

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2007 SPECIAL 301 REPORT

KUWAIT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List.

EXECUTIVE SUMMARY

Over the past two years, copyright protection in Kuwait has improved for most copyright industries due to increased cooperation with the Kuwaiti Ministry of Information and the Kuwaiti Police. The key issues remaining are the law, which still fails to fully meet the requirements of the TRIPS Agreement and, for example, contains a totally non-deterrent criminal remedy on the books, as well as the failure to provide focused and swift prosecutorial follow-up and to impose strict penalties against those raided, which results in high rates of recidivism. In addition to increasing criminal penalties on the books, the Kuwaitis need to begin prosecuting key commercial pirates (including imposition of deterrent fines and prison sentences against egregious offenders), legalizing use of copyright materials in businesses, and continuing the work begun by Kuwaiti Customs to provide a choke point to pirate imports.

PRIORITY ACTIONS REQUESTED IN 2007

- **Prosecute Piracy Cases in the Courts with Imposition of Deterrent Sentences (Including Imprisonment in Appropriate Cases) to Avoid Recidivism:** Piracy rates will not drop substantially until the courts in Kuwait impose deterrent sentences. Indeed, without the threat of criminal prosecution for copyright piracy, pirates will be emboldened to repeat-infringe and view raids as a mere nuisance or cost of doing business. In addition, until the copyright law is amended to strengthen criminal penalties, courts should impose maximum copyright sentences allowable under the law (including imprisonment), and prosecutors should seek alternative charges in order to maximize sentences.
- **Amend the Copyright Law to Significantly Strengthen Criminal Penalties:** The criminal penalties in the current copyright law are non-deterrent on their face, and therefore cannot meet the TRIPS requirement to provide criminal remedies that constitute a deterrent to further infringement. The maximum penalty ordered to date for copyright infringement was KD 300 (US\$1,042) (the maximum according to the law is KD 500, or US\$1,738). There have been no prison sentences or shop closures as a result of raids carried out. Given the brazen nature with which pirates have operated in Kuwait, and 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 seizure, forfeiture and destruction of pirate goods, as well as tools and implements used in pirating, shop closure, revocation of business licenses, and double penalties for recidivists.

- **Sustain Raiding, and Involve the Police IP Unit Systematically in Fight Against IPR Violations:** IIPA commends the Kuwaiti Government for taking significant numbers of raids in 2005 and again in 2006 against most forms of piracy. Further sustained raids are needed, including raids which are publicized and which are followed by swift and deterrent prosecutions. 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. The Kuwaiti Police can best employ their abilities, training, and resources by being empowered to investigate and take action against the various sources of piracy in Kuwait.
- **Shorten Procedural Delays:** When a raid is conducted by the Ministry of Information, the report is sent to the Public Prosecutor who will later transfer the case to the court. Unfortunately, it usually takes a very long time to transfer the case from the Ministry to the Public Prosecutor. Also, the Public Prosecutor takes an unduly long time before reaching a decision as to the transfer of the case to the criminal court. This process needs to be accelerated.
- **Continue Increased Seizures of Pirate Imports in 2007:** While the authorities in Kuwait showed excellent levels of activity in 2006, the same cannot be said for Kuwaiti Customs. A majority of pirate optical discs in Kuwait are imported from Southeast Asia. Kuwaiti Customs must become more active in 2006 in monitoring shipments, including large-scale shipments, courier packages, and personal baggage, to keep 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 online environment. Kuwait should join the Berne Convention and the WIPO "Internet" Treaties.
- **Apply Censorship Rules Fairly:** The Kuwaiti government should review censorship rules for sound recordings and their enforcement, and should refrain from using these rules arbitrarily to randomly block the release of recordings that objectively qualify and/or have been approved in the past.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

KUWAIT
Estimated Trade Losses Due to Copyright Piracy
(in millions of U.S. dollars)
and Levels of Piracy: 2002-2006¹

INDUSTRY	2006		2005		2004		2003		2002	
	Loss	Level								
Records & Music	9.0	70%	8.5	70%	8.0	65%	3.0	55%	3.4	64%
Business Software ²	49.0	71%	35.0	66%	26.0	68%	24.0	68%	4.7	73%
Motion Pictures ³	NA	NA	1.3	82%	12.0	95%	12.0	95%	10.0	95%
Entertainment Software	NA	NA	NA	91%	NA	NA	NA	95%	NA	NA
Books	0.5	NA	0.5	NA	1.0	NA	2.5	NA	2.5	NA
TOTALS	58.5		45.3		47.0		41.5		20.6	

PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Sustained Raiding Again in 2006; Rehab and Hawally Remain Havens for Entertainment Software Piracy: Kuwaiti authorities carried out, on an *ex officio* basis, more than 300 enforcement actions in 2005 and many actions in 2006 in Kuwait against most tiers of piracy, including retail outlets (movies, games, computer resellers, and the like),⁴ street vendors, distribution centers of pirate product (movies and interactive games, as well as optical disc storage areas), duplication sites of pirate product (VHS replication, DVD-R labs, and the like), and pirate cable operations (head end receiving locations in residences). IIPA is pleased that most actions in 2006 resulted in criminal charges being filed and cases transferred to the public prosecutor for criminal action. Moreover, 2006 saw the first raid coordinated by the newly established IPR Committee.⁵ This follows on a very active year of enforcement in 2005.⁶

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2007 Special 301 submission at www.iipa.com/pdf/2007spec301methodology.pdf. For information on the history of Kuwait under Special 301 review, see Appendix D at (<http://www.iipa.com/pdf/2007SPEC301USTRHISTORY.pdf>) and Appendix E at (<http://www.iipa.com/pdf/2007SPEC301HISTORICALSUMMARY.pdf>) of this submission.

² BSA's 2006 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Third Annual BSA/IDC Global Software Piracy Study (May 2006), 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 2005 piracy statistics were preliminary at the time of IIPA's February 13, 2006 Special 301 filing; the 2005 data was revised and posted on the IIPA website in September 2006 (see <http://www.iipa.com/statistics.html>), and the 2005 revisions (if any) are reflected above.

³ MPAA's trade loss estimates and piracy levels for 2006 are not yet available. However, such numbers will become available later in the year and, as for 2005, will be 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 the 2006 loss numbers and piracy levels become available, they will be posted on the IIPA website, <http://www.iipa.com>.

⁴ Factory-produced DVDs and CDs with pre-release music and motion picture titles, entertainment software, and business software continue to be sold at markets. Entertainment software products are also widely available at *souks*, flea markets, and retail stores, and have been known to be transshipped through Lebanon from Asia. We also note an increased trend of "burn-at-home" or "mom and pop" store piracy, in which pirate content is burned while the customer waits. The lack of deterrent penalties allows these operations to flourish.

⁵ On June 3, 2006, police officers, Ministry of Culture representatives, customs officers, and the industry group Arabian Anti-piracy Alliance (AAA) carried out a successful raid against two locations believed to be operating storage sires supplying a local video shop. The storage units were located on the first floor and basement areas of residential premises. Seizures totaled; 1,300 burned pirate DVDs, 3,180 pirate VHS tapes, 5 VCRs, a computer, a DVD duplicator, a DVD player, 12 catalogues, plus hundreds of cover inserts.

⁶ In 2005, the offenses involved movie piracy (79 separate actions), pay television signal theft (33 separate actions), business software piracy (32 separate actions), music piracy, and entertainment software piracy (e.g., 101 cases involved Playstation® console-based games). The authorities also took aggressive action against cable pirates with raids on pirate cable operations, including the seizure of supporting dishes, decoder boxes, and cables.

The Business Software Alliance and its members initiated and conducted 36 criminal raids in Kuwait in the course of 2006. They all targeted pirate resellers and were conducted through the Ministry of Information. The process of initiating and conducting the raids was very smooth and the relationship with the local enforcement authorities was generally improved in 2006. Other industries are less sanguine. In January 2006, eight video retail outlets were raided, in which pirate entertainment software was targeted, but at least for the entertainment software industry, there were no further raids in 2006. The entertainment software industry continues to be troubled by the piracy in the shops/outlets in the Rehab Center and the Hawally area, and the apparent lack of government action at these two notorious sources of pirated entertainment software products. Given the lack of deterrent fines or criminal sentencing, the rate of recidivism at these centers remains high. The Kuwaiti government must take concerted efforts to focus on Rehab and Hawally, which house hundreds of pirate retailers and remains the primary source of pirated entertainment software in the country.⁷

Raids Not Resulting in Criminal Prosecutions with Imposition of Deterrent Sentences: Unfortunately, raids are not leading to many criminal prosecutions, and no cases resulting in deterrent penalties being meted out. The courts are largely ignoring the copyright law and fail to mete out prison sentences, even in egregious cases, and fines serve only as a cost of doing business for the pirates. In 2007, IIPA looks to the Kuwaiti government to focus on the outcomes of these cases arising out of the numerous raids, to ensure that piracy is being deterred. 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.

There is also an incredible lag time between raids and forwarding cases to the prosecutor, due to the fact that prosecutors are not, to IIPA's knowledge, initiating raids themselves, but are instead referring raid targets to the Ministry of Information officials, who run the raid and forward the results back to the prosecutor. Public prosecutors in Kuwait need to exercise their rights to initiate raids with the police to solve this problem.

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, 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.

Signal Theft (Cable and Satellite Piracy): Signal piracy (which can involve altering set-top boxes to illegally receive broadcasts, or the unauthorized decryption and/or retransmission of pay television through a pirate signal to home and business "subscribers") remains a problem in Kuwait, but it is important to note that cooperation with the Kuwaiti government is improving significantly. The Ministry of Information has been very aggressive against the cable pirates and has raided targets that have been furnished, though piracy remains significant in the absence of stronger deterrent penalties.

⁷ In 2005, IIPA provided to the Kuwaiti and U.S. governments a list of targets in Kuwait suspected to be engaged in pirate activities. While we understand the provision of this list was helpful in spurring the Kuwaitis on to action, it should be noted that, since there are literally hundreds of retailers in these areas, providing a list of only several targets can capture only one part of the piracy picture in Kuwait. Indeed, some companies report that many of the previously identified targets are back in business (and were back in business within days of the last raid), because the raids are isolated and continuous pressure has not been directed at these pirate retailers. Thus, a sustained crackdown at the Rehab Center and the Hawally area is what is required.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in regulating book “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 2006. Other countries should learn from this approach by the government of Kuwait.

TRAININGS, CAMPAIGNS, AND BILATERAL ENGAGEMENT

Industry training efforts continued in 2006. The Business Software Alliance conducted regular trainings and seminars in 2006, including judicial round tables, training for airport officials, training for the Intellectual Property Rights Committee officials and a third training for Kuwaiti Customs officials. In one such training that occurred in May 2006, the BSA organized a Judicial Roundtable in Kuwait, in association with the Ministry of Information. More than twenty judges attended the event. The program included a presentation by a representative from the Ministry of Information and a presentation on behalf of BSA on software issues, including the definition of the various types of software piracy, an overview of the main principles in the Kuwaiti copyright law and the developments and legal challenges in copyright law and enforcement in the Arab world. The roundtable was concluded with case scenarios that were discussed by the judges in an interactive manner.

In October 2006, Kuwaiti authorities, in association with the BSA, announced they would step up their campaign against software piracy through a series of seminars, trainings and conferences targeted at IT resellers, public and private sector organizations, the student community and the public at large.⁸

The Kuwaitis wish to make progress with the U.S. bilaterally through the Trade and Investment Framework Agreement (TIFA) discussions, and we understand they remain interested in a free trade agreement, so it is hoped that the TIFA talks can remain one point of leverage to seek positive changes in Kuwait’s copyright law and enforcement system.⁹

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Kuwait is governed by Decree No. 66 (1999, effective February 9, 2000). IIPA has noted on many occasions that the 1999 law has never been interpreted through implementing regulations, nor has it been updated. As IIPA has also noted, the law fails to comply with TRIPS in certain respects and contains other problems/ambiguities.

⁸ *Kuwait clamps down on software piracy*, DPM, October 16, 2006 (indicating “the campaigns will highlight the adverse effects of software piracy on the national economy – in terms of reduced IT investments and employment opportunities – and also stress on the disadvantages of using pirated software, such as poor PC performance, non-availability of vital technical support and rampant virus attacks”).

⁹ The latest meeting was held in September, between Assistant U.S. Trade Representative Shaun Donnelly and Kuwait’s Trade Minister, Falah al-Hajiri.

In 2004, the Kuwaiti government released a new draft copyright law. IIPA's conclusion, which has been shared with the Kuwaiti and U.S. governments, is that the draft law would resolve many but not all of the TRIPS deficiencies in the current law. The draft law would also partially implement the WIPO Internet Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) but would not implement all aspects of these treaties adequately. For example, the draft law would insufficiently protect against the unlawful circumvention of technological protection measures.¹⁰ In addition, although the draft law would result in an increase in criminal penalties, there would remain no mandatory minimum prison sentences (even in cases of recidivism), and the penalties and fines, while above the levels in the 1999 Decree, would remain non-deterrent

IIPA understands from the Kuwaiti government that it has revisited the draft and made changes intended to comply with all related international conventions and treaties, including TRIPS, the WCT and the WPPT. To date, neither the U.S. government nor industry has been provided with an opportunity to review the draft. IIPA supports passage of a new copyright law in Kuwait, with necessary changes to ensure compliance with international norms, and to implement the WIPO Internet Treaties.

The following is a non-exhaustive list of key substantive and enforcement issues IIPA has noted in commenting on the 2004 draft (hereinafter Draft Law):¹¹

Key Concerns Regarding Substantive Provisions

- **Reproduction right:** Temporary copies must be protected to fully comply with the major copyright treaties and to effectuate protection for the digital age.¹² 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. 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

¹⁰ 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). Generally, such TIFAs can be a prelude to strengthening of trade ties including possibilities for a free trade agreement. If Kuwait is interested in an FTA with the U.S., it should be noted that any 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.

¹¹ For the complete IIPA analysis of the draft law, please see IIPA's 205 Special 301 Report on Kuwait, at <http://www.iipa.com/rbc/2005/2005SPEC301KUWAIT.pdf>.

¹² 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.

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.

- **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. It should be amended to provide for full WIPO Treaties implementation.¹³
- **Retransmission right:** The Draft Law does not expressly provide in Article 5(c) for retransmission rights. 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.
- **Exceptions to protection:** The Draft Law (Chapter 6 as to works, and Article 41 as to related rights) contains many exceptions to protection, some of which may not comport with TRIPS/Berne Convention standards.¹⁴ The well-established Berne three-step test (or its

¹³ For example:

- 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”).
- 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. This 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.
- 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.

¹⁴ For example:

- 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, should be limited to copies derived from a legal source, made by the person (not a third party) availing him or herself of the exception, limited to analog form, made strictly for private and personal uses, and limited to uses not resulting in profit or other financial gain.
- Article 25 provides for an exception for certain temporary reproductions. This exception appears to be too broad to pass muster under the Berne three-part test and must be narrowed
- Article 30 appears to impinge on the exclusive “communication” right in Article 5 as to the works concerned.
- Article 31, Clause 2 appears to violate the three-step. It is a software-specific exception that states,

It is permitted and without permission or compensation to the author for the legitimate owner of a copy of a computer program to make ... A single copy of the program if derived, adapted, upgraded, or translated into another computer language, if it was necessary to ensure its compatibility with a certain computer employed for private use of the owner of the original copy.

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 Law (Chapter 6 as to works, and Article 41 as to producers of sound recordings and performances).¹⁵

- **Term extension (Articles 30 and 31):** The Draft Law retains term of protection that is life of the author (or last surviving joint author) 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 80 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 (the government of Oman has agreed, in the U.S.-Oman Free Trade Agreement, to extend term to life plus 70 for works of natural authors, and 95 years from publication for audiovisual works and sound recordings).

We believe the Kuwaitis have attempted here an approximation of a limitation which exists in U.S. law, namely, Section 117(a)(1), which provides that it is not an infringement of copyright for the owner of a computer program to copy or adapt a computer program if “such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner.” The purpose of the Kuwaiti provision seems to be the same as 117(a)(1), namely, to ensure that someone who is the lawful owner of a computer program may use it on a particular machine, and to allow adaptation or copying when such adaptation or copying is an “essential step” to use the program on that machine. The Kuwaiti provision, however, goes well beyond what is required to use the program on a particular machine, exempting such activities as “deriv[ing]” or “upgrad[ing]” the program or even “translat[ing]” the program “into another computer language.” Such activities take the Kuwaiti provision outside the scope of what the three-step test as enumerated in the FTA would allow. One possible way to resolve the issue would be to amend Article 26(b) as follows:

It is permitted and without permission or compensation to the author for the legitimate owner of a copy of a computer program to make ... A single copy or to adapt a of the program if ~~derived, adapted, upgraded, or translated into another computer language,~~ if it was necessary to ensure its use compatibility on with a certain computer employed for private use only in that manner by of the owner of the original copy.

- 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 11bis(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 11bis(3) for the archival exception: neither of “official archives,” nor of “exceptional documentary character.”
- 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 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.
- 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. Any exception as to importation of personal copies should 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.

¹⁵ 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.”

- **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.
- **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 other right holders.
- **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 copyright 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.

Key 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 KD 500, or US\$1,738 and/or three months in prison).
 - The maximum fines and prison sentences for first-time offenders are doubled from the 1999 Decree (maximum KD 2,000, or US\$6,952 and/or one year in prison).
 - Both minimum and maximum fines and prison terms are doubled for recidivists (up to KD4,000, or US\$13,904 fine and two years in prison).
- **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 copyright materials:** While Article 51 does not expressly criminalize the unauthorized use of software or other copyrighted materials in a business setting, 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, in the Kuwaiti government’s view, end-user piracy is criminalized in Kuwait, and hopes that the Draft Law would confirm this expressly.
- **Civil remedies not adequately spelled out – compensatory damages and statutory damages, etc.:**¹⁶ 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.
- **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.¹⁷ This provision unfortunately 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, 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.
- **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) of the Draft Law [but the Draft Law does not contain a Berne-compatible presumption with respect to cinematographic works; see Berne Article 15(2)]. The Draft Law

¹⁶ 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.

¹⁷ 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.”

should provide for presumptions as to ownership and subsistence of copyright for works, performances and sound recordings.¹⁸

- **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”:** 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 criminalization even of acts that may not have a motive of financial gain is of the utmost importance. Kuwait should therefore provide that copyright piracy involving significant willful infringements that have no direct or indirect motivation of financial gain is criminalized in Kuwait.
- **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. 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.

The Need for Deterrent Penalties in Kuwait

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 roughly \$1,700 fine. There are no pre-established (statutory) damage awards possible in Kuwait. 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 required to reduce piracy in Kuwait.

¹⁸ 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 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.