to the software community and is a rising problem for all copyright owners. Unauthorized use of copyrighted materials is a form of piracy on a commercial scale, and as such, must be criminalized in Kuwait for Kuwait to comply with Article 61 of TRIPS. The Kuwaiti government has indicated that Article 51 criminalizes “any/all forms of unauthorized use of any copyrighted material in a business or commercial scale, including unauthorized use of software.” IIPA is pleased that end-user piracy is criminalized in Kuwait. It would still be better to expressly provide such.
- **Civil remedies not adequately spelled out—compensatory damages and statutory damages, etc.:**²³ Article 51 provides, “The right holder whose right, as specified by the Law, was subjected to infringement has the right to ask for adequate compensation.” This general provision on compensatory damages may not be enough to satisfy TRIPS. TRIPS requires that an infringer pay the right holder damages adequate to compensate for the injury the right holder has suffered as a result of the infringement and any profits of the infringer that are attributable to the infringement that are not taken into account in computing such damages. The injury to the right holder should be based upon the value of the

²³ The Kuwaiti government has indicated that compensatory damages are regulated under the general principles of the Kuwaiti civil law and are not detailed in the draft law.

infringed-upon item, according to the suggested retail price of the legitimate product, or other equivalent measures established by the right holder for valuing authorized goods. In addition, since many copyright infringements are difficult to calculate or quantify, Kuwait should establish a system of “statutory” or pre-established damages which shall be available upon the election of the right holder. As TRIPS calls for deterrent remedies, mere compensatory damages may not be sufficient. To balance the general cost of enforcement programs and the chances of bringing successful actions against serial, large-scale infringers, aggravated damages should be available, either explicitly or in the determination of statutory damages. Finally, costs and attorney’s fees should be able to be recovered by a right holder. These remedies are not expressly available in the Draft Law.

- **Provision allowing “custodian” to “re-publish, exhibit, manufacture or derive copies of the work” after a provisional order has been carried out must be deleted:** Article 46, Clause 2, would allow a custodian to “re-publish, exhibit, manufacture or derive copies of the work” pending agreement of “all the parties” to a provisional order.²⁴ This provision not only impinges on several exclusive rights of the copyright owner, in violation of international treaties, but also is subject to abuse since it appears to permit an infringer to hold up an administrative order, while allowing the infringing goods to be sold off or otherwise used in violation of copyright, by such “custodian.” This provision must be deleted.
- **Border measures—goods in transit and parallel imports:** Article 54 should be amended to ensure that pirated goods are covered, even when in transit (consistent with the EC Customs Regulation). In addition, as noted, the third clause should confirm that the exception to the application of border measures should only apply when the goods in question were imported into Kuwait with the authorization of the right holder to further distribute them in Kuwait. Finally, the border measures in the Draft Law must provide that the requirement to provide “sufficient information” will not unreasonably deter recourse to the procedures (i.e., suspension of the release of the suspected pirated goods into the channels of commerce), and that any security deposit or equivalent assurance will not unreasonably deter recourse to the procedures.
- **Unreasonable time limits:** Article 45 (provisional measures) imposes a time limit of 15 days for filing a legal action following an investigation/raid, which, while longer than the 8 days provided for in the 1999 Decree, remains too short. Article 50(6) provides that a judicial authority shall determine the time limits, but in the absence of judicially determined time limits, the time limit should be a minimum of 20 working days or 31 calendar days, whichever is longer.
- **Presumptions of ownership and subsistence of copyright:** The Berne Convention requires a presumption as to authorship of works [Berne Article 15(1)], which is provided for in Article 6(2) [but the Draft Law does not contain a Berne-compatible presumption with respect to cinematographic works; see Berne Article 15(2)]. The Draft Law should also provide for presumptions as to ownership and subsistence of copyright for works, performances and sound recordings.²⁵

²⁴ The Kuwaiti government asserts that the “purpose behind appointing a custodian who will be allowed to republish, exhibit, manufacture or derive copies of the work is to protect and benefit from such works and guarantee its continuance.”

²⁵ The Draft Law should include the presumption that, in the absence of proof to the contrary, the natural person or legal entity whose name is indicated as the author, producer, performer, or publisher of the work, performance or

- **Information on those connected with infringement:** The Draft Law should include the proviso that, in civil judicial proceedings, the judicial authorities may order the infringer to provide any information that the infringer possesses regarding any person(s) or entities involved in any aspect of the infringement and regarding the means of production or the distribution channel of such products, including the identification of third parties that are involved in the production and distribution of the infringing goods or services and their channels of distribution, and to provide this information to the right holder.
- **Criminalization of piracy for “no direct or indirect motivation of financial gain” (“Net Act”/Not-For-Profit):** Article 61 of the TRIPS Agreement requires the criminalization of copyright piracy on a commercial scale. Since piratical acts (such as those occurring over the Internet) can cause devastating commercial harm regardless of any profit motive, it is recognized that TRIPS requires criminalization even of acts that may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain shall be considered willful copyright piracy on a commercial scale.
- **Service provider liability:** The Draft Law contains no provisions governing the key issue of the liability of service providers that are involved in the hosting and transmission of infringing material over their facilities. If Kuwait is to consider this issue, it could include provisions that establish the basic functional equivalent of the concepts and provisions embodied in U.S. law (as found in Section 512 of the DMCA). Ensuring that secondary liability will apply to service providers involved in the hosting and transmission of infringing material over their facilities will provide the proper incentive for cooperation among service providers that is essential to making the Internet safe for the transmission of protected copyright products. An effective “notice and takedown” system modeled after the statutory system contained in the U.S. law is an essential element of any such set of provisions.

phonogram in the usual manner, is the designated right holder in such work, performance or phonogram, and that, in the absence of proof to the contrary, the copyright or neighboring right subsists in such subject matter.