

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

KUWAIT

EXECUTIVE SUMMARY

Special 301 Recommendation: Acknowledging that the Government of Kuwait took some significant enforcement actions against piracy operations in 2005, IIPA recommends that Kuwait should be lowered to the Watch List.

Priority Actions Requested in 2006:

- **The Government Must Amend Copyright Law to Significantly Strengthen Criminal Penalties:** The criminal penalties in the current copyright law are on their face non-deterrent. Given the brazen nature with which pirates have operated in Kuwait, and rampant recidivism, penalties must be increased to provide mandatory minimum fines that will discourage current and would-be pirates, maximum fines that will adequately punish commercial pirates for the significant financial harm caused in large-scale piracy cases, and mandatory minimum imprisonments (and sufficiently serious maximum sentences) to provide a true criminal deterrent. Criminal remedies should also include forfeiture and destruction of pirate goods and tools and implements used in pirating, shop closure, revocation of business licenses, and double penalties for recidivists.
- **The Courts Must Impose Deterrent Sentences:** Piracy rates will not drop substantially until courts impose deterrent sentences. Until the copyright law is amended to strengthen criminal penalties, courts should impose maximum copyright sentences allowable under the law, and prosecutors must seek alternative charges in order to maximize sentences.
- **Sustain Raiding Activity in 2006, and Bring IPR Federalized Task Force Into Operation:** IIPA commends the Kuwaiti Government for taking a significant number of raids in 2005 against pirate duplication sites and storage areas. IIPA also commends the Government for its decision to form the IPR Federalized Task Force, which includes police involvement, and urges the Kuwaiti Government to bring the task force into operation. Further sustained raids are needed, including against street vendors who continue to pirate with impunity. Raids which are publicized and which are followed by swift and deterrent prosecutions, will, it is hoped, have the desired effect of driving piracy rates down in Kuwait and driving pirates from Kuwait.
- **Significantly Increase Seizures of Pirate Imports in 2006:** While the authorities in Kuwait showed unprecedented activity in 2005, the same cannot be said for Kuwaiti Customs. It is known that a majority of pirate optical discs in Kuwait are imported from Southeast Asia (and, at least until a recent crackdown there, from Pakistan). Kuwaiti Customs must become more active in 2006 with monitoring of shipments, including large-scale, courier, and personal baggage, to keep as much of this illegal product out of Kuwait.
- **Amend and Modernize Copyright Law:** In addition to the need to increase criminal penalties, the copyright law amendment must make changes to bring Kuwait's law into line with the TRIPS Agreement, and should establish an adequate legal framework for electronic commerce by protecting copyright in the digital environment. Kuwait should join the Berne Convention and the WIPO "Internet" treaties.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>. In particular, since this year's report does not duplicate comments made on the 2004 copyright law draft, please refer to the 2005 Kuwait report at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>.

KUWAIT Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2001-2005¹										
INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level	Loss	Level	Loss	Level	Loss	Level	Loss	Level
Records & Music	8.5	70%	8.0	65%	3.0	55%	3.4	64%		70%
Business Software ²	30.6	68%	26.0	68%	24.0	68%	4.7	73%	4.5	76%
Motion Pictures ³	NA	NA	12.0	95%	12.0	95%	10.0	95%	9.0	85%
Entertainment Software ⁴	NA	91%	NA	NA	NA	95%	NA	NA	NA	85%
Books	0.5	NA	1.0	NA	2.5	NA	2.5	NA	2.5	NA
TOTALS⁵	39.6+		47.0		41.5		20.6		16.0	

PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Establishment of IPR Federalized Task Force Holds Promise: IIPA is pleased that the Kuwaiti Government, and Faisal Al Khendri, the new legal advisor to the Ministry of Information (replacing Khalid Al Hendi, who has been transferred back to the Ministry of Justice), established an IPR Task Force for enforcement of copyright at the end of August 2005. However, we are disappointed that the Task Force has not yet become truly operational. The Task Force includes all the requisite groups for effective anti-piracy operations in Kuwait, including the Ministry of Information, the Ministry of Commerce, the various municipalities, the Kuwaiti Police, and Kuwaiti Customs. The commitment of these resources and the commitment to run a set of sustained raids (see below) should bode well for the prospect of reducing piracy in Kuwait and creating a legitimate market for the first time there. This task force should immediately come into operation; continually set objectives and targets; allocate responsibilities among the group; and set time frames for action. The task force should routinely meet with rights holders to ensure that an effective IPR regime prevails in the country.

Sustained Raiding a First in Kuwait, Must be Followed by Prosecutions: IIPA is aware of 117 enforcement actions in 2005 in Kuwait, against pirate duplication sites and storage

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at <http://www.iipa.com/pdf/2006spec301methodology.pdf>.

² BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

³ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ 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.

⁵ Total losses due to piracy of records & music, business software, and books went up from \$35 million in 2004 to \$39.6 million in 2005.

areas. It is very positive that all of these actions were taken on an *ex officio* basis. Each action has resulted in criminal charges being filed and has been transferred to the public prosecutor for criminal action. The offenses have involved movie piracy (31 separate actions), pay television (9 separate actions), business software (7 separate actions), music, and entertainment software. However, there has yet to be any action against the street vendors, who continue to operate with complete impunity. In addition, in January 2006, IIPA understands that 8 video outlets were raided, so the signs are good that enforcement will be carried over into retail. In addition, the authorities have taken aggressive action against cable pirates, with raids on seven pirate cable operations, including the seizure of all supporting dishes, decoder boxes, and cables.

Criminal cases must proceed swiftly and result in deterrent sentences actually imposed. Since the current copyright law penalties (even at their maximums) do not provide a deterrent, prosecutors should charge defendants with cumulative offenses where they exist (e.g., fraud) and where the resultant fines and jail terms would be higher than under copyright alone.

Some Troubling Retail Piracy Remains: Despite these actions in 2005 (and perhaps because the pirates know the copyright law lacks teeth), serious retail piracy remains on the streets in Kuwait. Factory-produced DVDs and CDs with pre-release music and motion picture titles continue to be sold at markets. Entertainment software products are also widely available at souks, flea market-type venues and retail stores, and were at least until recently primarily imported from Pakistan, Lebanon and Asia (Pakistan recently closed its plants so product may now be coming from elsewhere). The market for entertainment software products worsened in 2005, with piracy rates at over 90%. Pirated business software is also available in the market.

Kuwaiti Customs Showed Fewer Results in 2005: While Kuwait Customs did a good job intercepting pirate imports coming into Kuwait in 2004, the same cannot be said for 2005. IIPA calls upon the Director General of Kuwait Customs to re-invigorate activities in 2006, to catch imports from Southeast Asia and elsewhere, which will make the job of the IPR Task Force easier.

Optical Disc Production in Kuwait: IIPA is now aware of one optical disc production plant in Kuwait. The plant has been visited once by industry, and while there is no information regarding possible illegal activity, nonetheless, the Kuwaiti Government needs to be aware of this plant and should monitor its activities to avoid Kuwait becoming the next in line of pirate producer nations.

Cable Piracy: Signal piracy remains a problem in Kuwait but it is important to note that cooperation with the Government of Kuwait is improving significantly. The Ministry of Information (MOI) has been very aggressive against the cable pirates and has raided all targets that have been furnished, though piracy remains significant in the absence of stronger deterrent penalties.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in regulating adoption procedures on university campuses so as to ensure use of legitimate textbooks by students and faculty. U.S. publishers continue to report a high ratio of legitimate sales to known student adoptions and maintain that this is due to the transparent procurement/purchase practices of Kuwaiti universities. 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 commends the Kuwaiti authorities on this success again during 2005.

COPYRIGHT LAW AND RELATED ISSUES

In its 2005 report, IIPA reviewed the 2004 draft copyright law then being considered by the Government of Kuwait (“Draft Law”), that would replace the current law, 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.⁶ IIPA’s conclusion is that the Draft Law would have resolved many but not all of the TRIPS deficiencies in the current law. The Draft Law would also have partially implemented the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), but would not have implemented all aspects of these treaties adequately. For example, we conclude that the Draft Law would have insufficiently protected against the unlawful circumvention of technological protection measures.⁷ IIPA understands from Kuwaiti Government officials that the Government is currently revisiting the draft to 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, and looks forward to seeing and having the opportunity to review the next iteration. Since the draft will undoubtedly change, we do not repeat the comments on the 2004 Draft Law here, which can be read at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>. Instead, we take the opportunity here to highlight the need for stronger criminal penalties in Kuwait.

The Need for Deterrent Penalties in Kuwait/Comparison with U.S.: In the current copyright law of Kuwait, criminal penalties for copyright infringement are provided, for a maximum of up to one year imprisonment and/or up to a \$1,700 fine. There are no pre-established (statutory) damage awards possible in Kuwait. The piracy levels in Kuwait are 91% for entertainment software, 70% for recorded music piracy, and 68% for business software piracy. In the United States, by contrast, video and music piracy levels hover around 5%, and the piracy level is 25% for business software. The U.S. retains stronger criminal penalties and high statutory damages to keep piracy abated and deter further infringements (see description below). It is clear that the Kuwaiti system is not working to eradicate piracy or deter further infringements. Stronger criminal penalties on the books, the addition of statutory damages, and application of these provisions in practice, are what is required to reduce piracy in Kuwait.

Compare the United States: According to “Prosecuting Intellectual Property Crimes,” written by the Computer Crime and Intellectual Property Section (CCIPS), Criminal Division, of the U.S. Department of Justice (January 2001), available at <http://www.cybercrime.gov/ipmanual.htm>:

⁶ See complete analysis in 2003 Special 301 Report for Kuwait, at the website <http://www.iipa.com/rbc/2003/2003SPEC301KUWAIT.pdf>.

⁷ 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.

The penalties available for criminal infringement are codified at [18 U.S.C. § 2319](#). For the misdemeanor violations, a defendant may be sentenced to up to one-year imprisonment and fined up to \$100,000. See [18 U.S.C. §§ 2319\(b\)\(3\), 3571\(b\)\(5\)](#). *For a felony violation*, where the infringement consists of the reproduction or distribution during a 180-day period of no fewer than ten copies or phonorecords which have a total retail value of more than \$2,500, *the maximum penalty can be three or five years imprisonment*, depending on what purpose can be proven. If the government proves that the defendant acted for purposes of commercial advantage or private financial gain, and obtains a conviction under [17 U.S.C. § 506\(a\)\(1\)](#), the maximum sentence for a first time offender is imprisonment for up to 5 years *and a fine of up to \$250,000*. See [18 U.S.C. §§ 2319\(b\)\(1\), 3571\(b\)\(3\)](#). Those with *a prior copyright infringement conviction* are subject to *up to 10-years imprisonment*. See [18 U.S.C. § 2319\(b\)\(2\)](#). If a financial motivation is not proven in a felony case, and the conviction is obtained under [17 U.S.C. § 506\(a\)\(2\)](#), the defendant can be imprisoned for up to 3 years – six years for the repeat offender – and fined up to \$250,000. See [18 U.S.C. §§ 2319\(c\), 3571\(b\)\(3\)](#). [emphasis added]

In the U.S., copyright infringement is a federal offense. In addition to this federal system, the 50 states do have laws which require manufacturers of products to post true names and addresses (TNA) on products; these are not copyright cases *per se*, but the industries and local law enforcement do pursue state actions to get pirated and counterfeited products (which fail to contain accurate TNA information) off the streets. For a listing of these state laws, see list compiled by the U.S. Department of Justice at <http://www.cybercrime.gov/ipmanual/appf.htm>.

In practice, there have been several recent deterrent penalties issued in criminal copyright infringement cases. For example, in 2005, a defendant pled guilty to copyright infringement and computer intrusion and received a 27 month jail sentence and a fine of \$201,000, to be followed by three years of supervised release (see *U.S. v. Jiang*, DOJ press release at <http://www.cybercrime.gov/jiangSent.htm>). In 2004, the defendant involved in a computer game piracy ring was sentenced to 50 months in jail and fined \$690,000, followed by three years of supervised release (see *U.S. v. Breen*, DOJ press release at <http://www.cybercrime.gov/breenSent.htm>). Also in 2004, another defendant was convicted of software piracy and sentenced to 37 months in jail (see *U.S. v. Tobolsky*, DOJ press release at <http://www.cybercrime.gov/tobolskySent.htm>).

In addition to criminal penalties, the U.S. has a system of pre-established, statutory damages that can be elected by a right holder prior to a judicial decision. See [17 U.S.C. §504\(c\)](#). The range of statutory damages, per work infringed, is a sum of not less than \$750 or more than \$30,000. In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 per work infringed. The range of statutory damage awards vary, according to judicial discretion in each case. However, there have been several very high statutory damage awards. For example, on September 6, 2000, Judge Rakoff, in *UMG Recordings v. MP3.com*, awarded the plaintiffs \$25,000 in statutory damages per CD uploaded on the MP3.com system. MP3.com stated that "no more than 4,700 CDs" owned by the plaintiffs were on the system, while the plaintiffs alleged that the number was closer to 10,000 CDs. The damages were estimated between \$118 million and \$250 million, a very deterrent message indeed.

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