

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2008 SPECIAL 301 REPORT

KUWAIT

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

EXECUTIVE SUMMARY

Over the past three years, copyright protection in Kuwait has improved for most but not all copyright industries due to increased cooperation with the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, and the Kuwaiti Ministry of the Interior (Police). The key developments in 2007 include increased *ex officio* raiding on behalf of the motion picture and entertainment software industries, shop closures in cases of repeat offenders, and the blocking of Internet websites offering pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. The Kuwaiti government also pursued most cases criminally, although the lack of mandatory minimal sentencing and deterrent maximum penalties by the criminal courts means defendants still do not fear the outcomes of such cases. The book publishing industry reports few piracy problems again in 2007 and commends the approaches to textbook adoption that have led to this continued success. For others in the recording and business software industries, results have proved less impressive, with fewer raids, few prosecutions, and more problems such as onerous, arbitrary and lengthy content review processes. Notwithstanding the laudable enforcement actions of the police, MOI and Customs, piracy rates remain quite high in general, underscoring the need for deterrent sentencing. The copyright law remains TRIPS deficient, including the lack of deterrent criminal penalties, and the government needs to update the law to effectively address Internet piracy.

PRIORITY ACTIONS REQUESTED IN 2008

- **Amend the Copyright Law to Provide Deterrent Fines and Mandatory Prison Sentences; Then Prosecute Piracy Cases in the Courts with Imposition of Maximum Penalties**
- **Deploy Police IPR and Cybercrime Unit (Complementing Efforts of MOI Against Movie and Game Piracy) to More Effectively Tackle Music and Software Piracy**
- **Successfully Target Pirate Internet Websites, Closing Down Web Access to Pirate Materials Expediently:** While the Ministry of Communication has expediently closed down pirate websites (e.g., movie downloads) when illegal activities other than copyright infringement occur on such sites (e.g., the site contain illegal religious material or materials that are prohibited in Kuwait), the Ministry of Information has not expediently blocked access to copyright materials on websites not containing other illegal material. The Ministry of Information must speed up its copyright infringement verification process, which now runs as long as three weeks now, to make Internet piracy enforcement more expedient and effective.
- **Amend and Modernize Copyright Law to Bring the Law Into Compliance with TRIPS and to Fully Implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty**
- **Apply Censorship Rules Fairly:** The Kuwaiti government should review censorship rules for sound recordings and movies and their enforcement, and should refrain from using these rules arbitrarily or randomly to block the release of movies or recordings that objectively qualify and/or have been

approved in the past.¹ The Ministry of Information censorship department now takes weeks to approve new sound recordings for the Kuwaiti market, while pirated CD-Rs of the same albums are already available in shops and through street vendors.

For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2008SPEC301HISTORICALSUMMARY.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: 2003-2007²										
INDUSTRY	2007		2006		2005		2004		2003	
	Loss	Level								
Records & Music	10.0	75%	9.0	70%	8.5	70%	8.0	65%	3.0	55%
Business Software ³	37.0	62%	33.0	64%	35.0	66%	26.0	68%	24.0	68%
Motion Pictures ⁴	NA	NA	NA	NA	1.3	82%	12.0	95%	12.0	95%
Entertainment Software	NA	NA	NA	NA	NA	91%	NA	NA	NA	95%
Books	NA	NA	0.5	NA	0.5	NA	1.0	NA	2.5	NA
TOTALS	47.0		42.5		45.3		47.0		41.5	

PIRACY UPDATES IN KUWAIT

Optical Disc Piracy ("Burned" and Imported Factory Discs): The impressive efforts of the Ministry of Information (MOI) against optical disc piracy have had a positive net impact on piracy for some industries. Notwithstanding their efforts, optical disc piracy, both imported factory discs and home-grown "burned" CD-Rs and DVD-Rs, continues to harm copyright owners and remains the chief form of piracy found in the markets in Kuwait. Locally duplicated pirate CD-Rs with foreign music remain widely available in Kuwait. In many retail outlets the burning of such CD-Rs is "on-demand," exacerbating enforcement issues (i.e., enforcement officials sometimes find very little stock). The piracy level for foreign music is estimated at about 75%.

IIPA is now aware of one optical disc production plant in Kuwait. The plant was visited by IFPI staff in 2006 and 2007, and the plant owner fully cooperated with the plant visits. The Kuwaiti government should know about the plant and its activities.

Internet Piracy: Internet piracy is on the rise in Kuwait, with industry noting it as the second most serious concern, after rampant retail piracy. Kuwait now boasts almost 817,000 Internet users, which amounts to a 32.6% penetration rate, has 2,013 independent hosts, and 25,000 broadband users.⁵ While

¹ As an example of the arbitrary and unfair nature of these censorship reviews, the motion picture "Ratatouille" was banned because of an animated kiss.

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2008 Special 301 submission at www.iipa.com/pdf/2008spec301methodology.pdf.

³ BSA's 2007 statistics are preliminary. They represent the U.S. software publishers' share of software piracy losses in Kuwait, and follow the methodology compiled in the Fourth Annual BSA and IDC Global Software Piracy Study (May 2007), available at <http://w3.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 2006 piracy statistics were preliminary at the time of IIPA's February 12, 2007 Special 301 filing and were finalized in June 2007 (see <http://www.iipa.com/statistics.html>) as reflected above.

⁴ MPAA's trade losses and piracy levels for 2006 and 2007 are not available. MPAA did provide 2005 estimates for a select group of countries, using a new methodology that analyzed both physical/"hard goods" and internet piracy. Details regarding MPAA's methodology for 2005 and prior years are found in Appendix B of this IIPA submission.

⁵ See The World Factbook, Kuwait, at <https://www.cia.gov/library/publications/the-world-factbook/geos/ku.html>. See Internet World Stats, at <http://www.internetworldstats.com/stats5.htm>. These statistics are up-to-date as of November 30, 2007, are based on Census Bureau data, while usage numbers come from various sources, mainly from data published by Nielsen/NetRatings, ITU, and other trustworthy sources. See also *Internet World Stats*, Kuwait, at <http://www.internetworldstats.com/middle.htm#kw> (reporting that there were 816,700 Internet users in Kuwait as of August 2007, representing a 32.6% penetration rate, according to International Telecommunications Union; and 25,000 broadband subscribers as of September 30, 2007, also according to International Telecommunications Union).

broadband penetration remains relatively low, the high overall rate of Internet penetration should give pause to industry and government alike as to the future of Internet usages of copyright materials in Kuwait. To avoid Kuwait becoming an Internet piracy haven, lawmakers should quickly act to pass a modern copyright statute to properly protect copyright on the Internet.

Business Software End-User Piracy: The business software industry reports no improvement in software piracy levels in 2007. Piracy continues to affect the ability of legitimate software businesses to operate in Kuwait.

Broadcast Signal Theft: The theft the satellite signals which involves altering set-top boxes to illegally receive broadcasts, and the unauthorized decryption and/or retransmission of pay television through a pirate signal to home and business “subscribers,” remain problems in Kuwait, exacerbated by the lack of deterrent minimum criminal penalties. The problem exists notwithstanding good and improving cooperation with the Kuwaiti government. In particular, the Ministry of Information has taken a very aggressive stance against cable pirates and has raided targets.

University Practices Help Keep Book Piracy Low: Kuwait retains its position as a leader in ensuring 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 2007. Other countries should learn from this approach.

ENFORCEMENT UPDATES IN KUWAIT

Significant Enforcement Gains in 2007 Against Retail Piracy of Movies and Entertainment Software Through *Ex Officio* Raids: A noticeable change has occurred in overt retail piracy (fixed location, street vendors) in Kuwait of motion pictures and entertainment software due to improved operational fluency of the Ministry of Information (MOI). In 2007, MOI has stepped up its enforcement against movies and game piracy, taking many *ex officio* actions with all known cases resulting in criminal charges.⁶ Additionally, MOI has engaged in numerous closures of repeat offenders’ locations. From January to November 2007, MOI conducted 97 successful raids against movie and game piracy, resulting in the closure of 28 recidivist pirate video stores and 11 recidivist pirate interactive game stores. The MOI also heavily publicized these closures in the local media. As a result of all the raiding activity and closures, piracy levels for movies and entertainment software decreased significantly in 2007. Unfortunately, this decrease has yet to translate into increased sales due to both the lack of deterrent penalties in the law as implemented by the courts and the onerous censorship standards keeping legitimate product out of the marketplace (while piracy flourishes).

Music and Software Industries Need Greater Engagement and Enforcement in 2008: The music industry reports less positive results, due to the high rates of sound recordings that either do not clear the censorship system or are clear censors only with great delays, leaving the market wide open to a monopoly in the market place for pirate discs which, of course, are not censored. In addition, the MOI officials view music piracy as a very low priority, with virtually no *ex officio* actions against music piracy and only the rare cosmetic anti-piracy raid. The industry proposes that the Police develop and deploy a

⁶ In one instance, on April 1, 2007, MOI and Ministry of Interior, with industry support, orchestrated a 50-man raid team against a nerve of piracy, the Rehab Complex. In that raid, 50 separate shops were raided, and more than 10,000 locally burned pirate DVD-Rs of movie titles and Playstation games were confiscated. MOI and the Ministry of Interior deserve praise for taking on such a large-scale anti-piracy operation, which is unprecedented in the history of copyright enforcement in Kuwait.

special IPR cybercrime unit (inspired by the Lebanese example) to handle both physical and Internet piracy.

The software industry reports that 14 criminal actions/raids were undertaken against pirate resellers in Kuwait in 2007, and that MOI carried out raids in a more expeditious manner in 2007. Unfortunately, they also report that MOI lacks the wherewithal to act as a strong administrative enforcer. IIPA and BSA call upon the Director of the Copyright Unit of MOI to become more proactive in fighting business software piracy, apply strong administrative sanctions, and transfer such cases quickly to the public prosecutor so that software cases will end up in court. As noted below, the copyright law needs to be amended to provide for higher criminal penalties for all piracy cases, but also to confirm that end-user piracy of business software is considered a crime.

Ministry of Communication Internet Piracy Enforcement Actions Impress, While MOI Enforcement Needs to be Invigorated: The Kuwait authorities have recognized the increase in Internet piracy and have taken some steps to address the problem. Specifically, 155 websites were shut down by four key ISPs in Kuwait between January and November 2007. The Ministry of Communications spearheaded these efforts, expeditiously closing down the pirate websites (e.g., sites offering pirate movie downloads). However, MOC has acted expeditiously mainly due to other illegal activities occurring on such sites (e.g., the sites contain illegal religious material or materials that are prohibited in Kuwait). On the other hand, the Ministry of Information has not expeditiously blocked access to pirate copyright materials on websites not otherwise engaged in other illegal activity or dealing with other illegal materials. Although the MOI finally acted upon complaints, some websites remained up for more than three weeks after a complaint, despite blatant copyright infringement. The Ministry of Information officials must speed up their copyright infringement verification processes.

Court Weaknesses: All the industries agree that no matter how many raids are run, piracy levels in Kuwait will not significantly decrease until courts are empowered to administer deterrent penalties, including mandatory minimum fines and mandatory minimum prison sentences, as well as deterrent maximum fines and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimal mandatory sentencing and higher maximums.

TRAINING

Some industry training efforts continued in 2007. Motion picture, entertainment and business software industry representatives have provided training to the judiciary and the enforcement authorities in Kuwait, and industry has generally participated in most U.S. government-led trainings of Kuwaiti officials. For example, the Business Software Alliance conducted a major training event on January 28, 2008, in partnership with the IPR unit of the Kuwaiti Law Society. The event was attended by representatives of the Judiciary, Public Prosecutor's Office, Ministry of Information, Law Society and Law Faculty of the University of Kuwait.

COPYRIGHT LAW AND RELATED ISSUES

Copyright protection in Kuwait is governed by Decree No. 64 (signed in 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, and that the law fails to comply with TRIPS in certain respects and contains other problems/ambiguities.⁷

⁷ IIPA notes the following non-exhaustive list of deficiencies or ambiguities in need of explicit clarification or amendment by the Kuwaiti government:

- **Innovativeness Requirement for Works:** Article 1 of the Copyright Law provides protection to authors of "innovative" works; such an "innovativeness" requirement is inconsistent with TRIPS Article 9.1. The term "innovative" in the Copyright Law should simply be replaced by the word "original."
- **Exclusive Rights Limited to Financial Exploitation:** Under Article 4 of the Copyright Law, the right holder is given the exclusive right "to exploit his writing financially." The word "financially" should be deleted from Article 4.

In 2004, timed closely to the February 6, 2004 signing of a Trade and Investment Framework Agreement (TIFA) between the U.S. and Kuwait, the Kuwaiti government released a new draft copyright law, which would have resolved many but not all of the TRIPS deficiencies of the 1999 Decree, and would have partially implemented the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) but not adequately in all respects. That draft was reworked after further government-to-government consultations and IIPA understands there may be a new version in the drafting process. Important issues to IIPA in the next drafting round are:

- Providing for Increased Criminal Penalties, with Mandatory Minimum Imprisonment and Fine (not and/or)
- Ensuring a WCT- and WPPT-compatible Communication to the Public and Making Available Right Both as to Works and Related Rights
- Ensuring Adequate Protection Against the Act of Circumvention of Technological Protection Measures, and Trafficking in Circumvention Devices, Including Both Civil and Criminal Remedies for Violations (and Providing Treaties-Compatible RMI Protection)
- Providing Express Temporary Reproduction Protection, With Only Limited Exceptions
- Ensuring Proper Enumeration of Other WCT/WPPT Rights Such as Distribution and Rental
- Limiting Exceptions to Protection, Avoiding Compulsory Licenses in the Copyright Area, and Avoiding Unreasonable Restrictions on the Ability of Parties to Freely Contract

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- **Unclear Retroactive Protection:** Article 44 of the Copyright Law makes the law applicable to works that “exist on the date on which [the Copyright Law] shall enter into force,” making it unclear (since there was no copyright law in existence prior to enactment of the Decree) whether the law provides full TRIPS-compatible protection for older works.
 - **Protection for Sound Recordings:** IIPA understands that protection for sound recordings has been effectuated by protecting “audio-visual broadcasting works” in Article 2(6) of the Copyright Law.
 - **Unclear Panoply of Exclusive Rights for Producers of Audiovisual Works:** The panoply of exclusive rights for producers of audiovisual works according to Article 25 of the Copyright Law is unclear.
 - **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Etc.:** Article 43 of the Kuwaiti Copyright Law fails explicitly to provide point of attachment for: 1) Kuwaiti or WTO members’ performers or broadcasters; 2) foreign unpublished works (performances or broadcasts); and 3) works of WTO members who are not members of WIPO.
 - **Inadequate Term of Protection for Computer Programs and Compilations of Data:** The Kuwaiti Copyright Law fails to provide computer programs and compilations of data with at least a TRIPS-compatible term of protection.
 - **Berne-Incompatible Compulsory License:** Article 14 of the copyright law amounts to an unacceptable compulsory license in violation of the Berne Appendix (and TRIPS Article 9.1).
 - **Moral Rights Provision Overly Broad, Possibly Impinging on Exclusive Adaptation Right:** The moral rights provisions exceed what is provided for in Article 6*bis* of the Berne Convention, and arguably nullify the exclusive right of adaptation, which would be a violation of TRIPS Article 9.1.
 - **Overly Broad Exceptions:** Several exceptions are arguably overly broad.
 - **Lack of Express Rental Right for Sound Recordings and Computer Programs:** There is no express rental right for sound recordings and computer programs; IIPA seeks clarification from the Kuwaiti Government that Article 4, clause 2, does in fact include a TRIPS-compatible rental right.
 - **Lack of Express Provision for *Ex Parte* Civil Searches:** The Kuwaiti Copyright Law does not expressly provide for civil *ex parte* search orders, as required by TRIPS Article 50.
 - **Insufficient Remedy as to “Materials and Implements,” in Violation of TRIPS Articles 61:** Article 42 of the Kuwaiti Copyright Law authorizes the Court “to confiscate all tools used for the illegal publication—if they are suitable exclusively for such publication . . . ,” making it incompatible with TRIPS Article 61, which requires criminal remedies to include “the seizure, forfeiture and destruction of . . . any materials and implements the predominant use of which has been in the commission of the offence.”
 - **Inadequate Criminal Remedies:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,800) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half]” for recidivists”), may be incompatible with TRIPS Article 61, which requires remedies “sufficient to provide a deterrent,” unless such maximums are regularly meted out.
 - **Need to Penalize End-User Pirates:** The Kuwaiti Copyright Law does not expressly criminalize the intentional unauthorized use or copying of computer programs in a business setting.
 - **Border Measures:** The Kuwaiti Copyright Law contains no border measures as required by TRIPS Articles 51-59.

- Providing TRIPS-Compatible Procedures and Remedies, Including *Ex Parte* Civil Searches, Adequate Compensatory Damages and Criminal Penalties Sufficient to Deter, and Seizure/Destruction Provisions
- Providing TRIPS-Compatible Border Measures

It is also well known that the Kuwaitis have discussed with the U.S. government the possibility of negotiating a Free Trade Agreement, especially after the signing of the TIFA. It should be noted that an IPR chapter of any 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; and (c) include modern and effective enforcement provisions, including those to respond to the threats of digital and Internet piracy, including P2P file sharing. Key issues of import to IIPA that have been part of the FTA negotiations to date, and thus should be included in any redraft of the Kuwaiti copyright law to account for developments in the law and technology, include the following:

- **Mandatory Minimum Fines, and Mandatory Minimum Fine and Prison Time for Recidivists.**
- **“Retransmission” Right:** The government of Kuwait should include an express “rebroadcast” or “retransmission” right, and protection against unauthorized retransmissions of television signals (whether terrestrial, cable, or satellite) on the Internet.
- **Criminalizing End-User Piracy of Software or Other Copyrighted Materials:** It should be clarified that the law criminalizes the unauthorized use of software or other copyrighted materials in a business setting.
- **ISP Provisions:** The Kuwait law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The new draft law should include principles of liability to hold those who facilitate infringement on the Internet accountable, and could include specific provisions related to service providers, including notice and takedown (including in the P2P context).
- **Term Extension:** The Kuwaitis should follow the modern trend (more than 70 countries have 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.
- **Parallel Import Protection:** The Kuwaiti law should be amended to 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).
- **Government Legalization of Software and Other Copyrighted Works/Sound Recordings:** The Kuwaiti government should address the need to provide that all government agencies use legitimate software and adequately manage government software usage.
- **Protection of Encrypted Program-Carrying Satellite Signals:** The Kuwaiti law should be amended to 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.
- **Presumptions of Ownership and Subsistence of Copyright:** The Berne Convention requires a presumption as to authorship of works (Berne Article 15(1)) and to cinematographic works (Berne

Article 15(2)). The Kuwaiti law should be amended to provide appropriate presumptions of ownership and should also provide for presumptions as to subsistence of copyright for works, performances and sound recordings.⁸

- **Information on Those Connected With Infringement:** The Kuwait 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.

MARKET ACCESS

Apply Censorship Rules Fairly: The Kuwaiti government should review censorship rules for sound recordings and movies and their enforcement, and should refrain from using these rules arbitrarily or randomly to block the release of recordings that objectively qualify and/or have been approved in the past. IIPA understands that the Ministry of Information refuses to approve content in an overly aggressive manner because National Assembly members have succeeded in sacking Ministers due to decisions to release certain products. As a result, even titles passed in Saudi Arabia are being banned in Kuwait, including films like “Ratatouille” (banned because of an animated kiss).

For the recording industry, the censorship authorities take too long in approving new albums for the Kuwaiti market, leaving uncensored pirate versions to capture the market. It has sometimes taken weeks before the censorship department approves the music album being submitted. In the meantime, shops and street vendors are selling pirate CD-Rs of the same albums! Unfortunately, other albums or single songs end up being banned in Kuwait. Yet, due to lack of enforcement against piracy, ironically, many shops that burn on demand shops have been detected selling CD-Rs with pornographic movies and/or photos.

⁸ The law should be amended to 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.