

KUWAIT

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2010 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

Special 301 Recommendation: IIPA recommends that Kuwait remain on the Watch List in 2010.¹

Executive Summary: Over the past five 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. Nonetheless, a number of piracy problems remain including end-user piracy of business software rampant internet piracy of sound recordings, and some pay TV decoder box businesses, although enforcement against the latter has resumed after a brief stoppage. Anecdotal accounts also report piracy in the open markets, including sale of pirate CDs right outside record stores which cannot sell legitimate copies of the exact same CDs due to censorship. These problems stifle the legitimate market for copyright owners and keep out investments in creative endeavors from the country. IIPA is calling upon the government of Kuwait to end this policy of inaction and make copyright protection and enforcement one of its top priorities. This is particularly important in light of the fact that Kuwait is now holding the rotating presidency of the Gulf Cooperation Council.

The courts in Kuwait remain the weak link in the enforcement chain, and the Law is clearly deficient. While the Kuwaiti government has pursued many cases criminally, the lack of mandatory minimum sentencing and the very low maximum fine (KD500 or \$1,735) usually applied by the criminal courts means those who engage in copyright piracy have no fear of the consequences of getting caught. 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. IIPA also encourages the government to implement and join the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), as other countries in the Gulf region have.

The United States and Kuwait entered into a Trade and Investment Framework Agreement (TIFA) in 2004, which established a formal dialogue to promote increased trade and investment between the two countries, and which recognizes "the importance of providing adequate and effective protection and enforcement of intellectual property rights and of membership and adherence to intellectual property rights conventions." IIPA hopes this ongoing bilateral dialogue in 2010 will help convince the Kuwaiti government to take steps to further reduce piracy and establish a modern and forward-looking copyright system in Kuwait.

Priority Actions Requested In 2010: In addition to sustaining the priority actions from previous submissions,² 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

- Investigate and where appropriate prosecute cases involving end-user piracy of business software, as well as cases involving pirate software resellers and hard-disk loading of pirate business software onto computers being sold in the market.
- 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.
- Enforcement and Internet takedowns by Kuwaiti authorities should be applied against pirate vendors who sell or advertise products which are prohibited by marketing restrictions (such as religious requirements) and

¹ For more details on Kuwait's Special 301 history, see IIPA's "History" Appendix to this filing at <http://www.iipa.com/pdf/2010SPEC301HISTORICALSUMMARY.pdf>, as well as the previous years' country reports, at <http://www.iipa.com/countryreports.html>.

² See, e.g., International Intellectual Property Alliance, *Kuwait*, at <http://www.iipa.com/rbc/2009/2009SPEC301KUWAIT.pdf>.



copyright rules. At present, enforcement is not even-handed and pirates effectively enjoy a state-enforced monopoly to sell restricted/banned materials on the streets or over the Internet, given the lack of action taken against them under copyright or other marketing/censorship grounds.

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.
- Ensure the law provides incentives for ISPs to cooperate with right holders against online piracy.
- Amend and modernize the copyright law to bring it into full compliance with the TRIPS Agreement, the WCT and the WPPT, and appropriately update the law to effectively address Internet piracy.
- Join the WCT and WPPT.

PIRACY AND ENFORCEMENT UPDATES IN KUWAIT

Previous reports have discussed the piracy and enforcement challenges faced in Kuwait, including business software end-user piracy, retail piracy, optical disc piracy (“burning” and factory produced discs),³ pay TV theft (through decoder boxes), growing Internet-based piracy, including downloading and P2P file sharing, mainly through P2P services such as LimeWire for international repertoire, as well as some advertising sites for hard goods piracy,⁴ and the onerous censorship process for music combined with the lack of enforcement against the corresponding pirate product.⁵ Also discussed were positive developments such as the good university adoption practices for the book publishing industry. The following sections provide brief updates to the piracy and enforcement situation in Kuwait. Failure to mention a specific issue does not indicate that the problem has been fully resolved.

Business Software End-User Piracy: The business software industry continues to be harmed by business software end-user piracy, losing an estimated \$39 million in 2009 with a 59% piracy level (both down from \$43 million in losses and a 63% piracy level for 2008).⁶ Many mainly small- and medium-sized enterprises in Kuwait, which are otherwise legitimate businesses, have failed to adequately license and pay for their software. Failure to address the problem of end-user piracy affects the ability of legitimate software businesses to operate in Kuwait and harms the development of the local IT industry. While cooperation with the Ministry of Commerce has improved significantly for the software industry, there has been no concerted effort to reduce the end-user software piracy rate through investigations, raiding where warranted, and criminal prosecutions. There were no end-user piracy raids in 2009.⁷

More Enforcement Needed Regarding Software Piracy, Including Against Pirate Resellers and Hard-Disk Loading: Two major problems facing the software industry are loading PCs with unlicensed or pirated software, so-called hard-disk loading, and pirate sales in the retail markets, much of which takes place in Hawalli, Bin Khaldoun street, and the Al Fahahil area. The level of cooperation and commitment of the Ministry of Commerce in Kuwait is apparent. However, the industry reports only three raids against resellers in the last six months. Industry would like to see more raids focused on resellers of software and hard-disk loading in 2010. In addition, for those raids which are

³ Industry reports that the main areas of piracy activities remain Hawalli, Bin Khaldoun street and the Al Fahahil area.

⁴ Kuwait had around one million Internet users, amounting to a 34.2% penetration rate, and 40,000 broadband subscriptions in 2008 (according to the International Telecommunications Union). The high overall penetration rate has meant an increase in Internet activity, unfortunately also including Internet-based piracy activities, in Kuwait.

⁵ See *supra* note 2.

⁶ Business software piracy levels in Kuwait have hovered around 60-65% for years, being 62% in 2007, 64% in 2006 and 66% in 2005. The music and recording industry has also previously recorded losses and levels of \$10 million and 75% respectively in 2007, which was up from previous years. BSA's 2009 statistics are preliminary, representing U.S. software publishers' share of software piracy losses in Kuwait. They follow the methodology compiled in the Sixth Annual BSA and IDC Global Software Piracy Study (May 2009), available at <http://global.bsa.org/globalpiracy2008/index.html>. 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. The methodology used by BSA and other IIPA member associations to calculate estimated piracy levels, losses, and/or sales is described in IIPA's 2010 Special 301 submission at www.iipa.com/pdf/2010spec301methodology.pdf.

⁷ The industry remains committed to work with authorities through trainings and seminars as it has done in 2009 and previous years. The trainings and seminars in 2009 were provided to judges, prosecutors and police officials.

run, greater speed and transparency are warranted in order to maximize their effectiveness. Right holders cannot assist the authorities if they do not know about impending or past raiding activities.

Courts Hampered by Non-Deterrent Maximum Penalties: No matter how many raids are run, piracy levels in Kuwait cannot 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 minimum mandatory sentences and much higher maximum penalties, and penalties that include both fines *and* imprisonment for maximum deterrent effect.

Lack of Even-Handed Enforcement Against Piracy Versus Enforcement of Marketing Requirements and Censorship Regulations: The recording industry reports that the Kuwaiti authorities are very diligent about enforcing censorship regulations and banning legitimate product from legal stores for this reason. For example, the Virgin Megastore in Kuwait City was closed for three months due to restrictive marketing requirements and censorship. Meanwhile, the same product for which the Virgin Megastore was closed is openly available on the streets in pirated copies as well as over the Internet through pirate sites. The product is considered too “subversive” for the legitimate store shelves but is allowed to be made available through illegal means, while no similar enforcement action is taken in this respect.

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 the Copyright Law, Decree No. 64/1999 (effective February 9, 2000).⁸ The Law has never been interpreted through implementing regulations. The law fails to comply with TRIPS in certain important respects and contains other problems and ambiguities, all of which have been recounted in previous IIPA filings.⁹ The most important changes or clarifications needed would include:

- **Provide Minimum Sentencing and Deterrent Maximum Fines *and* Imprisonment:** The criminal provisions in the Kuwaiti Copyright Law providing for a maximum fine of 500 Kuwaiti Dinars (approximately US\$1,735) or up to one year of imprisonment, or both penalties (to be raised by “not [more] than [half][sic] for recidivists”), are not in IIPA’s view “sufficient to provide a deterrent” as required by the TRIPS Agreement. In IIPA’s view, this is the most important element of the law which must be remedied. We understand the new draft Copyright Law provides for a maximum fine of KD5,000 (US\$17,350) but this must be accompanied by minimum penalties that include a fine *and* imprisonment to achieve deterrence.
- **Confirm Criminalization of End-User Piracy of Business Software:** The Kuwaiti Copyright Law does not expressly criminalize the unlicensed or unauthorized use or copying of computer programs in a business setting. Criminal liability for such acts should be confirmed.
- **Provide 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.
- **Provide (or Clarify) 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 whether the law provides full TRIPS-

⁸ Originally, the Copyright Law was passed as Decree Law No.5/1999 Relating to Intellectual Property Rights, published in the official *Gazette*, issue no. 414 in June, 1999. When a new National Assembly was elected in October 1999, it revoked all decrees including the Copyright Law, but in December 1999, the National Assembly voted again to reissue the code as Decree No. 64/1999, which was ratified by the Amir on December 25, 1999. Decree No. 64/1999, was published in the official *Gazette*, issue 445 on Jan. 9, 2000.

⁹ See *supra* note 2.

compatible protection for older works from WTO countries. The law must be confirmed to protect those works and sound recordings that are protected in their country of origin, including those which were never protected in Kuwait prior to 1999, or which may have expired due to failure to comply with a formality but otherwise are eligible for protection for their full TRIPS-compatible term.

- **Provide Adequate 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.
- **Fix 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.
- **Formally Confirm 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 to make existing protection for sound recordings express and unambiguous.
- **Provide 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.
- **Provide TRIPS-Compatible Remedy as to “Materials and Implements”:** 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.
- **Provide Border Measures, Including Protections Against 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. IIPA understands that Kuwaiti Customs is interceding on an *ex officio* basis in practice, and this should be provided for in the law to effectively enforce against illegal imports and exports. 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.
- **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.
- **Confirm 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.
- **Narrow Moral Rights Provision to Avoid Its Impingement on the 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 WCT and WPPT, but took some steps backward from the 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. Kuwait should take the opportunity to join those treaties, as well as the WCT and WPPT, and to fully modernize its law.

- **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, and Join the Treaties:** The amendment should make the necessary changes to conform the Kuwaiti law with the WCT and WPPT, as is apparently intended by the drafters. Then Kuwait should demonstrate its leadership in the GCC by joining the WCT and WPPT, and set a good examples for others who have not yet joined the Treaties. For example, the amendments should:
 - 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 and codes. Circumvention services should be clearly covered. A non-cumulative test should be employed to determine whether a circumvention device is unlawful.¹⁰ Civil and criminal (and as appropriate, administrative) 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 for Internet Service Provider Responsibility and Foster Cooperation, Through Statutory Notice and Takedown and Policy to Deal With Repeat Infringers:** The Kuwait law contains nothing regarding how service providers should cooperate with right holders to address online piracy. The new draft law should include

¹⁰ 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.

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). It should also ensure that the law provides incentives for ISPs to cooperate with right holders against online piracy, including having in place effective and fair policies to deal with repeat infringers.

- **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 other copyright materials (works and sound recordings) and adequately manage government software usage. If such implementation exists in other laws, regulations or decrees, the Kuwaiti government should share this information.
- **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.**
- **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.¹¹
- **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 extremely important to criminalize acts in which the one engaging in infringement may not have a motive of financial gain. Kuwait should therefore provide that copyright piracy involving significant willful infringements shall be criminalized and considered willful copyright piracy on a commercial scale, even if they have no direct or indirect motivation of financial gain.
- **Ensure the Possibility of Confiscation and Destruction of Infringing Goods, and Tools and Implements Used to Infringe.**
- **Provide for Authorities to Order Information Regarding Those Connected With Infringement:** The Kuwaiti 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.
- **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 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

¹¹ 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.

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.

- **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 criminal penalties, civil remedies, including compensatory damages, should be available for any person injured by these activities.
- **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 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 they otherwise allow copying or adaptation of a program without authorization of the right holder, such copy or adaptation must 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.