

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2009 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

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

Executive Summary: Over the past four years, copyright protection in Kuwait has improved for most industries due to increased cooperation with the Kuwaiti Ministry of Information (MOI), Kuwaiti Customs, the Kuwaiti Ministry of the Interior (Police), and the Kuwaiti Ministry of Commerce. The key developments in 2008 include increased *ex officio* raiding for the motion picture and entertainment software industries, increased raiding for the business software industry, shop closures in cases of some repeat offenders (although recidivism is a continuing issue), and blocking of many Internet websites offering pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. As a result, there has been a notable change in overt piracy, as pirate retailers and street vendors operate with a heightened sense of fear of enforcement activity. IIPA commends these efforts of the government to tackle overt hard goods piracy, but calls upon MOI to more evenly process criminal cases to include software and recorded music piracy cases. The book publishing industry continues to report few piracy problems in 2008 and commends the approaches by the government, and universities and schools, toward textbook adoption that have led to this continued success.

The courts in Kuwait remain the weak link in the enforcement chain. While the Kuwaiti government pursued many cases criminally, 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. Continued problems with the onerous, arbitrary, and lengthy content review processes cost right holders dearly, leaving sales figures stagnant for some industries. The copyright law remains TRIPS deficient, including the lack of deterrent criminal penalties, and IIPA welcomes the Kuwaiti government's efforts to draft amendments to the law to provide mandatory minimum sentencing, but also points out the need to ensure the law is fully in compliance with international standards and is updated to effectively address Internet piracy.

Priority Actions Requested In 2009: IIPA requests that the government of Kuwait take the following actions, which would result in the most significant near term commercial benefits to the copyright industries:

Enforcement

- Continue sustained raiding which is starting to have an impact on retail piracy activity.
- Continue blocking websites engaging in pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods.
- Once the copyright law is amended to provide mandatory deterrent fines and prison sentences, these penalties must be imposed by the courts in criminal cases to drive piracy levels down and defeat recidivism.
- Apply censorship rules for sound recordings and motion pictures fairly, to 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. 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.

Legislation

- Amend the copyright law to provide mandatory deterrent fines and mandatory minimum prison sentences, and to confirm that end-user piracy of business software is considered a crime.
- Amend and modernize the copyright law to bring it into full compliance with TRIPS and the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty.
- Join the WCT and WPPT.



KUWAIT										
Estimated Trade Losses Due to Copyright Piracy (in millions of U.S. dollars) and Levels of Piracy: 2004-2008 ¹										
INDUSTRY	2008		2007		2006		2005		2004	
	Loss	Level								
Records & Music	NA	NA	10.0	75%	9.0	70%	8.5	70%	8.0	65%
Business Software	43.0	63%	37.0	62%	33.0	64%	35.0	66%	26.0	68%
Motion Pictures	NA	NA	NA	NA	NA	NA	1.3	82%	12.0	95%
Entertainment Software	NA	NA	NA	NA	NA	NA	NA	91%	NA	NA
Books	NA	NA	NA	NA	0.5	NA	0.5	NA	1.0	NA
TOTALS	43.0		47.0		42.5		45.3		47.0	

PIRACY UPDATES IN KUWAIT

Optical Disc Piracy by “Burning” and Importing Factory Discs: The impressive efforts of the Ministry of Information (MOI) against optical disc piracy have had a positive net impact on piracy for most 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, mainly Hawalli and Salmeiah city (and including recidivists operating under the same business names, as well as apparent new businesses). Locally duplicated pirate CD-Rs with foreign music remain available in Kuwait. Indeed, in contrast to games and motion pictures, piracy of recorded music, due to the high rates of sound recordings that either do not clear the censorship system or clear censors only with great delays, remains severe. In many retail outlets the burning of such CD-Rs is “on-demand,” making enforcement more difficult as pirate shops keep very little stock on hand. Some stores also modify consoles to play pirate games, emphasizing the need for Kuwait to amend its law to outlaw circumvention of technological protection measures and the trafficking in circumvention devices such as mod chips, and ensuring that providing the service of “modding” a console is considered illegal. 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.

Internet Piracy: Internet piracy became a greater hurdle in Kuwait in 2008, with industry noting an increase in pirate downloads, peer-to-peer file sharing, and advertising the sale of pirate physical goods. Kuwait had 900,000 Internet users as of March 2008, amounting to a 34.7% penetration rate (according to the International Telecommunications Union). While broadband penetration remains relatively low, estimated at 25,000 users as of September 2007 (according to ITU), the high overall penetration rate has meant an increase in Internet piracy activities in Kuwait.

Business Software End-User Piracy: The business software industry reports no improvement in software piracy levels in 2008. Piracy continues to affect the ability of legitimate software businesses to operate in Kuwait and harms the development of the local IT industry.

Broadcast Signal Theft: The theft of 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,” both remain problems in Kuwait. These problems are exacerbated by the lack of deterrent minimum criminal penalties, and exist 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 some 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 due to the transparent procurement and purchase practices of Kuwaiti universities. University

¹ The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA’s 2009 Special 301 submission at www.iipa.com/pdf/2009spec301methodology.pdf. BSA’s 2008 statistics are preliminary, representing U.S. software publishers’ share of software piracy losses in Kuwait. They follow the methodology compiled in the Fifth Annual BSA and IDC Global Software Piracy Study (May 2008), available at <http://global.bsa.org/idcglobalstudy2007/>. 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. For more details on Kuwait’s Special 301 history, see IIPA’s “History” Appendix to this filing at <http://www.iipa.com/pdf/2009SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years’ country reports, at <http://www.iipa.com/countryreports.html>.

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 2008. Other countries in the Gulf region and elsewhere should learn from this approach.

ENFORCEMENT UPDATES IN KUWAIT

The industries affected agree that the key to resolving the piracy dilemma in Kuwait lies principally in continuing the sustained raiding which is starting to have an impact on retail piracy activity, continuing the blocking of websites engaging in pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods, and seeking the imposition by the courts of deterrent criminal sentences, including deterrent fines and jail terms that are actually served.

Sustained Raids in 2008 Having a Positive Effect on Overall Piracy: IIPA commends the Ministry of Information (MOI) for continuing to run *ex officio* raids against piracy locations in high volume. The sustained raiding has had a noticeable change in overt piracy of motion pictures and entertainment software, since retail pirates and street vendors operate in the knowledge that they can be raided at any point in time. The raids resulted in seizures of pirate product and equipment, and evidentiary dossiers were compiled for ensuing criminal prosecutions. MOI also exercised its authority to close recidivist locations, although recidivism remains a hurdle in Kuwait. The MOI continued to publicize its efforts in the local media, adding to the deterrent effect. Industry would like to see more raids focused on resellers of software and music piracy targets as well as games and motion pictures; in this way, enforcement could be made more uniform resulting in improving piracy levels across the board. In addition, the business software industry reports that not all of its cases get transferred to Public Prosecutors for criminal court actions. This should be remedied. Kuwaiti Customs has also set up an IPR team for border enforcement, and made interdictions on an *ex officio* basis in 2008.

Internet Enforcement Efforts Limit Harm to Right Holders by Blocking Key Piracy Sites: The government of Kuwait has recognized the harm caused by Internet piracy, whether pirate downloads, peer-to-peer file sharing, or advertising the sale of pirate physical goods. The record in 2008 (as in 2007) was excellent, with the Ministry of Commerce spearheading efforts and blocking access in Kuwait to many websites containing or providing access to pirate material. However, the recording industry reports that, despite numerous calls for intervention and extensive engagement of the Kuwaiti ISP hosting the illegal files, major illegal Internet site 6rb.com is up and running in Kuwait and providing access to a host of illegal tracks, including well-known U.S. artists, such as R-Kelly, Eminem, Usher, Alicia Keys, Anastacia, Britney Spears, Prince, Bon Jovi, and Beyonce. Definitively blocking access to this site and any of its off-spring, all of which infringe the rights of both local and international right holders, should be a top priority for the authorities in Kuwait and an opportunity to show they are serious about eradicating Internet piracy. IIPA would also request that the Ministry of Information speed up copyright infringement verification, which now takes as long as three weeks, so that takedowns can occur more expeditiously.

Content Review System Exacerbates Music Piracy Problem: 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. These delays or hurdles leave the music market wide open to pirates to monopolize. Of course, and ironically, the pirate disks are never censored and are openly available in the market while the legitimate disks wait to be reviewed. In addition, 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 MOI take the same kind of interest in recorded music piracy as it has for game and motion picture piracy, and also recommends that a special IPR cybercrime unit (inspired by the Lebanese example) be formed to handle both physical and Internet piracy investigations involving recorded music.

Courts Hampered by Non-Deterrent Maximum Penalties: 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

finer and prison sentences. IIPA calls for the immediate passage of a new copyright law with minimum mandatory sentences and higher maximums.

COPYRIGHT LAW AND RELATED ISSUES

Current Law (1999 Decree) Remains TRIPS-Incompatible and Contains Ambiguities on Important Matters: Copyright protection in Kuwait is governed by Decree No. 5 (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 and ambiguities. These include:

Deficiencies in the 1999 Decree

- **Inadequate Criminal Remedies:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,720) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”), is not in our view “sufficient to provide a deterrent.” In IIPA’s view, this is the most important element of the law which must be remedied.
- **Unclear Protection for Pre-Existing Works in WTO Members for WTO-Compatible Terms as Required by TRIPS:** 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 from WTO countries. Adding the phrase “in their country of origin” will correct this deficiency.
- **Failure to Provide Express Point of Attachment for Performers/Broadcasters, Unpublished Works, and Certain WTO Members:** 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. This must be remedied.
- **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. This must be remedied.
- **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). This must be remedied.
- **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. If not, then this deficiency must be remedied.
- **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. This must be remedied.
- **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.” This must be remedied.

Ambiguities in the 1999 Decree

- **Unclear Criminalization of End-User Piracy of Business Software:** The Kuwaiti Copyright Law does not expressly criminalize the intentional unauthorized use or copying of computer programs in a business setting.
- **Unclear 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, but this should be confirmed. The word “sound recordings” should be inserted into an amendment.
- **Absence of Border Measures, Piratical and Parallel Imports:** The Kuwaiti Copyright Law contains no border measures as required by TRIPS Articles 51-59. IIPA is unaware of other laws which may contain TRIPS-compatible border measures. Whatever the government does adopt, it should be clear that Kuwaiti Customs may intercede on an *ex officio* basis in order to effectively enforce against illegal imports and exports. It should also be confirmed that under no circumstances would piratical items be permitted in, and the law should also confirm 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, i.e., that it would never apply to unauthorized (parallel) imports.

- **Potentially Over Broad Exceptions:** Several exceptions are arguably overly broad.
- **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.
- **Inappropriate “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” may be a mistranslation, but in this case, the official English translation in the Copyright Law should use the word “original.”
- **Exclusive Rights Limited to Financial Exploitation (Possibly Inadvertently):** Under Article 4 of the Copyright Law, the right holder is given the exclusive right “to exploit his writing financially.” The attempt was clear to divide between moral rights and economic rights, but the wording makes it unclear whether Kuwait complies with TRIPS. The word “financially” should be deleted from Article 4.
- **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.

Amendments Should Be Enacted, and Should Result in Modern Copyright Statute, With Deterrent Criminal Remedy and Protections for the Digital Age: Beginning in 2004, the Kuwaiti government has been considering amendments to its copyright law. IIPA understands that the latest draft (2007) would resolve many but not all of the TRIPS deficiencies described above, and would partially implement the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, but takes some significant steps backward from a draft prepared in 2004, especially with respect to protection against the circumvention of technological protection measures. The draft would also improve criminal penalties, but not to the extent needed to provide a deterrent in Kuwait. The following bullet point list responds to the 2004 draft and what we understand to be in the 2007 draft.

By way of background, it should be noted that Kuwait, while an original member of the WTO, has joined neither the Berne Convention nor the Geneva (phonograms) Convention. The Kuwaiti government has indicated on previous occasions a desire to enter into FTA negotiations with the United States, and to that end, on February 6, 2004, former U.S. Trade Representative Robert Zoellick and Kuwaiti Minister of Commerce and Industry Abdullah Al Taweel signed a Trade and Investment Framework Agreement (TIFA). While the TIFA may not necessarily lead directly to negotiations toward a Free Trade Agreement, 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 importance to IIPA that have been dealt with adequately in FTA negotiations to date, and Kuwait should take the opportunity presented by the amendment process to Kuwait’s copyright law to fully modernize its law. Thus, the following bullet point list also addresses some aspects of protection which do not appear in the Kuwaiti draft to our understanding, but should be added to bring it into line with the latest international trends, as reflected in the most recent FTAs.

- **Resolve All Issues Noted Above from 1999 Decree, Including Most Pressingly, Providing for a Deterrent Criminal Remedy:** Criminal penalties in the new law must provide for much higher mandatory minimum fines and imprisonment, and provide for deterrent maximum fines and imprisonment (for example, in the United States, these are \$250,000 for an individual, \$500,000 for a company, and up to five years imprisonment), which should readily be imposed, especially in cases of recidivism. The remedies must be available as to violations of copyright as well as related rights (rights of performers and sound recording producers).
- **Provide WCT and WPPT-Compatible Rights:** The amendment must make the necessary changes to conform the Kuwaiti law with the WCT and WPPT, as is apparently intended by the drafters. For example, it must:
 - Confirm a “making available” right. Drafters should pay special attention to ensure not only that the right of making available is properly spelled out as to authors and related rights, but that the exclusive right is expressly granted in the ensuing provision (i.e., avoid a situation where there is a proper definition but then the rights grant is ambiguous or incomplete).
 - Confirm that “temporary reproductions” are protected under the reproduction right.

- Prohibit the circumvention of technological protection measures and the trafficking of circumvention devices or provision of services related to circumvention. Drafters should ensure that both the act of circumvention and trafficking in devices or services are covered. They should also ensure that both access controls and controls on exclusive rights are covered (e.g., by defining a TPM 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”). Circumvention devices also need to be specifically defined to include “component” parts. Circumvention services should be clearly covered. A non-cumulative test should be employed to determine whether a circumvention device is unlawful.² Both civil and criminal remedies should apply to violations involving circumvention.
- Provide WCT and WPPT-compatible language to protect rights management information.
- Provide a TRIPS- and WCT/WPPT-compatible distribution and “rental” right for works (Article 6(a) and (d) for works), computer programs, and sound recordings. Drafters should avoid ambiguity by making the distribution right express in the related rights provisions.
- **Provide Exclusive “Retransmission” Right:** The government of Kuwait should include an express “rebroadcast” or “retransmission” right. Specifically, the draft should ensure that the 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.
- **Criminalize End-User Piracy of Software or Other Copyrighted Materials in a Business Setting.**
- **Provide for Adequate Civil Compensation, Including Statutory Damages, Attorney Fees, and Costs.**
- **Ensure the Availability of *Ex Parte* Civil Searches and Provisional Measures as Required by TRIPS.**
- **Ensure the Possibility of Confiscation and Destruction of Infringing Goods, and Tools and Implements Used to Infringe.**
- **Provide for Service Provider Responsibility and Foster Cooperation, For Example, Through Statutory Notice and Takedown:** 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).
- **Extend Term of Protection in Line with International Trends:** 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.
- **Provide 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).
- **Preserve Freedom to Contract:** The Kuwaiti draft should preserve the rights of copyright owners to exercise their exclusive rights, and should also preserve the freedom to contract, and, for example, should not contain provisions that essentially interfere with the negotiations of two contractual parties.
- **Ensure that the Government Legalizes Software Usage and Use of Other Copyright Works and Sound Recordings:** The Kuwaiti government should address the need to provide that all government agencies use legitimate software and adequately manage government software usage. If such implementation exists in other laws, regulations or decrees, the Kuwaiti government should share this information.
- **Provide Protection for 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

² 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.

criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.

- **Provide 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.³
- **Provide for Authorities to Order Information Regarding 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.
- **Criminalize Piracy in Cases of “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 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.
- **Ensure Exceptions are Appropriately Narrow:** Any exceptions adopted must meet international standards and the three-step test of the Berne Convention. IIPA understands that the Kuwaitis may be considering software exceptions that allow more than back-up, and to the extent it otherwise allows copying or adaptation of a program without authorization of the right holder, such copy or adaptation should be limited to what is necessary as an “essential step” to use the computer program in conjunction with a particular machine, and subject to the proviso that such copy or adaptation would be destroyed when the machine is no longer being used. The drafters also need to be very wary of any attempts in the amendment to unduly curtail the rights of authors or translators, for example, by deemed rights to expire if they are not exercised within a certain time-frame. Any restriction of rights in this manner would violate the tenets of the Berne Convention and the TRIPS Agreement.

MARKET ACCESS

Apply Censorship Rules Fairly: The Kuwaiti government should change the censorship rules for sound recordings and movies, 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 sell 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.

³ 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.